STATE OF MINNESOTA
COUNTY OF RAMSEY

DISTRICT COURT
SECOND JUDICIAL DISTRICT

Case Type: Civil Other
File No.: 62-CV-20-5188
Judge: John H. Guthmann

James Charles Winterer, Kathryn McGuire, Catherine M. Hunt and Howard J. Miller, Bruce J. Faribault, Bruce Hoppe,

Petitioners,

v.

The City of Saint Paul, a body corporate and politic under Minnesota law,

Respondent.

ORDER VACATING ALTERNATIVE WRIT OF MANDAMUS AND DISMISSING PETITION FOR WRIT OF MANDAMUS WITH PREJUDICE

Petitioner's ex parte Petition for an Alternative Writ of Mandamus was filed on October 28, 2020. On November 2, 2020, the court issued an Alternative Writ of Mandamus ordering respondent to comply with the request for relief or show cause why it need not do so. In lieu of an answer, respondent filed a motion to dismiss under Rule 12 of the Minnesota Rules of Civil Procedure. A hearing on the motion to dismiss was held on January 29, 2021 via Zoom, before the Honorable John H. Guthmann, Judge of District Court. Martin H.R. Norder, Esq., appeared on behalf of petitioner. Kyle Citta, Esq., appeared on behalf of respondent City of St. Paul. Based upon all of the files, records, submissions and arguments of counsel herein, the court issues the following:

STATEMENT OF FACTS

The court compiled the following Statement of Facts from the Petition for an Alternative Writ of Mandamus ("Petition"), documents referenced in the Petition, and jurisdictional affidavits:

1. Petitioners are individual citizens of the City of St. Paul ("St. Paul") and each belongs to an organization called Neighbors for a Livable St. Paul. (Pet. for Alt. Writ of Mandamus ¶¶ 1-6.)

2. St. Paul is currently developing the former Ford Assembly Plant property ("the Ford Site") located in St. Paul's Highland Park district. (*Id.* ¶¶ 1-6.)

3. To support development, St. Paul adopted the Ford Site Zoning and Public Realm Master Plan ("Ford Master Plan") and the Ford Site Open Space Guidelines Report ("Open Space Guidelines"). (*Id.* ¶¶ 9; *id.*, Exs. 1-2.)

4. Chapter 4 of the Ford Master Plan states that each development lot must have a certain percentage of "open space coverage" that is distinct from the percentage of the parcel that is occupied by the building. (*Id.*, Ex. 1 at 47.)

5. Chapter 4 of the Ford Master Plan states: "Required open space coverage for lots is addressed in 'Zoning – Building Types' chapter. Open space is defined as areas covered by landscape materials, gardens, walkways, patios, recreation facilities, or play areas." (*Id.*, Ex. 1 at 47.)

6. The "Zoning—Building Types" chapter of the Ford Master Plan is Chapter 6. (*Id.*, Ex. 1 at 5 (Table of Contents).)

7. A separate chapter of the Ford Master Plan, Chapter 8: Parks and Open Space, states that "[d]esign and performance standards for specific elements are provided in the Ford Site Open Space Guidelines Report, found on the City's Ford web pages." (*Id.*, Ex. 1 at 133.)

8. In the Open Space Guidelines, "open space" is defined as

> Natural lands, athletic fields (even if managed by non-city entity), recreational lands, community gathering spaces and recreational buildings which are publicly-owned and/or publicly-accessible. *The term is not intended to refer to privately-owned lands,* yards, urban plazas, storm water treatment areas or public street rights-of-way unless, through agreement, the land is designated as public space with a recreational and/or habitat function.

(*Id*., Ex. 2 at 3 (emphasis added).) According to the plain language of the Open Space Guidelines, the definition of "open space" is inapplicable to Chapter 4 "open space coverage" requirements on private development lots.

9. St. Paul contracted with Ryan Companies US, Inc. ("Ryan") to develop the Ford Site. (*Id*. ¶ 16.)

10. As part of the Ford Site development, Ryan proposed a mixed-use building located at 2170 Ford Parkway (the "Project"). (*Id*. ¶ 17.) The Project is a "private site development project[]." (*Id*., Ex. 3 at 3.)

11. The open space coverage requirement applicable to the Project is found on page 101 of Chapter 6 in the Ford Master Plan. (*Id*., Ex. 1 at 101.) The lot was limited to a maximum of 70% building coverage and a minimum of 25% "lot coverage for open space." (*Id*.)

12. According to plans for the Project, the building included 22,000 square feet of rooftop amenity space. (*Id*., Ex. 3 at 11.) The Ford Master Plan addresses treatment of rooftop green areas as follows:

> **Functional Green Roof Area** shall be defined as area atop a roof surface on a building, open to the sky and air, which is surfaced with soil and living plant materials for the purpose of retaining rainwater and absorbing heat from sunlight. The depth of substrate and planted material shall be at least two (2) inches to be considered Functional Green Roof Area.
>
> . . . .
>
> Where a rooftop surface above the third floor includes Functional Green Roof Area, adjacent open-air outdoor space intended for use by building occupants or other persons that does not meet the definition of Functional Green Roof Area, such as a patio or deck, is eligible to meet up to 50% of the open space requirements of the property/site, as measured in gross square feet of the usable adjacent space.

(*Id*., Ex. 1 at 57.)

13. On May 26, 2020, Ryan submitted a Zoning Variance Application to St. Paul for the Project, seeking several variances. (*Id*. ¶ 18; *id*., Ex. 3.)

14. The Zoning Variance Application includes Variance Request 4: Lot Coverage – Open Space in which Ryan requests the following:

> Ryan is pursuing a variance for the minimum amount of open space of 25% as required by the City's Masterplan. The project provides approximately 7,300 SF (6.3%) of open space around the building exterior at ground level and approximately 22,000 SF (19.1%) of rooftop amenity space above the ground floor grocery and parking deck, which together equates to 25.4% of open space on the site. When rooftop square-footage is adjusted per the Masterplan, which limits the rooftop amenity space to count towards only half (or 12.5%) of the total open space calculation, the percentage drops to 18.8% which is short of the required 25%.
>
> The values above also do not consider the additional open space provided by some of the resident balconies on the north and west sides of the building elevated above the ground floor. While these elevated balconies are only available to a limited number of residents, they still contribute to the open space on the site as they will have people actively using the space on a frequent basis.

(*Id*., Ex. 3 at 11.)

15. Following its submission, the Zoning Variance Application was reviewed by St. Paul's Zoning Administrator, Yaya Diatta. (11/17/20 Diatta Decl. ¶¶ 1, 4-6.)

16. Based on his review of the Zoning Variance Application, Mr. Diatta concluded that Variance Request 4: Lot Coverage – Open Space did not actually require a variance and that the planned use fully complied with the definition of "open space coverage" as set forth in Chapter 4, page 47 of the Ford Site Master Plan. (*Id*. ¶¶ 7-8.) He appears to have determined that the rooftop space should count 100% towards the 25% minimum "open space coverage" requirement rather than 50% as Ryan assumed in its variance application.

17. Mr. Diatta's decision was communicated to Ryan via correspondence authored by Principal City Planner Tia Anderson. (*Id*. ¶ 9.) In her June 26, 2020 email to Ryan, Ms. Anderson informed Ryan that St. Paul would not require Ryan to seek a variance in connection with the 25%

open space coverage requirement. (Pet. for Alt. Writ of Mandamus, Ex. 4.) Specifically, Ms. Anderson wrote:

> Per the Ford Public Realm Master Plan, Open Space is defined as: *areas covered by landscape materials, gardens, walkways, patios, recreation facilities, or play areas* (MP pg 47). Based on the definition currently written within the Master Plan:
>
> - All private property areas that meet the open space definition – ground level or above grade – apply 100% towards meeting the Open Space requirement.
> - Therefore, for the Block 3, Lot 1 mixed use project the 25% Open Space requirement is met based on perimeter landscape/hardscape (including the dog run area in SW corner) as well as the above grade amenity deck and green roof area (see attached image provided by Joseph Peris on 6/12 identifying Open Space areas).

(*Id*. (emphasis in original).)

18. Ms. Anderson went on to note "that the Planning Administrator will likely pursue a Master Plan text amendment to clarify the Open Space definition for projects going forward, which may be more restrictive." (*Id*.)

19. Ms. Anderson's email was more broadly communicated later in the day on June 26 when it was forwarded by Highland District Council Executive Director Kathy Carruth to the entire Highland District Council and several other individuals. (*Id*.)

20. Twelve days later, on July 8, 2020, Neighbors for a Livable Saint Paul sent a letter to St. Paul expressing concern about St. Paul's determination that a variance for the 25% open space coverage requirement for the Project was not required. (*Id*. ¶ 22; *Id.*, Ex. 5.)

21. Petitioners had notice of Mr. Diatta's decision as early as June 26, 2020 but no later than July 8, 2020.

22. On July 16, 2020, St. Paul replied to Neighbors for a Livable Saint Paul, stating that the Project "meets the 25% Open Space Lot Coverage requirement with the proposed square

footage perimeter landscape/hardscape and above grade amenity deck and green roof area." (*Id*. ¶ 23; *Id.*, Ex. 6.)

23. On October 2, 2020, Neighbors for a Livable Saint Paul sent a second letter to St. Paul expressing the same concerns and asking St. Paul to "enforce the open space requirements per the original intent of the Code and Master Plan and supporting documents" and suspend the building permits "until Ryan can submit a revised plan that is in in compliance. Alternatively, Ryan can submit a variance request." (*Id*. ¶ 24; *Id.*, Ex. 7.)

24. On October 9, 2020, St. Paul responded with a letter stating that a variance was not needed for the 25% open space coverage requirement of the Project. (*Id*. ¶ 25; *Id.*, Ex. 8.)

25. To date, no variance hearing regarding the Project's Zoning Variance Application Variance Request 4: Lot Coverage – Open Space has been scheduled or heard by St. Paul. (*Id*. ¶ 26.)

26. At no time did petitioners file an administrative appeal from the decision of the City Zoning Administrator. (11/17/20 Diatta Decl. ¶¶ 15-20.)

27. The instant Petition for Writ of Mandamus was filed with the court on October 29, 2020.

28. The sole relief sought in the Petition is a court order compelling St. Paul to conduct a variance hearing on the 2170 Ford Parkway Project's Zoning Variance Request 4: Lot Coverage – Open Space. (Pet. for Alt. Writ of Mandamus, Wherefore section ¶ 1.)

29. The Petition contains no allegation that any of the petitioners sustained any form of injury as a result of St. Paul's failure to hold a variance hearing regarding the Project's Zoning Variance Application Variance Request 4: Lot Coverage – Open Space.

30. Similarly, the Petition contains no allegation that any of the petitioners would benefit in any way if St. Paul were to hold a variance hearing regarding the Project's Zoning Variance Application Variance Request 4: Lot Coverage – Open Space.

31. The Petition contains no explanation as to why petitioners did not or could not avail themselves of the appeal process established by the St. Paul Administrative Code, sections 61.701-.704.

CONCLUSIONS OF LAW

1. In the Petition, petitioners allege no harm to themselves nor does the Petition state or imply that petitioners sustained any harm to themselves that is different than or unique from the potential harm suffered by the general public.

2. Petitioners failed to demonstrate that they have sustained or will sustain a direct or imminent injury due to St. Paul's failure to advance Ryan's variance request to the Board of Zoning Appeals.

3. By statute, a writ of mandamus "shall not issue in any case where there is a plain, speedy, and adequate remedy in the ordinary course of law." Minn. Stat. § 586.02 (2018).

4. Pursuant to city ordinance, petitioners had a "plain, speedy, and adequate remedy" at law available to them in the form of an appeal to the Board of Zoning Appeals and the St. Paul City Council. Saint Paul Leg. Code, §§ 61.701-.704 (2020). A party seeking redress from a decision of the St. Paul City Council may appeal to the District Court. *Id*. § 61.704; *see* Minn. Stat. § 462.361 (2020).

5. Petitioners failed to pursue their available "plain, speedy, and adequate remedy." The available appeal remedy would have been "reasonably efficient and adequate to reach the end intended, and actually compel the performance of the [alleged] duty refused" because it would

have resulted in the same outcome that petitioners seek in the instant mandamus action. *State v. Dist. Ct. of Meeker Cty.*, 77 Minn. 302, 307, 79 N.W.960, 962 (1899). Accordingly, their mandamus action must be dismissed.

6. Petitioners have no standing to bring suit against respondent by mandamus or otherwise.

7. Because the Petition fails to allege a justiciable controversy, this court has no jurisdiction.

8. The "open space" definition in the Open Space Guidelines that is incorporated by reference in Chapter 8 of the Ford Master Plan is irrelevant to and has no application to the "open space coverage" requirements for private site development lots under Chapter 4 of the Ford Master Plan.

9. Based on the present record, the court cannot determine whether St. Paul's failure to advance Ryan's variance request to the Board of Zoning Appeals, constituted "an act which the law specially enjoins as a duty resulting from an office, trust, or station." Minn. Stat. § 586.01 (2020). Accordingly, assuming jurisdiction, St. Paul is not entitled to a Rule 12 dismissal.

10. Petitioners' Writ of Mandamus satisfied the pleading requirement of providing "a short and plain statement of the claim showing that the pleader is entitled to relief." Minn. R. Civ. P. 8.01. It is clear from the Petition that petitioners seek an order compelling St. Paul's Board of Zoning Appeals to conduct a variance hearing on the "open space coverage" variance request for 2170 Ford Parkway. The rule is satisfied.

ORDER

1. The Alternative Writ of Mandamus issued by the court is **VACATED**.

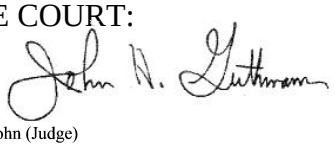
2. The Petition is **DISMISSED WITH PREJUDICE** because petitioners lack standing and failed to present a justiciable controversy to the court.

3. The following Memorandum is made part of this Order.

THERE BEING NO JUST REASON FOR DELAY, LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated: April 8, 2021

BY THE COURT:



Guthmann, John (Judge)
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John H. Guthmann
Judge of District Court

M E M O R A N D U M

I. LEGAL UNDERPINNINGS OF PETITIOENRS' MANDAMUS ACTION

Although it has common-law origins, the mandamus remedy in Minnesota is statutory. *In re State*, 632 N.W.2d 225, 227 (Minn. 2001). Minnesota's district courts have "exclusive original jurisdiction in all cases of mandamus." Minn. Stat. § 586.01 (2018).[1] According to the legislature:

> The writ of mandamus may be issued to any inferior tribunal, corporation, board, or person to compel the performance of an act which the law specially enjoins as a duty resulting from an office, trust, or station. It may require an inferior tribunal to exercise its judgment or proceed to the discharge of any of its functions, but it cannot control judicial discretion.

Id. § 586.01.

"Mandamus is an extraordinary legal remedy awarded, not as a matter of right, but in the exercise of sound judicial discretion and upon equitable principles." *Cty. of Swift v. Boyle,* 481 N.W.2d 74, 77 (Minn. 1992) (quoting *State ex rel. Hennepin Cty. Welfare Bd. v. Fitzsimmons,* 239 Minn. 407, 422, 58 N.W.2d 882, 891 (1953)). To prevail in a mandamus action, the petitioner must

[1] The statutory exceptions to the district court's original jurisdiction are inapplicable in this case. *See* Minn. Stat. § 586.11 (2018).

prove that the respondent: (1) "failed to perform an official duty clearly imposed by law . . .; (2) as a result, the petitioner suffered a public wrong specifically injurious to the petitioner . . .; and (3) that there is no other adequate legal remedy." *N. States Power Co. v. Minn. Metro. Council*, 684 N.W.2d 485, 491 (Minn. 2004) (citations omitted); *accord Madison Equities, Inc. v. Crockarell*, 889 N.W.2d 568, 571 (Minn. 2017); *Breza v. City of Minnetrista*, 725 N.W.2d 106, 110 (Minn. 2006); *Coyle v. City of Delano*, 526 NW.2d 205, 207 (Minn. Ct. App. 1995).

As to the third element, the statute is clear. A writ of mandamus "shall issue on the information of the party beneficially interested, but it shall not issue in any case where there is a plain, speedy, and adequate remedy in the ordinary course of law." Minn. Stat. § 586.02 (2018).

II. MOTIONS TO DISMISS MANDAMUS PROCEEDINGS

Mandamus actions are no different than any other civil action and they are governed by the Minnesota Rules of Civil Procedure. *E.g.*, *City of Waite Park v. Minn. Office of Admin. Hrgs*, 758 N.W.2d 347, 352 (Minn. Ct. App. 2008) (citations omitted). Under Rule 12.02(e) of the Minnesota Rules of Procedure, a party may move to dismiss a claim in lieu of filing a formal answer to test the claim's legal sufficiency. *Barton v. Moore*, 558 N.W.2d 746, 749 (Minn. 1997). Like a complaint, a petition for an alternative writ of mandamus should be dismissed when it fails "to state a claim upon which relief can be granted." Minn. R. Civ. P. 12.02(e). A complaint fails to state a claim when there is no legal basis supporting the relief requested. *Walsh v. U.S. Bank, N.A.*, 851 N.W.2d 598, 602 (Minn. 2014) (quotation omitted). Minnesota's liberal pleading rules are not "a substitute for substantive law." *N. Star Legal Found. v. Honeywell Project*, 355 N.W.2d 186, 188 (Minn. Ct. App. 1984).

When considering a motion to dismiss, the court must accept as true the factual allegations in the pleading, construing all reasonable inferences in favor of the non-moving party. *Bodah v.*

Lakeville Motor Express, Inc., 663 N.W.2d 550, 553 (Minn. 2003). Consequently, only documents embraced by the pleadings may be considered. *In re Hennepin Cty. 1986 Recycling Bond Litig.*, 540 N.W.2d 494, 497 (Minn. 1995). Documents that are central to the parties' claims and referenced in the complaint are embraced by the pleadings. *Id.* at 497 ("[t]he court may consider the entire written contract when the complaint refers to the contract and the contract is central to the claims alleged."). Nevertheless, the court is not bound by any legal conclusions asserted in the pleading. *Bahr v. Capella Univ.*, 788 N.W.2d 76, 80 (Minn. 2010). A sufficient complaint "requires more than labels and conclusions." *Hebert v. City of Fifty Lakes*, 744 N.W.2d 226, 235 (Minn. 2008) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "[L]egal conclusions masquerading as factual conclusions will not suffice to prevent a motion to dismiss." *Id*. (quoting *Anspach v. City of Philadelphia, Dept. of Pub. Health*, 503 F.3d 256, 260 (3d Cir. 2007) (internal quotation omitted)).

Rule 8 of the Minnesota Rules of Civil Procedure requires every complaint to contain "a short and plain statement of the claim showing that the pleader is entitled to relief and a demand for judgment for the relief sought." Minn. R. Civ. P. 8.01. Applying the Rule 8 standard, the Supreme Court stated in *First National Bank of Henning v. Olson*: "'[T]here is no justification for dismissing a complaint for insufficiency . . . unless it appears to a certainty that the plaintiff would be entitled to no relief under any state of facts which could be proved in support of the claim.'" 246 Minn. 28, 38, 74 N.W.2d 123, 129 (1955) (quoting *Dennis v. Vill. of Tonka Bay*, 151 F.2d 411, 412 (8th Cir. 1945)). In other words, a motion to dismiss should be denied "if it is possible on any evidence which might be produced, consistent with the pleader's theory, to grant the relief demanded." *N. States Power Co. v. Franklin*, 265 Minn. 391, 394-95, 122 N.W.2d 26, 29 (1963)

(citations omitted); *see Martens v. Minnesota Min. & Mfg. Co.*, 616 N.W.2d 732, 748 (Minn. 2000) (if complaint fails to state a claim upon which relief may be granted, dismissal is appropriate).

In *Walsh v. U.S. Bank, N.A.*, the Supreme Court reaffirmed the interpretation of Rule 8 by *Olson* and *Franklin* and rejected the "plausibility" standard applicable to federal cases:

> In our view, the plain language of Rule 8.01, its purpose and history, and its procedural context make clear that the rule means today what it meant at the time *Olson* and *Franklin* were decided. A claim is sufficient against a motion to dismiss for failure to state a claim if it is possible on any evidence which might be produced, consistent with the pleader's theory, to grant the relief demanded.

851 N.W.2d 598, 603 (Minn. 2014).[2]

A motion to dismiss should be treated as a summary judgment motion once matters outside the pleadings are presented to the court. Minn. R. Civ. P. 12.02. "Rule 12.02 provides that such a motion shall be treated as a motion for summary judgment and disposed of as provided in Rule 56 if matters outside the pleadings are submitted to the district court for consideration and not excluded." *N. States Power Co. v. Minn. Metro. Council*, 684 N.W.2d 485, 490 (Minn. 2004).

However, affidavits containing information outside the pleadings may be considered if the motion to dismiss is premised upon a lack of jurisdiction. *See, e.g., Turner v. Comm'r of Revenue*, 840 N.W.2d 205, 208 n.1 (Minn. 2013) (if motion to dismiss is premised on a ground other than failure to state a claim court may consider facts outside the pleadings without converting the motion to a motion for summary judgment). Accordingly, the court may consider any affidavits submitted by respondent on the question of jurisdiction.

[2] St. Paul argues that it is entitled to dismissal because the Petition failed to provide a short and plain statement of their claim. (Resp. City of St. Paul's Mem. Supporting the Mot. to Dismiss at 2.) However, as stated in Conclusion of Law #10, the argument is without merit. No more need be said in the court's Memorandum of Law.

III. ABSENT STANDING THERE IS NO JUSTICIABLE CONTROVERSY AND THE COURT IS WITHOUT JURISDICTION

Any civil action is subject to dismissal if the court lacks subject matter jurisdiction. Minn. R. Civ. P. 12.08(c). The court has no subject matter jurisdiction over an action that is not justiciable. *See, e.g., State ex rel. Smith v. Haveland*, 223 Minn. 89, 91-92, 25 N.W.2d 474, 476-77 (1946). Standing is essential to the existence of a justiciable controversy and, therefore, a court's exercise of subject matter jurisdiction. *Annandale Advoc. v. City of Annandale*, 435 N.W.2d 24, 27 (Minn. 1989) (citing *Izaak Walton League of Am. Endowment, Inc. v. State Dep't of Nat. Res.*, 312 Minn. 587, 589, 252 N.W.2d 852, 854 (1977)); *see McCaughtry v. City of Red Wing*, 808 N.W.2d 331, 337 (Minn. 2011). "Standing is a legal requirement that a party have a sufficient stake in a justiciable controversy to seek relief from a court." *Lorix v. Crompton Corp.*, 736 N.W.2d 619, 624 (Minn. 2007) (citation omitted).

A. <u>The Standing Requirement Applies to Mandamus Actions and Petitioners Failed to Demonstrate that they Sustained an Injury Distinct from Harm Suffered by the Public at Large</u>.

The petitioner in a mandamus action must demonstrate standing as defined by the mandamus statute. *Coyle,* 526 N.W.2d at 207 ("To obtain a writ of mandamus, a petitioner must meet standing requirements."). One of the standing requirements ingrained in the mandamus statute is expressed in the second *N. States Power Co.* element that all petitioners must prove in any mandamus suit. 684 N.W.2d at 491 ("the petitioner suffered a public wrong specifically injurious to the petitioner").

To have standing, the petitioner in a mandamus action must be a "beneficially interested party." Minn. Stat. § 586.02 (2018). A party is "beneficially interested" if it suffered "a public wrong specifically injurious to petitioner." *Coyle*, 526 NW.2d at 207; *see Madison Equities, Inc.*, 889 N.W.2d at 574; *N. States Power Co.*, 684 N.W.2d at 491;*Chanhassen Chiropractic Ctr., P.A.*

v. City of Chanhassen, 663 N.W.2d 559, 562 (Minn. Ct. App.) (citing *Coyle*), *rev. denied* (Minn. 2003). The petitioner must also establish that "it would benefit from an order compelling performance of a statutorily imposed duty." *Knudson v. Comm'r of Pub. Safety,* 438 N.W.2d 423, 425 (Minn. Ct. App. 1989).

Respondent argues that petitioners lack standing to seek mandamus relief. The statutory standing standard of a "public wrong specifically injurious to petitioner" is no different than the common-law formulation of standing that is applicable to all cases. To acquire standing, the petitioner must have either "suffered some 'injury-in-fact' or the [petitioner] is the beneficiary of some legislative enactment granting standing." *State by Humphrey v. Philip Morris Inc.*, 551 N.W.2d 490, 493 (Minn. 1996) (quoting *Snyder's Drug Stores, Inc. v. Minn. State Bd. of Pharmacy*, 301 Minn. 28, 31-32, 221 N.W.2d 162, 165 (1974)); *see Sylstad v. Johnson*, No. C4-98-1932, 1999 WL 314883, slip. op. at *2 (Minn. Ct. App. May 18, 1999) (unpublished) (citation omitted) (to have standing, the mandamus petitioner must be "injured in fact").

Injury-in-fact in public interest citizen actions requires "damage or injury to the individual bringing the action which is special or peculiar and different from damage or injury sustained by the general public." *Channel 10, Inc. v. Indep. Sch. Dist. No. 709. St. Louis Cty.*, 298 Minn. 306, 312, 215 N.W.2d 814, 820 (1974) (citations omitted). The peculiar injury requirement "precludes citizens from bringing lawsuits against governmental agencies based only on their disagreement with policy or the exercise of discretion by those responsible for executing the law." *Conant v. Robins, Kaplan, Miller & Ciresi, L.L.P.*, 603 N.W.2d 143, 146 (Minn. Ct. App. 1999) (citing *McKee v. Likins*, 261 N.W.2d 566, 571 (Minn. 1977)), *rev. denied* (Minn. Mar. 14, 2000). Instead, to avoid a flood of litigation, public rights are generally enforced by public authorities rather than by individuals. *Channel 10, Inc.*, 298 Minn. at 312, 215 N.W.2d at 820 (citation omitted).

Here, petitioners allege no injury-in-fact in the Petition. Even in the course of opposing respondent's motion, petitioners never articulated an injury at all, much less an injury that is different from the injury all citizens would suffer if the variance request is not advanced to the St. Paul Board of Zoning Appeals. Petitioners made no effort to demonstrate that they are any different than all citizens. Petitioners' sole response to the standing issue is to argue that they have a strong case on the merits under the first of the three *N. States Power Co.* elements. (*See* Pet. Response Mem. to Resp. City of St. Paul's Mot. to Dismiss at 8-12.) However, the cases are clear: all three elements must be met and a strong position regarding any one element does not obviate the petitioners' obligation to satisfy the others.

Without citing any authority, petitioners' brief erroneously argues that the mandamus statute automatically confers standing. (*Id*. at 8.) As already discussed, petitioner's contention flies in the face of both the mandamus statute and innumerable appellate decisions. Then, at the motion hearing, petitioners argued that *Scinocca v. St. Louis Cty. Bd. of Comm'rs* supports a conclusion that they have standing. 281 N.W.2d 659 (Minn. 1979). However, *Scinocca* involved a statute expressly authorizing the subject taxpayer mandamus action. *Id*. at 660-61 & n.1 (citing Minn. Stat. § 394.37, subd. 4); *accord Haen v. Renville Cty. Bd. of Comm'rs*, 495 N.W.2d 466, 469 (Minn. Ct. App) (citing *Scinocca*), *rev. denied* (Minn. 1993). As such, *Scinocca* is distinguishable and the case only underscores petitioners' lack of standing. *See All. of Taxpayers Against Corruption, Inc. v. Lyon Cty.*, No. A11-247, 2011 WL 3654502, slip op. at *3 (Minn. Ct. App. Aug. 22, 2011) (unpublished) (in *Scinocca*, standing was conferred by statute and the present case does not support a mandamus action to "restrain illegal action on the part of public officials" absent a showing of standing (quotation omitted)).

The only statute potentially conferring standing on petitioners is section 462.361. Ironically, petitioners maintain that the statute is inapplicable. (Pet'rs' Response Mem. to Resp. City of St. Paul's Mot. to Dismiss at 8.) Even so, as discussed below, petitioners failed to satisfy the statutory prerequisites to gain standing under section 462.361.

One type of injury-in-fact may give rise to taxpayer standing. Although petitioners do not claim entitlement to taxpayer standing, based on the court's understanding of the taxpayer standing doctrine, they are not entitled to assert taxpayer standing. In the instant case, taxpayer standing does not exist because petitioners' challenge is either funding neutral or involves the non-expenditure of taxpayer funds. Petitioners do not challenge an alleged improper or unlawful use of taxpayer funds. *See, e.g., St. Paul Area Chamber of Commerce v. Marzitelli*, 258 N.W.2d 585, 588 (Minn. 1977) (taxpayer standing does not extend to the non-expenditure of public funds).[3]

In conclusion, petitioners allege no specific injuries to themselves at all much less injuries that are distinct or unique from the potential injuries that would be suffered by the general public. Absent a public wrong specifically injurious to each petitioner, petitioners have no standing to sue under the mandamus statute. On this ground alone, the Petition must be dismissed.

[3] The taxpayer standing exception to the general rule traces its origin to 1888. "[I]t generally has been recognized that a state or local taxpayer has sufficient interest to challenge illegal expenditures." *McKee*, 261 N.W.2d at 570-71 (citing *State v. Weld*, 39 Minn. 426, 428, 40 N.W. 561, 562 (1888) (Mitchell, J.); *see Oehler v. City of St. Paul*, 174 Minn. 410, 417-418, 219 N.W. 760, 763 (1928) ("it is well settled that a taxpayer may, when the situation warrants, maintain an action to restrain unlawful disbursements of public moneys")). Thus, "the right of a taxpayer to maintain an action in the courts to restrain the unlawful use of public funds cannot be denied. Taxpayers are legitimately concerned with the performance by public officers of their public duties." *Id*. at 571. The taxpayer standing exception, which was reaffirmed in *McKee*, has been "limited . . . closely to its facts." *Citizens for Rule of L. v. Senate Comm. on Rules & Admin.*, 770 N.W.2d 169, 175 (Minn. Ct. App.) (citations omitted), *rev. denied* (Minn. 2009). In other words, the challenged conduct must actually involve an alleged unlawful use of public funds. Thus, in *Conant v. Robins, Kaplan, Miller & Ciresi, L.L.P.*, there was no taxpayer standing because "the challenged moneys [fees paid to attorneys hired by the state to prosecute the tobacco litigation] are not state funds and . . . the law does not require an appropriation for payment of attorney fees for special counsel." 603 N.W.2d 143, 149 (Minn. Ct. App. 1999). Similarly, a return of money from a special mineral fund to the general fund cannot confer taxpayer standing because an unlawful disbursement of funds was not alleged. *Rukavina v. Pawlenty*, 684 N.W.2d 525, 531 (Minn. Ct. App.), *rev. denied* (Minn. 2004).

B. Petitioners Have no Standing to Bring a Mandamus Action Because They Failed to Exhaust An Adequate Remedy Provided by Statute and Ordinance.

By statute, a writ of mandamus "shall not issue in any case where there is a plain, speedy, and adequate remedy in the ordinary course of law." Minn. Stat. § 586.02 (2020). The section 586.02 prohibition is built into the *N. States Power Co.* test as its third element, which permits mandamus only when "there is no other adequate legal remedy." 684 N.W.2d at 491. "The other remedy 'must be one which is reasonably efficient and adequate to reach the end intended, and actually compel the performance of the duty refused.'" *Madison Equities, Inc.*, 889 N.W.2d at 574 (quoting *State v. Dist. Ct. of Meeker Cty.*, 77 Minn. 302, 307, 79 N.W.960, 962 (1899)).

Municipalities have the authority to make and enforce zoning ordinances pursuant to the Municipal Land Use Act. Minn. Stat. §§ 462.351-.364 (2020). The statute creates district court jurisdiction to review grievances related to zoning matters. *Id.* § 462.361, subd. 1. The proper process for seeking judicial review of a city's decision in a zoning matter is usually through a declaratory judgment action. *Mendota Golf, LLP*, 708 N.W.2d at 177 (citing *Honn v. City of Coon Rapids*, 313 N.W.2d 409, 416 (Minn. 1981) and Minn. Stat. § 462.361, subd. 1 (2004)).

Section 462.361, subd. 2 includes an exhaustion of remedies defense that is consistent with the analogous requirement in the mandamus statute. According to subdivision 2:

> In actions brought under this section, a municipality may raise as a defense the fact that the complaining party has not attempted to remedy the grievance by use of procedures available for that purpose under ordinance or charter, or under sections 462.351 to 462.364. If the court finds that such remedies have not been exhausted, it shall require the complaining party to pursue those remedies unless it finds that the use of such remedies would serve no useful purpose under the circumstances of the case.

Minn. Stat. § 462.361, subd. 2 (2020); *see Centra Homes, LLC v. City of Norwood Young Am.*, 834 N.W.2d 581, 588 (Minn. Ct. App. 2013) (failing to follow a City's internal procedures before filing a district-court lawsuit over a municipal planning dispute deprives any district court of

subject-matter jurisdiction); *Stillwater Twp. v. Rivard*, 547 N.W.2d 906, 912 (Minn. Ct. App. 1996) (district court had no jurisdiction to order town board to issue PUD permit because there was no "final action" for the court to review and therefore no exhaustion under section 462.361, subd. 2); *Hagstrom v. City of Shoreview*, No. A04-1812, 2005 WL 1620117, at *8 (Minn. Ct. App. July 5, 2005) (unpublished) (citing section 462.361, subd. 2; dismissing plaintiff's driveway permit claim because failure to exhaust administrative remedies by obtaining a final decision by the city deprived the court of subject matter jurisdiction), *rev. denied* (Minn. Sep. 28, 2005); *Friends of Chester Park v. Humes*, No. CX-00-1385, 2001 WL 290419, slip op. at *3 (Minn. Ct. App. Mar. 27, 2001) (unpublished) (citing section 462.361, subd. 2; dismissing second cause of action in declaratory judgment action disputing Duluth's permitting decision because petitioner failed to appeal to the city council within ten days per city zoning code).

Whether the petition is examined through the lens of a mandamus action under section 586.02 or a declaratory judgment action under section 462.361, the court has no jurisdiction unless petitioners exhaust their legal remedies. For this court to have jurisdiction over petitioners' mandamus action, there must be no adequate remedy other than mandamus.[4]

In the instant case, petitioners disregard both the unambiguous exhaustion requirement in section 586.02 and the applicable cases, arguing instead that the mandamus statute contains no

[4] According to the *Mendota Golf, LLP* case, mandamus is appropriate in lieu of a declaratory judgment action if "a city failed to perform a clearly defined duty that is required by a statute or zoning ordinance" but not to review "the exercise of legislative discretion in municipal zoning matters." 708 N.W.2d at 178-79. However, the case does not relieve a petitioner from satisfying the applicable exhaustion requirement. *Mendota Golf, LLP* recognized the viability of the exhaustion requirement. *Id*. at 171 (citations omitted). The court did not need to reach the exhaustion issue because the petitioner properly pursued its remedy in the ordinary course of law before proceeding to court. It applied to the city for an amendment to the comprehensive plan, appeared at a hearing of the city's planning commission, challenged the planning commission's recommended denial at the city council, and appealed the action of the city council to district court by mandamus rather than through a declaratory judgment action. *Id*. at 169-70. Here, unlike *Mendota Golf, LLP*, petitioners satisfied neither the section 586.02 exhaustion requirement nor the section 462.362, subd. 2 exhaustion requirement. As such, the Petition is subject to dismissal for lack of jurisdiction regardless of whether petitioners chose to proceed by mandamus or by declaratory judgment.

exhaustion of alternative remedies requirement. (Pet'rs' Response Mem. to Resp. City of St. Paul's Mot. to Dismiss at 5.) As already discussed at length, their position is without merit.

Petitioners had an adequate remedy in the ordinary course of law through the appeal process outlined in St. Paul's Zoning Ordinance. Any person "affected by a decision of the planning or zoning administrator" may appeal the decision to the Board of Zoning Appeals "within ten (10) days after the date of the decision." Saint Paul Leg. Code, § 61.701(c) (2020). An appeal must be based on an alleged "error in any order, requirement, permit, decision or refusal made by the zoning administrator in carrying out or enforcing any provision." *Id*. § 61.701(a). In their Petition, petitioners allege that the St. Paul Zoning Administrator unlawfully refused to submit Ryan's variance request to the Board of Zoning Appeals. As such, they should have appealed his determination to the Board of Zoning Appeals.

Persons "affected" by a decision of the Board of Zoning Appeals may, in turn, appeal to the St. Paul City Council "within ten (10) days after the date of the decision appealed from." *Id*. § 61.702(a). "Decisions of the city council on all matters within its jurisdiction shall be final subject only to judicial review by a court of competent jurisdiction." *Id*. § 61.704.

Petitioners had plenty of time to engage in the appeals process. Their ten days to appeal from the decision of the St. Paul's Zoning Administrator to the St. Paul Board of Zoning Appeals arguably began on June 26, 2020 when the St. Paul Zoning Administrator's decision was distributed to the Highland District Council. However, even if the ten days did not begin to run until petitioner's organization received Ms. Anderson's July 16, 2020 email response, petitioners still failed to appeal. A timely appeal would have been efficient, adequate, and serve a useful purpose because it would have provided petitioners the same relief sought in their Petition for Alternative Writ of Mandamus—a hearing before the St. Paul Board of Zoning Appeals. Based

on the applicable statutes, ordinances, and cases, the court concludes that it has no subject matter jurisdiction over the instant mandamus Petition for a second reason—petitioners failed to pursue their "plain, speedy, and adequate remedy in the ordinary course of law." Minn. Stat. § 586.02 (2020).

IV. DEPENDING ON THE EVIDENCE PRODUCED AT A TRIAL, IT MIGHT BE POSSIBLE TO CONCLUDE THAT ST. PAUL FAILED TO PERFORM AN OFFICIAL DUTY CLEARLY IMPOSED BY LAW

The first element of the *N. States Power Co.* test requires the petitioner to demonstrate that the municipality "failed to perform an official duty clearly imposed by law." 684 N.W.2d at 491. Although the case is being dismissed based on a lack of jurisdiction, the court nevertheless addresses all claims and defenses in the event of an appeal. Accordingly, the court examines whether petitioners can satisfy the first *N. States Power Co.* element in the context of a Rule 12 motion to dismiss.

A. Standard Applicable to Judicial Review of a Municipal Zoning Decision.

Land use decisions are given great deference and are disturbed on judicial review only in "those rare instances in which the City's decision has no rational basis." *White Bear Docking v. City of Mound*, 324 N.W.2d 174, 176 (Minn. 1982); *accord Mendota Golf, LLP v. City of Mendota Heights*, 708 N.W.2d 162, 179-80 (Minn. 2006) (citing *Honn v. City of Coon Rapids*, 313 N.W.2d 409, 414-15 (Minn. 1981)). If the municipality provides reasons for its decision, the reviewing court examines the record and determines if the reasons are legally sufficient and have a rational basis. *See VanLandschoot v. City of Mendota Heights*, 336 N.W.2d 503, 508 (Minn. 1983). "A decision lacks a rational basis if it is unsupported by substantial evidence in the record, premised on a legally insufficient reason, or based on subjective or unreasonably vague standards." *PTL, L.L.C. v. Chisago Cty. Bd. of Comm'rs*, 656 N.W.2d 567, 571 (Minn. Ct. App. 2003).

The same reasonableness standard applies whether the city's decision was "legislative in nature (rezoning)" or "quasi-judicial (variances and special use permits)." *Honn*, 313 N.W.2d at 416-17. The *Honn* court elaborated:

> [I]n legislative zoning, the municipal body is formulating public policy, so the inquiry focuses on whether the proposed use promotes the public welfare. In quasi-judicial zoning, public policy has already been established and the inquiry focuses on whether the proposed use is contrary to the general welfare as already established in the zoning ordinance. Consequently, the reviewing courts, in determining what is reasonable, should keep in mind that the zoning authority is less circumscribed by judicial oversight when it considers zoning or rezoning than when it considers a special use permit or a variance.

Id. at 417; *see Odell v. City of Eagan*, 348 N.W.2d 792, 796 (Minn. Ct. App. 1984) (citing *Honn*, 313 N.W.2d at 417; *Frank's Nursery Sales, Inc.*, 295 N.W.2d at 608). "The fact that a court reviewing the action of a municipal body may have arrived at a different conclusion, had it been a member of the body, does not invalidate the judgment of the city officials if they acted in good faith and within the broad discretion accorded them by statutes and the relevant ordinances." *VanLandschoot*, 336 N.W.2d at 509 (citation omitted). Plaintiff bears the burden of persuasion that the reasons stated by St. Paul are either without factual support in the record or are legally insufficient. *Hubbard Broad., Inc. v. City of Afton*, 323 N.W.2d 757, 763 (Minn. 1982).

B. From the Submitted Record, it is Not Possible to Determine Whether St. Paul Failed to Perform an Official Duty Clearly Imposed by Law

St. Paul's Zoning Administrator determined that Ryan's request for a zoning variance was unnecessary because the proposed project contained sufficient "open space coverage" to comply with the Ford Master Plan. Consequently, he decided not to send the variance request to the St. Paul's Board of Zoning Appeals for a hearing. Assuming, arguendo, that petitioners face no standing or other procedural impediments, the court concludes that the present record is insufficient to hold that the Zoning Administrator failed to perform an official duty clearly imposed

by law. Nevertheless, as discussed below, the court's decision does not compel relief to either party as a matter of law.

The court begins with a statement of what is not at issue. Petitioners appear to conflate the "open space" definition in Chapter 8 of the Ford Master Plan with the "open space coverage" requirements for private site development projects under Chapter 4 of the Ford Master Plan. As noted in the court's Findings of Fact and Conclusions of Law, the two definitions are conceptually distinct and do not apply to the same tracts of land within the Ford Site. The Chapter 8 definition of "open space" is clearly and unambiguously inapplicable to "open space coverage" on private site development projects such as the Project at issue in this case. There is simply no legal merit to petitioners' suggestion that the Zoning Administrator failed to perform an official duty clearly imposed by law based on his decision to rely solely on the "open space coverage" provision in Chapter 4 of the Ford Master Plan.

Turning to the true issue, Ryan apparently thought the Project as proposed did not satisfy the 25% minimum open space coverage requirement in Chapter 4 of the Ford Master Plan. Ryan concluded that it needed to divide the roof's open space coverage in half because of the "Green Roofs" provision in the Ford Master Plan. (Pet., Ex. 3 at 11). Based on its understanding of the Ford Master Plan, Ryan submitted a variance application to St. Paul seeking a variance from 25% minimum open space coverage requirement. (*Id*.)

As noted in the Statement of Facts, St. Paul Zoning Administrator Yaya Diatta reviewed the Zoning Variance Application and concluded that a variance was unnecessary because, in the exercise of his discretion to interpret the Ford Master Plan, he concluded that the rooftop space should count 100% towards the 25% minimum "open space coverage" requirement rather than 50% that Ryan assumed in its variance application. (Findings of Fact ¶ 16.) Although *what* Mr.

Diatta concluded is clear from the motion record, it is not clear *how* Mr. Diatta arrived at his conclusion. The record contains no detailed computation of what spaces Mr. Diatta used to find 25% open space coverage nor does it contain an explanation as to why Mr. Diatta concluded that the rooftop space should count 100% rather than 50% as discussed in the Ford Master Plan. (Pet. for Alt. Writ of Mandamus, Ex. 1 at 57.) In fact, the Rule 12 record contains no reasoning directly from Mr. Diatta at all. His decision was communicated by a subordinate. (*Id*., Ex. 4.)

St. Paul filed a motion to dismiss. Motions to dismiss must be denied "if it is possible on any evidence which might be produced, consistent with the pleader's theory, to grant the relief demanded." *Walsh*, 851 N.W.2d 598, 603 (Minn. 2014). Here, the record contains insufficient information to determine whether Mr. Diatta's decision not to refer the variance request to the Board of Zoning Appeals met the rational basis standard. In other words, it is not possible for the court to determine whether St. Paul's failure to advance Ryan's variance request to the Board of Zoning Appeals, constituted "an act which the law specially enjoins as a duty resulting from an office, trust, or station." Minn. Stat. § 586.01 (2020).

Absent the missing information, Mr. Diatta's decision may or may not have had a rational basis. The fact that the present record does not support a Rule 12 dismissal does not mean that petitioners' claim has merit. Rather, the court's conclusion only means that the resolution of the open space coverage and 50% versus 100% issues would require discovery, a dispositive motion if there are no genuine issues of material fact, or a trial to resolve any genuine issues of material fact if the case was not dismissed on jurisdictional grounds.

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