NO. A05-2316

State of Minnesota
In Court of Appeals

City of Minneapolis,

Appellant,

v.

Ames & Fischer Co. II, LLP and Capitol Indemnity Corporation,

Respondents,

and

Ames & Fischer Co. II, LLP,

Respondent,

v.

City of Minneapolis and
Minneapolis Community Development Agency,

Appellants.

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STATEMENT OF ISSUES

I. Are the City of Minneapolis' and Minneapolis Community Development Agency's decisions and conduct relating to making projections regarding the economic feasibility of a parking ramp project and sharing them with a developer entitled to statutory immunity?

District Court Ruling:

The District Court held that the City of Minneapolis and Minneapolis Community Development Agency were not entitled to statutory immunity.

Most Apposite Cases/Statutory Provisions:

Minn. Stat. § 466.03, subd. 6;

Pletan v. Gaines, 494 N.W.2d 38 (Minn. 1992);

Bloss v. University of Minnesota, 590 N.W.2d 661 (Minn. Ct. App. 1999);

Muller Family Theaters v. McMenomy, 1996 WL 469346 (Minn. Ct. App. Aug. 20, 1996), review denied (Minn. Nov. 20, 1996).

II. Are the City of Minneapolis' and Minneapolis Community Development Agency's decisions and conduct relating to making projections regarding the economic feasibility of a parking ramp project and sharing them with a developer entitled to vicarious official immunity?

District Court Ruling:

The District Court held that the City of Minneapolis and Minneapolis Community Development Agency were not entitled to vicarious official immunity.

Most Apposite Cases:

McDonough v. City of Rosemount, 503 N.W.2d 493 (Minn. Ct. App. 1993), review denied (Minn. Sept. 10, 1993);

SJ & F Enterprises, Inc. v. City of Winsted, 1998 WL 345436 (Minn. Ct. App. June 30, 1998); review denied (Minn. Aug. 31, 1998);

TCM Stores, Inc. v. City of Robbinsdale, 2003 WL 22889869 (Minn. Ct. App. Dec. 9, 2003).

STATEMENT OF THE CASE

The City of Minneapolis (the "City") and Minneapolis Community Development Agency ("MCDA") appeal from the November 21, 2005, order of the Hennepin County District Court (the Honorable Kevin S. Burke) denying the City's and MCDA's motion for summary judgment dismissing Ames & Fischer Co. II, LLP's ("Ames & Fischer") tort claims and counterclaims based on statutory and vicarious official immunity.

This is an action by the City for breach of contract by Ames & Fischer. Pursuant to the contract, Ames & Fischer initially financed and built a 640-space parking ramp at 10th Avenue North and Washington Avenue North, Minneapolis, next door to an office building owned by Ames & Fischer. Upon completion of construction, the City purchased the parking ramp from Ames & Fischer with the proceeds from $10.8 million in General Obligation Parking Revenue Bonds issued by the City.

Under the contract, Ames & Fischer guaranteed payment of the parking ramp operating costs and repayment of the bonds. Ames & Fischer agreed to pay any "Shortfall" between revenues (operating and tax increment) and the sum of the operating costs and debt service.

Since the parking ramp opened in September 2000, a Shortfall in excess of $2 million has accumulated. The City presented for payment a security bond obtained by Ames & Fischer from Capitol Indemnity Corporation for the benefit of the City in the event of a Shortfall, and demanded that Ames & Fischer pay the Shortfall balance. Capitol Indemnity Corporation, at the behest of Ames & Fischer, refused to tender the

amount of the security bond to the City, and Ames & Fischer refused to pay any part of the Shortfall. The City then commenced this action.

Ames & Fischer has asserted against the City and MCDA counterclaims and, in a lawsuit subsequently consolidated with this action, claims for fraudulent misrepresentation, negligent misrepresentation, breach of implied warranty, promissory estoppel, breach of an implied covenant of good faith and fair dealing, and for a declaratory judgment. The City and MCDA moved for summary judgment dismissing all of Ames & Fischer's counterclaims and claims (collectively, "claims") on several grounds, including that the tort claims are barred by statutory and vicarious official immunity.

The district court denied, in part, the City's and MCDA's motion for summary judgment. This appeal with respect to immunity followed.

STATEMENT OF FACTS

I. Ames & Fischer's John Deere Building And The Genesis Of The Parking Ramp Project.

The John Deere Building is a 500,000 sq. ft. former manufacturing and warehouse facility built in the early 1900s in the Minneapolis Warehouse District. It is located at 800 Washington Avenue North. Ames & Fischer or its principals have owned the John Deere Building since 1989 for the purpose of leasing space to office and warehouse tenants. S.R. 6-8.[1] At the time Ames & Fischer acquired the building, only "the first

[1] References to "S.R. __" refer to portions of the record reproduced in the Supplemental Record submitted with Appellants' Brief pursuant to Minn. R. Civ. App. P. 130.03. The testimony reproduced in the Supplemental Record at S.R. 6-8 is from the deposition of

couple of floors" had been "sort of redeveloped and occupied by some tenants . . . ." The remainder "was vacant and needed repair." S.R. 12.

Ames & Fischer began renovating the building to create more rentable space to attract additional tenants. S.R. 13. However, Ames & Fischer's plans were impeded by the lack of parking space for more tenants. S.R. 40 ("We cannot proceed further with the rehabilitation of the building, because the market is restrictive unless there is adequate parking to meet the needs of the customer desiring office space in the area.").

By 1996, Ames & Fischer's leasing agent was looking for "additional parking space to support the ongoing redevelopment" of the John Deere Building. S.R. 41; S.R. 14-16. However, not just any parking space would do. Crime in the surrounding neighborhood made secure parking necessary to attract tenants. S.R. 37 ("There was a lovely bar across the street that had a lot of shootings."); S.R. 48 ("efforts to secure tenants for additional space have been thwarted by the absence of secure parking in close proximity to the building for building employees, clients and customers.").

Ames & Fischer decided that a parking ramp next to the John Deere Building was the solution to its dilemma. S.R. 39 ("[w]ithout the Parking Ramp to support the office

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Liza Robson, Ames & Fischer's managing partner. Ames & Fischer is a partnership comprised of members of the families of Mathias ("Matt") Fischer and Richard ("Dick") Ames. S. R. 7-8. Fischer and Ames are the founders of two successful Twin Cities businesses, AVR, Inc. (a/k/a Apple Valley Red-E-Mix) and Ames Construction, Inc., respectively. S.R. 2, 5. AVR, Inc. is a closely-held, family-owned business that supplies ready-mix concrete to subcontractors in the Twin Cities metropolitan commercial, industrial, and housing markets. It has about 70 full-time year-around employees, and employs about 300 during the construction season. S.R. 3-5. Ames Construction, Inc. describes itself as one of the "largest heavy civil and industrial design-build general contractors" in the United States. S.R. 38.

space at an affordable cost, we will be unable to secure tenants."); see also S.R. 24-25. However, there was a problem. A privately-owned, tax-paying parking ramp was not economically feasible. S.R. 25-26; see also S.R. 47 ("Private development of a structured parking ramp . . . near the John Deere building is not economically feasible by private investors and operators. This is because hourly and contract parking rates are not sufficient this far from the downtown core to pay the capital and operating costs of a new parking facility and still generate a profit.").

In order to fully renovate and lease the John Deere Building, Ames & Fischer not only needed a parking ramp, it needed a publicly-owned, tax-exempt parking ramp. S.R. 40 ("But for a publicly owned ramp that does not pay real estate taxes, we do not believe the feasibility of the parking ramp would be justified in today's market."); S.R. 25-26; S.R. 47 ("A public parking ramp is feasible, however, since it can be financed with low interest, tax exempt, public debt and does not have to pay property taxes out of its operating revenues.").

By early 1998, Ames & Fischer had set into motion a plan to build a parking ramp that would benefit Ames & Fischer's John Deere Building but be owned by the City and/or MCDA. It began putting together a high-powered team comprised of lobbyists (including former Minneapolis Mayor Al Hofstede), who could open doors at City Hall, and development consultants, parking consultants, design and construction consultants, accountants, and attorneys who could provide strategic and technical advice to Ames & Fischer and help it shepherd the project through the City and MCDA bureaucracies. S.R. 9-11, 17-23.

By May 1998, Ames & Fischer, through former Mayor Al Hofstede and Frank Dunbar (of Dunbar Development Corporation), had approached Minneapolis City Council President Jackie Cherryhomes to enlist her support for the parking ramp project. Council President Cherryhomes brought MCDA's Director of Economic Development and the City's Director of Transportation & Assistant Director of Public Works to the table with Ames & Fischer. S.R. 76.

II. Ames & Fischer's Negotiations With And Commitment To The City And MCDA.

In October 1998, Ames & Fischer made a written proposal setting out the concept that had been discussed with the City and MCDA in a series of meetings and correspondence over the previous few months: Ames & Fischer or a related entity would build the ramp and sell it to the City or MCDA, which would sell bonds to finance the purchase. S.R. 77.

A few months later, in January 1999, MCDA Project Coordinator Patrick Connoy wrote to Ames & Fischer stating that a "written commitment" from Ames & Fischer was necessary to move forward. Connoy attached a draft letter that included "the key elements and items which I believe Ames and Fischer should commit to prior to the January 25, 1999 MCDA Operating Committee meeting. The MCDA will not proceed with this project without such commitments from Ames and Fischer." S.R. 79.

Two days later, Ames & Fischer made the written commitment MCDA had requested, adopting Connoy's draft letter virtually verbatim. It stated, "I am writing to you to request that the [MCDA] assist us with our proposal to rehabilitate a building we

own at 800-824 North Washington Avenue. Specifically, we need the MCDA's assistance to provide structured parking adjacent to our building." S.R. 82.

The specific terms to which Ames & Fischer committed itself included: (1) Ames & Fischer would build an approximately 640-stall parking ramp adjacent to the John Deere Building; (2) Ames & Fischer would initially finance the construction; (3) the City would issue bonds to finance the purchase of the parking ramp from Ames & Fischer; and (4) revenues "pledged to support the City bonds" would include (a) user fees, (b) tax increment revenues, and (c) "[a] personal guaranty, a bond or a letter of credit of bond debt service and operating payments for the parking ramp by Ames and Fischer which will be payable in the event user fees and tax increment revenues are inadequate to satisfy annual debt service and operating cost requirements." S.R. 82-83.

III. Making And Sharing The Projections.

While negotiating with Ames & Fischer, the City and MCDA analyzed for its own purposes whether the proposed parking ramp project was consistent with the City's goals and plans for the Warehouse District, what the parking needs were in the area, and whether the project was economically feasible. S.R. 86-87 (internal pages 10-16) ("So each project was weighed in terms of what is the benefit or could there be a benefit to the City, and then was the City willing to participate and at what capacity was the City willing to participate?" See id. at internal page 13).[2] This process is reflected in the

[2] The testimony reproduced in the Supplemental Record at S.R. 85-93 is from the deposition of Greg Finstad, who was the City's Director of Transportation and Parking Services during most of the relevant time.

MCDA's 10th Avenue North & Washington Avenue North Redevelopment Plan & Tax Increment Finance Plan ("Redevelopment & Finance Plan"). S.R. 43-75.

Through the Redevelopment & Finance Plan, the MCDA authorized the use of tax increment revenue to help fund the parking ramp project. S.R. 46. The objective was:

> to facilitate the rehabilitation and commercial reuse of the historic John Deere building, and other loft manufacturing buildings located in the Warehouse Riverfront District, by providing an essential public parking facility for employee and customer parking in the area. The public purposes that will be achieved by the implementation of these plans include rehabilitation of blighted structures, historic preservation, tax base enhancement, and the development of needed public parking facilities.

Id.

The MCDA authorized the Redevelopment & Finance Plan only after the MCDA and City Departments reviewed parking studies and completed "extensive legal and financial due diligence for the project." S.R. 53; see also S.R. 88 (internal pages 23-24) (describing the City's process in analyzing the feasibility of parking ramp projects).

As part of this "due diligence" process, the MCDA prepared, with City input, spreadsheets projecting cash flow for the proposed parking ramp (the "Projections"). See, e.g., S.R. 95. The Projections were "made for the purpose of estimating debt service coverage and cash flow . . . ," and were used by the City and MCDA "in determining whether it was reasonable and feasible to issue general obligation bonds to purchase the Parking Ramp from Ames & Fischer." S.R. 115, 117; see also S.R. 123 (internal page 9) (Michael Monahan, Finstad's predecessor, testifying that the City conducted feasibility analyses to fulfill its obligation to spend public funds wisely and to determine whether there would be sufficient funds to repay City-issued bonds).

As was their practice, the City and MCDA shared the Projections and related information with Ames & Fischer. See, e.g., S.R. 94-95; see also S.R. 89 (internal pages 27-28) (the City typically shares information with developers because "it behooves everybody to understand what the project elements are and how decisions are being made[,]" and "it was always done on an atmosphere of collaboration, trying to coordinate and communicate between the groups."); S.R. 30 (Ames & Fischer received "several projections," each different from the other). The Projections were clearly marked as "PRELIMINARY" and otherwise indicated they were based on estimates, assumptions, and uncertain variables. See S.R. 95.

Ames & Fischer acknowledges it understood at the time it received the Projections that they were estimates based on assumptions about the future and not "unqualified guarantees." See S.R. 33-34. There was no doubt that Ames & Fischer assumed the risk that the Projections might be wrong, as evidenced by an express warning by MCDA to Ames & Fischer that "Should the ramp open but generate no revenue, the guarantee being provided by Ames & Fischer must cover these expenditures." S.R. 94; see also S.R. 91 (the purpose of the Ames & Fischer guarantee was "to make sure that the City was not held at risk on the project[,]" and the risk that revenues might not be adequate to pay the debt service "was understood by everyone").[3]

[3] The fact that Ames & Fischer was well-aware the Projections could be wrong and that Ames & Fischer bore the risk is evident from Matt Fischer's and Dick Ames' refusal, on advice of their financial advisors, to personally guarantee any shortfall in Parking Ramp revenues. See S.R. 27-29.

Thus, notwithstanding any sharing of information, it remained the personal responsibility of Ames & Fischer to do its own due diligence, assess its own risks and rewards, and make its own decisions about whether and how to proceed. See S.R. 89-90 (internal pages 28-29) ("everybody takes the information and each party, whether it's the City or developer, makes their own decisions as to whether the project should proceed"); S.R. 93 (internal page 43) (information was shared with Ames & Fischer "to use as they saw fit in their evaluation of the project"); S.R. 125 (internal pages 83) (former City Finance Officer testifying: "I expected them [Ames & Fischer] to do their due diligence and rely on what they thought was appropriate."). Ames & Fischer acknowledges it never said it expected the City to look out after Ames & Fischer's interests, S.R. 128 (internal page 230), and admits that "[u]ltimately it was our decision" whether to sign the contract for the parking ramp project. S.R. 127 (internal page 227).

In fact, Ames & Fischer did make some attempt to evaluate the Projections and related information. See S.R. 35-36 ("Our accountants looked at it, but, you know, they took the numbers based on what the City had projected, kind of did the math, asked some questions, but the City has several ramps. There was no reason to disbelieve that the numbers weren't accurate."); see also S.R. 130-131 (file notes made by CPA firm in evaluating the Projections and related documents and information on behalf of Dick Ames, one of Ames & Fischer's principals). Notably, the City provided all of the information Ames & Fischer requested and was willing to provide additional information upon request. S.R. 133 (¶¶ 3-4); see also S.R. 32 (Ames & Fischer managing partner

testifying she has no information indicating the City or MCDA ever refused to provide information requested by Ames & Fischer).

IV. The Contract And Ames & Fischer's Guarantee.

The plan Ames & Fischer set into motion in early 1998 resulted in the signing of the Contract for Private Redevelopment (the "Contract") on September 28, 1999. See S.R. 135-193. It contains essentially the same terms that Ames & Fischer committed itself to in writing back in January 1999.

Pursuant to the Contract, Ames & Fischer initially financed and constructed the 640-stall parking ramp at 10th Avenue North and Washington Avenue North, adjacent to and connected with the John Deere Building (the "Parking Ramp"). A. 2, ¶ 9; A. 11, ¶ 6.[4] Upon completion of construction, the City purchased the Parking Ramp from Ames & Fischer with the proceeds from $10.8 million in General Obligation Parking Revenue Bonds (the "Bonds") issued by the City. A. 2, ¶ 10; A. 11, ¶ 6. Ames & Fischer also entered into a management agreement to operate the Ramp, which opened in September 2000. S.R. 194-209.

Under the Contract, Ames & Fischer guaranteed payment of the Parking Ramp operating costs and repayment of the Bonds. Section 5.03 of the Contract states that Ames & Fischer will obtain a security bond "in an amount sufficient to pay for the estimated annual debt service for the Bonds and the Parking Fund Loan and the estimated annual operating costs for the Parking Facility." S.R. 154 (§ 5.03). The security bond

[4] References to "A. __" refer to portions of the record reproduced in the Appendix submitted with Appellants' Brief pursuant to Minn. R. Civ. App. P. 130.01.

"will provide that it shall be payable to the City, upon presentation to the underwriter of the security bond in the event the sum of the parking revenues generated by the Parking Facility and the Tax Increment revenue generated by the Minimum Improvements [to the Deere Building parcel] are not equal to or in excess of the sum of the annual debt service for the Bonds, the Parking Fund Loan and the operating cost for the Parking Facility as determined by the City and reviewed by [Ames & Fischer] ("Shortfall")." Id.

In March 2004, Ames & Fischer obtained a security bond from surety Capitol Indemnity Corporation ("Capitol"), for the benefit of the City, in the amount of $375,904.00. A. 5, ¶ 23; A. 12, ¶ 15.

V. The Shortfall And The City's Demand

The Parking Ramp has operated at a net loss every year since it opened in 2000. A. 4, ¶ 17; A. 11, ¶ 10. In December 2002, the City notified Ames & Fischer that there was a Shortfall in the amount of $364,978. S.R. 210. Ames & Fischer requested more information. S.R. 211.

Over the next 18 months, the City accommodated Ames & Fischer's requests for additional information and provided updates of the Shortfall culminating, in October 2004, with a detailed analysis of Parking Ramp revenues and expenses demonstrating a cumulative Shortfall of $1,705,128 (in addition to a Parking Fund Loan repayment obligation in the amount of $850,000). S.R. 212-221. The City also provided notice, as required by the Contract, that it intended to draw on the security bond and sue for the balance unless Ames & Fischer satisfied the Shortfall. S.R. 213. Ames & Fischer disputed the Shortfall and refused to pay. S.R. 222-223.

In November 2004, the City presented the security bond to surety Capitol for payment. Ames & Fischer responded by demanding that Capitol not honor the City's request. S.R. 224-225. Capitol has not made payment to the City. A. 6, ¶ 27; A. 13, ¶ 19.

VI. The Lawsuits And Motion For Summary Judgment.

On November 29, 2004, the City commenced this action against Ames & Fischer and Capitol, alleging breach of contract and seeking to recover on the security bond and to enforce Ames & Fischer's guarantee to cover all Shortfalls. See, generally, A. 1-9. Ames & Fischer answered and counterclaimed, asserting claims for fraudulent misrepresentation, negligent misrepresentation, breach of an implied warranty, promissory estoppel, breach of an implied covenant of good faith and fair dealing, and for a declaratory judgment. See, generally, A. 10-29. Ames & Fischer also commenced a separate action against the City and MCDA, asserting claims identical to its counterclaims. See Ames & Fischer Complaint, Henn. Co. Dist. Ct. File No. CT 04-018897. The two actions have been consolidated in this action. See June 27, 2005, Order Granting Consolidation.

The City and MCDA moved for summary judgment dismissing all of Ames & Fischer's counterclaims and claims regardless of whether asserted in Henn. Co. Dist. Ct. File No. 04-016998 or Henn. Co. Dist. Ct. File No. CT 04-018897. See A. 30-31. With respect to the tort claims, the City and MCDA asserted statutory and vicarious official immunity.

The district court denied in part and granted in part the City's and MCDA's motion. See A. 32-41. The City and MCDA timely appealed from the District Court's order to the extent it denied the motion for summary judgment dismissing the tort claims based on immunity. See A. 42-44.

ARGUMENT

I. Standard of Review.

Whether a party is entitled to statutory and/or vicarious official immunity is a question of law subject to de novo review. Sletten v. Ramsey County, 675 N.W.2d 291, 299 (Minn. 2004); Bloss v. Univ. of Minn., 590 N.W.2d 661, 664 (Minn. Ct. App. 1999).

II. The City's And MCDA's Decisions And Conduct Relating To Making And Sharing The Projections Are Protected By Statutory Immunity.

Under the Municipal Tort Liability Act, a municipality is immune from suit and liability for "[a]ny claim based upon the performance or the failure to exercise or perform a discretionary function or duty, whether or not the discretion is abused." Minn. Stat. § 466.03, subd. 6.[5] This exception to municipal tort liability preserves the separation of powers among coordinate branches of government by "insulating executive and legislative policy decisions from judicial review through tort actions." Rico v. State, 472 N.W.2d 100, 104 (Minn. 1991). "If a governmental decision involves the type of

[5] Statutory immunity under Minn. Stat. § 466.03, subd. 6 has been referred to as "discretionary immunity" and "discretionary function immunity" and various other terms. The Minnesota Supreme Court, however, has expressed a preference for the term "statutory immunity." See Watson v. Metro. Transit Comm'n, 553 N.W.2d 406, 409-10 n.1 (Minn. 1996).

political, social and economic considerations that lie at the center of discretionary action, including consideration of safety issues, financial burdens, and possible legal consequences, it is not the role of the courts to second-guess such policy decisions." Watson, 553 N.W.2d at 412.

In determining whether statutory immunity applies, Minnesota courts have drawn a distinction between planning-level decisions and conduct, which are protected, and operational-level decisions and conduct, which are not protected. Fischer v. County of Rock, 596 N.W.2d 646, 652 (Minn. 1999).[6] Planning-level decisions involve "the evaluation of factors such as the financial, political, economic, and social effects of a given plan or policy." Id. (internal citation omitted). Operational-level decisions involve the "day-to-day operations of government." Id. However, "the mere labeling of a governmental function as either operational or planning is not dispositive as to immunity." Steinke v. City of Andover, 525 N.W.2d 173, 175 (Minn. 1994). The critical inquiry is whether the challenged decision or conduct involves the balancing of social, political, and economic considerations. Id.

A court reviewing whether immunity applies begins "by looking at the nature of plaintiffs' claims." Pletan v. Gaines, 494 N.W.2d 38, 40 (Minn. 1992); see also Watson, 553 N.W.2d at 411 (reviewing court "must examine with particularity the nature of the conduct the plaintiff alleges as the basis of a negligence claim"). In conducting this

[6] Operational-level decisions may, however, be protected by official immunity. See Watson, 553 N.W.2d at 414 ("Unlike statutory immunity, official immunity protects the kind of discretion which is exercised on an operational rather than a policymaking level."); see also discussion infra.

examination, a court should "look to the roots" of the challenged decision or conduct. Zank v. Larson, 552 N.W.2d 719, 722 (Minn. 1996). Decision making "should not be 'broken down into component parts' and isolated from the context of the overall plan." Id., quoting Smith v. Johns-Manville Corp., 795 F.2d 301, 308 (3d Cir. 1986); see also Watson, 553 N.W.2d at 414.

Ames & Fischer's tort claims are for alleged fraudulent or negligent affirmative misrepresentations and nondisclosures relating to the City's and MCDA's Projections of future Parking Ramp revenues, operating expenses and debt service.[7] Thus, making and sharing the Projections is the alleged tortious conduct. See Aldrich v. Northwest Technical College, 2001 WL 799997, *3 (Minn. Ct. App. July 11, 2001) (for purposes of determining whether fraud and misrepresentation claims are barred by statutory immunity, "[m]aking the statements is the alleged tortious conduct") (S.R. 226-228). To determine whether statutory immunity bars Ames & Fischer's claims, the Court must consider whether the City and MCDA balanced competing policy considerations in making and sharing the Projections. See id.

A municipality's decisions whether and how to deal with developers generally are viewed as discretionary decisions that involve cost balancing, market considerations,

[7] In its counterclaims, Ames & Fischer alleged that the MCDA negligently or fraudulently provided "grossly inaccurate" Projections. A. 19, ¶ 30. In opposition to the City's and MCDA's motion for summary judgment, Ames & Fischer further contended that the "conduct in question" for purposes of deciding the application of statutory immunity is: (1) MCDA's alleged misrepresentations that the Projections were based on a "typical city operation" and "existing data and previous experience," and (2) the City's and MCDA's alleged failure "to provide Ames & Fischer with information that would have cast serious doubt" on the Projections. Ames & Fischer Brief in Opposition to Motion for Summary Judgment (Oct. 14, 2005) at 50.

social factors, and zoning issues. See Muller Family Theaters v. McMenomy, 1996 WL 469346, *4 (Minn. Ct. App. Aug. 20, 1996), review denied (Minn. Nov. 20, 1996) (S.R. 229-232). Muller Family Theaters involved a proposal to develop a movie theater complex, with municipal assistance, in city business park. Id. at *1. The Port Authority accepted the plaintiff's proposal over a competing proposal, and preliminarily approved it subject to certain conditions. However, final approval was delayed. The delay allowed the competitor to begin construction first, which caused the plaintiff to abandon its project. The plaintiff sued the Port Authority, City, and mayor alleging, among other claims, negligent and reckless misrepresentation. Id. at **1-2.

The district court denied the Port Authority's and City's motion for summary judgment based on statutory immunity because it concluded that the defendants "acted in an operational capacity (not balancing policy) in dealing with [plaintiff's] proposal following [the Port Authority's] 'acceptance' of such proposal." Id. at *4. The Court of Appeals, however, disagreed. It found that:

> the Port Authority's actions with regard to respondent's proposal required it to weigh economic and social factors to come to an agreement with respondent on several issues including the land price, the size of the proposed business park lots, when and how the infrastructure for the business park would be developed, and what roadways were needed to service the business park. Such actions are discretionary and are entitled to statutory immunity.

Id. In addition, the City's actions following preliminary approval of the proposal involved zoning decisions, which "involve the balancing of complex and competing factors. [Citation omitted.] Accordingly, we conclude the district court erred by refusing

to grant the Port Authority and [City's] motions for summary judgment on the issue of discretionary [statutory] immunity." Id.

Similarly in this case, the City's and MCDA's decisions and actions in dealing with Ames & Fischer and its development proposal required the City and MCDA to balance complex social, political, and economic factors and, thus, are "planning-level" decisions and conduct protected by statutory immunity.

Greg Finstad, who was the City's Director of Transportation and Parking Services during most of the pertinent period, gave clear and unrefuted deposition testimony regarding the planning-level activity involved in the City's consideration of proposed parking projects, including the one at issue in this case. The process generally involves "several different divisions within the City to determine the feasibility of a project, both physically and financially, and then, of course there's always the political aspect of it also, and political meaning the sense to meet the long-term goals of the City, et cetera." S.R. 86 (internal pages 10-11). Proposed projects were evaluated in terms of whether they met the City's "planning goals," "transportation goals" and "development objectives," and whether they "tied to other projects." S.R. 87 (internal page 13).[8]

Finstad testified that the process with respect to the Parking Ramp at issue in this case included consideration of whether it would "meet broader goals for the City," including increasing the tax base, generating jobs, and addressing parking needs in the

[8] Finstad's predecessor, Michael Monahan, similarly testified that the City conducted feasibility analyses for proposed parking ramp projects in light of the City's obligation to expend public money wisely and to ensure the projects would generate funds sufficient to repay bonds issued by the City to finance the projects. S.R. 123 (internal page 9).

area, as well as whether it was "financially feasible and what the real needs were." S.R. 87 (internal pages 13-16). These considerations are reflected in the MCDA's 10th Avenue North & Washington Avenue North Redevelopment Plan & Tax Increment Finance Plan ("Redevelopment & Finance Plan"). S.R. 43-75.

The Redevelopment & Finance Plan authorized the use of tax increment revenue as a financing tool to help fund the Parking Ramp to be built adjacent to Ames & Fischer's John Deere Building. S.R. 46. The objective of the plan was to "facilitate the rehabilitation and commercial reuse" of the John Deere Building and other buildings in the Warehouse Riverfront District by providing "an essential public parking facility" for employee and customer parking. Id. The "public purposes" to be achieved included "rehabilitation of blighted structures, historic preservation, tax base enhancement, and the development of needed public parking facilities." Id.

The MCDA justified public assistance for the Parking Ramp based on its conclusions that: (1) the modernization and adaptive reuse of manufacturing and warehouse buildings in the Warehouse Riverfront District was "essential for meeting the City's goal for historic preservation," (2) the provision of adequate parking in parking ramps, as opposed to surface lots, was necessary to avoid undermining of "the cohesiveness and character of the urban environment in the historic district," and (3) private development of parking ramps in the district was "not economically feasible." S.R. 47-48.

The Redevelopment & Finance Plan also noted that the "MCDA and appropriate City Departments" undertook "extensive legal and financial due diligence for the

project." S.R. 53. The City's Department of Public Works generated a "pro forma" including estimated revenues, expenses and debt service; the MCDA calculated debt service coverage; and the Finance Department "would look at financial feasibility in terms of the City's debt level" and related bond issues. S.R. 88 (internal pages 23-24); see also S.R. 59-64 (due diligence process included estimating costs, identifying sources of revenues, estimating amounts of revenue, and assessing tax ramifications).

The results of these efforts are reflected in the Projections, which the City and MCDA shared with Ames & Fischer. See, e.g., S.R. 94-96.[9] The Projections were "made for the purpose of estimating debt service coverage and cash flow . . . ," and were used by the City and MCDA "in determining whether it was reasonable and feasible to issue general obligation bonds to purchase the Parking Ramp from Ames & Fischer." S.R. 115, 117; see also S.R. 123 (internal page 9) (City conducted feasibility analyses to ensure the appropriate expenditure of public money and to ensure there would be funds to repay bonds).

It was the City's and MCDA's practice to share projections with developers in the spirit of cooperation to further the City's goals. S.R. 89 (internal pages 27-28) (the City typically shares information with developers because "it behooves everybody to understand what the project elements are and how decisions are being made[,]" and "it

[9] The projections reflected in "Scenario E," S.R. 94-96, apparently are the last projections conveyed to Ames & Fischer prior to signing the Contract. However, Ames & Fischer's managing partner acknowledges receiving "several projections." S.R. 30 (internal page 137). See also Transcript of Summary Judgment Hearing (Oct. 26, 2005) at 30 ("We [Ames & Fischer] knew that they [the City and MCDA] were going to try to figure out whether this thing would pay off the debt service. We knew that they were using it to analyze the financial feasibility of the project. And they gave those documents to us.").

was always done on an atmosphere of collaboration, trying to coordinate and communicate between the groups."). Notwithstanding, developers, including Ames & Fischer, remained responsible for conducting their own due diligence, assessing their own potential risks and rewards, and making their own ultimate decisions. Finstad explained:

> I think that the information was shared by the developers, by the city staff, et cetera. And it was – and whether a project was going to be successful or not wasn't the City's responsibility.
>
> It was, you know, in this case it was *everybody was looking at the projections, everyone is looking at their estimates, everyone had an understanding of the project, and everybody has got a different crystal ball.*
>
> So it was like who knows, you know, where it's going to end up. But *everybody takes the information and each party, whether it's the City or developer, makes their own decisions as to whether the project should proceed.*

S.R. 89-90 (internal pages 28-29) (emphasis added); see also S.R. 93 (internal page 43) (information was shared with Ames & Fischer "to use as they saw fit in their evaluation of the project"); S.R. 92 (internal page 39) ("what reliance they put on it [shared information], I guess that's up to them"); S.R. 125 (internal pages 83-84) (former City Finance Officer testifying: "I expected them [Ames & Fischer] to do their due diligence and rely on what they thought was appropriate" and "I always expect them [developers in general] to use their due diligence responsibilities"); S.R. 116 (City and MCDA "expected Ames & Fischer to determine for itself whether or how to use the

projections").[10] Ames & Fischer understood that whether to sign the contract for the parking ramp project ultimately was its own decision. S.R. 127 (internal page 227).

The City could have refused to share its projections with developers, but sharing information promotes a cooperative atmosphere that furthers the City's social and economic goals, including historic preservation, rehabilitation of blighted properties, tax base enhancement, and the provision of public parking. Alternatively, the City could relieve developers of their independent due diligence obligations by assuming all risks, but doing so could have dire effects on the City's bond rating and financial stability. Instead, the City has adopted and implemented a policy – due diligence is a developer's personal responsibility notwithstanding any sharing of information – that strikes a balance among these political, economic, social and legal considerations. In this context, making and sharing the Projections is protected by statutory immunity.

The Minnesota Supreme Court addressed these principles in Pletan, supra. In Pletan, a school district was sued when a student, who had not boarded his assigned bus,

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[10] Significantly, Ames & Fischer made a middling attempt to evaluate the Projections. See S.R. 35-36 (Ames & Fischer managing partner testifying: "Our accountants looked at it, but, you know, they took the numbers based on what the City had projected, kind of did the math, asked some questions, but the City has several ramps. There was no reason to disbelieve that the numbers weren't accurate."). In addition, a CPA firm evaluated the Projections and related documents and information on behalf of Dick Ames, one of Ames & Fischer's principals. See S.R. 130-131. Notably, the City provided all of the information Ames & Fischer requested and was willing to provide additional information upon request. S.R. 133 (¶¶ 3-4); see also S.R. 32 (Ames & Fischer managing partner testifying she has no information indicating the City or MCDA ever refused to provide requested by Ames & Fischer). Ames & Fischer's managing partner also testified that she did not believe the City or MCDA lied in connection with the Projections, and did not contend the City or MCDA knew the alleged misrepresentation were false at the time they were made. S.R. 31-32.

attempted to walk home and was struck and killed by a car. Pletan, 494 N.W.2d at 39. The plaintiffs contended the school district "had a responsibility 'for seeing to it that students get on the right bus' . . . ." Id. at 43. The school district asserted statutory immunity.

The school district had a bus transportation policy providing that "[p]upils are responsible for being on the bus at the designated departure time at the school." Id. In practice, the elementary school the student attended required teachers to escort students to either the "bus line" or the "walkers line." Id.

The plaintiffs in Pletan conceded that the decision to adopt the bus transportation policy was protected by statutory immunity.[11] However, the plaintiffs contended that "making sure the children assigned to buses get on the bus is a day-to-day, operational-level implementation of an established policy" that is not protected. Id. at 44. The Minnesota Supreme Court rejected the argument:

> The distinction between "making" and "implementing" policy is not so simple as plaintiffs would have it. Until people carry out a governmental policy, by doing or not doing something, the policy itself is a dead letter. Discretionary function [statutory] immunity would afford little comfort if it did not extend to some of the consequences of the policy itself. Whether certain consequences are immune depends, as we have noted, on whether the consequential conduct itself involves the balancing of public policy considerations in the formulation of policy.

[11] The school district's formulation of the bus transportation policy involved the balancing of several public policy considerations, including "safety, cost, and the educational goal of instilling a sense of personal responsibility in the students." Pletan, 494 N.W.2d at 44.

Pletan, 494 N.W.2d at 44; see also Zank, 552 N.W.2d at 722 (statutory immunity protects decisions resulting from balancing of "considerations stemming from and in consequence" of a policy decision).

The Court found the Pletan plaintiffs' claim -- that by adopting the practice of escorting students to riders' and walkers' lines the school became responsible for "seeing to it" that riders get on their buses -- was:

> basically a disagreement with the school district's policy which says boarding the proper bus is the students' personal responsibility and, therefore, is really an attempt to have the courts reexamine the policy considerations that entered into the school district's policy. Discretionary function [statutory] immunity protects the school district from such reassessments.

Id. See also Watson, 553 N.W.2d 413-14 (statutory immunity bars suit where challenges to the implementation of policy "amount to an attack upon the policies themselves"); In re: Alexandria Accident of Feb. 8, 1994, 561 N.W.2d 543, 548 (Minn. Ct. App. 1997) ("Actions implementing a policy may be protected by statutory immunity if the claim of negligent implementation effectively attacks the policy itself."), review denied (Minn. June 26, 1997).

Similarly in this case, the City's and MCDA' policy is that due diligence is a developer's personal responsibility. The fact that the City and MCDA made and shared its Projections does not relieve Ames & Fischer of responsibility for conducting its own due diligence, just as the school's practice of escorting students to the bus loading area did not relieve students of personal responsibility for boarding designated buses in Pletan. Ames & Fischer's contentions that the City and MCDA provided "grossly inaccurate"

Projections and should have volunteered different or additional information is basically a disagreement with the policy that Ames & Fischer was responsible for its own due diligence and, like the claims in Pletan, is an attempt to have the courts reexamine the policy considerations that entered into it. Statutory immunity protects the City and MCDA from such reassessment.[12]

The Minnesota Court of Appeal's decision in Bloss, supra, also is instructive. Bloss involved a claim, among others, that the University of Minnesota should have provided more information or warnings relating to risks associated with participation in a study-abroad program. Bloss, 590 N.W.2d at 666. The Court of Appeals held that the claim was barred because "[t]o rebalance the extent of the warnings would represent

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[12] Whether the Projections appear in hindsight to be wrong or inadequate or negligent goes to abuse of discretion and is irrelevant for purposes determining if statutory immunity applies. See Minn. Stat. § 466.03, subd. 6 (any claim based on the performance of failure to perform a discretionary function or duty is protected by statutory immunity "whether or not the discretion is abused"); Smith, 795 F.2d at 308 n.10 ("The fact that the plan implemented may, in hindsight, seem ill-advised, imprudent, or lacking in a rational policy basis 'in no way changes the character of the function under scrutiny'; rather the lack of a rational or careful plan or even the lack of policy goes to the actor's abuse of discretion.") (citation omitted). See also Holmquist v. State, 425 N.W.2d 230, 232 (Minn. 1988) ("The question is not whether the State's conduct resulted in a condition posing an unreasonable risk of harm; it is whether the conduct consisted of planning or policymaking decisions . . . ."); Doe v. Park Center High Sch., 592 N.W.2d 131, 136 (Minn. Ct. App. 1999) (whether analysis and investigation were flawed is irrelevant; immunity protects even "incorrect or imprudent discretionary decisions"); In re: Alexandria Accident, 561 N.W.2d at 548 ("Negligence in gathering the information on which an immune decision is based cannot defeat immunity protection already afforded to the decision."); cf. Killen v. Ind. Sch. Dist. No. 706, 547 N.W.2d 113, 117 (Minn. Ct. App. 1996) (in official immunity analysis, "the issue is not whether, in hindsight, a different decision" might have been made, but whether the alleged failure to act was discretionary), review denied (Minn. Aug. 6, 1996), overruled on other grounds, S.W. v. Spring Lake Park Sch. Dist. No. 16, 580 N.W.2d 19, 23 (Minn. 1998).

judicial interference with executive policy-making and affect the program's design, a University decision protected by statutory immunity." Id.

Here, as in Bloss, the City and MCDA provided information sufficient to warn Ames & Fischer about the potential risks associated with Ames & Fischer's undertaking. Specifically, the City and MCDA informed Ames & Fischer that the Projections were preliminary estimates, not guarantees, and warned that Ames & Fischer bore the risk of the Projections being wrong. The Projections were marked "PRELIMINARY," referred to "[p]rojected" net parking revenues and "[p]rojected" net tax increment derived from "estimates," and stated the cost of the Parking Ramp was "Subject to Verification." S.R. 95. The City and MCDA also provided a "Projected Guarantee Schedule" with a clear warning regarding Ames & Fischer's assumption of risk:

> The annual guarantee amount (column (8)) [totaling $28,933,829] is the sum of projected annual operating expenses and bond & loan debt service payments. *Should the ramp open but generate no revenue, the guarantee being provided by Ames & Fischer must cover these expenditures.*

S.R. 94 (emphasis added). Ames & Fischer's managing partner, who signed the Contract on behalf of Ames & Fischer, acknowledged in deposition testimony her understanding that the Projections were *not* "unqualified guarantees," but rather were estimates based on assumptions about what the future might hold. S.R. 33-34.

To rebalance the nature or extent of the information provided to Ames & Fischer would interfere with the fundamental principles and design of the City's policy for dealing with developers by relieving Ames & Fischer of responsibility for conducting its own due diligence. This would impermissibly make the City and MCDA insurers and

guarantors of the Parking Ramp project. See Masonick v. J.P. Homes, Inc., 494 N.W.2d 910, 913 (Minn. Ct. App. 1993) (alleged negligent issuance of certificate of occupancy was protected by statutory immunity; if the court were to hold otherwise "we would essentially be mandating that municipalities become insurers of construction."); Bloss, 590 N.W.2d at 666 ("The litigation appears to be premised on a belief that the University is the guarantor of the student's safety. Unfortunately, this is neither physically possible nor realistic.").

The City and MCDA are protected by statutory immunity from litigation, such as this, that seeks to have the courts second-guess the City's and MCDA's policy decisions. Therefore, the District Court erred when it denied the City's and MCDA's motion for summary judgment dismissing Ames & Fischer's tort claims.

III. The City's And MCDA's Decisions And Conduct Relating To Making And Sharing The Projections Are Protected By Vicarious Official Immunity.

If not protected by statutory immunity, the City's and MCDA's decisions and conduct relating to making and sharing the Projections are protected by official immunity. The official immunity doctrine provides that public officials engaged in duties that call for the exercise of judgment or discretion are not liable unless they are guilty of a willful or malicious wrong. Elwood v. County of Rice, 423 N.W.2d 671, 677 (Minn. 1988); Podruch v. State, 674 N.W.2d 252, 254 (Minn. Ct. App. 2004), review denied (Minn. April 20, 2004). Official immunity is "intended to insure that the threat of potential liability does not unduly inhibit the exercise of discretion required of public officers in the discharge of their duties." Rico, 472 N.W.2d at 107 (citation omitted).

Official immunity analysis addresses three questions: Does the conduct at issue involve discretionary or ministerial duties? If the duties are discretionary, did the officials act willfully or maliciously? If not, does vicarious official immunity apply to protect the officials' employer?

A. The Conduct At Issue Involves Discretionary Duties.

Making and sharing the Projections involved the exercise of discretion. "Discretion" has a broader meaning in the context of official immunity than in the context of statutory immunity. Watson, 553 N.W.2d at 414. "Unlike statutory immunity, official immunity protects the kind of discretion which is exercised on an operational rather than a policymaking level." Id. Nevertheless, discretion in the official immunity context "requires something more than the performance of 'ministerial duties.'" Id. (citation omitted).

A duty is ministerial "when it is absolute, certain and imperative, involving merely the execution of a specific duty arising from fixed and designated facts." Id. (citation omitted); see also Kelly v. City of Minneapolis, 598 N.W.2d 657, 664 (Minn. 1999) ("A ministerial duty is simple and definite, leaving nothing to the discretion of the official."); Anderson v. Anoka Hennepin Sch. Dist. 11, 678 N.W.2d 651, 659 (Minn. 2004) (a ministerial duty "must dictate the scope of the employee's conduct").

In contrast, a duty is discretionary if it involves "more individual professional judgment that necessarily reflects the professional goal and factors of a situation." Wiederholt v. City of Minneapolis, 581 N.W.2d 312, 315 (Minn. 1998); see also Mumm v. Mornson, ___ N.W.2d ___, 2006 WL 45128, *14 (Minn. Jan. 10, 2006) (discretionary

duties derive from polices that give little specific guidance and set few limits on officials' independent exercise of judgment).

In determining whether discretionary duties are involved, the focus is on "the specific conduct at issue in the case." Anderson, 678 N.W.2d at 656. Here, the specific conduct challenged is the making and sharing (or not sharing) of the Projections and related information to Ames & Fischer. Claims such as this, relating to how city officials deal with developers, invariably involve discretionary decisions protected by official immunity. See Muller Family Theaters, 1996 WL 469346 at *3 ("No one disputes McMenomy was exercising discretion when dealing with the Muller and GTI proposals.").

This Court repeatedly has held that official immunity applies to claims alleging misrepresentations by city officials in connection with development projects. McDonough v. City of Rosemount, 503 N.W.2d 493 (Minn. Ct. App. 1993), review denied (Minn. Sept. 10, 1993), for example, involved a deal to sell land to, and lease it back from, the city. The city council approved the deal subject to resolution of a dispute regarding a lease termination clause. The deal ultimately fell through after a new mayor took office. The landowner then sued, alleging the mayor and city administrator conspired to avoid executing necessary documents, and that the city administrator made misrepresentations reassuring the plaintiff about the deal even though the city administrator was part of this conspiracy. Id. at 495. The district court denied the city administrator's motion for summary judgment based on official immunity. Id. at 496. The Court of Appeals reversed, holding that "the nature of the acts" required the city

administrator "to exercise his judgment and discretion, entitling him to immunity." Id. at 498.

TCM Stores, Inc. v. City of Robbinsdale, 2003 WL 22889869 (Minn. Ct. App. Dec. 9, 2003) (S.R. 233-235), also stands for the proposition that representations by city officials in connection with development projects involve the exercise of professional judgment. The plaintiff in TCM Stores subleased property that was the site of a city development project. Id. at *1. When construction disrupted the plaintiff's business, it sued the city alleging negligent misrepresentation regarding "predictions" by city officials about "what would happen during the construction project." Id. at *3. The district court found that the claim was based on the city officials' discretionary acts, and granted the city's motion for summary judgment based on official immunity. The Court of Appeals affirmed. Id.

Similarly, the plaintiff in SJ & F Enterprises, Inc. v City of Winsted, 1998 WL 345436 (Minn. Ct. App. June 30, 1998), review denied (Minn. Aug. 31, 1998) (S.R. 236-238), wanted to develop property it believed, based on information from the city clerk, was within the city's boundaries. Id. at *1. After informing the plaintiff that the property was within the city, the city clerk discovered information to the contrary but did not report this information to plaintiff. Id. at *2. In addition, the city attorney, despite having information that the property may not have been within the city limits, represented to the plaintiff that it must comply with a city ordinance restricting use of the property. Id.

When the plaintiff in SJ & F Enterprises later discovered that its property was not within the city limits, it sued alleging misrepresentation by both the city clerk and the city attorney. The district court denied the officials' motions for summary judgment based on official immunity. The Court of Appeals reversed. With respect to the city clerk, the Court of Appeals reasoned that the duties at issue were discretionary in nature because "[h]er task of ascertaining the city boundaries and weighing sometimes-conflicting evidence regarding whether the Baker property was within or without city limits used her individual professional judgment." Id. at *3. In addition, the Court of Appeals held that the city attorney's determination of whether an ordinance applies to a particular fact situation and should be enforced required his professional judgment and, therefore, did not involve a ministerial duty. Id.

Here, as in SJ & F Enterprises, Ames & Fischer alleges that the City and MCDA made the Projections, on which Ames & Fischer allegedly relied, when the City and MCDA knew or should have known that the Projections were wrong or were misleading or that there was information inconsistent with the Projections that the City and MCDA did not share. If the task of ascertaining a city's boundaries and determining whether a parcel is within the city limits involves research in a "murky area" that requires the exercise of "individual professional judgment," see id., then surely the task of researching and weighing the vast body of data that went into making the Projections requires the application of individual professional judgment.

Determining what the Projections should be and what information was relevant to share is the antithesis of "the execution of a specific duty arising from fixed and

designated facts." The process required City and MCDA officials to evaluate and weigh numerous factors and variables. See S.R. 95 (Projections based on estimates regarding numerous factors over a 25-year period, including but not limited to the net parking revenue and inflation rate, net tax increment, borrowing from the Parking Fund Loan, loan interest rate, bond costs, bond rates, and bond interest); see also S.R. 88 (internal pages 23-24) (Finstad describing the City's process for conducting financial feasibility analysis for a parking ramp project as involving multiple people in multiple departments, requiring estimates of revenues, expenses and debt service projected over time, and requiring consideration of the City's debt level, City overhead, and issues relating to bond sales); S.R. 93 (Finstad testifying the proformas prepared by the City for the Parking Ramp were "based on our experience, but also it was based upon the parameters of this project. Certainly you modify the pro forma to be project specific."); S. R. 240, ¶ 5 (author of proformas averring he "determined information to include in the proformas based, in part, on the characteristics, revenues, and expenses of other City parking facilities" and that "[e]ach ramp is unique, and the proformas are ramp specific"); S.R. 115-116 ("the projections were based on information regarding parking demand, utilization, and rates from Ames & Fischer's agents . . . and on information regarding existing parking ramps"); S.R. 30 (managing partner testifying that Ames & Fischer received "several projections; and of course, each time you run a projection, they're never 100 percent the same as the last one. They're always a little bit different."); S.R. 33-34 (Ames & Fischer managing partner testifying to her understanding that the

Projections were not "unqualified guarantees," but were estimates based on assumptions about the future).

Determining what the Projections should be and what information was relevant to share required the exercise of professional judgment and discretion. Therefore, making and sharing the Projections is protected by official immunity unless City and MCDA officials are guilty of a willful or malicious wrong.

B. There Is No Evidence That The City Or MCDA Acted Willfully Or Maliciously.

City and MCDA officials did not commit a willful or malicious wrong in making and sharing the Projections.

Malice is "the intentional doing of a wrongful act without legal justification or excuse, or, otherwise stated, the willful violation of a known right." Rico, 472 N.W.2d at 107 (citation omitted). The Minnesota Supreme Court has established a "high standard for a finding of a willful or malicious wrong . . . by requiring the defendant to 'have reason to know that the challenged conduct is prohibited * * *. [T]he exception anticipates liability only when an official intentionally commits an act that he or she then has reason to believe is prohibited.'" Anderson, 678 N.W.2d at 663, quoting Rico, 472 N.W.2d at 107.

To show malice, a party "may not rely on general allegations, but must present specific facts showing such intent." City of Willmar v. Reigstad, 1998 WL 405040, *2 (Minn. Ct. App. July 21, 1998) (S.R. 242-244); see also Reuter v. City of New Hope, 449 N.W.2d 745, 751 (Minn. Ct. App. 1990) (a party "may not rely on 'bare allegations of

malice' to defeat a summary judgment, but must present specific facts evidencing bad faith") (citation omitted), review denied (Minn. Feb. 28, 1990). Ames & Fischer has not met this standard.

As the City and MCDA pointed out in support of their motion for summary judgment, the deposition testimony of Ames & Fischer's managing partner precludes it from establishing willful or malicious wrongdoing. She testified that Ames & Fischer is *not* claiming City or MCDA officials lied, that they knew their representations were false at the time made, or that they made any alleged misrepresentations in bad faith. S.R. 31-33. This testimony belies any bare allegations of willful or malicious wrongdoing that might be inferred from Ames & Fischer complaint or counterclaims.

In its response to the City's and MCDA's motion, Ames & Fischer did not present facts that might support allegations of willful or malicious conduct. Instead, it merely asserted that even if the conduct at issue involved discretionary duties, official immunity would not apply "because the challenged conduct . . . amounts to an intentional tort." Ames & Fischer Brief in Opposition to Motion for Summary Judgment (Oct. 14, 2005) at 52. Merely alleging an "intentional tort," however, does not satisfy the "willful or malicious" test. "Malice in the context of official immunity means intentionally committing an act *that the official has reason to believe is legally prohibited.*" Kelly, 598 N.W.2d at 663 (emphasis added).

This Court address a similar situation in City of Willmar, supra. In that case, the plaintiffs claimed city officials misrepresented that plaintiffs would not need a building permit to make proposed building alterations and that the alterations would obviate the

need for a fire alarm system. City of Willmar, 1998 WL 405040 at *1. When a city building inspector later cited the plaintiffs and ordered expensive repairs, they sued. The district court granted summary judgment in favor of the city, finding that the plaintiffs failed to present specific evidence that the city officials acted with malice. Id. at *2. The Court of Appeals affirmed, rejecting plaintiffs-appellants' argument that willfulness and malice can be inferred from the circumstances. Id. at *3. It concluded that because the plaintiffs failed to identify facts indicating the city officials' representations "were made without legal justification or excuse or that respondents willfully violated a known right, the district court properly found that respondents were entitled to official immunity." Id.; see also Elwood, 423 N.W.2d at 679 (summary judgment appropriate where nothing in plaintiff's version of the incident suggests other than an "honest . . . effort" by officials "faced with uncertain circumstances.").

Here, too, Ames & Fischer has failed to identify facts indicating the City's or MCDA's representations were made without legal justification or that the City or MCDA willfully violated a known right. Therefore, official immunity applies.

C. The City and MCDA Are Entitled To Vicarious Official Immunity.

This is a classic case for application of vicarious official immunity. Vicarious official immunity applies "when failure to grant it would focus stifling attention on an official's performance to the serious detriment of that performance." Anderson, 678 N.W.2d at 664 (citation omitted). Under this standard, vicarious official immunity is granted "where officials' performance would be hindered as a result of the officials second-guessing themselves when making decisions, in anticipation that their

government employer would also sustain liability as a result of their actions." Id. If this standard is met, vicarious official immunity applies regardless of whether a government employee is named as a defendant in the lawsuit. Id.; see also Wiederholt, 581 N.W.2d at 316-17.

Minnesota courts have granted vicarious official immunity when to deny it might deter a government employee from exercising his or her professional judgment in the exercise of discretionary duties. For example, in Carlson v. Ind. Sch. Dist. No. 281, 1996 WL 5784 (Minn. Ct. App. Jan. 9, 1996) (S.R. 245-247), this Court held that vicarious official immunity applied in connection with a school district employee's decision that conditions were suitable to conduct physical education classes outdoors:

> [T]o grant immunity to the district employee while denying it to the district 'would still leave the focus of a stifling attention on the [employee's] performance, to the serious detriment of that performance.' [Citation omitted.] Faced with an additional basis for district liability whenever a physical education class is conducted outdoors, the physical education department employees deciding whether conditions are suitable for outdoor classes would hesitate to use outdoor facilities under any but the best conditions. This would defeat the purpose of official immunity.

Id. at *3.

Similarly, in this case, to grant immunity to the City and MCDA employees responsible for making and sharing the Projections while denying it to the City and MCDA would focus stifling attention on the employees' performance to the serious detriment of their performance. Faced with the prospect of City liability if their projections turned out to be wrong or if they failed to convey to developers every bit of information considered, City officials responsible for dealing with developers would

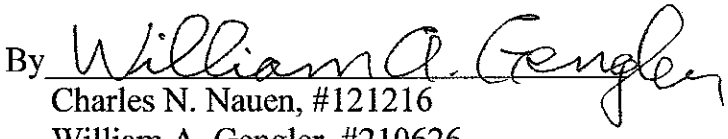
hesitate to make and share projections. Under these circumstances, the purpose of official immunity would be defeated if vicarious official immunity were denied.

CONCLUSION

For all of the foregoing reasons, the City and MCDA respectfully ask the Court of Appeals to reverse the District Court's denial of the City's and MCDA's motion for summary judgment dismissing Ames & Fischer's tort claims and counterclaims based on immunity.

Dated: February 13, 2006

LOCKRIDGE GRINDAL NAUEN P.L.L.P.

By 

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