THE UTAH COURT OF APPEALS

NORTHERN MONTICELLO ALLIANCE, LLC, Petitioner and Appellant, vs. SAN JUAN COUNTY COMMISSION *et al.*, Respondents and Appellees.	Case No. 20180225-CA

BRIEF OF APPELLEES

Appeal from a 28 February 2018 *Order Denying Petitioner's Motion for Summary Judgment and Granting Respondents' Cross-motion for Summary Judgment* in the Utah Seventh District Court, Monticello Department, San Juan County, by the Honorable Lyle R. Anderson.

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APPELLEES REQUEST ORAL ARGUMENT

PARTIES TO THE PROCEEDING

Petitioner and appellee: Northern Monticello Alliance, LLC

Respondents and appellees: San Juan County Commission; San Juan County; Sustainable Power Group, LLC; and Latigo Wind Project, LLC

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INTRODUCTION

This dispute arises from San Juan County's decision not to revoke the conditional use permit it issued for a wind power project owned by Latigo Wind Project, LLC, which is in turn owned by Sustainable Power Group, LLC ("sPower," pronounced *ess-power*) northwest of Monticello, Utah, known as the Latigo Wind Farm.

Members of Northern Monticello Alliance, LLC ("NMA") own property adjacent to the wind farm. Their property is zoned for agricultural use and is undeveloped, save for a well on one parcel for which the drilling permit has expired. Besides the well, none of NMA's members has applied for any sort of development permit, although they contend they intend to eventually build homes on their parcels.

The wind farm was initially developed by Wasatch Wind Intermountain, LLC ("Wasatch Wind"), which applied for and received a conditional use permit from San Juan County in July 2012. The county planning commission issued Wasatch Wind an amended permit at a hearing later that year in October. The amended permit was conditioned on Wasatch Wind including as much flicker (the shadows created by turning blades), light, and sound mitigation as possible, and putting any new land purchase or lease deals it entered into with contiguous landowners in writing. During the October 2012 hearing, Wasatch Wind's representatives made several representations about what the company would do to mitigate the project's impact, including taking steps to mitigate ice throw (a rare event that could occur when ice that had built up on a blade was thrown off, but is

largely avoided with sensors and monitoring) and offering either to buy the NMA members' properties or make financial mitigation payments to them. None of Wasatch Wind's representations beyond the flicker, light, and sound mitigation, however, were made permit conditions by the planning commission.

NMA appealed the grant of the permit, but withdrew its challenge upon entering into an option agreement with Wasatch Wind in February 2013, whereby Wasatch Wind agreed to immediately pay NMA members $1,250 an acre in exchange for withdrawing the appeal and a two-year option to purchase the NMA property for $10,000 an acre, which had to be exercised (unless it first terminated the agreement) when Wasatch Wind began "significant construction activities" on the wind park.

The two years passed, however, without Wasatch Wind beginning physical construction on the project or exercising the option. Wasatch Wind then sold Latigo Wind Park, LLC, with its conditional use permit, to sPower in June 2015. Although sPower wasn't bound by Wasatch Wind's agreement with NMA, it nonetheless attempted to negotiate purchasing the NMA members' property. But sPower was unwilling to pay the $10,000 per acre price agreed to by Wasatch Wind under the expired option agreement, and ultimately was only successful in persuading one of NMA's members to sell for what sPower believed was a more reasonable price.

When sPower began physically constructing the park, NMA and others (including a competing wind power company) complained to the county that sPower wasn't satisfying

its permit's conditions, including what NMA believed, based on Wasatch Wind's representations at the October 2012 planning commission meeting, was a requirement to either purchase the NMA members' properties or make financial mitigation payments to them.

The county planning commission, in response, held a revocation hearing on sPower's permit in September 2015. sPower representatives appeared at the hearing and asserted its compliance with the permit's conditions, providing various studies and documentation to support their representations. Although NMA members wished to participate in the revocation hearing, the planning commission told them that they could not actively participate. After the hearing, the planning commission voted not to revoke sPower's permit.

NMA appealed the planning commission's decision under San Juan County Zoning Ordinance (SJCZO) 2-2(2), which broadly allows "any person affected by the land use authority's decision applying a land use ordinance" to appeal the decision to the county's appeal authority, the county commission. (NMA2R.549-50.)[1] NMA and sPower submitted briefs to the county commission, and the planning commission submitted a report explaining its decision.

The county commission heard arguments from attorneys representing both NMA and sPower, and issued a *Written Decision* in December 2015 wherein it determined in part

[1] The record in district court case no. 170700006 is referred to herein as "NMA2R." and the record in district court case no. 160700001 is referred to as "NMA1R."

that, because sPower hadn't done more than just represent that it had done studies regarding mitigating flicker, light, and sound impacts, it hadn't provided sufficient evidence to allow the county commission to affirm the planning commission's decision.[2] The county commission therefore reversed and remanded the matter to the planning commission for further review. Although the county commission determined that NMA had no right to participate in the revocation hearing, it nonetheless ordered the planning commission to allow NMA's participation anyway, since it was going to be reconsidering the matter.

sPower wrote the county commission the following day, expressing its confusion at the commission's assertion that sPower had presented no evidence beyond its representations that it was complying with the permit's conditions, since it asserted it had provided the planning commission with voluminous studies and other documentation. sPower asked the county commission to reconsider its decision, warning that the ruling jeopardized its financing, and it would lose more than $100 million if it were unable to start operations. sPower didn't serve its letter on NMA, and the county commission neglected to inform NMA of sPower's request.

The county commission met in a closed session to consider sPower's request, and a few days later issued an *Amendment to Written Decision* ("Amended Decision"). In it, the county commission explained that it had mistakenly not considered sPower's mitigation

[2] This assessment appears to have come as a surprise to the decision's drafter, whose bracketed question remained in the final document: "[Is this truly all the evidence there is in the record on appeal?]." (NMA1R.0179.)

evidence when it issued its original decision, and that, after having reviewed it, the county commission instead affirmed the planning commission's decision not to revoke sPower's permit, and therefore also did not remand the matter for its reconsideration or to allow NMA's participation. One of the three commissioners wrote a separate dissent.

NMA petitioned for review to the Utah Seventh District Court, case number 160700001 ("*NMA 1*"), arguing that the county commission's finding that sPower was complying with its permit's conditions wasn't supported by substantial evidence, particularly that sPower wasn't complying with what NMA called self-imposed conditions, like the financial payments and ice throw mitigation Wasatch Wind had mentioned during its October 2012 permit hearing. NMA also alleged that the county commission's decision was illegal because it wasn't allowed to reconsider its initial written decision.

On cross-motions for summary judgment, the district court implicitly agreed with respondents San Juan County and the San Juan County Commission ("County") that the permit's only conditions were to mitigate flicker, light, and sound impacts and to ensure that any land purchase or lease deals were in writing. The district court concluded that the county commission's decision was supported by substantial evidence, and held that the county commission had inherent authority to reconsider its initial decision, but that it had violated NMA's due process rights by not giving it a chance to respond to sPower's request for reconsideration. The district court then remanded the matter back to the county commission for proceedings consistent with its ruling.

On remand, the county commission scheduled a hearing on sPower's request for reconsideration and accepted briefing from both sPower and NMA. It heard arguments from counsel for both parties and issued its unanimous *Amended Written Decision on Remand* ("Remand Decision") in February 2017. The county commission affirmed the planning commission's decision and found that its conclusion that sPower was complying with its permit's conditions was supported by substantial evidence. The county commission also reaffirmed its holding that NMA had no right to participate in the revocation hearing. NMA again petitioned for review in the Utah Seventh District Court, case number 170700006 ("*NMA 2*").

In the interim, the Utah Supreme Court had decided *McElhaney v. City of Moab*, 2017 UT 65, 423 P.3d 1284, wherein it held that the Moab City Council failed to provide adequate findings of fact and conclusions of law to allow judicial review of its denial of an application for a conditional use permit for a bed and breakfast. NMA framed *McElhaney* as new law in *NMA 2*, and argued that the matter should be remanded to the planning commission because it hadn't provided adequate findings to allow the county commission's or the district court's review. NMA also argued again that the county commission was prohibited from reconsidering its decision and that its conclusion that sPower was meeting its permit's conditions wasn't supported by substantial evidence.

The district court held that the county commission had cured the due process violation on remand, and otherwise reiterated its conclusions in *NMA 1* that the county

commission could reconsider its decision and that its determination that sPower was complying with its permit's conditions was supported by substantial evidence.

NMA then brought this appeal, raising three issues: (1) whether the planning commission failed to provide adequate findings per *McElhaney* to allow the county commission's and district court's review; (2) whether the planning commission denied NMA due process when it didn't allow NMA members to participate in sPower's revocation hearing; and (3) whether the county commission lacked authority to reconsider its initial decision. The County reorders these issues in its response in order to address the threshold issue of reconsideration first.

As the district court correctly held, unless a statute provides otherwise, tribunals have inherent authority to reconsider their decisions. Because the decision being appealed is the district court's, the planning commission's findings aren't at issue. But, even if they were, they're adequate for the matter reviewed here (a decision not to revoke an existing conditional use permit), as opposed to the decision being reviewed in *McElhaney* (a denial of a conditional use permit application). Finally, NMA lacks a protectable property interest in the County's enforcement of its laws that would have given it a due process right to participate in sPower's revocation hearing. The County and sPower therefore ask the Court to affirm.

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STATEMENT OF THE ISSUES

First Issue. Did the district court correctly hold that the county commission (acting as the county's land use appeal authority) had, and wasn't prohibited from exercising by any provision in state or local law, inherent authority to reconsider its initial decision on NMA's land use appeal?

Standard of Review and Preservation: Correctness. When considering a district court's review of a county appeal authority's decision, the appellate court "afford[s] no deference to the intermediate court's decision and appl[ies] the statutorily defined standard to determine whether the court correctly determined whether the administrative decision was arbitrary, capricious, or illegal." *McElhaney*, 2017 UT 65, ¶ 26. The applicable statutorily defined standard "presume[s] that a final decision of . . . an appeal authority is valid," and requires the decision be upheld unless it is arbitrary and capricious or illegal. Utah Code § 17-27a-801(3)(b). Whether the appeal authority acted within its authority to reconsider its initial decision is a legal question. A decision is illegal if it is contrary to law. Utah Code § 17-27a-801(3)(c)(ii). This issue is preserved at NMA2R.2877-78 & NMA1R.3163-65.

Second Issue. Assuming the county commission could reconsider its initial decision, did *McElhaney* require the district court to go beyond its statutory review of the county commission's written decision and also determine whether the planning commission's decision was supported by findings adequate for a substantial evidence review?

Standard of Review and Preservation: Correctness, for the same reasons as the first issue. The County and sPower contend that this issue is unpreserved as explained in Part II.A of their argument below.

Third Issue. Assuming the county commission could reconsider its initial decision, did NMA have a due process right to be heard at the planning commission's revocation hearing on sPower's conditional use permit?

Standard of Review and Preservation: Correctness, for the same reasons as the first issue. This issue is preserved at NMA2R.1972 & 1975.

STATEMENT OF THE CASE

Relevant Facts

The county planning commission issued the amended conditional use permit at issue for the Latigo wind power project to sPower's predecessor in interest, Wasatch Wind, at a 4 October 2012 planning commission meeting.[3] (NMA2R.0717-18, 0998, 1003-04.) At that meeting, Wasatch Wind made various representations about what it voluntarily would do to address flicker, light, sound, and other impacts on the surrounding area, including efforts to purchase the NMA members' properties or make mitigation payments to them. (NMA2R.0930-0947, 0961-65.) It also submitted a document setting forth proposed findings, conclusions, and conditions (*Summary of Findings and Conclusions*) that set forth

[3] The Latigo project is actually owned by Latigo Wind Park, LLC. For simplicity on appeal, this brief refers simply to Latigo Wind Park, LLC's owners and managers (first Wasatch Wind and later sPower), as those were the entities that appeared before the relevant commissions on behalf of Latigo Wind Park, LLC.

several representations made by Wasatch Wind about how it intended to build the Latigo project and treat NMA. Wasatch Wind's attorney, Tom Ellison, referenced it at the hearing, describing "the second document that I brought to the table, and it addresses, or I mean, this is a proposed set of findings." But the document was not adopted by the planning commission as embodying conditions on the permit. (NMA2R.0713, 0938, 0961, 0963-65, 0974.)

As amended by the planning commission, the following conditions were added to the permit:

> [I]ncorporate as much flicker, light, sound[] mitigation as possible, and to meet all industry standards of those challenges, . . . and reiterating that all and any new land purchase lease deals be in writing for any contiguous and affected landowners. . . . [A]ny mitigation and standards and conditions of this CUP must be met by any and all project development people, be they owners now or in the future, and all of these be met at the time of building permit issuance.

(NMA2R.0711, 0194-0214, 0998, 1003-04.)

Following the planning commission's grant of the permit to Wasatch Wind, sPower acquired the Latigo project. (NMA2R.0171.)

Sometime after that, upon receiving complaints, including from NMA, that sPower was not complying with the permit's conditions, the planning commission met to consider whether to revoke the permit. (NMA2R.0230, 0711.) It received evidence and testimony from sPower, including studies, information on thresholds, how they were determined, and what neighboring lands were affected. (NMA2R.0711, 0714, 0721-22.) sPower provided

the county evidence of its mitigation efforts, including the following related to flicker (the shadows cast by moving blades), light, and sound:

A. Flicker

i. A 2012 DNV KEMA flicker study based on assumed use of Vesta turbines with a ninety-foot hub height found that two properties, a residence, and the Discovery School might by impacted by flicker.

ii. sPower changed turbine locations in order to decrease impacts on nearby properties, and it chose to use GE turbines with an 80-foot hub height.

iii. sPower hired DNV KEMA to do an updated analysis accounting for the changed locations and turbines. A 2015 report found that, at worst, flicker impact would not exceed industry guidelines on any nearby properties.

iv. There are no industry standards for limiting flicker on vacant agricultural land like that of the NMA members. Even the Massachusetts and Oregon standards NMA frequently cites do not have such standards.

(NMA2R.1749-51, 2038-40, 2103-04, 2141-60.)

B. Light

i. sPower worked with the Federal Aviation Administration (FAA) to reduce the number of turbines required to have navigation lights from 27 to 14. (NMA2R.1751-52.)

ii. sPower also developed a lighting plan for its substation and operations building that eliminated lighting at night unless the buildings are in use. Downward facing lights are used wherever possible. (NMA2R.1752, 2041-42, 2103-04, 2108-11.)

C. Sound

i. A December 2013 sound study based on Vestas turbines found that no adjacent property with existing residences or businesses exceeded sound standards. Although there was no industry standard for undeveloped agricultural property, Wasatch Wind sought to limit noise exposure to 49 decibels for such properties. The report found that a part of one NMA property might exceed 47 decibels, the limit for developed residential property.

ii. sPower decided against turbines from Siemens and Vestas in favor of a new turbine manufactured by GE that ran quieter than the Vestas model.

iii. sPower conducted sound studies to confirm that, through its placement of turbines and selection of a quieter turbine, the wind park met all sound limits for existing residences and businesses. There is no industry sound standard for vacant agricultural land, and a 2015 sound study based on the quieter GE turbines sPower selected found that the impact would be a decibel less. One

NMA member's parcel still might experience noise higher than 47 decibels, the accepted limit for residential property.

(NMA2R.1749, 2042-44, 2103-04, 2108-39.)

Procedural History

NMA appealed the planning commission's 14 September 2015 decision not to revoke sPower's permit, asserting that the planning commission erred when it determined that sPower was satisfactorily meeting the permit's conditions. (NMA2R.0712-13, 1969.)

The county commission, acting as the county's land use appeal authority, held a hearing on NMA's appeal. It received briefing from the planning commission, NMA, and sPower, and heard from both NMA and sPower at the hearing. (NMA2R.0174, 0186-0266, 0464-0729, 1772-1968.) The county commission issued a written decision reversing and remanding the planning commission's decision that sPower had complied with the permit's requirement that it mitigate flicker, light, and sound because the county commission said it had not received any evidence of studies or mitigation beyond sPower's representations. (NMA2R.0144, 0178-79.)

sPower's attorneys wrote to the county commission immediately after the decision issued, noting that, contrary to its written decision, sPower had provided the county with relevant studies on sound, light, and flicker, and requested that the county commission reconsider its decision. The letter, however, was not copied to NMA. (NMA2R.0168-72.)

The county commission then issued its Amended Decision, wherein it acknowledged that it had issued its prior decision without considering the mitigation evidence sPower had presented. The commission stated that it had since reviewed sPower's evidence after having its attention called to it, and had decided to amend its decision to instead uphold the planning commission's decision not to revoke the permit because sPower had satisfied its conditions to implement flicker, sound, and light mitigation as much as possible according to industry standards. (NMA2R.0145-46.) The county commission, however, didn't give NMA a chance to respond to sPower's request to reconsider. (NMA2R.2876.)

NMA petitioned for review of the amended decision to the district court in *NMA 1*. It asserted that the county commission's decision was arbitrary and capricious because the sound exceeded 55 decibels on some NMA property, sPower had not used dark sky technology, and sPower had not met self-imposed conditions regarding ice throw, purchasing NMA properties, or making mitigation payments. (NMA1R.0128-29.) While the Court held that it could not "find that the County's decision was unsupported by substantial evidence" and that every tribunal has inherent authority to correct its mistakes (NMA1R.3163-64), it nonetheless held that the County's decision was illegal because it had deprived NMA of due process when it considered sPower's reconsideration request without giving NMA notice or an opportunity to be heard. (NMA1R.3164-65.) The district

court remanded the dispute to the county commission to take action consistent with its order. (NMA1R.03243.)

On remand, the County asked for briefing on the issues raised by sPower's letter, which both sPower and NMA submitted. The County held a hearing on 3 January 2017, at which both sPower and NMA appeared and made arguments. The County also limited sPower and NMA to the record as already constituted. (NMA2R.1975, 1977.)

The County issued its Amended Decision on 21 February 2017. In it, the County found that "sPower had, indeed, submitted extensive documentation, including studies and reports, to the Planning Commission regarding its efforts to mitigate light, sound and flicker," and that, therefore, the County's "statement that sPower had offered nothing more than bare oral representations was, we now recognize, erroneous." (NMA2R.1977.) In light of that evidence, the County decided that it could not say that "the Planning Commission's decision not to revoke the Latigo CUP lacked substantial evidence." The County held that it would not, "in light of the record evidence," "disturb the Planning Commission's conclusions that sPower has and is meeting the Latigo CUP's conditions and its decision not to revoke the permit." (NMA2R.1978.) Finally, the County reversed its remand instruction to allow NMA to address the planning commission. It explained that, "upon rehearing and considering all the record evidence," it "no longer view[ed] such a remand as helpful because now its sole purpose would be to allow NMA to comment, which [it] ha[d] determined is not a right that the Planning Commission was obligated to recognize."

(NMA2R.1978-79.) NMA then commenced the underlying action, *NMA 2*, by petitioning the district court for review a second time.

Disposition Below

The County and NMA filed cross-motions for summary judgment in the district court. (*NMA 2*, Index.) sPower intervened and opposed NMA's motion. (*Id.*) The district court heard argument on the motions and entered an order denying NMA's motion and granting the County's. (NMA2R.2875-79.) The district court explained that, "as it ha[d] considered and decided these matters on effectively the same record in *NMA I* once before, [it could] determine that it need not reconsider them and instead rely on its prior determination that, but for the due process violation, the county commission's decision was not illegal and was supported by substantial evidence." (NMA2R.2877.) Finding that the County had followed its instruction to cure the due process violation it had found in *NMA 1*, the district court granted the County's motion. (NMA2R.2878.) This appeal followed. (NMA2R.2880-82.)

ARGUMENT SUMMARY

The County's and sPower's argument begins by addressing the threshold issue whether the county commission had inherent authority to reconsider its initial decision because, if it didn't, the other issues NMA raises on appeal would be moot. The County and sPower argue, based on Utah precedent recognizing it, that the county commission had

inherent authority to reconsider its initial decision on NMA's appeal from the planning commission's decision not to revoke sPower's conditional use permit.

Next, the County and sPower argue that, contrary to NMA's assertions, the *McElhaney* opinion did not require the district court to remand this dispute all the way back to the planning commission to require it to hear evidence from NMA and make more extensive findings. The district court's, not the county commission's, decision is under review here, and, even assuming the Court could reach the question of the adequacy of the planning commission's findings for review, its report to the county commission was sufficient under the circumstances. The County and sPower also challenge NMA's substantial evidence analysis as irrelevant to the question it poses—whether the planning commission made adequate findings as NMA argues *McElhaney* requires for the county commission's review. Nonetheless, the County and sPower also show that the district court correctly found that the county commission's decision was supported by substantial evidence.

Finally, the County and sPower address NMA's argument that the County violated NMA's due process rights by refusing to allow its members to participate in sPower's revocation hearing. NMA is essentially claiming a protectable property interest in the County's enforcement of its laws against NMA's neighbor. But since the decision whether to revoke a permit is within the planning commission's discretion, NMA lacks a protectable

property interest that would allow it to claim due process rights to participate in the revocation hearing on its neighbor's permit.

ARGUMENT

I. The county commission's inherent authority to reconsider its initial decision isn't proscribed by statute or ordinance. (responding to Point III of NMA's brief, pages 40-44[4])

NMA makes two arguments challenging the county commission's reconsideration of its initial decision. It first asserts that the county commission's inherent authority permitted it only to enact ordinances allowing it to reconsider its decision, and that, because it hadn't done so, it lacked the authority to reconsider. That argument both misunderstands the nature of inherent authority and misinterprets controlling case law. Second, NMA claims that, even if the county commission would otherwise have had inherent authority to reconsider its initial decision, it lacked that authority here because it was proscribed by statute and ordinance. NMA, however, interprets the statutes and ordinances it relies upon too broadly—they do not address the county commission's inherent authority to reconsider its decisions.

"Inherent in the power to make an administrative decision is the authority to reconsider a decision. The absence of specific authority in the governing statutes is not determinative. Every tribunal has some power to correct its own mistakes." *Clark v. Hansen*, 631 P.2d 914, 915 (Utah 1981) (citations omitted). *See also DLB Collection Trust*

[4] The County herein uses NMA's page numbers, not the page numbers from its brief's PDF file.

by Helgesen & Waterfall v. Harris, 893 P.2d 593, 595 n. 1 (Utah Ct. App. 1995) (describing *Clark*'s conclusion as "axiomatic"). "Utah is among the majority of western states to have held that administrative agencies have the power to reconsider their decisions in the absence of statutory provisions to the contrary." *Career Service Review Board v. Utah Dep't of Corrections*, 942 P.2d 933, 945 (Utah 1997) ("*CSRB*"). In *CSRB*, the Utah Supreme Court held that the board retained jurisdiction to reconsider and modify its order "[u]ntil an appeal was perfected." *Id.* at 946.

NMA attempts to distinguish *Clark*, arguing that the opinion recognized only that the State Engineer had inherent "authority to adopt rules which provide for rehearings." *Clark*, 631 P.2d at 915. While in *Clark* the State Engineer had made rules regarding rehearings, the supreme court's characterization of inherent authority was broader; it recognized that the authority to reconsider was inherent in "the power to make an administrative decision," not in the power to pass rules. *Id.* NMA's narrow interpretation also ignores the supreme court's endorsement of a broader reading in *CSRB*. There, after finding that the board lacked "any explicit statutory authority to make subsequent modification to previously entered orders," *CSRB*, 942 P.2d at 945, the court nonetheless held that the board "retained jurisdiction and had the inherent authority to reconsider and modify its [order] in light of subsequently discovered facts," *id.* at 946. The supreme court explained that, in *Clark*, it had joined those jurisdictions holding that administrative tribunals' authority to modify orders still under their control "is inherent and exists

independent of, or apart from, any statutory authority." *Id.* at 945. Unlike *Clark*, *CSRB* was not decided on an administrative rule allowing reconsideration, and it explicitly rejected the argument NMA attempts here—that an administrative body's authority to amend or modify its decision is entirely statutory. *Id.*

This conclusion is both consistent with the nature of inherent authority and avoids the absurdity the narrower reading NMA proposes would allow. If, as NMA argues, a secondary step were necessary before an administrative entity could exercise its inherent authority (by passing a rule or an ordinance, for example), then the authority would cease to be "involved in the constitution or essential character" of its decision-making power. Merriam-Webster.com, *inherent*, https://www.merriam-webster.com/dictionary/inherent (last visited Nov. 5, 2018). Curtailing administrative entities' exercise of their inherent authority to only those circumstances where they have passed rules or ordinances authorizing its use would present situations where an obvious error couldn't be addressed, needlessly prolonging the litigation and increasing expenses, all while the administrative tribunal could simply make a quick fix to save all parties time and money.

NMA next argues that, even assuming the county commission had inherent authority to reconsider its decision here, statutes and ordinances proscribed it. But the best NMA can muster in support are general provisions related to land use appeals and review that unsurprisingly don't mention reconsideration, and fall far short of the contrary provisions required to abrogate inherent authority.

Section 17-27a-701(2) requires would-be petitioners for judicial review to first challenge a land use decision "in accordance with local ordinance." Utah Code § 17-27a-701(2). Section 17-27a-706(1) similarly requires county appeal authorities to conduct each appeal "as described by local ordinance." Utah Code § 17-27a-706(1). Section 17-27a-801 allows those adversely affected by a final decision to "file a petition for review of the decision with the district court within 30 days after the decision is final." Utah Code § 17-27a-801(2)(a). And, finally, San Juan County Zoning Ordinance § 2-2 sets forth the procedure for appealing from a land use decision, but lacks any provision expressly authorizing reconsideration. (NMA2R.0287-88.) NMA argues that, since the foregoing provisions of the County Land Use, Development, and Management Act ("CLUDMA") defer to local ordinances governing land use appeals, and the county's land use appeals ordinances don't contain a reconsideration provision, CLUDMA effectively proscribes reconsideration. (NMA's Br. at 42.) Not only, however, does that interpretation ignore *Clark*'s instruction that "[t]he absence of specific authority in the governing statutes is not determinative," *Clark*, 631 P.2d at 915, but it also falls short of the "provisions to the contrary" required to extinguish the county commission's inherent authority. *CSRB*, 942 P.2d at 945.[5] Statutes and ordinances setting forth the process to be used to appeal and seek review of land use decisions aren't "provisions to the contrary."

[5] NMA erroneously summarizes this language from *CSRB* as holding that "the inherent power to reconsider does not exist where no statutory provisions state to the contrary." (NMA's Br. at 42.) The case actually states the opposite: "[A]dministrative agencies have

Thus, that CLUDMA lacks what NMA calls a "global automatic initiation" provision (NMA's Br. at 42) similar to the Utah Administrative Procedures Act's (UAPA) section 63G-4-302 (which expressly allows for a motion to reconsider from a final agency decision, Utah Code § 63G-4-302) is inapposite. Inherent authority doesn't require an enabling statute; and it can only be extinguished by an affirmative act. *CSRB* itself demonstrates as much. There, the supreme court found the board's attempt to justify its decision to revisit a prior order under the UAPA "unconvincing" before affirming the board's action instead under its inherent authority—without referencing section 63G-4-302 (then numbered as Utah Code § 63-46b-13 (1997)). *CSRB*, 942 P.2d at 943-46. Even though CLUDMA and the county's ordinances don't expressly provide for reconsideration, therefore, they don't expressly prohibit it, and therefore the county commission's inherent authority persists.[6]

Utah recognizes the county commission's inherent authority to reconsider its initial decision in the absence of a statute or ordinance expressly limiting that authority. Because

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the power to reconsider their decisions in the absence of statutory provisions to the contrary." *CSRB*, 942 P.2d at 945.

[6] This is also why NMA's reference to *Gillett v. Price*'s holding, 2006 UT 24, ¶ 8, 135 P.3d 861, that parties seeking reconsideration in a district court proceeding must follow one or more of the multiple avenues that allow for reconsideration under the civil rules (NMA's Br. at 42, n. 1) is inapt. There are no rules regarding reconsideration applicable to county appeal authorities that mimic the state rules of civil procedure. Land use appeals are governed by state law and county ordinances, and in this case neither adopted the civil procedure rules. More importantly, nowhere does *Gillett* overturn the supreme court's recognition of the state's administrative tribunals' inherent authority to correct their own mistakes.

NMA fails to identify any statute or ordinance that prohibited the county commission from exercising that authority here, the county commission's reconsideration was legal, and its amended decision on remand should not be overturned on that ground.

II. The *McElhaney* opinion didn't require the district court to go back and evaluate whether the planning commission provided sufficient findings to allow the county commission to determine that its decision was supported by substantial evidence. (responding to Part I of NMA's brief, pages 18-34)

The district court reviewed the record when it ruled in *NMA 1* that the county commission's decision was supported by substantial evidence. Despite the issuance of the supreme court's *McElhaney* opinion in the interim, the district court determined that it didn't need to revisit the same record in *NMA 2* to conclude that its determination still held. NMA's argument that *McElhaney* so substantively changed the law that the district court needed to go back and review whether the planning commission had provided adequate findings for the county commission's review mistakes the decision under review. Even supposing the Court can reach the planning commission's decision, its report to the county commission was adequate under the circumstances. NMA's substantial evidence challenge is irrelevant to the issues it raises on appeal, and fails regardless.

A. The district court's, not the county commission's, decision is under review here, and therefore NMA's post-hoc argument that the planning commission's report to county commission was inadequate under *McElhaney* is inapposite.

NMA doesn't dispute that the county commission's Amended Decision and Remand Decision provided written findings and conclusions adequate to permit the district

court's reviews here and in *NMA 1*. NMA instead argues that the planning commission's written report of its decision not to revoke sPower's permit was insufficient to allow the county commission's review. But the district court made the decisions under review here, not the planning commission. NMA failed, moreover, to preserve any objection to the planning commission's report.

McElhaney addressed a district court's review of a decision made by the Moab City Council (acting as a land use authority) to deny an applicant a conditional use permit. *McElhaney*, 2017 UT 65, ¶ 1. The supreme court clarified that the decision reviewed by an appellate court isn't that of the adjudicative body, but rather that of the intermediate reviewing court. *Id.*, ¶¶ 24-26. The court explained that focusing on the intermediate court's decision rather than the adjudicative body's strengthens the integrity of the appellate process and provides an incentive for parties "to preserve, develop, narrow and refine the arguments they may eventually make to an appellate court—an incentive that would not be as potent if the parties could anticipate getting a second, and entirely fresh, appeal of the administrative decision." *Id.*, ¶ 24. This part of the *McElhaney* opinion, which NMA ignores, undermines its argument that this matter should be remanded to the county planning commission because that body didn't provide adequate findings and conclusions to the county commission.

McElhaney makes clear that the district court's, not the county commission's, decisions are under review here. Because NMA doesn't argue that the county commission's

written decisions were inadequate to allow the district court's substantial evidence review, it cannot simply move the argument down another procedural level in order to claim that the subsequent decision actually under review is flawed. Allowing parties to skip down to find alleged deficiencies in decisions made at points in the process prior to the decision being appealed would foster the same undesirable incentives the supreme court identified when clarifying that appeals review the intermediate court's decision: undermining the appellate process's integrity by allowing parties to raise otherwise unpreserved issues at any point.

McElhaney stands for the unsurprising conclusion that, in order for a district court to effectively review a land use authority's decision, the land use authority must transmit sufficient findings of fact and conclusions of law to the district court to enable that review. The supreme court explained that the requirement that a land use authority transmit a record of its proceedings to the reviewing court implied transmitting the authority's orders and findings. *McElhaney*, 2017 UT 65, ¶ 32. Recognizing an implied requirement isn't a change in law. *See, e.g.*, *True v. UDOT*, 2018 UT App 86, ¶ 35, 427 P.3d 338 (acknowledging as an exception to the preservation doctrine the possibility that "an intervening change in law might create exceptional circumstances that could justify addressing an issue uniquely affected by that intervening change"). The supreme court also noted that the court of appeals had, in several opinions, "require[d] land use authorities to issue findings of fact when denying conditional use permits." *McElhaney*, 2017 UT 65, ¶ 37. NMA's argument

that *McElhaney* represents new law falls flat when considered against such controlling precedent. Finally, the supreme court explained that substantial-evidence review is "a term of art that presupposes written findings." *Id.*, ¶ 41. Requiring what a statute presupposes is not new law. So long as the district court had sufficient findings of fact and conclusions of law from the county commission to conclude in *NMA 1* that the decision was supported by substantial evidence (which NMA doesn't dispute), therefore, there was no need for the Court to revisit its holding. The district court had adequate findings to make that evaluation, and NMA doesn't argue that it didn't.

Because *McElhaney* didn't change the law, NMA was required to lodge a timely objection if it believed the planning commission's report was inadequate for the county commission's or the district court's review. *Roundy v. Staley*, 1999 UT App 229, ¶ 24, 984 P.2d 404 ("To preserve an issue for appeal, a party claiming error in the admission of evidence must object on the record in a timely fashion. One who fails to make a necessary objection or who fails to insure that it is on the record is deemed to have waived the issue."). NMA instead waited until *NMA 2* and after *McElhaney* was issued to do so. NMA thus waived its ability to raise its objection to the planning commission report's completeness by its delay in asserting it.

B. Even supposing the Court could reach the adequacy of the planning commission's report, it was sufficient for the county commission's review.

The planning commission's report was, regardless whether the Court reaches the question, adequate for the county commission's review.

The difference between the showings required to deny a conditional use permit and to revoke a conditional use permit is material. The law governing whether a city should grant an application for a conditional use permit (at issue in *McElhaney*) requires the city to issue the permit unless the contemplated use's reasonably anticipated detrimental effects cannot be substantially mitigated by imposing reasonable conditions. *McElhaney*, 2017 UT 65, ¶ 27. Whether a permit should be revoked, in contrast, is left to the planning commission's discretion if it finds that the permittee is violating the permit's conditions. SJCZO § 6-10 (NMA2R.0299). The city's findings and conclusions in denying the permit application in *McElhaney*, therefore, had to be more detailed than those of the planning commission here. In *McElhaney*, the city had to identify the detrimental effects it anticipated and explain why conditions couldn't satisfactorily mitigate them. Here, the planning commission merely had to state that it had reviewed the evidence presented and found no violation of the permit's conditions.

All that the planning commission had to do here was to compare the evidence to the permit's conditions. If the evidence showed a violation, the planning commission could revoke the permit; and if not, it would not. The county commission's review was even more limited—whether the planning commission's finding that sPower wasn't violating its permit's conditions was itself supported by substantial evidence. Under these circumstances, the planning commission's written report explaining that sPower had made a presentation and provided "studies concerning sound, flicker, and light," as well as

"information on thresholds and how they were determined and what neighboring lands were affected" (NMA1R.2645) was sufficient.

In fact, the absence of any written report or decision in *McElhaney* is a critical distinction. Not only did the land use authority have to provide a more thorough explanation for its decision in *McElhaney*, but there was no written report at all. Here, however, the planning commission provided the county commission with a written report explaining why it determined it could not enforce NMA's so-called self-imposed conditions and that, based on the studies it received from sPower "concerning sound, flicker, and light," including thresholds and how there were determined and the neighboring properties affected, it unanimously determined that the conditions were met. (NMA2R.0711-24.) That NMA wants more detail is irrelevant. There was enough in the report for the county commission, upon reviewing the same evidence, to determine that the planning commission's decision was supported by substantial evidence, i.e., enough to "convince a reasonable mind" that sPower wasn't violating the permit's conditions. *Patterson v. Utah County Bd. of Adj.*, 893 P.2d 602, 604 n. 6 (Utah Ct. App. 1995) (cleaned up). The district court, whose substantial evidence determination NMA doesn't challenge on appeal, did nothing more.

The substantial evidence standard applies to many different kinds of land use decisions, and, like any standard of review, the showing the standard requires changes with the elements of the claim being appealed. Here, the permit's conditions were set, as was

the record. All that was required was a determination that the record did not show a violation of the known conditions. In *McElhaney*, however, the detrimental effects were unknown, as were the possible conditions and whether they might mitigate the detrimental effects. *McElhaney*, 2017 UT 65, ¶¶ 29-30. There needed to be more detailed findings in *McElhaney* than here, where the planning commission's report provided adequate basis for the county commission's review.

C. NMA's substantial evidence analysis is unrelated to whether the planning commission's report was adequate under *McElhaney*, but, even if it were related, the district court correctly affirmed the county commission's decision.

For some reason, NMA tucks a lengthy substantial evidence analysis into its argument on the *McElhaney* issue it raises on appeal. Whether the district court's holding is supported by substantial evidence is unrelated to whether the *McElhaney* opinion required the planning commission to provide the county commission with more detailed and extensive findings (NMA's "Issue 1"). Even if it were, NMA's reliance on the whole-record test in an attempt to weaken the substantial evidence test is misplaced, since, even if the test applies, NMA hasn't performed the required marshaling. The district court's holding that sPower is complying with the permit's conditions is, moreover, supported by substantial evidence.

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1. NMA doesn't raise a substantial evidence challenge on appeal, and its analysis is therefore irrelevant.

Although NMA doesn't raise a substantial evidence challenge on appeal, it dedicates a substantial number of pages to arguing that the district court's—or at times that the county commission's, or the planning commission's—decision didn't satisfy that standard when finding that sPower was complying with its permit's conditions. Those arguments are, however, irrelevant to the issues NMA has raised on appeal and should be disregarded.

NMA raises three issues on appeal, none of which directly challenge the district court's substantial evidence determination. The closest is NMA's first issue, asking the Court to decide whether the district court erred when it supposedly refused to review whether the planning commission's decision was supported by substantial evidence in light of the *McElhaney* opinion. (NMA's Br. at 2.) (The district court's conclusion that it saw no need to reconsider its decision in *NMA 1*, despite NMA's *McElhaney* argument, implies that the district court simply found the argument unpersuasive.) The other two issues are further afield: whether due process required the district court to remand the revocation decision back to the planning commission to allow NMA to participate (second issue), and whether the county commission could reconsider its initial decision (third issue). (NMA Br. at 3-4.)

While NMA's first issue at least contains the phrase *substantial evidence*, it instead focuses on NMA's distinct argument that the planning commission's report to the county

commission on its decision was inadequate to allow review under *McElhaney*, not a separate challenge to the district court's holding that the county commission's decision was supported by substantial evidence. The issues are distinct, and NMA raised only the former (whether the planning commission's report was adequate to allow the county commission's review). NMA's lengthy substantial evidence review is therefore irrelevant and should be disregarded.

2. NMA's reliance on the whole-record test, assuming it even applies here, fails because NMA hasn't marshaled the evidence supporting the district court's decision.

NMA's reliance on UAPA's statutory whole-record test is misplaced. Assuming the test even applies in this context, NMA fails to marshal the evidence supporting the district court's decision. Nor does NMA provide more than a reasonably conflicting view, which is resolved in the County's favor.

A county appeal authority's decision is presumed valid, and reviewed only to determine, based on the record, whether it is arbitrary, capricious, or illegal. Utah Code § 17-27a-801(3)(a) & (8)(a). The decision at issue here—a county planning commission's decision not to revoke a conditional use permit—is an administrative decision reviewed under the substantial evidence standard. Utah Code § 17-27a-801(3)(b) & (c); *Salon Tropicana Midvale, Inc. v. Midvale City*, Case No. 20090057-CA, 2009 UT App 327, *6-*8, 2009 Utah App. LEXIS 345 (Nov. 13, 2009) (Mem. Dec.) (unpublished) (reviewing

city appeal authority's decision upholding its planning commission's decision to revoke a conditional use permit under the substantial evidence standard).

"'Substantial evidence is that quantum and quality of relevant evidence that is adequate to convince a reasonable mind to support a conclusion.'" *Patterson*, 893 P.2d at 604 n. 6 (quoting *First Nat'l Bank of Boston v. County Bd. of Equalization*, 799 P.2d 1163, 1165 (Utah 1990) (quotation marks omitted).) "It is 'more than a mere scintilla of evidence . . . though something less than the weight of the evidence.'" *Id.* (quoting *Grace Drilling Co. v. Board of Review*, 776 P.2d 63, 68 (Utah Ct. App. 1989) (quotation marks and citation omitted)).

NMA charges, based on no evidence whatever, that the district court violated this standard because it "made no effort to consider evidence that 'fairly detracted' from sPower's position, in contravention of Utah's substantial evidence standard." (NMA's Br. at 22.) NMA relies on *Grace Drilling* for this characterization, which arises from what this Court termed the *whole record test*. Under that test, a reviewing court "must consider not only the evidence supporting the [adjudicative body's] factual findings, but also the evidence that fairly detracts from the weight of the [adjudicative body's] evidence." *Grace Drilling*, 776 P.2d at 68 (cleaned up). That test is, however, specific to UAPA, and even if it weren't, NMA hasn't marshaled the evidence supporting the district court's decision sufficient to allow this Court's review.

The *whole record test* is explicitly mandated by UAPA, which allows as one of several express bases for an appellate court to grant the petitioner relief that "the agency action is based upon a determination of fact, made or implied by the agency, that is not supported by substantial evidence when viewed in light of the whole record before the court." Utah Code § 63G-4-403(4)(g); *Grace Drilling*, 776 P.2d at 66. (At the time *Grace Drilling* was decided, this language, which remains unchanged, was found in Utah Code § 63-46b-16(4)(g) (1988).) It appears to be a distinct test from the substantial evidence test, because the Court differentiates them within the space of two sentences in the opinion. *Grace Drilling*, 776 P.2d at 68. Because a phrase similar to "when viewed in light of the whole record before the court" doesn't appear in CLUDMA's judicial review provision, Utah Code § 17-27a-801, the test doesn't translate to reviews of land use decisions.

Even if the whole record test did apply to substantial evidence reviews of county land use decisions, NMA couldn't rely on it here because it hasn't marshaled all the evidence supporting the district court's decision. The test "necessarily requires that a party challenging the [adjudicative body's] findings of fact must *marshall* all of the evidence supporting the findings and show that despite the supporting facts, and in light of the conflicting or contradictory evidence, the findings are not supported by substantial evidence." *Grace Drilling*, 776 P.2d at 68 (emphasis original). While NMA mentions some of the evidence that supports the district court's decision, it falls far short of marshaling all the supporting evidence in the record.

"To satisfy its marshaling burden, the [challenger] need[s] to marshal all of the evidence supporting the Board's findings, not simply the evidence supporting its preferred interpretation." *Uintah County v. Dep't of Workforce Servs.*, 2014 UT App 44, ¶ 7, 320 P.3d 1103 (cleaned up). "When a party challenging a factual finding fails to marshal the evidence in support of that finding, we assume that the record supports the finding." *Id.* (cleaned up).

While NMA identifies what it believes the county commission failed to consider (albeit without support)—its 5 November 2015 memorandum and attached documents (NMA's Br. at 22-23)—it falls short marshaling the evidence supporting the county commission's findings. NMA appears to argue in its defense that it's difficult to determine what the county commission or the district court relied on (NMA Br. at 21-22; NMA Suppl. at 7-8), even suggesting that the district court might not even have reviewed the record (NMA Suppl. at 8). But just because the record contains a lot of evidence that supports the adjudicative body's findings doesn't excuse the challenger from marshaling them. And in reality it shouldn't be that difficult here, where the county commission set out its findings in its decisions, and the County and sPower set out their arguments in their memoranda that the district court implicitly adopted. Because NMA fails to carry its burden, its argument that the county commission's and the district court's decisions weren't supported by substantial evidence fail, even under the whole record test.

NMA presents, at most, a conflicting view of the evidence in support of its position. But, when undertaking a substantial evidence review, a court "will not substitute its judgment as between two reasonably conflicting views, even though [it] may have come to a different conclusion had the case come before it for de novo review." *Grace Drilling*, 776 P.2d at 68. Because NMA fails to marshal all of the evidence opposing its own position, and then show that the district court's conflicting view of the evidence is unreasonable, its substantial evidence challenge fails. "It is," after all, "the province of the [adjudicative body], not appellate courts, to resolve conflicting evidence, and where inconsistent inferences can be drawn from the same evidence, it is for the [adjudicative body] to draw the inferences." *Id.*

Though NMA doesn't raise it as an express issue, throughout its brief it argues that the record is unreliable because it contains materials submitted to the county commission that weren't before the planning commission when it made its decision, particularly a 23 September 2015 letter from sPower, to which was attached several documents showing sPower's compliance with the permit's conditions. (NMA's Br. at 5-8, 21-22; NMA's Suppl. at 3, 5-6.) But NMA waived this objection to evidence in the record long ago, and, even if it could still object, the same or substantially similar materials appear elsewhere in the record.

"To preserve an issue for appeal, a party claiming error in the admission of evidence must object on the record in a timely fashion. One who fails to make a necessary objection

or who fails to insure that it is on the record is deemed to have waived the issue." *Roundy*, 1999 UT App 229, ¶ 24. NMA failed to timely object to the materials it now claims shouldn't be in the record.

CLUDMA provides that, "[i]f there is a record, the district court's review is limited to the record provided by the land use authority or appeal authority, as the case may be." The district court is prohibited from "accept[ing] or consider[ing] any evidence outside the record of the land use authority or appeal authority, as the case may be, unless that evidence was offered to the land use authority or appeal authority, respectively, and the court determines that it was improperly excluded." "If there is no record, the court may call witnesses and take evidence." Utah Code § 17-27a-801(8). CLUDMA requires appeal authorities to transmit the record to the reviewing court. Utah Code § 17-27a-801(7)(a).

The County transmitted the record before the county commission to the district court on 19 May 2016. (*NMA 1*, Index at 1.) NMA has never formally objected to its contents. In fact, it appears that the first time NMA even noted any concern that the record was inaccurate wasn't until 18 October 2017, when it alleged that there was no evidence that the planning commission considered the flicker, light, and sound studies attached to a September 23 letter from sPower. (NMA2R.2391.)

The letter, which was sent to the county attorney, not the county building department, merely summarizes evidence sPower provided to the planning commission (NMA2R.1748-55, 2103-04, 2581), which probably explains NMA's delay in commenting

on it. Once NMA suggested the material might not have been considered by the planning commission, the County switched the citations supporting its argument that sPower presented evidence it was meeting its permit's conditions to other parts of the record. (NMA2R.2774-75.) Even supposing NMA's comments about the September 23 letter were read as an objection, the County referenced other evidence that still showed sPower met the permit's conditions.

In its brief on appeal, NMA has moved beyond questioning the September 23 letter, going so far as creating, for the first time, a list of all the documents it now contends weren't part of the record before the planning commission. (NMA's Br. at 9-10 & Add. I.) NMA argues that the inclusion of that evidence violated Utah Code § 17-27a-707, which implicitly limited the county commission's review to the record because the County had by ordinance designated a scope of review. (*Id.*) *See* SJCZO § 2-2(2)(e) (establishing an arbitrary-and-capricious standard of review). NMA's argument, however, comes too late.

As the Court explained in *Roundy*, objections to evidence must be made "in a timely fashion" or they are waived. *Roundy*, 1999 UT App 229, ¶ 24. NMA's objections to the record here—if they can be considered objections—are untimely and have been waived. The record of the county commission's decision was transmitted to the district court in May 2016 in *NMA 1*. NMA first noted concern about the record in October 2017 in *NMA 2*, which consisted of alleging that there was nothing in the record demonstrating that the planning commission had considered the studies attached to the September 23 letter.

Between those dates, the district court rendered its decision in *NMA 1*, holding that substantial evidence supported the county commission's decision (NMA1R.3163), the county commission received briefs and heard argument on sPower's request to reconsider and issued a decision (NMA2R.1970-81), and NMA petitioned for review a second time (NMA2R.0001-0035). And NMA didn't raise its objections beyond sPower's September 23 letter until its opening brief on this appeal. Because an objection to evidence raised after a decision has been rendered is untimely, *see, e.g.*, *438 Main Street v. Easy Heat, Inc.*, 2004 UT 72, ¶ 51, 99 P.3d 801 ("In order to preserve an issue for appeal, the issue must be presented to the trial court in such a way that the trial court has an opportunity to rule on that issue." (cleaned up)), NMA has waived its objections to the record.[7]

3. Finally, even if NMA had raised the district court's substantial evidence decision as an issue here, the court correctly affirmed the county commission's decision.

The permit's only conditions relevant here deal with flicker, light, and sound. The county required Wasatch Wind to provide as much mitigation of these impacts as possible. In its briefing in *NMA 1*, the County argued that meant as much mitigation as can be required by industry standards (NMA1R.3141-43), and the district court implicitly agreed. NMA has not challenged that holding. Until now, NMA has argued that the other

[7] This same analysis applies to NMA's objection to Sean McBride's 22 December 2016 declaration (NMA's Br. at 19, n. 5) (although there's no indication the County relied on it—the opposite, in fact (NMA2R.1977)). NMA failed to object to the declaration before the county commission and the district court before raising the issue here. It has therefore waived its objection.

conditions it contends apply to sPower's permit (e.g., financial mitigation, dark sky technology, ice throw) were "self-imposed" conditions adopted by Wasatch Wind and enforceable against sPower, even though not formally adopted by the County.

On this appeal, however, NMA argues that the permit's conditions actually include a financial mitigation requirement, although perhaps the planning commission failed "to clearly enunciate" it.[8] (NMA's Br. at 26.) NMA asserts that the condition "reiterating that all and any new land purchase lease deals be in writing for any contiguous and affected landowners" adopts Wasatch Wind's assertion at the October 2012 hearing that it would either buy or make financial mitigation payments to NMA's members. (NMA's Br. at 24, 27-28.) This argument is both waived and unsupported.

Because NMA didn't raise this argument—that the requirement that new land purchase or lease deals be in writing is really the financial mitigation condition in disguise—until now, it's been waived. "Issues not raised before the district court are normally waived and cannot be raised for the first time on appeal." *Gardner v. Bd. of County Comm'r*s, 2008 UT 6, ¶ 32, 178 P.3d 893. The Court therefore need not address it.

Even were the Court to address this argument, it fails because it seeks to expand the permit's application beyond its plain language. The condition is plainly limited to "new

[8] NMA also contends that "sPower conceded that there is a financial mitigation condition in the Amended CUP" because, in its memorandum opposing NMA's motion for summary judgment in *NMA 1*, sPower asserted that it had "satisfied 'financial mitigation' commitments." (NMA Suppl. at 3, n. 4.) But sPower refers to commitments, not conditions, and its use of scare quotes indicates its disagreement with NMA's characterization.

land purchase [or] lease deals," and simply requires that they "be in writing." This is not ambiguous and it is not a requirement that Wasatch Wind or its successors in interest purchase the NMA members' properties or, alternatively, provide them financial mitigation.

NMA also generally criticizes sPower's micrositing of its turbines after receiving its permit. Relying on a definition from an anti-wind-energy website, NMA contends that sPower's rearrangement went beyond micrositing. (NMA's Br. at 28-29 & n. 8.) The County and sPower object to NMA's citation to the National Wind Watch website because it is outside the record and lacks foundation. (National Wind Watch is alleged to be connected to the fossil fuel industry. *See* https://www.energyandpolicy.org/tom-stacy-anti-wind-activist/ *(last visited 4 December 2018).)*

The County and sPower readily agree with NMA that, had sPower relocated one of its turbines inside Monticello city limits, it would have been handled differently. (NMA's Br. at 33.) But that's not because the County is for some reason targeting NMA, but rather because the city is a different jurisdiction, isn't zoned agricultural, and most likely the turbine would be located on developed land.

As for the flicker, light, and sound mitigation requirements, NMA cannot show that the evidence supporting the district court's decision was unlikely to convince a reasonable mind. The County and sPower address each requirement below.

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i. Flicker

sPower provided evidence that, even using the taller Vesta turbines originally planned, just one residence and a school would be impacted by flicker. But sPower relocated turbines to decrease those impacts and used shorter GE turbines. A 2015 analysis based on the relocated turbines and the GE turbines found that flicker wouldn't exceed industry guidelines on any nearby properties. (There are no industry standards for flicker for vacant agricultural land like the NMA members'.)

NMA's sole evidence supporting its contention that its members' properties are adversely affected by flicker is its speculation that sPower's relocation of turbines to be farther away from the residence and school brought them closer to its members' properties and therefore must have had increased flicker impact on those properties. (NMA's Br. at 29.) But, even were that so, there is no industry standard against which to assess the impact and it doesn't show that the County's view of the evidence was unreasonable.

sPower's evidence was adequate to convince a reasonable mind that it was complying with the permit's flicker mitigation condition.

ii. Light

sPower asserted that it worked with the FAA to reduce the number of turbines required to have navigation lights from 27 to 14, and that it had developed a lighting plan for its substation and operations building that eliminated lighting at night while not in use. sPower also represented that it used downward-facing lighting whenever possible.

NMA argues that sPower's representations are just "bald assertions in self-serving letters." (NMA's Br. at 33.) It also claims that a sentence in one of Wasatch Wind's application papers belies sPower's contention that it negotiated fewer navigation lights. According to NMA, Wasatch Wind had represented that the FAA "typically requires only that turbines on the perimeter be lit." (NMA's Br. at 32.)

Contrary to NMA's characterization, Wasatch Wind noted that the FAA typically requires "the turbines on at least the perimeter" to be lit. (NMA2R.1062.) Wasatch Wind's assessment therefore sets lighting the perimeter as a minimum, whereas NMA erroneously casts the same language as setting a ceiling.

NMA's complaints about sPower's representations are really only that—objections that sPower didn't provide documentation corroborating its representation. But where NMA doesn't point to contradictory evidence, sPower's statements are more than a scintilla, even if less than the weight of the evidence, and that is sufficient to support the County's determination under the substantial evidence test.

iii. Sound

There are no industry standards applicable to sound impacts on undeveloped agricultural property like that of the NMA members. sPower has, nonetheless, made efforts to decrease sound impact. Instead of using Siemens and Vestas turbines as originally planned, it used new, quieter GE turbines. sPower conducted sound studies to confirm that its rearrangement of turbines and use of the GE turbines had reduced the sound impact by

a decibel, meeting the industry standard for existing residences and businesses near the project. The study indicated that one NMA member's property might experience noise higher than 47 decibels, the accepted limit for residential property.

NMA argues that the GE turbines are actually noisier, and, regardless, sPower's study doesn't specify what turbines it's analyzing. It also argues that sPower's rearrangement brought turbines closer to its properties that it believes had to have worsened the sound impacts. (NMA's Br. at 30-31.) But these arguments are inaccurate and speculative.

The citation NMA provides for its assertion that the GE turbines are actually noisier is the updated sound study, which states that the new turbines are indeed quieter. (NMA2R.0730.) Although the update doesn't specify that it's analyzing the new GE turbines, that information appears elsewhere in the record. Finally, NMA's speculation that moving turbines closer to its members' properties increased sound impact, even if true, isn't enough to render the County's assessment unreasonable when NMA provides no evidence of an industry standard controlling sound impacts on vacant agricultural land.

III. NMA lacked a due process right to participate in the planning commission's revocation hearing on sPower's permit. (responding to Point II of NMA's brief, pages 34-40)

NMA asserts that it had a due process right to participate (present evidence and argument and object) in the planning commission's revocation hearing on sPower's permit based on what is essentially a claimed property right in the County's enforcement of the

permit's conditions. The County therefore allegedly violated that right when it denied NMA participation in the hearing. But there is no property right in the enforcement of zoning laws against others that would give rise to the due process right NMA claims.

"'To state a cognizable substantive [or procedural] due process claim, [plaintiffs] must first allege sufficient facts to show a property or liberty interest warranting due process protection.'" *Petersen v. Riverton City*, 2010 UT 58, ¶ 21, 243 P.3d 1261 (quoting *Patterson v. Am. Fork City*, 2003 UT 7, ¶ 23, 67 P.3d 466) (alterations original) (quotation marks and citations omitted). "The United States Supreme Court has defined a property interest 'as a legitimate claim of entitlement to some benefit.'" *Id.* (quoting *Hyde Park Co. v. Santa Fe City Council*, 226 F.3d 1207, 1210 (10th Cir. 2000)) (quotation marks and citations omitted). "'An abstract need for, or unilateral expectation of, a benefit does not constitute property.'" *Id.*, ¶ 22 (quoting *Hyde Park*, 226 F.3d at 1210) (alteration and quotation marks omitted). "Rather, a property interest exists only where 'existing rules and understandings that stem from an independent source such as state law . . . secure certain benefits and [ ] support claims of entitlement to those benefits.'" *Id.* (alterations original).

The County doesn't dispute that it didn't allow NMA to participate in the revocation hearing. The County's disagreement with NMA is rather over a legal question: whether an adjacent property owner has a due process right to participate in its neighbor's permit revocation hearing, particularly where the hearing arises from the adjacent property

owner's complaint that its neighbor's failure to meet the permit's conditions is causing the adjacent property harm.

NMA identifies no authority supporting its proposition that an adjacent property owner has a due process right to be heard at its neighbor's permit revocation hearing. It cites to *United States v. James Daniel Good Real Property* ("*James Daniel*") for the "right to the unrestricted use and enjoyment" of its property, 510 U.S. 43, 54 (1993), but the opinion offers NMA little, if any, support.

James Daniel is a civil forfeiture case involving a physical taking, so its relevancy here is limited to establishing that a deprivation of a possessory interest in property might qualify for due process protection. But NMA fails to explain how its members have been deprived of any use or enjoyment of their properties. Even assuming that NMA is correct and the County wasn't properly enforcing the conditions it placed on sPower's permit, the NMA members' properties' agricultural zoning remained unchanged, and no uses were curtailed or enjoyment limited.

Even if sPower were violating the permit's conditions resulting in harm to the NMA members' rights of use and enjoyment, sPower would be causing that harm, not the County. NMA asserts that, ultimately, the County is responsible for the alleged harm to the NMA members' property rights because it has failed to enforce the permit's conditions against sPower. NMA's due process argument against the County therefore essentially asserts a

protectable property interest in the County's enforcement of the permit's conditions against sPower. But NMA doesn't have that right for at least two reasons.

First, the County's land use laws are enacted "to provide for the health, safety, and welfare" of its citizens generally. Utah Code § 17-27a-102(1)(a). These generally applicable laws do not create the private entitlements distinguishable from generalized public benefits that give rise to protectable property interests subject to due process protections. NMA therefore errs by asserting a protectable property interest in enforcing the County's land use laws against sPower because those laws haven't created a personalized entitlement. *See Gagliardi v. Village of Pawling*, 18 F.3d 188, 191 (2d Cir. 1994) (noting the federal district court's dismissal of due process claims upon finding that the plaintiffs had no protectable property right in zoning laws "enacted for the general health and welfare of the entire public").

Next, even if a protectable property interest in the County's enforcement of its laws were possible, it wouldn't exist here because the County's decision whether to bring an enforcement action against sPower is discretionary.

The U.S. Court of Appeals for the Second Circuit addressed this unusual question (typically petitioners challenge a local government's land use decisions when an application for a permit is denied or approved) directly in *Gagliardi*. The plaintiffs owned property zoned residential next to industrially-zoned property occupied by a corporation that the plaintiffs contended was violating local zoning regulations, including generating

excessive noise, storing hazardous materials, and failing to provide adequate drainage. The plaintiffs sued the corporation, the local village government, and various village officials, bringing several claims, including one against the village under 42 U.S.C. § 1983 for allegedly violating the plaintiffs' procedural and substantive due process rights by not enforcing zoning regulations against the corporation. The Second Circuit affirmed the due process claims' dismissal.

The court explained that, because a protectable property interest arises from a legitimate claim of entitlement to a benefit, "[w]here a local regulator has discretion with regard to the benefit at issue, there normally is no entitlement to that benefit. An entitlement to a benefit arises only when the discretion of the issuing agency is so narrowly circumscribed as to virtually assure conferral of the benefit." *Gagliardi*, 18 F.3d at 192 (cleaned up). The court also observed that "[g]overnment officials . . . generally are given broad discretion in their decisions whether to undertake enforcement actions." *Id.* Upon its review of the applicable ordinances, the court found that the village officials had discretion in the enforcement of the zoning regulations and affirmed the due process claims' dismissal for lack of a protectable property interest. *Id.* at 192-93. *See also Kuhl v. Halquist Farms, Inc.*, case no. 02-1156 (MJD/RLE), 2003 U.S. Dist. LEXIS 11251 at *13-*17 (D. Minn. June 26, 2003) (finding no due process right in enforcing zoning laws against neighbor's manure basin).

Utah recognizes this discretion in prosecutors' analogous determinations whether and what charges to pursue in criminal matters. *See, e.g.*, *State v. Mohi*, 901 P.2d 991, 1011 (Utah 1995) (Russon, J., dissenting) ("[T]he determination of the appropriate charge with its applicable sanctions is the sort of matter that has traditionally been left to the prosecutor's discretion.").

The County's revocation ordinance doesn't limit this traditional discretion. It describes a conditional use permit as "revocable," rather than setting forth specific circumstances under which revocation would be mandatory:

> A conditional use permit shall be revocable by the Planning Commission at any time due to failure of the permittee to observe any condition specified or failure to observe other requirements of this Ordinance in regard to the maintenance and improvements or conduct of the use or business as approved.

SJCZO § 6-10. After a hearing where the permittee may be heard, call witnesses, and present evidence, "the Planning Commission shall determine whether the permit should be revoked." *Id.* The decision whether to revoke is left to the planning commission's discretion.

Because the zoning ordinance gives the planning commission broad discretion when deciding whether to revoke a conditional use permit, NMA lacked any entitlement to that outcome, and therefore had no protectable property interest on which to base its due process claims.

Recognizing a protectable property interest in the County's enforcement of its ordinances likely would require Utah's local governments to convene hearings whenever they received a third-party complaint alleging that a permittee wasn't complying with its permit's conditions. Rather than deciding in their discretion whether a complaint merited convening a revocation hearing, local officials would have to at least hold a hearing on the third party's complaint. Because the third party would have a protectable property interest in enforcement, the local officials likely would need to provide it with notice and an opportunity to present evidence and argument before deciding whether to proceed against the permittee or not (and thereby extinguishing what the third party believes is a legitimate property right in having the permit's conditions enforced). A local government could try alternatively to streamline that process by almost always convening a revocation hearing when it received a complaint, exposing the permittee to the real risk of abuse by allowing competitors and any other adverse third party to trigger multiple expensive reviews where it must defend its supposedly vested rights. The burden on local governments would likely correspondingly increase, not only due to increased administrative costs of holding so many hearings, but it would also expose more opportunities to create liability by pitting them between the permittee's vested rights and the complainant's enforcement rights. This cannot be the law, and NMA presents no authority that it is.

Finally, NMA's attempt to leverage the district court's conclusion in *NMA 1* that NMA's due process rights were violated when it wasn't provided notice or an opportunity

to be heard by the county commission on sPower's request for reconsideration into a general finding of due process rights that entitled it to be heard at sPower's revocation hearing before the planning commission fails. The due process right recognized by the district court arises from NMA's entitlement to appeal the planning commission's decision not to revoke sPower's permit to the county commission under the County's zoning ordinance. Ordinance § 2-2(2) broadly allows "any person affected by a land use authority's decision" to appeal that decision to the county appeal authority (in contrast to Utah Code § 17-27a-801(2)(a)'s authorization for anyone "adversely affected" to petition for review). SJCZO § 2-2(2) (NMA2R.0549-50). That ordinance does not, however, affect the County's discretionary enforcement or create a property interest therein. Thus, to the extent NMA suggests that, since the district court found that it had a due process right to be heard on sPower's reconsideration request, it also had a due process right to be heard at sPower's revocation hearing, it is incorrect.

CONCLUSION

The County requests that the Court affirm the district court's ruling on NMA's and the County's cross-motions for summary judgment. NMA's argument that the county commission lacked authority to reconsider its written decision on NMA's appeal fails because the county commission enjoyed inherent authority to do so. NMA's contention that the district court's decision is deficient because the record wasn't sufficient for review under *McElhaney* is erroneous. The standard's application here is different than in

McElhaney, and was fulfilled by the county commission's written decision. Finally, NMA's claim that the County's refusal to allow it to participate in the planning commission's revocation hearing on sPower's permit violated its due process rights fails because NMA has no due process right in the County's discretionary enforcement of the permit's conditions.

DATE: 5 December 2018.

GOEBEL ANDERSON PC

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*Signed by filing attorney with permission received by email on 5 December 2018.
/s/Barton H. Kunz II

CERTIFICATE OF COMPLIANCE

In compliance with the type-volume limitation of Utah Rule of Appellate Procedure 24(g)(1), I certify that this brief contains 12,738 words, excluding the table of contents, table of authorities, and addendum. In compliance with the typeface requirements of Utah Rule of Appellate Procedure 27(b), I certify that this brief has been prepared in a proportionally spaced font using Microsoft Word 2013 in 13-point Times New Roman typeface.

/s/Barton H. Kunz II
Barton H. Kunz II
Attorney for the County Appellees

CERTIFICATE OF SERVICE

I hereby certify that on this 5 December 2018, a searchable PDF of the foregoing brief of the appellees was served upon the following by email, with two hard copies to follow within seven days by first class, postage prepaid U.S. mail:

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ADDENDUM

INDEX

The Order of the Court is stated below:
Dated: February 28, 2018 11:52:34 AM **/s/** LYLE R ANDERSON
District Court Judge

Prepared and submitted by:

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SEVENTH DISTRICT COURT – MONTICELLO DEPARTMENT

SAN JUAN COUNTY, STATE OF UTAH

NORTHERN MONTICELLO ALLIANCE, LLC,

Petitioner,

vs.

SAN JUAN COUNTY COMMISSION *et al.*,

Respondents,

SUSTAINABLE POWER GROUP, LLC; and LATIGO WIND PROJECT, LLC,

Intervening Respondents.

ORDER DENYING PETITIONER'S MOTION FOR SUMMARY JUDGMENT AND GRANTING RESPONDENTS' CROSS-MOTION FOR SUMMARY JUDGMENT

Case No. 170700006
Judge Lyle R. Anderson

The Court, having considered cross-motions for summary judgment filed by petitioner Northern Monticello Alliance, LLC ("NMA") and respondents the San Juan County Commission and San Juan County (collectively, "County") and the briefing thereon, and having heard oral argument, and reviewed the proposed order submitted

by the County, the objection filed by NMA, and the County's response thereto, now decides the motions as follows.

This petition arises from a decision of the San Juan County Commission, acting in its capacity as the county appeal authority under Utah Code § 17-27a-701, made on remand from this Court's order in a prior petition for review between these parties and heard by this Court, case no. 160700001 ("*NMA I*"). That petition arose after the county commission affirmed the county planning commission's decision not to revoke a conditional use permit for a wind power facility held by Sustainable Power Group, LLC and Latigo Wind Park, LLC (collectively, "sPower"). The county commission did so via an amended decision after initially reversing the planning commission's decision upon finding that sPower had presented no evidence beyond bare statements that it was complying with the permit's conditions requiring it to mitigate the project's flicker, light, and sound impacts. In a letter dated December 3, 2015 seeking the county commission's reconsideration, sPower contended that the county commission's initial decision was mistaken, and that it had presented extensive evidence showing its compliance. The county commission issued its amended decision as a result. But sPower did not send NMA a copy of its letter, and the county commission reconsidered its decision without involving NMA.

In *NMA I*, this Court held that the county commission's failure to involve NMA in its reconsideration violated NMA's due process rights, but otherwise held that the county commission's amended decision was supported by substantial evidence and

legal. This Court vacated the county commission's amended decision and remanded this matter back to the county commission "for proceedings consistent with the Court's Decision." (*NMA I*, Ruling Am. J. (Nov. 14, 2016).)

On remand, the county commission took briefs from both sPower and NMA on sPower's request for reconsideration and held a hearing where attorneys for both parties presented arguments. The county commission limited the parties to the evidence already in the record, reasoning that it was considering sPower's contention that, contrary to the county commission's initial decision, the record contained more than its representative's bare statements that it was complying with the permit's conditions. The county commission then issued a new amended decision affirming the planning commission. This petition for review followed, where NMA again argues that the county commission's decision is illegal and unsupported by substantial evidence.

While the law of the case doctrine may not strictly apply to this situation, the Court nonetheless may, as it has considered and decided these matters on effectively the same record in *NMA I* once before, determine that it need not reconsider them and instead rely on its prior determination that, but for the due process violation, the county commission's decision was not illegal and was supported by substantial evidence.

In *NMA I*, the Court explained that, "[w]hile the County's decision to reverse its earlier decision was based on evidence properly before it, NMA did not have the same opportunity to argue its side of the case with regard to that evidence or to present its own evidence." (*NMA I*, Mem. Dec. on Aug. 30, 2016 Hr'g at 8 (Sept. 9, 2016).) The

Court expected that on remand the county commission would remedy its denial of due process to NMA by giving it a chance to respond to sPower's December 3, 2015 letter, which was essentially sPower's motion to reconsider, and to evaluate those arguments and consider any evidence in the record that NMA would want to call to the county commission's attention in evaluating whether it should have reconsidered its decision. (The Court did not mean for the county commission to take evidence if it hadn't taken evidence in the first place.) The Court hasn't read anything in the memoranda or heard anything at argument that persuades it that the county commission didn't do what the Court expected it to do.

The Court therefore DENIES NMA's motion for summary judgment and GRANTS the County's cross-motion for summary judgment. This order fully resolves all claims at issue in this matter and serves as the Court's FINAL JUDGMENT.

----------END OF ORDER----------

Ordered by the Court as indicated
by the date and seal at the top of the first page.

Approved as to form this 20 February 2018. Goebel Anderson PC /s/Barton H. Kunz II Barton H. Kunz II *Attorneys for County Respondents*	Approved as to form this _____ February 2018. Smith Hartvigsen, PLLC **[unsigned]** J. Craig Smith Jennie B. Garner Aaron M. Worthen *Attorneys for Petitioner*

Approved as to form this _____ February 2018. Snell & Wilmer L.L.P. **[unsigned]** Paul W. Shakespear Elizabeth M. Brereton *Attorneys for Intervening Respondents*	

CERTIFICATE OF SERVICE

I hereby certify that I caused a true copy of the foregoing proposed order (except for revisions subsequently agreed to by the County) to be served upon the following by email on 12 February 2018:

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/s/Barton H. Kunz II
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Attorney for County Respondents

Kuhl v. Halquist Farms, Inc.

United States District Court for the District of Minnesota

June 26, 2003, Decided

Civil File No. 02-1156 (MJD/RLE)

Reporter
2003 U.S. Dist. LEXIS 11251 *; 2003 WL 21517361

James W. Kuhl and Marilynn E. Kuhl, Plaintiffs, v. Halquist Farms, Inc.; Florence Halquist; William Floyd Halquist; County of Carver, Minnesota; and Michael Lein, an Environmental Services Director of Carver County, Defendants.

Disposition: [*1] Defendant Carver County and Michael Lein's Motion for Summary Judgment granted in part. Counts One through Five and Count Eight of Complaint dismissed without prejudice. Defendant Halquist Farms, Inc., Florence Halquist and William Halquist's Motion for Summary Judgment denied as moot.

Core Terms

Farms, Manure, Basin, feedlot, property interest, Ordinance, summary judgment, conditional use permit, testing, odors, certificate of compliance, air, entitlement, emissions, rights, protected property interest, public hearing, due process, deprivation, regulation, statutes, variance, asserts, Counts, notice, barn

Case Summary

Procedural Posture

Plaintiff landowners sued defendant farm, farm owners, Carver County, and a county official, alleging a deprivation of their constitutional rights and a taking as a result of the county's alleged failure to enforce state and local laws surrounding the regulation of the farm's manure basin and alleging state law claims against the farm and farm owners. The farm, farm owners, county, and county official moved for summary judgment.

Overview

The county and county official were entitled to summary judgment on the landowners' substantive and procedural due process claims because the state and county laws regulating animal manure waste (Minn. Stat. § 116.07, subd. 1, Minn. R. 7020.0200, and the Carver County, Minnesota, Feedlot Management Ordinance) did not give the landowners a particular benefit that could have been construed as a liberty or property interest. In addition, nothing in the statutes, rules, or ordinance gave the landowners a legitimate claim of entitlement based upon limited decision-making discretion. Moreover, adjacent landowners in Minnesota did not have a property interest in the enforcement of zoning regulations and laws because the notice and hearing procedures were not sufficient to entitle the landowners to the benefit of a certificate of compliance, variance, or conditional use permit. The court declined to exercise supplemental jurisdiction over the state law claims against the farm and farm owners given the significant interests in comity concerning that area of state and county law.

Outcome

The county and county official were granted summary judgment on the substantive and procedural due process claims. The remaining state law claims against the farm and farm owners were dismissed without prejudice.

LexisNexis® Headnotes

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Appropriateness

Civil Procedure > Judgments > Summary Judgment > Evidentiary Considerations

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Materiality of Facts

HN1[] **Entitlement as Matter of Law, Appropriateness**

Summary judgment is proper if there are no disputed issues of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). The court must view the evidence and the inferences which may be reasonably drawn from the evidence in the light most favorable to the nonmoving party. However, summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules of Civil Procedure as a whole, which are designed to secure the just, speedy, and inexpensive determination of every action. Fed. R. Civ. P. 1.

Civil Procedure > ... > Summary Judgment > Opposing Materials > General Overview

Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

Civil Procedure > ... > Summary Judgment > Motions for Summary Judgment > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

HN2[] **Summary Judgment, Opposing Materials**

The party moving for summary judgment bears the burden of showing that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. The nonmoving party must demonstrate the existence of specific facts in the record which create a genuine issue for trial. A party opposing a properly supported motion for summary judgment may not rest upon mere allegations or denials, but must set forth specific facts showing that there is a genuine issue for trial.

Civil Rights Law > Protection of Rights > Section 1983 Actions > Scope

Civil Rights Law > Protection of Rights > Section 1983 Actions > General Overview

HN3[] **Protection of Rights, Section 1983 Actions**

The language of 42 U.S.C.S. § 1983 is not in itself a source of substantive rights, but instead is a vehicle for asserting federal rights conferred elsewhere. Thus, a plaintiff asserting claims under § 1983 must identify a specific constitutional right allegedly deprived under color of state law.

Civil Rights Law > ... > Section 1983 Actions > Elements > Protected Rights

Constitutional Law > Substantive Due Process > Scope

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Scope of Protection

Constitutional Law > Substantive Due Process > General Overview

HN4[] **Elements, Protected Rights**

In analyzing a claim that the deprivation of property violates either procedural or substantive due process rights, a court must first consider whether the claimant has a protected property interest to which the Fourteenth Amendment's due process protection applies. Protected property interests are created by state law, but federal law determines whether property interests rise to the level of constitutionally protected property interests. State law can create a property interest by explicitly creating a property right, by establishing statutory or regulatory measures that impose substantive limitations on the exercise of official discretion, or by understandings between the state and the other party. An interest is considered a protected property interest for the purposes of 42 U.S.C.S. § 1983 when the plaintiff has a legitimate claim to entitlement as opposed to a mere subjective expectancy.

Civil Rights Law > ... > Section 1983 Actions > Elements > Protected Rights

Governments > Local Governments > Ordinances & Regulations

Torts > ... > Types of Negligence Actions > Animal Owners > Control & Restraint

Business & Corporate Compliance > ... > Environmental Law > Land Use & Zoning > Agriculture & Farmland

Governments > Agriculture & Food > Animal Protection

Governments > Local Governments > Administrative Boards

Torts > ... > Types of Negligence Actions > Animal Owners > Statutory Duties

HN5[] **Elements, Protected Rights**

Under Minn. Statutes § 116.07, the powers and duties of the Minnesota Pollution Control Agency are prescribed. Minn. Stat. § 116.07, subd. 1. Minn. R. ch. 7020 governs the storage, transportation, disposal and utilization of animal manure and process wastewaters and sets requirements for application for and issuance of permits for construction and operation of animal manure management and disposal or utilization systems for the protection of the environment. Minn. R. 7020.0200. The Carver County Feedlot Management Ordinance regulates the location, development, operation, and expansion of feedlots. While these laws operate to set standards for issuing permits and regulating land-use, they do not give individuals a particular benefit that could be construed as a property interest for the purposes of a 42 U.S.C.S. § 1983 claim.

Business & Corporate Compliance > ... > Real Property Law > Zoning > Constitutional Limits

Real Property Law > Encumbrances > Adjoining Landowners > General Overview

Civil Rights Law > ... > Section 1983 Actions > Elements > Protected Rights

Constitutional Law > Substantive Due Process > General Overview

Constitutional Law > Substantive Due Process > Scope

Business & Corporate Compliance > ... > Environmental Law > Land Use & Zoning > Agriculture & Farmland

Environmental Law > Land Use & Zoning > Constitutional Limits

Real Property Law > Zoning > General Overview

Business & Corporate Compliance > ... > Real Property Law > Zoning > Ordinances

HN6[] **Zoning, Constitutional Limits**

Adjacent property owners in Minnesota do not have a property interest in the enforcement of zoning regulations and laws. The Minnesota Court of Appeals reasons that state law and some city ordinances recognize that certain adjacent property owners can sue to require enforcement of the zoning laws. It does not necessarily follow, however, that this right confers a protected property interest for the purposes of the Substantive Due Process Clause and 42 U.S.C.S. § 1983. Minnesota law has recognized that zoning ordinances do not create a property interest in adjacent landowners.

Constitutional Law > Substantive Due Process > Scope

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Scope of Protection

HN7[] **Constitutional Law, Substantive Due Process**

Notice and public hearing processes alone are insufficient to create a constitutionally protected property right to trigger a substantive or procedural due process violation. Procedures alone do not create a substantive property right. A law's notice and hearing provisions alone do not entitle property owners to the benefit of a denial of a certificate of compliance, variance, or conditional use permit. The procedures proffered by statutes and ordinance do not establish a property interest where the statute or ordinance does not provide substantive rules of entitlement.

Constitutional Law > Substantive Due Process > Scope

Environmental Law > Land Use & Zoning > Conditional Use Permits & Variances

HN8[] **Constitutional Law, Substantive Due Process**

A decision to grant or deny a variance or conditional use permit remains vested in the decision-makers. While a notice and hearing itself may sway the decision, it does not in fact place a significant substantive restriction on the decision-makers' discretion sufficient to create an entitlement to a benefit for purposes of the Substantive Due Process Clause.

Civil Procedure > ... > Jurisdiction > Jurisdictional Sources > General Overview

Governments > Courts > Judicial Comity

Civil Procedure > ... > Jurisdiction > Subject Matter Jurisdiction > General Overview

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview

Civil Procedure > ... > Subject Matter Jurisdiction > Supplemental Jurisdiction > General Overview

HN9[] **Jurisdiction, Jurisdictional Sources**

Under 28 U.S.C.S. § 1367(a), a federal court may assert supplemental jurisdiction over state claims when a federal claim is properly before the court. However, when all federal claims have been dismissed, the court has discretion to dismiss the remaining state claims. 28 U.S.C.S. § 1367(c)(3). Section 1367(c)(3) specifically states that the district court may decline to exercise supplemental jurisdiction over a claim if the district court has dismissed all claims over which it has original jurisdiction. The district court's discretion as to whether to exercise jurisdiction over the remaining claims should be informed by principles of judicial economy, convenience, fairness, and comity.

Counsel: James P. Peters, Esq., Peters & Peters, Alexandria, Minnesota, counsel for Plaintiff.

Thomas G. Jovanovich, Esq., and Sarah L. Smith, Esq., Rajkowski Hansmeier, St. Cloud, Minnesota, counsel for Defendants Halquist Farms Inc. and Florence and William Floyd Halquist.

Paul D. Reuvers, Esq., and Jason J. Kuboushek, Esq., Iverson Reuvers, Bloomington, Minnesota, counsel for Defendants County of Carver and Michael Lein.

Judges: DONOVAN W. FRANK, Judge of United States District Court.

Opinion by: DONOVAN W. FRANK

Opinion

MEMORANDUM OPINION AND ORDER

Introduction

The above-entitled matter is before the undersigned United States District Judge pursuant to Defendants' motions for summary judgment. Defendants Carver County and Michael Lein (collectively, the "Carver County Defendants") move for summary judgment on Count Six, Substantive **[*2]** Due Process; Count Seven, Procedural Due Process; and Count Eight, Inverse Condemnation, of the Complaint. Defendants Halquist Farms, Inc., Florence Halquist, and William Floyd Halquist (collectively, "Halquist Farms") move for summary judgment on four counts of the Complaint: Count One, Nuisance; Count Two, Trespass; Count Three, MERA; and Count Four, Negligence. For the reasons set forth below, Carver County and Michael Lein's motion is granted on Counts Six and Seven of the Complaint. The remaining claims are dismissed without prejudice.

Background

This case arises out of a dispute over the odors emanating from a 5-million gallon liquid manure basin (the "Manure Basin") at a dairy feedlot operation located in Carver County, Minnesota. The Manure Basin at issue is located on the Halquist Farms' feedlot in Belle Plaine, Minnesota. Halquist Farms is a family dairy corporation and feedlot operation owned by members of the Florence and William Halquist family. The farm has been in the Halquist family for more than 100 years. Halquist Farms is neighbored by James and Marilyn Kuhl's hog farm. The Kuhls have lived at their farm since 1964. The Halquist Farms' Manure Basin is located **[*3]** 350 feet from the Kuhls' house.

Simply put, the Kuhls do not like how the Manure Basin smells. According to the Kuhls, the Manure Basin emits strong and offensive odors and air emissions of a combination of chemicals. The Kuhls assert that the odors

emanating from the manure basin have substantially interfered with the use and enjoyment of their property and, further, that the manure smells have diminished their property value. Specifically, the Kuhls contend that the odors force them out of their sleep at night, that they must search for a place to sleep in their home where the smells are not as strong, and that people will not visit them at their home because of these odors and air emissions. As a result, the Kuhls assert claims of nuisance, trespass, and violations of the Minnesota Environmental Rights Act ("MERA") against Halquist Farms. In addition, the Kuhls assert that the Carver County Defendants' have failed to enforce state and local laws surrounding the regulation of the Manure Basin, thus resulting in a deprivation of their constitutional rights and a taking of their property.

The Manure Basin was built in December 1992 as part of an expansion project on Halquist Farms **[*4]** that included a freestall dairy barn and a milking parlor. In August 1992, Florence Halquist, on behalf of Halquist Farms, submitted an application to Carver County for this expansion. (*See* Lein Aff., Ex. A.) Neither her application nor the 1992 certificate of compliance issued by the County specifically mentioned the Manure Basin.

In 1994, the Kuhls complained to Carver County regarding the location of the Manure Basin and the odors stemming from it. On May 19, 1994, Michael Lein, the Carver County Environmental Services Director, sent a letter to Halquist Farms stating that the 1992 certificate of compliance "included an approval to construct a manure lagoon."

On December 21, 1995, Patrick Mader ("Mader") of the Minnesota Pollution Control Agency ("MPCA") wrote to Halquist Farms, notifying them that in order for the manure basin to meet MPCA design specifications, Halquist Farms would need to obtain permeability tests on the Manure Basin walls. Later, the MPCA obtained an estimate to conduct thin wall permeability tests on the Manure Basin. Mader ultimately requested four tests, one on each wall of the Manure Basin. The Kuhls assert that these tests were never conducted.

[*5] In June 1996, Carver County appropriated $ 4,000 for soil testing for the Manure Basin and retained B.A. Liesch Associates to conduct the testing. In November 1996, B.A. Liesch Associates submitted its soil investigation report to Carver County. Lein forwarded the soil investigation report to Ron Leaf of the MPCA. On December 31, 1996, Leaf issued a letter to Halquist Farms stating that they could continue to use the Manure Basin. The Kuhls contend that this "1996 certification" was granted in violation of Minn. R. Chapter 7020 and Minn. Stat. § 116.07, subd. 5, which requires a variance and a public hearing. In addition, the Kuhls assert that Lein failed to acknowledge to the MPCA that the permeability testing, as required by the MPCA, had not been conducted.

In 1997, the Halquists proposed to build a heifer barn with additional animal units. The Kuhls contend that there was no conditional use permit, notice, or hearing regarding these changes to the feedlot operation. However, the County issued a Conditional Use Permit to Halquist Farms, pursuant to the newly adopted Carver County Feedlot Ordinance, in July 1997. [1] Further, the County asserts that a public hearing was held on **[*6]** July 15, 1997, and the CUP was granted after the Carver County Board of Commissioners received input from James Kuhl.

In September 1998, the MPCA notified Halquist Farms that the Manure Basin had the potential to exceed the state ambient air quality standard for hydrogen sulfide and that the MPCA intended to work with Halquist Farms to address this issue. After the MPCA confirmed that emissions might exceed Minnesota state air quality standards, the MPCA and Halquist Farms entered into a Memorandum of Understanding that included measures for reducing Halquist Farms' hydrogen sulfide emissions. The Kuhls maintain that the MPCA and Halquist Farms have not abided by this Memorandum of Understanding.

In addition to their assertions against the Carver County Defendants regarding the regulation of the Manure Basin, the Kuhls raise several other issues. First, the Kuhls claim that the Carver County Defendants bypassed state and county legislation **[*7]** in issuing certificates of compliance in 1998 and 2000 for the Halquist family's Market Avenue feedlot operation, located on a different property. The Kuhls contend that the Market Avenue feedlot and the Halquist Farms feedlot are joint operations and that cattle are moved between the two properties. Second, the Kuhls maintain that Halquist Farms was housing more calves than permitted by its certificate of compliance. The

[1] The Carver County Feedlot Ordinance was adopted on June 23, 1996.

Kuhls base this assertion on newspaper reports indicating that a fire that destroyed a dairy barn on the Halquist Farms feedlot in 2000 resulted in the loss of 108 calves, when only 70 calves were permitted under Halquist Farms' 1997 certificate of compliance. Finally, the Kuhls assert that Halquist Farms did not have a permit, certificate of compliance, or conditional use permit for a new free-stall heifer barn installed at the feedlot in 2001.

The Kuhls contend that the Manure Basin and feedlot have operated in violation of state and county laws since the construction of the Manure Basin in 1992. As a result, they assert a federal cause of action under 42 U.S.C. § 1983 for what they allege to be the Carver County Defendants' violation of **[*8]** their substantive and procedural due process rights. The Kuhls also allege multiple state claims against Halquist Farms: a nuisance action for creating and allowing air emissions and water contamination to pollute their property; a trespass claim for noxious air and water emissions that enter their property; a MERA claim pursuant to Minn. Stat. § 116B.01 for pollution of air, water, and other natural resources; and a negligence action for the negligent design, construction and operation of the feedlot and manure basin. Finally, the Kuhls allege an assault claim related to actions by William Floyd Halquist.

The Carver County Defendants admit that in 1994 they began receiving complaints from neighbors, including the Kuhls, regarding odors from the Halquist Farms feedlot. The County maintains, however, that there were no laws restricting the placement of the manure basin when the manure basin was built. The County further asserts that the conditional use permit issued for the construction of a heifer barn at the Halquist Farms property complied with the procedures outlined in the Carver County Feedlot Management Ordinance, including notice and a public hearing on the matter. The County **[*9]** contends that James Kuhl's concerns were heard during that public hearing. Finally, the County asserts that the MPCA has conducted odor monitoring and testing of the manure basin and has noted no violations of hydrogen sulfide standards except during the exempted pump-out times.

Discussion

1. Standard of Review

HN1[⬆] Summary judgment is proper if there are no disputed issues of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). The court must view the evidence and the inferences which may be reasonably drawn from the evidence in the light most favorable to the nonmoving party. *Enterprise Bank v. Magna Bank of Missouri*, 92 F.3d 743, 747 (8th Cir. 1996). However, as the Supreme Court has stated, "summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed 'to secure the just, speedy, and inexpensive determination of every action.'" Fed. R. Civ. P. 1; *Celotex Corp. v. Catrett*, 477 U.S. 317, 327, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986).

HN2[⬆] The moving party bears the burden of showing **[*10]** that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. *Enterprise Bank*, 92 F.3d at 747. The nonmoving party must demonstrate the existence of specific facts in the record which create a genuine issue for trial. *Krenik v. County of Le Sueur*, 47 F.3d 953, 957 (8th Cir. 1995). A party opposing a properly supported motion for summary judgment may not rest upon mere allegations or denials, but must set forth specific facts showing that there is a genuine issue for trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986); *Krenik*, 47 F.3d at 957.

2. 42 U.S.C. § 1983

The parties agree that the applicable statute of limitations period for the Kuhls' section 1983 claims is six years, pursuant to Minn. Stat. § 541.05, subdivision 1(5). *See Berg v. Groschen*, 437 N.W.2d 75, 77 (Minn. Ct. App. 1989). The Kuhls filed their Complaint on April 23, 2002. Thus, the section 1983 claim may only encompass the Carver County Defendants' actions alleged to have occurred after April 23, 1996.

HN3[] Section **[*11]** 1983 is not in itself a source of substantive rights, but instead is a vehicle for asserting federal rights conferred elsewhere. *Adewale v. Whalen*, 21 F. Supp. 2d 1006, 1014 (D. Minn. 1998), *citing Bahr v. County of Martin*, 771 F. Supp. 970, 974 (D. Minn. 1991). Thus, a plaintiff asserting claims under Section 1983 must identify a specific constitutional right allegedly deprived under color of state law. *Adewale*, 21 F. Supp.2d at 1014, *citing Bahr*, 771 F. Supp. at 974. Here, in Counts Six and Seven of their Complaint, the Kuhls assert that the Carver County Defendants deprived them of their rights to substantive and procedural due process in violation of section 1983.

HN4[] "In analyzing a claim that the deprivation of property violates either procedural or substantive due process rights, a court must first consider whether the claimant has a protected property interest to which the Fourteenth Amendment's due process protection applies." *Ellis v. City of Yankton, S.D.*, 69 F.3d 915, 917 (8th Cir. 1995), citing *Dover Elevator Co. v. Arkansas State Univ.*, 64 F.3d 442, 445-46 (8th Cir. 1995). **[*12]** Protected property interests are created by state law, but federal law determines whether property interests rise to the level of constitutionally protected property interests.*Id.*, citing *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 9, 56 L. Ed. 2d 30, 98 S. Ct. 1554 (1978). State law can create a property interest by explicitly creating a property right, by "establishing statutory or regulatory measures that impose substantive limitations on the exercise of official discretion," or by "understandings between the state and the other party." *Movers Warehouse, Inc. v. City of Little Canada*, 71 F.3d 716, 719 (8th Cir. 1995), quoting *Craft v. Wipf*, 836 F.2d 412, 416-17 (8th Cir. 1987). An interest is considered a protected property interest for the purposes of section 1983 when the plaintiff has a "legitimate claim to entitlement" as opposed to a "mere subjective expectancy." *Batra v. Board of Regents of University of Nebraska*, 79 F.3d 717, 720 (8th Cir. 1996), quoting *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 577, 33 L. Ed. 2d 548, 92 S. Ct. 2701 (1972).

Here, the Kuhls **[*13]** "claim a liberty or property interest based on Minn. Stat. Sec. 116.07 and the Minnesota Rules, Chapter 7020, which operate as significant substantive restrictions on the actions of the County." (Pl.'s Mem. Opp. Summ. J. at 6.) The Court finds that the Kuhls have failed to demonstrate a constitutionally protected property interest under section 1983.

First, the state and county laws at issue do not create a property interest. ***HN5***[] Minnesota Statutes § 116.07 prescribes the powers and duties of the Minnesota Pollution Control Agency. *See* Minn. Stat. § 116.07, subd. 1. Minnesota Rules, Chapter 7020, "governs the storage, transportation, disposal and utilization of animal manure and process wastewaters" and sets requirements for "application for and issuance of permits for construction and operation of animal manure management and disposal or utilization systems for the protection of the environment." *See* Minn. Rules, Ch. 7020.0200. The Carver County Feedlot Management Ordinance regulates the "location, development, operation, and expansion of feedlots." While these laws operate to set standards for issuing permits and regulating land-use, they do not give the defendants a particular **[*14]** benefit that could be construed as a property interest for the purposes of a section 1983 claim.

In addition, nothing in the statutes, rules, or ordinances cited here gives the Kuhls a legitimate claim of entitlement based upon limited decision-making discretion. In *Movers Warehouse, Inc. v. City of Little Canada*, the Eighth Circuit held that there was no property interest in the renewal of a bingo hall license where the city retained discretion, without substantive limitations, to withhold approval of an application for license renewal. 71 F.3d 716, 718 (8th Cir. 1995). Here, too, the Carver County decision-makers have great discretion in either granting or denying a variance or conditional use permit within the meaning of the laws. Because of this discretion, there is no guarantee that the Plaintiffs would be absolutely "entitled" to the benefit that they seek--the denial of certification, variance, or conditional use permit for the Manure Basin.

Moreover, ***HN6***[] adjacent property owners in Minnesota do not have a property interest in the enforcement of zoning regulations and laws. *Mohler v. City of St. Louis Park*, 643 N.W.2d 623, 635-36 (Minn. Ct. App. 2002); **[*15]** *see also Gagliardi v. Village of Pawling*, 18 F.3d 188 (2d Cir. 1994) (holding that there was no property interest in enforcement of the zoning ordinance and, therefore, there was no entitlement to due process). In *Mohler*, the Minnesota Court of Appeals reasoned:

> State law and the city's ordinance recognize that certain adjacent property owners can sue to require enforcement of the zoning laws. It does not necessarily follow, however, that this right confers a protected

> property interest for the purposes of the substantive due process clause and 42 U.S.C. § 1983. Minnesota law has recognized that zoning ordinances do not create a property interest in adjacent landowners

643 N.W.2d at 635 (*internal citations omitted*).

Here, the Minnesota statutes, rules, and the Carver County feedlot ordinance contain provisions regarding notice and public hearing. ***HN7***[⬆] These processes alone, however, are insufficient to create a constitutionally protected property right to trigger a substantive or procedural due process violation. Procedures alone do not create a substantive property right. *Bituminous Materials, Inc. v. Rice County, Minn.*, 126 F.3d 1068 (8th Cir. 1997), **[*16]** citing *Stow v. Cochran*, 819 F.2d 864, 866 (8th Cir. 1987); *see also Gagliardi v. Village of Pawling*, 18 F.3d 188, 193 (2d Cir. 1994) ("The deprivation of a procedural right to be heard, however, is not actionable when there is no protected right at stake"); *Azizi v. Thornburgh*, 908 F.2d 1130, 1134 (2d Cir. 1990); *New Burnham Prairie Homes, Inc. v. Village of Burnham*, 910 F.2d 1474, 1479 (7th Cir. 1990). A law's notice and hearing provisions alone do not entitle the Kuhls to the benefit of a denial of a certificate of compliance, variance, or conditional use permit. The procedures proffered by the statutes and ordinance do not establish a property interest where the statute does not provide substantive rules of entitlement. *North Mem'l Med. Ctr. v. Gomez*, 59 F.3d 735, 740 (8th Cir. 1995). ***HN8***[⬆] The decision to grant or deny the variance or conditional use permit remains vested in the decision-makers. While the notice and hearing itself may sway the decision, it does not in fact place a significant substantive restriction on the decision-makers' discretion sufficient to create an entitlement to a benefit. **[*17]** *Id.; see also Hogue v. Clinton*, 791 F.2d 1318, 1324 (8th Cir.), *cert. denied*, 479 U.S. 1008, 93 L. Ed. 2d 704, 107 S. Ct. 648 (1986).

This does not leave the Kuhls without a remedy. The Kuhls may be able to enforce the statutes, rules, and ordinances that the Carver County Defendants have allegedly violated. *See Mohler*, 643 N.W.2d at 635. They may also have valid claims in tort against Halquist Farms. However, they have not asserted a protected property interest for the purposes of a section 1983 claim. Accordingly, summary judgment must be granted on the Kuhls' substantive due process and procedural due process claims against Carver County and Lein. [2]

[*18] 2. Supplemental Jurisdiction

Having granted summary judgment on the Kuhls' federal claims against the Carver County Defendants, the Kuhls' state law claims for inverse condemnation, nuisance, trespass, negligence, and MERA violations remain. The record before the Court suggests that the Plaintiffs may have cognizable causes of action as to some of these remaining claims. *See, e.g., Wendinger v. Forst Farms, Inc.*, 662 N.W.2d 546 (Minn. Ct. App. 2003).

HN9[⬆] Under 28 U.S.C. § 1367(a), a federal court may assert supplemental jurisdiction over state claims when a federal claim is properly before the court. However, when all federal claims have been dismissed, the court has discretion to dismiss the remaining state claims. *See* 28 U.S.C. § 1367(c)(3); *Willman v. Heartland Hosp. E.*, 34 F.3d 605, 613 (8th Cir. 1994). Section 1367(c)(3) specifically states that the Court "may decline to exercise supplemental jurisdiction over a claim . . . if the district court has dismissed all claims over which it has original jurisdiction." The Court's discretion as to whether to exercise jurisdiction over these remaining claims **[*19]** should be informed by principles of judicial economy, convenience, fairness, and comity. *See United Mine Workers of America v. Gibbs*, 383 U.S. 715, 726, 16 L. Ed. 2d 218, 86 S. Ct. 1130 (1966).

Here, although the Court regrets returning this action to state court given the time and resources the parties have expended on a federal action, the Court recognizes that significant interests in comity exist in this important area of state and county law. As such, the Court determines that it will not exercise its supplemental jurisdiction in this instance and that the remaining claims stated in the Complaint are dismissed without prejudice.

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[2] The Kuhls do not allege suit against Lein in his personal capacity in their Complaint. As such, the section 1983 claims are against Lein in his official capacity and, therefore, are in effect a suit against Carver County. *See Johnson v. Outboard Marine Corp.*, 172 F.3d 531, 535 (1999). Regardless, the Kuhls' failure to establish a constitutionally protected liberty or property interest would likewise warrant dismissal of the section 1983 claims against Lein in his personal capacity.

For the reasons stated, **IT IS HEREBY ORDERED THAT**:

1. Defendant Carver County and Michael Lein's Motion for Summary Judgment (Doc. No. 12) is **GRANTED** on Counts Six and Seven of the Complaint.

2. Counts One through Five and Count Eight of the Complaint (Doc. No. 1) are **DISMISSED WITHOUT PREJUDICE**.

3. Defendant Halquist Farms, Inc., Florence Halquist and William Halquist's Motion for Summary Judgment (Doc. No. 20) is **DENIED AS MOOT**.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated: June 26, 2003

DONOVAN **[*20]** W. FRANK

Judge of United States District Court

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