

MINNESOTA STATE BAR

A 05-2316
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 the Minneapolis
Community Development Agency,
Appellants.

BRIEF OF RESPONDENT AMES & FISCHER CO. II, LLP

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STATEMENT OF THE ISSUES

- I. Summary judgment on immunity grounds is appropriate only if the governmental-entity defendant can establish an entitlement to immunity as to each and every tortious act alleged by the plaintiff. The City and MCDA did not even attempt to demonstrate they are immune to claims arising out of each of the tortious acts alleged by Ames & Fischer. Should this Court affirm the District Court’s denial of summary judgment?

Most apposite authority:

Sletten v. Ramsey County, 675 N.W.2d 291 (Minn. 2004)

Schroeder v. St. Louis County, 708 N.W.2d 497 (Minn. 2006)

Myers v. Price, 463 N.W.2d 773 (Minn. App. 1990)

- II. As a general rule, this Court does not consider matters not argued and considered in the district court. The City and MCDA expressly limited their immunity argument in the District Court to claims arising out of their “making and sharing the Projections.” Should the City and MCDA be permitted to argue for the first time on appeal that they are immune also to claims arising out of their affirmative misrepresentations and failure to disclose information?

Most apposite authority:

Thiele v. Stich, 425 N.W.2d 580 (Minn. 1988)

Melina v. Chaplin, 327 N.W.2d 19 (Minn. 1982)

McIntire v. State, 458 N.W.2d 714 (Minn. App. 1990)

- III. Statutory immunity is available only as to conduct that involves a balancing of policy objectives. Neither the City and MCDA's misrepresentation of the basis for the projections nor their failure to disclose information that cast doubt on the financial feasibility of the Project was the result of a balancing of policy considerations. Are the City and MCDA immune to suit on these claims?

Most apposite authority:

Minn. Stat. § 446.03

Fisher v. County of Rock, 596 N.W.2d 646 (Minn. 1999)

Zank v. Larson, 552 N.W.2d 719 (Minn. 1996)

- IV. Official immunity is available only as to conduct of a specific officer who must be identified by the government-entity defendant. The City and MCDA did not identify in the District Court a specific government official responsible for the conduct underlying Ames & Fischer's tort claims. Should the District Court's official-immunity ruling be affirmed?

Most apposite authority:

Janklow v. Minnesota Bd. of Examiners for Nursing Home Administrators, 552 N.W.2d 711 (Minn. 1996)

LePage v. State of Minnesota, 1997 WL 714712 (Minn. App. Nov. 18, 1997)

- V. Official immunity is not available as to conduct of a ministerial nature. Ames & Fischer has presented unrefuted evidence that the City and MCDA had a policy of freely sharing information with developers, compliance with which would require only ministerial action. Should the District Court's official-immunity ruling be affirmed as to Ames & Fischer's misrepresentation-by-nondisclosure claim?

Most apposite authority:

Wiederholt v. City of Minneapolis, 581 N.W.2d 312 (Minn. 1998)

Janklow v. Minnesota Bd. of Examiners for Nursing Home Administrators, 552 N.W.2d 711 (Minn. 1996)

- VI. Ministerial conduct involves professional judgment that necessarily reflects the professional goal and factors of a situation. Accurately representing the basis for the Projections did not involve any professional judgment. Should the District Court's official-immunity ruling be affirmed as to Ames & Fischer's claim arising out of the City and MCDA's misrepresentation of the basis for the Projections?

Most apposite authority:

Wiederholt v. City of Minneapolis, 581 N.W.2d 312 (Minn. 1998)

Janklow v. Minnesota Bd. of Examiners for Nursing Home Administrators, 552 N.W.2d 711 (Minn. 1996)

- VII. Malicious or willful actions are not protected by official immunity. On summary judgment, malice may be inferred from the evidence viewed in a light most favorable to the plaintiff. The record in this case contains evidence that the City and MCDA wanted a parking ramp for their own economic-development purposes and that the City and MCDA misrepresented the basis for the Projections, and provided Ames & Fischer positive information about the feasibility of the Project while withholding all information that cast doubt on the viability of the Project. Was the record evidence sufficient to defeat the City and MCDA's motion?

Most apposite authority:

Soucek v. Banham, 503 N.W.2d 153 (Minn. App. 1993)

Johnson v. Morris, 453 N.W.2d 31 (Minn. 1990)

Elwood v. Rice County, 423 N.W.2d 671 (Minn. 1988)

STATEMENT OF THE CASE AND FACTS

I. The Project

In 1998, Respondent Ames & Fischer Co. II, LLP, and Appellants Minneapolis Community Development Agency (MCDA) and the City of Minneapolis (City) began discussing a project to construct a parking ramp in the Minneapolis Warehouse District next to the John Deere Building, an historic warehouse that Ames & Fischer was converting to commercial office space (“the Project”).¹ The City and the MCDA wanted the ramp in order to further their development objectives in the Warehouse District, and Ames & Fischer needed structured parking to support its further renovation and leasing of the Deere Building (“the Building”).²

By early 1999, the parties had agreed in principle to a framework under which Ames & Fischer would finance construction of a parking ramp, and the City would then purchase the ramp from Ames & Fischer for approximately \$10 million dollars that the City would raise through a bond issue. The bonds would be repaid from net parking revenues from the ramp and tax-increment financing (TIF) revenues generated by Ames & Fischer’s renovation of the Building. In the event operating and TIF revenues were insufficient to satisfy the annual debt

¹ See Order on City of Minneapolis’ and MCDA’s Motion for Summary Judgment and Ames & Fischer’s Motion to Amend (“Order”) at 3-4 (Appellants’ Appendix (“A.A.”) at 34-35). See also R.A. 42-46 (Ames & Fischer’s Memorandum in Opposition to the City’s and MCDA’s Motion for Summary Judgment, pp. 4-9).

² See *id.*

service (referred to as a “Shortfall” hereafter), the Shortfall would be covered by a bond, guaranty or letter of credit to be provided by Ames & Fischer.

Ames & Fischer had no experience or background in owning or operating a parking ramp,³ and the City knew that.⁴ The City did have that experience and background, as it had owned and operated parking facilities in the Minneapolis area since 1974.⁵ Ames & Fischer did not have access to data relating to the operation of a parking facility either.⁶ But the City did – it maintains various data regarding its parking ramps, including accounting data with respect to operating revenues and costs for each of its ramps, and performance and utilization statistics.⁷ (The City operated 10 ramps in 1998.)

As part of the parties’ discussions and consideration of the Project, the MCDA provided Ames & Fischer several spreadsheets showing projected revenues, expenses, and debt service for the proposed parking ramp for the years 2000 through 2026 (“Projections”). The financial assumptions underlying the various Projections differed, but each set of Projections provided to Ames & Fischer showed the ramp operating at an annual surplus within a few years, with sufficient revenue to pay off the bonds within 30 years. Unbeknownst to Ames &

³ See Respondent Ames & Fischer’s Supplemental Record (“R.S.R.”) at 2, ¶ 4 (Liza Robson averring that “[n]either my father, Math Fischer, Dick Ames, or myself had any experience in owning or operating parking facilities prior to September 1999).

⁴ R.S.R. 8 (p. 37) (“yeah, [. . .] they probably didn’t have a lot of knowledge in operating parking facilities.”).

⁵ See *id.*

⁶ R.S.R. 2, ¶ 4 (Robson averring “[W]e did not have data relating to expected revenues and expenses for a parking facility.”).

⁷ R.S.R. 99 (pp. 78-79).

Fischer at the time, the City and MCDA had prepared other sets of Projections using assumptions the City and MCDA viewed as more realistic, and these Projections showed the proposed ramp losing money. None of these Projections were provided to Ames & Fischer.

During meetings prior to execution of the Contract, MCDA and City representatives communicated to Ames & Fischer that the projected revenues and expenses were based on the City's previous experience in owning and operating its other ramps.⁸ As Greg Finstad, the City's director of parking and transportation, later testified,

[w]e certainly explained to Ames & Fischer that these were – the pro formas that we run in public works were kind of our standard pro formas, and that generally that that was based upon *other facility operations, typical operating expenses and revenues, et cetera.*⁹

Based on these representations, Liza Robson, the Ames & Fischer partner most actively involved in the negotiations, understood that the Projections, or “pro formas,” were based on the City's previous experience and existing data with respect to its other ramps.¹⁰ Ames & Fischer trusted the City,¹¹ and the City held

⁸ R.S.R. 2 ¶ 5 (Robson averring city “representatives indicated that the Projections were based on the City's previous experience and existing data with respect to other ramps”)

⁹ R.S.R. 9 (p. 42) (emphasis added).

¹⁰ R.S.R. 2 ¶ 5. *See also* S.R. 130 (Ames's accountant noting projected operating costs “based on experience of the city with similar ramps”).

¹¹ R.S.R. 2 ¶ 4; R.S.R. 13 (P. 149, l. 18).

themselves out as the experts in operating parking ramps and estimating revenues and expenses for this Parking Ramp.¹²

But the Projections provided by the City and MCDA were not in fact based on the City's previous experience and existing data. As Ames & Fischer later learned through discovery in this litigation,

- The starting monthly rate of \$85 was itself **nearly twice** the rate actually charged at a comparable City ramp (St. Anthony Main) that the City used for calculating projected operating expenses during the two years in which the Contract was negotiated.¹³
- The projections assumed that the monthly parking rate would start at \$85 per month per stall, and would increase \$5 every year going forward. This 5.9 percent annual increase is over **twice** the rate of increase experienced by the City at its other ramps, where the average annual increase was only 2.35 percent.¹⁴
- The per-stall operating expenses projected for the Ramp are approximately only **one-fourth** of the actual operating expenses for the other city ramps in that five-year period.¹⁵
- The projected annual increases in operating expenses are also approximately **one-fourth** of the average actual annual increase in operating expenses for the City's other ramps for the time period of 1995 to 1999.¹⁶

¹² R.S.R. 2 ¶ 4-5.

¹³ See R.S.R. 66 (p. 3 of SEH Report noting that a "comparable parking ramp may be the St. Anthony Ramp which has rates of \$43 and \$55 per month"); Respondent's Confidential Supplemental Record ("C.S.R.") 23 (noting that the monthly rate for the St. Anthony Ramp was \$40 per month in 1997, and \$43 in 1998).

¹⁴ C.S.R. 22; C.S.R. 10, ¶ 6; C.S.R. 23, Table No. 5.

¹⁵ C.S.R. 10, ¶ 7.

¹⁶ C.S.R. 2, ¶ 6; C.S.R. 11, ¶ 8.

- When calculating projected operating expenses for other proposed automated ramps, the City used a per-stall figure **over two times greater** than the figures used in the projections for the Ramp.¹⁷

Based upon the Projections that the City and MCDA did provide to Ames & Fischer, as well as the City and MCDA's representation as to the basis for the Projections, Ames & Fischer entered into a redevelopment contract with the MCDA in September 1999 ("the Contract").¹⁸ Pursuant to the Contract, Ames & Fischer constructed a 634-stall parking ramp that was completed in September 2000 ("the Ramp" or "the Parking Ramp"). Later that month, the City purchased the Parking Ramp from Ames & Fischer with proceeds from the issuance of revenue bonds, and Ames & Fischer began operating the Ramp. In February 2000, the MCDA assigned its interest in the Contract to the City.

From almost day one, the Ramp consistently failed to generate the projected revenues, and its operating expenses far exceeded the expenses projected by the MCDA and City. The City's records show that by the end of 2000 – after only three months of operation – the Ramp had already lost over \$400,000.¹⁹ By the end of 2001, the Ramp had lost a further \$595,000.²⁰ After adjustment for amounts borrowed from the City's parking fund, as called for in the Contract, this meant that the Ramp had generated a Shortfall of over \$150,000 by the end of

¹⁷ C.S.R. 25; C.S.R. 24-28.

¹⁸ R.S.R. 3 ¶ 8 (Robson averring that she would not have signed the Contract had she known the projections were not based on the City's previous experience with other ramps).

¹⁹ R.S.R. 31-32.

²⁰ *Id.*

2001.²¹ The City did not provide Ames & Fischer notice of the Shortfall until December 2002,²² however, even though the Contract required the City to provide Ames & Fischer with notice of any Shortfall on an annual basis, in December of each year. By that time the Shortfall had grown to \$360,000 – after only two full years of operation. Ames & Fischer was surprised by the notice and the size of the Shortfall, and immediately requested additional information regarding the calculation of the Shortfall, including but not limited to information relating to the City’s calculations of revenues and expenses for operating the Ramp.

The City provided the requested information in 2003 and in 2004. Based on that information, Ames & Fischer determined that the projected and actual expenses and revenues differed substantially.

For example:

- In just the first five years of operation, the actual operating expenses exceeded projected operating expenses by over \$1 million.²³
- The City included in its calculation of actual expenses numerous items of overhead that were not included in the projections the MCDA provided to Ames & Fischer in 1999. Among those items were overhead expenses described as “Personal Services,” “Contractual Services,” and “Materials and Supplies,”²⁴ which amount to some \$130,000 per year,²⁵ when the Projections estimated *total* operating expenses to be \$148,438 per year.²⁶

²¹ *Id.*

²² Appellants’ Supplemental Record (“S.R.”) 210.

²³ Answer and Counterclaims of Ames & Fischer Co. II, LLP at ¶ 32 (A.A. 19).

²⁴ *Id.*, ¶ 34 (A.A. 20).

²⁵ *See* C.S.R. 30.

²⁶ *See* R.S.R. 54; Transcript of October 26, 2005, summary judgment hearing (“T.”) at 33-34.

- The City also included within its calculation of the actual expenses certain security expenses that were not included in the Projections.²⁷

Ames & Fischer also later determined that the City and MCDA took a \$350,000 fee for issuing the Bonds (3.5% of the \$10 million bond issuance) that it had never disclosed to Ames & Fischer,²⁸ and added it to the amount that Ames & Fischer must repay.

II. The Lawsuits

On November 29, 2004, the City sued Ames & Fischer and Capitol Indemnity Corporation, Ames & Fischer's indemnitor, in Hennepin County District Court for breach of contract. Ames & Fischer asserted counterclaims for fraudulent and negligent misrepresentation, breach of implied warranty, promissory estoppel, breach of implied covenant of good faith and fair dealing, and for declaratory relief. Shortly thereafter, Ames & Fischer commenced an action against the MCDA and the City asserting the same claims.

In neither action was Ames & Fischer able to include all of the factual allegations that support its misrepresentation claims – both affirmative misrepresentation and misrepresentation through nondisclosure – because those facts could and would only become known through discovery of the City and MCDA's documents and financial records and analysis of those records by an expert. Only through these steps could Ames & Fischer evaluate the City and

²⁷ Answer and Counterclaims of Ames & Fischer Co. II, LLP at ¶ 35 (A.A. 20).

²⁸ Compare R.S.R. 101 with R.S.R. 97, under "Bond Issue Breakdown."

MCDA's representations as to the basis for the Projections and determine what information had not been provided. At the outset of the two actions, the City and MCDA had provided only enough information for Ames & Fischer to conclude that the Projections differed significantly from actual experience. Ames & Fischer's initial pleadings were therefore necessarily limited to claims based on the disparity between the projected and actual financial performance of the ramp.

III. The Scheduling Order and Discovery.

The City's lawsuit and Ames & Fischer's action against the City and MCDA were consolidated on April 19, 2005. Following consolidation, the parties engaged in several rounds of written discovery during the spring and early summer 2005. On July 11, 2005, Ames & Fischer's attorney contacted the City and MCDA's attorneys to discuss the scheduling of depositions, and identified 12 probable deponents.²⁹ Ames & Fischer wanted to begin the depositions the week of July 25, but the City and MCDA's attorneys were not available until August 16, when Ames & Fischer's attorney was scheduled to begin a two-day trial.³⁰ Because that would leave the parties only one month to complete discovery before the September 23, 2005, discovery deadline set forth in the district court's scheduling order,³¹ the parties agreed that they would jointly seek to extend the discovery period and trial date by three months.³² Despite the agreement of the

²⁹ R.S.R. 15.

³⁰ *Id.*

³¹ R.S.R. 18.

³² R.S.R. 21-26.

parties, the district court refused to move the trial date and agreed to only a one-month extension of the discovery cut-off, to October 26, 2005.³³ That date was also the deadline for the hearing of non-dispositive and dispositive motions.³⁴

IV. Ames & Fischer Discovers Additional Evidence of Misrepresentation and Nondisclosure.

During a truncated and expedited period of discovery, which included 17 depositions in six weeks, Ames & Fischer learned that the City and MCDA had failed to provide Ames & Fischer significant information that cast doubt on the financial feasibility of the Project—and on the validity of the information the City and MCDA had provided. And Ames & Fischer also discovered that the City and MCDA had withheld this information despite having a general policy and practice of sharing all financial-feasibility information with developers. For example, Greg Finstad, the City’s director of parking and transportation, testified that

in these type of development-type projects that it’s—the City is sort of an open book; you share the information with the developer. . . . *[The developer] is going to be a partner on the project so there would be no reason not to share that information with the developer.*³⁵

Michael Monahan, who held Finstad’s position for 30 years until 1999, testified that he knew of “no reason” why the City would not share with a developer information relating to financial feasibility analysis, or the fact that the City had reached a different conclusion as to the financial feasibility of a project than the

³³ R.S.R. 27.

³⁴ *Id.*

developer had.³⁶ He further testified that if the City believed an outside party was operating under a false assumption regarding the financial feasibility of a project, it would be “appropriate” to communicate that fact to the party.³⁷

Despite their general policy and practice of providing project-related financial information to developers, the MCDA and City failed to provide Ames & Fischer with five key documents or pieces of information that cast serious doubt on the financial feasibility of the Project:

1. The June 1998 Net Revenue Projections at \$30 per month.

The City and MCDA prepared two differed types of projections for the Project. The first type, the Net Revenue Projections, showed the projected operating expenses and revenues for the Ramp. These were prepared by the City’s public works department. The second type of projections, the Cash Flow Projections, projected the overall performance of the Ramp in relation to the repayment of the bonds. The Cash Flow Projections were prepared by the MCDA’s finance department using the operating expenses and revenues from the Net Revenue Projections as an input.

In June 1998, the City’s Department of Public Works, Transportation Division, compiled its first Net Revenue Projection for the proposed ramp.³⁸ Those projections assumed a \$30 monthly contract parking rate for the first four

³⁵ R.S.R. 5 (p. 27) (emphasis added).

³⁶ R.S.R. 30 (p. 32).

³⁷ *Id.*

³⁸ R.S.R. 39 - 46.

years of operation.³⁹ Public Works had determined \$30 to be the prevailing market rate for monthly parking in the area of the proposed ramp.⁴⁰ With that and other assumptions, the June 1998 projection showed that *the ramp could support only approximately \$3 million in debt*⁴¹—less than one third of what the parties believed the ramp would cost. Public Works ran another Net Revenue Projection that same day, this time assuming a more reasonable total project cost of \$8.5 million (the ultimate cost was approximately \$10 million) and a monthly parking rate of \$30.⁴² With those assumptions, this projection showed the ramp not only failing to cover the debt, but actually *losing* over \$10.7 million after 25 years of operation.⁴³

Neither of these June 1998 Net Revenue Projections were provided to Ames & Fischer.⁴⁴ Ames & Fischer was never told that Public Works believed the appropriate monthly rate for the area was \$30, or that at that rate there was an expected deficit of more than \$10 million.⁴⁵ Instead, the City appears to have re-run the Net Revenue Projection with unrealistic inputs that were selected to generate a specified (positive) outcome. The City produced a handwritten note, believed to have been written by Monahan of Public Works,⁴⁶ that reads “revenue

³⁹ *Id.*

⁴⁰ R.S.R. 11 (p. 79).

⁴¹ R.S.R. 45.

⁴² R.S.R. 47 - 50.

⁴³ R.S.R. 50.

⁴⁴ R.S.R. 2 ¶ 6(a).

⁴⁵ R.S.R. 3 ¶ 7.

⁴⁶ R.S.R. 10 (p. 47).

to pay debt” and “redo pro forma @ \$65-\$80.”⁴⁷ And in November 1998, Public Works in fact ran a new projection that assumed a monthly rate of \$85 – *i.e.* an amount nearly three times greater than the prevailing market rate as determined by Public Works – with an annual increase of five dollars over each of the first four years (“the November Net Revenue Projection”).⁴⁸ Using this rate structure, the November Net Revenue Projection showed enough “revenue to pay debt:” It indicated that with a project cost of approximately \$7.6 million, there would be a surplus of over \$8.9 million after 25 years of operation.⁴⁹ The City or MCDA provided the November Net Revenue Projection to Ames & Fischer.

2. The November 25, 1998 Fax.

On November 25, 1998, Greg Finstad of the public-works department faxed the November Net Revenue Projection to Jack Crimmins at the MCDA.⁵⁰ In an accompanying cover letter, Finstad wrote that there were “major assumptions which can dramatically change the pro forma,” including “the rate structure.”⁵¹ At no time did the City or MCDA convey this fax to Ames & Fischer.⁵²

⁴⁷ R.S.R. 51.

⁴⁸ R.S.R. 54 - 56.

⁴⁹ R.S.R. 56.

⁵⁰ R.S.R. 52-56.

⁵¹ R.S.R. 52.

⁵² R.S.R. 2 ¶ 6(b).

3. The April 1999 SEH Report.

In June 1999, the MCDA issued its Redevelopment Plan and Tax Increment Plan for the Project (“MCDA Plan”).⁵³ This plan was a necessary part of the MCDA’s proposal for tax-increment financing. The MCDA Plan indicated that the “Warehouse Riverfront District is currently undergoing a renaissance[,]”⁵⁴ and that its objective was to “facilitate the rehabilitation and reuse of the historic John Deere Building, and other loft manufacturing buildings... by providing an essential public parking facility for employee customer parking in the area[.]”⁵⁵

In order to be eligible for tax-increment financing, a proposed project must serve a public purpose. On that point, the MCDA Plan states that the “public purposes that will be achieved . . . include . . . the development of needed *public* parking facilities.”⁵⁶ The Plan indicated that the uses of funds for the Project matched the sources, without need to collect against Ames & Fischer.⁵⁷

The MCDA Plan further stated that the “MCDA and appropriate City Departments have... completed extensive legal and financial due diligence for the project[,]” including commissioning a study by the parking consulting firm SEH.⁵⁸ According to the MCDA Plan, SEH’s study confirmed “that the combination of increased demand generated by the renovation of the John Deere Building and

⁵³ S.R. 43-75.

⁵⁴ S.R. 48.

⁵⁵ S.R. 46.

⁵⁶ *Id.* (emphasis added).

⁵⁷ S.R. 61.

⁵⁸ S.R. 53.

general demand in the area would justify the construction of a 640 public parking facility at this location.”⁵⁹ (Patrick Connoy, the MCDA project coordinator, admitted at his deposition that he was “not sure if that’s a correct statement.”⁶⁰)

The SEH study did not support the representation by the MCDA that there was “general demand in the area that would justify the construction of a 640 stall public parking facility at this location.” In fact, the SEH study reached dramatically different conclusions in response to the MCDA’s request for analysis of the Project. The MCDA had requested that SEH address three questions, which SEH answered as follows:

MCDA Question⁶¹	SEH Answer⁶²
1. Does the proposed parking ramp provide only for the proposed development or does it provide parking for the surrounding area?	1. It appears that the proposed parking ramp would mainly provide parking for the proposed development.
2. Is there parking demand for a parking ramp in this location?	2. It does not appear that there is an existing demand for additional off-street pay parking in this area.
3. Will the parking ramp be utilized so that operating and maintenance costs are covered and debts can be retired?	3. It is not clear that with the proposed parking rate of \$85 per month that parking use would meet its financial commitments. Further economic analysis may be needed.

⁵⁹ S.R. 46.

⁶⁰ R.S.R. 59 (p. 137).

⁶¹ R.S.R. 61.

⁶² R.S.R. 66 - 67.

The SEH engineer who prepared the analysis had in his files the November projections that assumed an \$85 monthly parking rate. He also had notes from a telephone conversation with Finstad of Public Works regarding the \$85 rate:

How was rate arrived at?

- Acceptable
- needed to pay bills.⁶³

The engineer testified that he understood that the MCDA wanted him to raise any potential red flags concerning the feasibility of the Project,⁶⁴ and that he felt he was raising such a red flag when he wrote it was “not clear that with the proposed parking rate of \$85 per month that parking use would meet its financial commitments.”⁶⁵ But when MCDA project coordinator Patrick Connoy wrote a report to the City regarding the Project approximately two weeks later, on May 3, 1999, he stated:

Overall [SEH] verified the market, feasibility and location of the proposed parking facility at Tenth and Washington Avenue North.⁶⁶

The SEH report was never provided to Ames & Fischer prior to this litigation,⁶⁷ no further economic analysis was conducted as SEH had proposed,⁶⁸ and no one otherwise communicated to Ames & Fischer that its own consultant

⁶³ R.S.R. 68; 71-72 (pp. 72-73).

⁶⁴ R.S.R. 72 (p. 76).

⁶⁵ R.S.R. 72 (p. 76); 73-74 (pp. 84-85).

⁶⁶ R.S.R. 77.

⁶⁷ R.S.R. 14 (p. 170).

⁶⁸ R.S.R. 70 (p. 67).

believed there was insufficient demand for parking in the area and that it appeared the Project would not be able to “meet its financial commitments.”⁶⁹

4. The July 2, 1999, Negative Cash Flow Projection.

On July 2, 1999, the MCDA’s Mark Winkelhake ran a Cash-Flow Projection for the Ramp using the November Net Revenue Projection. This projection showed that even with an \$85 monthly rate, \$5 annual increases, and 22 years to pay the debt service, the Project still would not cash flow, but would generate a total deficit of approximately \$1.6 million.⁷⁰ Winkelhake never showed this projection to Ames & Fischer.⁷¹ Instead, Winkelhake sent Ames & Fischer’s consultant a Cash-Flow Projection with a July 6, 1999, print date.⁷² Although that projection was stamped “preliminary,” it showed that the Project cash flowed, and that after 25 years the bonds and all debt service would be repaid, with a surplus of over \$3 million.⁷³ Two weeks later, Winkelhake sent the Ames & Fischer consultant another Cash-Flow Projection, labeled Scenario E, with a July 26, 1999, print date.⁷⁴ Scenario E also showed that the Project cash flowed and would generate a surplus of over \$2.7 million over 25 years.⁷⁵

⁶⁹ R.S.R. 2-3, ¶¶ 6(c), 7; R.S.R. 58 (pp. 106-07); R.S.R. 83 (p. 174); R.S.R. 72 (pp. 74-75).

⁷⁰ R.S.R. 84 (column 9).

⁷¹ R.S.R. 2-3, ¶¶ 6(d), 7.

⁷² R.S.R. 89.

⁷³ *Id.*, column 10.

⁷⁴ S.R. 95.

⁷⁵ *Id.*, column 12.

5. The September 27, 1999 Cash Flow Projection.

On September 27, 1999, the day before Ames & Fischer partner Liza Robson signed the Contract on behalf of Ames & Fischer, Winkelhake ran another Cash Flow Projection (Scenario G).⁷⁶ In this Projection, the projected bond interest rates increased, and the total amount of bond interest payable increased to approximately \$12.2 million.⁷⁷ This was an increase of approximately \$400,000 in bond interest expense over the Cash-Flow Projections provided to the Ames & Fischer consultant in July 1999.⁷⁸ In Scenario G the net projected surplus had decreased approximately \$500,000.⁷⁹ Although he acknowledged at his deposition that this information was “important,”⁸⁰ Winkelhake did not immediately provide it to Ames & Fischer. Scenario G was not sent to Ames & Fischer until October 7, 1999,⁸¹ approximately one week after Robson had signed the Contract and committed Ames & Fischer to covering any Shortfall in debt service for the Ramp for the ensuing 25 years.

6. The Overhead Expenses.

Prior to Ames & Fischer’s signing of the Contract on September 28, 1999, neither the City nor the MCDA ever disclosed to Ames & Fischer that it would be responsible for overhead expenses for the entire city-wide parking system. The

⁷⁶ R.S.R. 92.

⁷⁷ *Id.*, column 8.

⁷⁸ *Cf.* R.S.R. 94.

⁷⁹ *Cf.* R.S.R. 94, R.S.R. 92.

⁸⁰ R.S.R. 82 (pp. 129-31).

⁸¹ R.S.R. 91.

November Net Revenue Projection,⁸² upon which the Cash-Flow Projections were based, did not include any estimate for overhead expenses.⁸³ The November Net Revenue Projection estimated the *total* annual operating expenses for the first year of operation to be \$148,438.⁸⁴

But the City later demanded, in its calculation of the Shortfall, that Ames & Fischer pay overhead expenses exceeding \$130,000 per year.⁸⁵ This non-disclosure led Ames & Fischer to believe that its annual operating expenses for the Ramp would be approximately 50% less than what the City and the MCDA knew they would be.

7. \$350,000 Bond Issuance Fee.

Prior to Ames & Fischer's execution of the Contract, the City and the MCDA also failed to inform Ames & Fischer that it would be charged a \$350,000 bond-issuance fee. In all of the Cash Flow Projections done by the MCDA (some of which were sent to Ames & Fischer), there is no reference to this fee. Yet, after the Contract was signed and the bonds were issued, Ames & Fischer was charged \$350,000, which the City is now requiring that Ames & Fischer pay over the 25-year repayment term for the bond issuance.

⁸² R.S.R. 54-56.

⁸³ See R.S.R. 54-55.

⁸⁴ R.S.R. 54.

⁸⁵ See S.R. 214 (City's calculation of alleged amount of Shortfall that includes allocation for overhead expenses); S.R. 218-221 (City's allocation of overhead expenses to Ramp for 2003 and 2004).

As a result of its reliance on the City and MCDA's misrepresentations, Ames & Fischer finds itself tied to a rapidly sinking ship. The projected total Shortfall over the life of the bonds amounts to just under \$17 million – excluding the overhead that the City is attempting to add to Ames & Fischer's obligations.

V. Ames & Fischer Seeks to Amend its Pleadings.

Based on evidence that emerged during discovery, Ames & Fischer decided to seek to amend its complaint and answer and counterclaims (collectively, "Pleadings") to add several additional claims and factual allegations to support those claims. As the amended scheduling order set an October 26, 2005, deadline for completing discovery and hearing all dispositive and non-dispositive motions,⁸⁶ the motion to amend did not need to be filed and served until October 12. However, because the City and MCDA had already scheduled a summary-judgment hearing for October 26, Ames & Fischer provided the City and MCDA with a copy of an early draft of its proposed amended pleadings on September 22, six days before the City's summary judgment brief would be due, so that the City and MCDA would be on notice of Ames & Fischer's intent to add factual allegations when briefing their motion.⁸⁷ Ames & Fischer provided the draft at this time even though the parties had yet to depose ten witnesses.⁸⁸ The draft

⁸⁶ R.S.R. 27.

⁸⁷ See October 12, 2005, Affidavit of Steven J. Weintraut, Ex. N, ¶ 15.

⁸⁸ Ames & Fischer deposed Jerel Shapiro and Michael Monahan on Sept. 23, Thomas Sohrweide and Greg Finstad on Oct. 3, Tim Blazina on October 19, and Michael Sachi on October 20, 2005. The City and MCDA deposed Ed Terhaar and David Steingart on

amended pleadings expressly alleged that the City and MCDA had engaged in misrepresentation through omission.⁸⁹

On Monday, September 26, 2005, Ames & Fischer's attorneys provided the City's and MCDA's attorney with a redlined version of another draft of the proposed Amended Answer and Counterclaims.⁹⁰ Between September 22 and September 26, Ames & Fischer's attorneys proposed to allow the City an additional day to file their brief in support of their motion for summary judgment if the City agreed to consent to the filing and service of Amended Answer and Counterclaims. The City and MCDA's attorneys did not agree to that proposal.⁹¹

VI. The City's Summary Judgment Motion.

Instead, the City and MCDA served their summary judgment brief on Ames & Fischer on September 28, 2005.⁹² At that time, seven witnesses were still to be deposed, including Thomas Sohrweide, the author of the SEH study that the City and MCDA did not provide to Ames & Fischer, and Greg Finstad, who testified as to the basis for the Projections and testified that the City's practice is to share financial information with developers.

Sept. 27, Frank Dunbar on Oct. 4, Ken Sherman on Oct. 7, and Liza Robson on Oct. 19, 2005.

⁸⁹ See October 12, 2005 Affidavit of Steven J. Weintraut, Ex. N, p. 16, ¶ 57.

⁹⁰ See October 12, 2005 Affidavit of Steven J. Weintraut, Ex. O. The September 26 draft had additional amendments to those in the proposed Amended Complaint sent to the City's and MCDA's attorneys on September 22. *Id.*

⁹¹ See October 12, 2005 Affidavit of Steven J. Weintraut, pp. 2-3, ¶ 17.

⁹² S.R. 34.

In their brief, the City and MCDA sought summary judgment on all of Ames & Fischer's tort claims, on the merits and on grounds of statutory and official immunity. And they sought to take advantage of the District Court's denial of the parties' joint request to continue the trial date and other deadlines by three months. With regards to both the merits and the immunity issues, the City and MCDA's analysis was limited to the question of whether it could be liable for misrepresentation based on *the accuracy* of the projections they provided to Ames & Fischer. On the merits, the City and MCDA's brief did not address or even acknowledge the evidence adduced during discovery suggesting that the City and MCDA had misrepresented the basis for the projections and engaged in misrepresentation through nondisclosure. The City and MCDA's immunity argument was similarly limited to the factual allegations stated in Ames & Fischer's original Complaint, even though the City and MCDA knew of Ames & Fischer's misrepresentation-by-omission claim and had learned of the same additional evidence that Ames & Fischer had.⁹³

On October 12, 2005, Ames & Fischer timely filed and served its Notice of Motion and Motion to Amend Its Answer and Counterclaims. In that motion, Ames & Fischer specifically identified the five pieces of information that the MCDA and the City had failed to disclose to Ames & Fischer, sought to add those

⁹³ See Memorandum in Support of City of Minneapolis' and MCDA's Motion for Summary Judgment at 31-34 (identifying the conduct at issue as "evaluat[ing], planning and provi[ding] . . . public parking" and "making the Projections"), Respondent's Appendix (R.A.) 31-34.

factual allegations and a claim for fraudulent non-disclosure,⁹⁴ and included the allegation that the City and MCDA had misrepresented the basis for the Projections as being based on the City's previous experience and then-existing data with respect to its other ramps.⁹⁵

And in its October 17 summary judgment opposition brief, Ames & Fischer set forth those facts and pointed out that the City and MCDA had failed in their summary judgment brief to address the actual conduct at issue:

The conduct giving rise to Ames & Fischer's nondisclosure and misrepresentation claims is not "the City's and MCDA's evaluation, planning, and provision of public parking," as Defendants contend. Rather, the conduct in question is the MCDA's acts of representing that its Projections were based on a "typical city operation," existing data and previous experience, and in failing to provide Ames & Fischer with information that would have cast serious doubt on the financial Projections that the MCDA did disclose.⁹⁶

In their October 24 reply, the City and MCDA stuck to their guns and continued to ignore the factual basis for Ames & Fischer's claims. Rather than attempt to demonstrate immunity as to the actual conduct alleged by Ames & Fischer—based on the actual evidence adduced during discovery and set forth in

⁹⁴ See October 12, 2005 Affidavit of Steven J. Weintraut, Ex. A, pp. 18-19, ¶¶ 68-76.

⁹⁵ See October 12, 2005 Affidavit of Steven J. Weintraut, Ex. A, p. 21, ¶ 80, p. 22, ¶ 88.

⁹⁶ Ames & Fischer Co. II, LLP's Memorandum in Opposition to Defendants City of Minneapolis and MCDA's Motion for Partial Summary Judgment at 50, R.A. 86. On October 19, 2005, Ames & Fischer amended its motion to amend, and requested leave to add the claims of joint enterprise and breach of fiduciary duty.

Ames & Fischer’s summary judgment brief and proposed Amended Answer and Counterclaims—the City and MCDA expressly limited their argument and motion to the allegations contained in Ames & Fischer’s original Complaint and Answer and Counterclaims:

Like all of its other arguments, Ames & Fischer’s argument that its tort claims are not barred by discretionary (statutory) and official immunity are premised on allegations that it did not plead: a so-called ‘policy’ to ‘freely share information relating to financial feasibility of a Project with the developer,’ and the alleged failure to disclose information. *The City’s and MCDA’s summary judgment motion is addressed to the claims Ames & Fischer actually pled, not claims Ames & Fischer now wishes it had pled.*⁹⁷

At oral argument, the City and MCDA acknowledged that Ames & Fischer’s misrepresentation claims are also based on the City and MCDA’s failure to disclose information, but they again failed to address the allegation that they misrepresented the basis for the Projections.⁹⁸ In short, *before the District Court the City and MCDA never even attempted to demonstrate that they enjoy immunity to claims based on the representations as to the basis for the Projections.*

The District Court denied the City and MCDA’s motion as it related to Ames & Fischer’s tort claims without explanation. This appeal followed.

⁹⁷ Reply Memorandum in Support of City of Minneapolis’ and MCDA’s Motion for Summary Judgment at 7, R.A. 96.

⁹⁸ See T. 18-19; 22 (“[A]ll of these statements they are accusing the City of making are qualified statements.”).

ARGUMENT

I. Standard of Review.

The standard of review applicable to this appeal is not disputed. Ames & Fischer agrees with the City and MCDA that the application of immunity presents a question of law that this court reviews de novo.⁹⁹

II. **The District Court’s ruling should be affirmed without consideration of the merits of Appellants’ arguments because they did not establish – nor even attempt to establish – an entitlement to immunity as to each tortious act alleged by Ames & Fischer.**

As the City and MCDA recognize, the availability of immunity depends on the nature of the specific acts or conduct alleged.¹⁰⁰ Identification of the specific acts underlying the plaintiff’s tort claims is therefore the “starting point” in any immunity analysis.¹⁰¹ A court weighing an immunity claim must apply the principles of immunity to *each tortious act* alleged by the plaintiff.¹⁰² A

⁹⁹ See *Schroeder v. St. Louis County*, 708 N.W.2d 497, 503 (Minn. 2006).

¹⁰⁰ See *Watson v. Metro. Transit Comm’n*, 553 N.W.2d 406, 411 (Minn. 1996) (reviewing court “must examine with particularity the nature of the conduct the plaintiff alleges as the basis of a negligence claim”) (cited by the City at 15). See also *Schroeder*, 708 N.W.2d at 504 (Minn. 2006) (immunity analysis focuses on the “precise government conduct being challenged”); *Sletten v. Ramsey County*, 675 N.W.2d 291, 306 (Minn. 2004) (“the starting point” for immunity analysis is “identification of the precise governmental conduct at issue”); *Pletan v. Gaines*, 494 N.W.2d 38, 76 (Minn. 1992) (burden on governmental entity claiming immunity “to establish that the specific conduct or decision complained of is within the exception”); *Olson v. Ramsey County*, 509 N.W.2d 368, 371 (Minn. 1993) (“In analyzing any immunity question it is essential to identify the precise governmental conduct at issue”).

¹⁰¹ *Sletten*, 675 N.W.2d at 306 (“the starting point” for immunity analysis is “identification of the precise governmental conduct at issue”).

¹⁰² *Watson*, 553 N.W.2d at 416 (“Since we have determined that all four acts or decisions challenged by Watson are protected by immunity, the MTC is entitled to judgment as a matter of law, and denial of summary judgment was not proper.”).

government defendant is not immune to suit unless it is immune to claims arising out of all of the alleged tortious conduct.¹⁰³

Under these principles, the City and MCDA could have prevailed on summary judgment only if they had established that they are immune to claims arising out of *each* tortious act alleged by Ames & Fischer. Those acts, as Ames & Fischer explained to the District Court on summary judgment, were the following:

(1) MCDA's alleged misrepresentations that the Projections were based on 'existing data and previous experience' and a 'typical city operation,' 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.¹⁰⁴

But in neither its written nor oral arguments before the District Court did the City and MCDA address whether it is immune to claims arising out of its representations as to the basis for the Projections. *Indeed, it expressly excluded that issue from the scope of its motion.*¹⁰⁵ Because the City and MCDA had to prevail on this issue in order to establish the broad immunity they sought, and because they did not even address the issue, the District Court could have properly

¹⁰³ See *Schroeder*, 708 N.W.2d at 497 (remanding case for trial where county had demonstrated its employee had immunity for claims arising out of his driving road grader against flow of traffic but not for operating grader without lights at dusk).

¹⁰⁴ See Ames & Fischer Co. II, LLP's Memorandum in Opposition to Defendants City of Minneapolis and MCDA's Motion for Partial Summary Judgment at 50, R.A. 86.

¹⁰⁵ See Reply Memorandum in Support of City of Minneapolis' and MCDA's Motion for Summary Judgment at 7, R.A. 96.

denied summary judgment on this ground alone. Its ruling should therefore be affirmed.¹⁰⁶

III. If this Court considers the merits of the Appellants' arguments, its decision should be limited to the issues that the City and MCDA actually presented to the District Court.

As general rule, this court does not consider matters not argued and considered in district court.¹⁰⁷ Accordingly, any ruling in this case should be limited to the immunity issues that were presented to the District Court – namely, whether the City and MCDA are immune to suit on claims arising out of the accuracy of the Projections and out of the City and the MCDA's failure to provide Ames & Fischer with information it was entitled to receive. This Court should not weigh the City and MCDA's claim to immunity as to their misrepresentation of the basis for the Projections because this issue was not presented to or considered by the District Court.

Consideration of the City and MCDA's possible immunity to claims arising out of representations of the basis for the Projections would also be inappropriate because the City and MCDA have not briefed the issue on appeal. Instead, they present the sole issue as whether or not they are immune to claims arising out of the general conduct of "making and sharing the Projections." By not briefing the specific issue of immunity for misrepresenting the basis for the Projections, the

¹⁰⁶ See *Myers v. Price*, 463 N.W.2d 773, 775 (Minn. App. 1990) ("A district court's summary judgment ruling will be affirmed if it can be sustained on any grounds."), *review denied* (Minn. Feb. 4, 1991).

¹⁰⁷ See *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988).

City and MCDA have waived that issue.¹⁰⁸ And the City and MCDA cannot overcome that waiver by addressing the issue for the first time in a reply brief.¹⁰⁹

Strict adherence to the waiver rules is particularly appropriate in this case because the City and MCDA *have affirmatively chosen for strategic reasons* not to address the immunity issues relating to its misrepresentation of the basis for the Projections. After Ames & Fischer argued in its summary judgment opposition brief that the City and MCDA had failed to demonstrate an entitlement to immunity for the specific conduct alleged by Ames & Fischer,¹¹⁰ the City and MCDA's response was to urge the court not to consider any allegations outside of the original Complaint and Answer and Counterclaims.¹¹¹ But there is no proper basis for limiting the immunity analysis to the pleadings, at either the summary judgment stage or on appeal. On this point, the *Watson* case is instructive.

In *Watson*, a bus passenger had sued a transit authority and one of its bus drivers for negligence after being assaulted on a bus. In his complaint, the passenger alleged that the transit authority was negligent for “fail[ing] to take reasonable steps to protect or assist [him] when he sustained injury from fellow passengers.”¹¹² On summary judgment, the plaintiff presented evidence that the

¹⁰⁸ See *Melina v. Chaplin*, 327 N.W.2d 19, 20 (Minn. 1982) (issues not briefed on appeal considered waived).

¹⁰⁹ See *McIntire v. State*, 458 N.W.2d 714, 717 n.2 (Minn. App. 1990) (waived claims cannot be revived by addressing them in for first time in reply brief), *review denied* (Minn. Sept. 28, 1990).

¹¹⁰ R.A. 50.

¹¹¹ See Reply Memorandum in Support of City of Minneapolis' and MCDA's Motion for Summary Judgment at 7, R.A. 96.

¹¹² *Watson*, 553 N.W.2d at 411.

defendants had breached the duty of care in four specific ways. The district court denied the defendants' motion without considering the alleged acts of negligence individually, and the authority appealed. On review, both this Court and the supreme court resolved the immunity issues by analyzing each of the alleged negligent acts separately, including acts the plaintiff had apparently first identified in his summary judgment brief.¹¹³ As the supreme court explained, the defendant had the burden of responding to the allegations "of which it has been put on notice."¹¹⁴

In this case, the City and MCDA had even greater notice of the allegations than the *Watson* defendant had, as Ames & Fischer provided the City and MCDA with a proposed Amended Complaint that expressly contended the MCDA and City had omitted material information in their communications with Ames & Fischer regarding the projections and the basis for the projections.¹¹⁵ And Ames & Fischer set forth *all of the facts* in its summary judgment opposition brief,¹¹⁶ providing the City and MCDA ample opportunity to address those facts. The City and MCDA's attempt to limit the immunity discussion to the allegations contained in Ames & Fischer's initial pleadings lacks merit also because Rule 56 required the District Court to consider not only the pleadings, but also "*depositions, answers to interrogatories, and admissions on file, together with the affidavits, if*

¹¹³ See *id.*; *Watson v. Metro. Transit Comm'n*, 540 N.W.2d 94 (Minn. App. 1995).

¹¹⁴ *Watson*, 553 N.W.2d at 416.

¹¹⁵ October 12, 2005 Affidavit of Steven J. Weintraut, Ex. O, p. 17, ¶ 63.

¹¹⁶ R.A. 46-59.

any,” to determine whether either party was entitled to a judgment as a matter of law.¹¹⁷

The City and MCDA may argue that they properly limited the immunity analysis to the allegations in the initial pleadings because the District Court had not – and ultimately did not – grant Ames & Fischer’s motion to amend its pleadings to include, among other allegations, express claims of fraudulent and negligent nondisclosure. If made, this argument should be rejected. Even without an express claim of fraudulent nondisclosure in the case, the City and MCDA face potential liability for nondisclosure because Ames & Fischer has alleged fraudulent and negligent misrepresentation, and a misrepresentation claim may be based either on an affirmative statement that is false or on a failure to disclose “certain facts that render the facts that are disclosed misleading.”¹¹⁸ Therefore, even without amending its pleadings to add an express claim of fraudulent or negligent disclosure, Ames & Fischer would be able to present evidence of the City and MCDA’s failure to disclose information.¹¹⁹ The merits and ultimate disposition of Ames & Fischer’s motion to amend therefore has no relationship to the immunity issues.

¹¹⁷ Minn. R. Civ. P. 56.03.

¹¹⁸ *Dakota Bank v. Eiesland*, 645 N.W.2d 177, 183-84 n.4 (Minn. App. 2002). *See also* 4 *Minnesota Practice*, CIVJIG 57.30 (“A person who speaks must say enough to prevent his or her words from misleading the other person.”); *M.H. v. Caritas Family Servs.*, 488 N.W.2d 282, 288 (Minn. 1992) (“[A] duty to disclose facts may exist when disclosure would be necessary to clarify information already disclosed, which would otherwise be misleading.”)

¹¹⁹ *See* 4 *Minnesota Practice*, CIVJIG 57.30 (“A person who speaks must say enough to prevent his or her words from misleading the other person.”)

Because the City and MCDA did not seek summary judgment on immunity to claims arising out of their representations as to the basis for the Projections, that issue is not properly before this Court for decision. Any appellate ruling on the merits of the immunity issues should be limited to the issues actually presented to the District Court—which was whether the City and MCDA are immune to claims relating to the accuracy of the Projections and to their failure to provide Ames & Fischer with information it was entitled to receive.

IV. Even if this Court considered the City and MCDA’s claim to immunity as to all of the alleged conduct, the District Court’s ruling should be affirmed because none of that conduct involved a balancing of policy objectives or discretionary functions.

A. The City is not entitled to statutory immunity because none of the challenged conduct involved a balancing of policy objectives.

The Municipal Tort Liability Act provides that a municipality is immune from tort liability for “[a]ny claim based upon the performance [of] or the failure to exercise or perform a discretionary function or duty, whether or not the discretion is abused.”¹²⁰ The discretionary-function exception is construed narrowly, with the focus on its “underlying purpose – to preserve the separation of powers by preventing courts from passing judgment on policy decisions entrusted to coordinate branches of government.”¹²¹ Immunity does not turn on “whether the government action involved the exercise of discretion in a general sense, because almost every government function does involve some exercise of

¹²⁰ Minn. Stat. § 466.03, subd. 6.

¹²¹ *Zank v. Larson*, 552 N.W.2d 719, 721 (Minn. 1996).

discretion,” but rather depends on whether “*the challenged activity involved a balancing of policy objectives.*”¹²²

A municipality is protected by statutory immunity only when it produces evidence that “the conduct at issue was of a policy-making nature involving social, political, or economic considerations.”¹²³ Because neither the City and MCDA’s failure to disclose negative information about the feasibility of the Project nor their misrepresentation of the basis for the Projections involved a balancing of policy considerations, the City and MCDA are not statutorily immune to claims based on those acts.

1. The misrepresentation of the basis for the Projections was not the result of a balancing of policy considerations.

The *Aldrich* case cited by the City and MCDA provides the proper framework for considering a claim of immunity to liability for an affirmative misrepresentation. In that case, former technical-college students unhappy with a computer course they had enrolled in sued the college for fraud and misrepresentation, alleging that the college had made false statements about the course in promotional materials. On appeal from a denial of an immunity-based summary-judgment motion, this Court explained that the conduct at issue for immunity purposes was the “making [of] the statements,” and that immunity in that case therefore turned on “*whether making the statements involved a policy*

¹²² *Id.*

¹²³ *Fisher v. County of Rock*, 596 N.W.2d 646, 652 (Minn. 1999).

decision or an operational decision.”¹²⁴ Under this standard, immunity is available to the City and MCDA only if they can demonstrate that *their representation* to Ames & Fischer that the Projections were based on “existing data and previous experience” was the result of a policy decision that involved the balancing of policy objectives. Nothing in the record – or in the City and MCDA’s summary-judgment or appellate arguments – supports such a conclusion.

2. The City and MCDA’s failure to disclose information that cast doubt on the financial feasibility of the Project was not the result of a balancing of policy considerations.

Statutory immunity is also unavailable as to the City and MCDA’s failure to disclose negative information about the Project because the acts of nondisclosure were not the result of balancing policy considerations. Indeed, the record suggests that to the extent the City and MCDA engaged in *any* balancing of policy considerations relating to information-sharing, that balancing resulted in a policy of *full disclosure to developers* working with the City and MCDA.

In the sole passage of the City and MCDA’s brief describing their approach to sharing information, the City and MCDA concede that 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

¹²⁴ *Aldrich v. Northwest Technical College*, 2001 WL 799997, * 3 (Minn. App., July 11, 2001) (S.R. 226-228).

communicate between the groups.”¹²⁵ And this concession finds substantial additional support elsewhere in the record. For example, Michael Monahan, the City’s former director of parking and transportation, testified that if an outside party was operating under an incorrect assumption as to the financial feasibility of a project, it would be “appropriate” for the City to inform the party of its misassumption.¹²⁶ Greg Finstad concurred, testifying that

in these type of development-type projects that it’s—the City is sort of an open book; you share the information with the developer. . . . [The developer] is going to be a partner on the project so there would be no reason not to share that information with the developer.”¹²⁷

Far from supporting the City and MCDA’s argument, Finstad’s testimony suggests the city recognized policy reason *for* sharing all information—that a project is more likely to succeed as a result of open and complete communication between the City and the developer.

Because the City and MCDA cannot plausibly argue that the acts of nondisclosure in this case were the result of a balancing of policy objectives, they offer that their failure to disclose the negative information about the Project was consistent with City “policy” that “due diligence is a developer’s personal

¹²⁵ Appellants’ Brief at 20-21.

¹²⁶ R.S.R. 30 (p. 32).

¹²⁷ R.S.R. 5-6, 7 (pp. 27-31, 36).

responsibility notwithstanding any sharing of information.”¹²⁸ This argument should be rejected for at least four reasons.

First, this so-called “policy” was not presented to the District Court for consideration. It is an entirely new concept manufactured for the purposes of this appeal and should be disregarded for that reason alone.

Second, the record contains no evidence that the City actually adopted or even considered adopting any such policy. Indeed, *the paragraph in which the City and MCDA describes how the City balanced various policy alternatives contains not a single citation to the record.*¹²⁹ The credibility of that description is further undermined by the City’s remarkable claim that it “could have refused” to share its projections with developers.¹³⁰ Of course, all government data is available to the public unless classified by statute as nonpublic.¹³¹ Statements by random City employees as to their own personal understanding and expectations do not constitute a balancing of policy objectives.

Third, the statement “due diligence is a developer’s personal responsibility notwithstanding any sharing of information” is a legal conclusion, not a policy. And it is a legal conclusion that may not even apply in this case in light of the District Court’s summary judgment ruling that there are genuine issues of material

¹²⁸ Appellants’ Brief at 22.

¹²⁹ *See id.*

¹³⁰ *Id.*

¹³¹ *See* Minn. Stat. § 13.03, subd. 1. The stated alternative that the City could assume all risks on development projects is similarly quizzical.

fact as to whether the parties were engaged in a joint enterprise.¹³² If they were, the City and MCDA owed Ames & Fischer a fiduciary duty,¹³³ and that duty would have required full disclosure of the negative information about the Project.¹³⁴

Fourth, and finally, the alleged “policy” is based on the false premise that a party’s duty to carry out its own due diligence operates to free the other party from any and all duty to disclose information. Put differently, the City and MCDA’s position assumes that parties to an arm’s length transaction do not—and *cannot*—have any duty to provide full and complete disclosure to each other. This is not the law. “A duty to disclose facts may exist under certain circumstances, such as when a confidential or fiduciary relationship exists between the parties *or when disclosure would be necessary to clarify information already disclosed, [that] would otherwise be misleading,*”¹³⁵ and this rule applies even to parties to an arm’s length transaction.¹³⁶ Therefore, even if the City had adopted a policy “that

¹³² See Order on City of Minneapolis’ and MCDA’s Motion for Summary Judgment and Ames & Fischer’s Motion to Amend at 9. (A.A. 40).

¹³³ See, e.g., *Lipinski v. Lipinski*, 227 Minn. 511, 519, 35 N.W.2d 708, 712 (1949) (noting that a joint venture relationship is “fiduciary in character and that each of the parties to the agreement owe to the others the highest degree of good faith”); *Bringgold v. Stucki*, 162 Minn. 343, 345, 202 N.W. 739, 740 (1925) (noting that those engaged in a joint venture “must act in entire good faith toward one another.”),

¹³⁴ *L & H Airco, Inc. v. Rapistan Corp.*, 446 N.W.2d 372, 380 (Minn. 1989).

¹³⁵ *Id.*

¹³⁶ See, e.g., *Taylor Investment Corp. v. Weil*, 169 F. Supp.2d 1046 (D. Minn. 2001) (applying rule to transaction between two companies but finding no facts to support obligation to disclose); *American Computer v. Boerboom Intern.*, 967 F.2d 1208 (8th Cir. 1992) (same); *Lakeland Tool & Eng’g v. Thermo-Serv*, 916 F.2d 476 (8th Cir. 1990) (applying standard to commercial transaction; finding no nondisclosure of “material” facts).

due diligence is a developer's responsibility," such a policy would in no way categorically preclude a duty to provide information, or the creation of such a duty through partial disclosure.

In short, the decision to provide Ames & Fischer with positive assessments of the feasibility of the Project but not more negative information was not based on a balancing of policy objectives. And the City and MCDA never claimed otherwise in the District Court.

B. The City and MCDA are not entitled to official immunity.

Under the common-law doctrine of official immunity, a government official who is charged by law with duties calling for the exercise of judgment or discretion is not personally liable to an individual for damages unless the official is guilty of a willful or malicious act.¹³⁷ The availability of official immunity turns on whether the official's actions are discretionary or ministerial, because "only discretionary decisions are immune from suit."¹³⁸ A discretionary decision involves individual professional judgment that necessarily reflects the professional goal and factors of a situation.¹³⁹ "In contrast, a ministerial duty is one which leaves nothing to discretion; it is absolute, certain, and imperative, involving merely execution of a specific duty arising from fixed and designated facts."¹⁴⁰

¹³⁷ See *Elwood v. Rice County*, 423 N.W.2d 671, 677 (Minn. 1988).

¹³⁸ *Wiederholt v. City of Minneapolis*, 581 N.W.2d 312, 315 (Minn. 1998).

¹³⁹ See *Janklow v. Minnesota Bd. of Examiners for Nursing Home Administrators*, 552 N.W.2d 711, 716 (Minn. 1996).

¹⁴⁰ *Wiederholt*, 581 N.W.2d at 315 (quotation omitted).

The City and MCDA contend that the conduct at issue in this case is “making and sharing the Projections.”¹⁴¹ But a proper official immunity analysis requires separate examination of *each underlying allegation of wrongful conduct*.¹⁴² The Court must therefore determine whether the City and MCDA can invoke official immunity as to their failure to disclose negative information about the Project and their misrepresentation of the basis for the Projections.

1. Official immunity does not protect the City and MCDA from suit on claims arising out of their failure to provide Ames & Fischer with information that cast doubt on the financial-feasibility information that it did provide.

The City and MCDA are not entitled to official immunity as to claims arising out of the alleged acts of nondisclosure, for two reasons. First, at a minimum the record presents a factual dispute as to whether the City had adopted a policy of freely sharing with developers all information relating to financial feasibility of a project. If it had such a policy, then forwarding the nondisclosed pieces of information to Ames & Fischer would have involved the “mere execution” of that policy,¹⁴³ and thus ministerial conduct.¹⁴⁴

Second, the City and MCDA have failed to identify the specific government official(s) whose alleged exercise of judgment or discretion resulted

¹⁴¹ Appellants’ Brief at 28.

¹⁴² See *Olson*, 509 N.W.2d at 371 (analyzing immunity question by addressing separately different aspects of governmental conduct).

¹⁴³ *Wiederholt*, 581 N.W.2d at 315.

¹⁴⁴ See *Larson v. Indep. Sch. Dist. No. 314*, 289 N.W.2d 112, 119 (1979) (ministerial duty leaves nothing to discretion; it is “a simple, definite duty arising under and because of stated conditions”).

in the City and MCDA's failure to share the negative financial-feasibility information with Ames & Fischer – or even whether it was City or MCDA official(s). Unlike statutory immunity, which extends to the government as an entity, “official immunity applies only in situations involving the *act of an individual state official*.”¹⁴⁵ Accordingly, for official immunity to be available, there must be a specific “official” responsible for the alleged conduct, *see id.*, and that official must be identified to the court.¹⁴⁶

Without knowing whose decisions are at issue in this case, it cannot be determined whether granting immunity would serve the purpose of the official immunity doctrine, which is to protect “public officials from the fear of personal liability that might deter independent action and impair effective performance of their duties.”¹⁴⁷ The deterrent effect of potential liability will vary depending on the employee's responsibilities and level or authority within the organization. Further, without knowing the identity of the responsible individual(s), it is also impossible to assess whether the alleged nondisclosure involved “individual professional judgment that necessarily reflects the professional goal and factors of a situation.”¹⁴⁸ Official immunity turns on the nature, quality, and complexity of

¹⁴⁵ *Janklow*, 552 N.W.2d at 715 (emphasis added).

¹⁴⁶ *See LePage v. State of Minnesota*, 1997 WL 714712 * 4 (Minn. App. Nov. 18, 1997) (finding that “purposes of vicarious liability would not be served” by applying doctrine in case where individual state official who made challenged decision was not identified) (R.S.R. 105-06).

¹⁴⁷ *Elwood*, 423 N.W.2d at 678.

¹⁴⁸ *See Janklow*, 552 N.W.2d at 716.

the decision-making process,¹⁴⁹ and these factors cannot be assessed without knowing the duties and discretionary powers of the decision maker in question. Identifying the specific officials entitled to official immunity is the City and MCDA's burden,¹⁵⁰ and they have failed to meet that burden.

For both of these reasons, the District Court's ruling that the City and MCDA are not entitled to vicarious official immunity should be affirmed.

2. Vicarious official immunity does not shield the City and MCDA from liability for claims relating to misrepresentation of the basis for the Projections.

In addition to the failure to identify the precise official(s) who allegedly acted in a discretionary capacity when misrepresenting the basis for the Projections (see argument above), the City and MCDA also do not enjoy vicarious official immunity for that misrepresentation because the act of accurately stating the basis for the Projections is not discretionary conduct. There was simply no professional judgment involved in deciding whether to represent accurately the underpinnings of the Projections, nor the exercise of any discretion reflecting a *legitimate* professional goal that City and MCDA officials could have been pursuing.

¹⁴⁹ See *S.L.D. v. Kranz*, 498 N.W.2d 47, 50 (Minn. App. 1993).

¹⁵⁰ See *Rehn v. Fischley*, 557 N.W.2d 328, 333 (Minn. 1997) (party asserting immunity has burden of showing it is entitled to immunity).

3. Even if the conduct underlying Ames & Fischer's tort claims was discretionary, the City and MCDA are not entitled to vicarious official immunity because there is a genuine fact dispute as to whether the officials acted with malice.

Malicious or willful actions are not protected by official immunity.¹⁵¹

Thus, even if the City and MCDA could establish that City and MCDA officials were engaged in discretionary action when representing the basis for the Projections and failing to make necessary disclosures to Ames & Fischer, official immunity would be unavailable if those officials acted willfully or with malice.

In the official immunity context, willful and malicious are synonymous and mean “the intentional doing of a wrongful act without legal justification or excuse, or, otherwise stated, the willful violation of a known right.”¹⁵² Whether or not an official acted willfully or with malice is usually a question of fact to be resolved by a jury.¹⁵³ To defeat a claim of official immunity on summary judgment, the plaintiff need only demonstrate that a reasonable jury could infer malice from the evidence viewed in a light most favorable to the plaintiff.¹⁵⁴

¹⁵¹ See *Elwood*, 423 N.W.2d at 677.

¹⁵² *Rico v. State*, 472 N.W.2d 100, 107 (Minn. 1991).

¹⁵³ See *Johnson v. Morris*, 453 N.W.2d 31, 41-42 (Minn. 1990); *Soucek v. Banham*, 503 N.W.2d 153, 160 (Minn. App. 1993).

¹⁵⁴ See *Soucek*, 503 N.W.2d at 161 (affirming denial of summary judgment on immunity because “[v]iewing the evidence in the light most favorable to respondent . . . a jury could reasonably conclude the officers knew the animal was a dog when they shot it and they were acting with willful intent.”); *Johnson v. Morris*, 453 N.W.2d at 42 (affirming reversal of district court judgment granting immunity because, “facts exist which would permit a jury to infer that [officer] . . . acted maliciously and willfully”). To the extent that the unpublished *Reigstad* case “reject[ed] [the] argument that willfulness and malice can be inferred from the circumstances,” as the City contends, that case misstates the law.

In this case, the record before the District Court contains ample evidence from which a reasonable jury could infer that City and MCDA officials willfully misrepresented the basis for the projections and withheld information they knew Ames & Fischer was entitled to receive and that City policy required them to provide, including but not limited to the following:

- The City and MCDA provided Ames & Fischer projections that cast the financial feasibility of the Project in a positive light and withheld negative information. This neat division between information provided (positive) and information withheld (negative) is strong circumstantial evidence of willfulness.
- Ames & Fischer presented to the District Court substantial evidence showing that the City and MCDA wanted a public parking ramp in vicinity of the Building for its own purposes of promoting general economic development in the area, and the District Court made an express factual finding to this effect.¹⁵⁵ This provides a clear motive for misleading Ames & Fischer. A jury could reasonably infer from this evidence that the City and MCDA withheld pessimistic analyses of the Project out of fear that Ames & Fischer might withdraw from the Project.
- Consistent with their failure to disclose negative information to Ames & Fischer, the City and MCDA exaggerated parking needs and demand in the MCDA Plan in order to secure TIF financing for the Project. The MCDA project coordinator admitted that he is “not sure” whether the statements about parking demand in the MCDA Plan are correct.¹⁵⁶

Therefore, even if the conduct underlying Ames & Fischer’s tort claims amounted to discretionary action, the City and MCDA were not entitled to official immunity

¹⁵⁵ See Order on City of Minneapolis’ and MCDA’s Motion for Summary Judgment and Ames & Fischer’s Motion to Amend at 4. (A.A. 35).

¹⁵⁶ R.S.R. 59 (p. 137).

on those claims because there is a fact issue as to whether City and MCDA officials acted willfully or with malice. And the presence of this fact issue requires affirmance of the District Court's ruling, regardless of the grounds for that ruling and regardless of whether Ames & Fischer recited these facts from the record in its summary-judgment briefing.¹⁵⁷

CONCLUSION

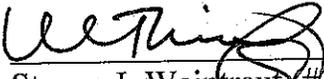
Because the City and MCDA did not even attempt in the District Court to establish an entitlement to immunity as to each tortious act alleged by Ames & Fischer, the District Court's order denying summary judgment on all of Ames & Fischer's tort claims should be affirmed. Alternatively, a reconsideration by this Court of the issues that were actually raised by the City and MCDA should not extend to the question of immunity to claims arising out the misrepresentation of the basis for the projections, as the City and MCDA expressly chose not to present that issue to the District Court. If all of the immunity issues are considered, including those not raised below, the City and MCDA should not be found immune to trial on Ames & Fischer's tort claims because the conduct challenged by Ames & Fischer did not involve a balancing of policy of objectives, and there

¹⁵⁷ See, e.g., *Witcher Constr. Co. v. St. Paul Fire & Marine Ins. Co.*, 550 N.W.2d 1, 8 (Minn. App. 1996) ("If the [district] court arrives at a correct decision, that decision should not be overturned regardless of the theory upon which it is based."), *review denied* (Minn. Aug. 20, 1996); *Schoeb v. Cowles*, 279 Minn. 331, 336, 156 N.W.2d 895, 898 (1968) (applying "the doctrine, long accepted by this court, that a correct decision will not be reversed on appeal simply because it is based on incorrect reasons").

are genuine issues of material fact as to whether City and MCDA officials acted willfully or with malice.

Dated: March 20, 2006.

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A 05-2316
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IN COURT OF APPEALS

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Appellant,

v.

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

and

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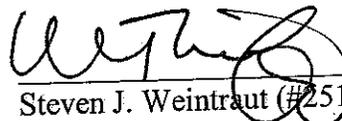
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I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subd 3(a)(1), for a brief produced with a proportional font. The length of the brief is 10,260 words. This brief was prepared using Microsoft Word 2003.

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