

STATE OF MINNESOTA

DISTRICT COURT

COUNTY OF FILLMORE

THIRD JUDICIAL DISTRICT
CASE TYPE: Zoning/Other Civil

Alvin H. and Merilee Hein,

Court File No. _____
The Honorable _____

Plaintiffs,

v.

Newburg Township, Newburg Township
Board of Supervisors, Newburg Township
Board Chair Oswald Landsom, and Newburg
Township Board Supervisor Mark Gjere,

SUMMONS

Defendants.

1. **YOU ARE BEING SUED.** The Plaintiffs have started a lawsuit against you. The Plaintiffs' Complaint against you is attached to this Summons. Do not throw these papers away. They are official papers that affect your rights. You must respond to this lawsuit even though it may not yet be filed with the Court and there may be no court file number on this Summons.

2. **YOU MUST REPLY WITHIN 20 DAYS TO PROTECT YOUR RIGHTS.** You must give or mail to the person who signed this Summons a **written response** called an Answer within 20 days of the date on which you received this Summons. You must send a copy of your Answer to the person who signed this Summons located at Briggs and Morgan, 2200 IDS Center, 80 South Eighth Street, Minneapolis, Minnesota, 55402.

3. **YOU MUST RESPOND TO EACH CLAIM.** The Answer is your written response to the Plaintiffs' Complaint. In your Answer you must state whether you agree or disagree with each paragraph of the Complaint. If you believe the Plaintiffs should not be given everything asked for in the Complaint, you must say so in your Answers.

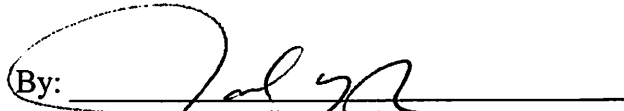
4. **YOU WILL LOSE YOUR CASE IF YOU DO NOT SEND A WRITTEN RESPONSE TO THE COMPLAINT TO THE PERSON WHO SIGNED THIS SUMMONS.** If you do not Answer within 20 days, you will lose this case. You will not get to tell your side of the story, and the Court may decide against you and award the Plaintiffs everything asked for in the Complaint. If you do not want to contest the claims stated in the Complaint, you do not need to respond. A default judgment can then be entered against you for the relief requested in the Complaint.

5. **LEGAL ASSISTANCE.** You may wish to get legal help from a lawyer. If you do not have a lawyer, the Court Administrator may have information about places where you can get legal assistance. **Even if you cannot get legal help, you must still provide a written Answer to protect your rights or you may lose the case.**

6. **ALTERNATIVE DISPUTE RESOLUTION.** The parties may agree to or be ordered to participate in an alternative dispute resolution process under Rule 114 of the Minnesota General Rules of Practice. You must still send your written response to the Complaint even if you expect to use alternative means of resolving this dispute.

Dated: July 26, 2018

BRIGGS AND MORGAN, P.A.

By: 

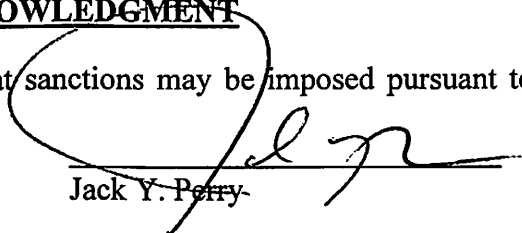
Jack Y. Perry (#209272)
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2200 IDS Center
80 South Eighth Street
Minneapolis, MN 55402-2157
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**ATTORNEYS FOR PLAINTIFFS
ALVIN H. AND MERILEE HEIN**

ACKNOWLEDGMENT

The undersigned acknowledges that sanctions may be imposed pursuant to Minn. Stat. § 549.211, subd. 3.


Jack Y. Perry



2200 IDS Center
80 South 8th Street
Minneapolis, MN 55402
oFC 612-977-8400
FAX 612-977-8650
URL Briggs.com

July 25, 2018

Jack Y. Perry
(612) 977-8497
jperry@briggs.com

BY HAND DELIVERY

Newburg Township
Genette Halverson, Town Clerk
Newburg Townhall
County Highway 34
Mabel, MN 55954

Newburg Township Board of Supervisors
Gennette Halverson, Town Clerk
Newburg Townhall
County Highway 34
Mabel, MN 55954

Oswald Landsom
Newburg Township Board Chair
15058 431st Avenue
Mabel, MN 55954

Mark Gjere
Newburg Township Board Supervisor
11100 445th Avenue
Mabel, MN 55954

Re: Alvin H. and Merilee Hein v. Newburg Township, Newburg Township Board of Supervisors, Newburg Township Board Chair Oswald Landsom, and Newburg Township Board Supervisor Mark Gjere

Dear Sir/Madam:

Enclosed herein and served upon you in the above-referenced matter are the following:

1. Summons;
2. Plaintiffs' Verified Complaint for Declaratory and Other Relief;
3. Plaintiffs' Notice of Motion and Motion for Temporary Restraining Order;
4. Plaintiffs' Memorandum of Law in Support of Their Motion for Temporary Restraining Order; and
5. [Proposed] Order Granting Temporary Restraining Order.

Sincerely,

A handwritten signature in black ink, appearing to read 'Jack Y. Perry', written over a large, stylized oval scribble.

Jack Y. Perry



Newburg Township
Newburg Township Board of Supervisors
Oswald Landsom
Mark Gjere
July 25, 2018
Page 2

JYP/kg
Enclosures

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STATE OF MINNESOTA
COUNTY OF FILLMORE

DISTRICT COURT
THIRD JUDICIAL DISTRICT
CASE TYPE: Zoning/Other Civil

Alvin H. and Merilee Hein,

Court File No. _____
The Honorable _____

Plaintiffs,

v.

**PLAINTIFFS' NOTICE OF MOTION
AND MOTION FOR TEMPORARY
RESTRAINING ORDER**

Newburg Township, Newburg Township
Board of Supervisors, Newburg Township
Board Chair Oswald Landsom, and Newburg
Township Board Supervisor Mark Gjere,

Defendants.

To: Defendants and their counsel

PLEASE TAKE NOTICE that as soon as counsel may be heard, but prior to Board's Special Meeting at 8:00 a.m. on August 2, 2018, at the Fillmore County Courthouse, 101 Fillmore Street West, Preston, Minnesota, Plaintiffs Alvin H. and Merilee Hein (Heins), will move and do hereby move the Court for a temporary restraining order imposing an indefinite stay on Defendant Newburg Township Board of Supervisors' (Board) August 2, 2018 Special Meeting until this Court has time to adequately address the merits of the serious and multiple allegations of misconduct against Defendants Newburg Township (Township), Board, Newburg Township Board Chair Oswald Landsom (Landsom), and (4) Newburg Township Board Supervisor Mark Gjere (Gjere) (collectively, Defendants).

DATED: July 26, 2018

BRIGGS AND MORGAN, P.A.

By: 

Jack Y. Perry (#209272)

Maren F. Grier (#0390221)

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**ATTORNEYS FOR PLAINTIFFS
ALVIN H. AND MERILEE HEIN**

STATE OF MINNESOTA
COUNTY OF FILLMORE

DISTRICT COURT
THIRD JUDICIAL DISTRICT
CASE TYPE: Zoning/Other Civil

Alvin H. and Merilee Hein,

Court File No. _____
The Honorable _____

Plaintiffs,

v.

**PLAINTIFFS' VERIFIED COMPLAINT
FOR DECLARATORY AND
OTHER RELIEF**

Newburg Township, Newburg Township
Board of Supervisors, Newburg Township
Board Chair Oswald Landsom, and Newburg
Township Board Supervisor Mark Gjere,

(JURY TRIAL DEMANDED)

Defendants.

Plaintiffs Alvin H. and Merilee Hein (Heins), for their Verified Complaint for Declaratory and Other Relief (Verified Complaint) against (1) Defendant Newburg Township (Township), (2) Defendant Newburg Township Board of Supervisors (Board), (3) Defendant Newburg Township Board Chair Oswald Landsom (Landsom), and (4) Defendant Newburg Township Board Supervisor Mark Gjere (Gjere) (collectively, Defendants), state and allege as follows:

BACKGROUND FACTS

A. THE PARTIES

1. Heins are Township residents with their home residence address at 14147 County Road 28, Mabel, MN 55954.

2. With a population of just 444 per the 2000 census, Township is a rural agricultural community in Fillmore County (County).

3. Besides Landsom and Gjere, Board's third member is Board Supervisor Steve Melbostad (Melbostad).

4. Township's two other elected officials are Township Treasurer Barb Eiken (Eiken) and Township Clerk Genette Halverson (Halverson).

B. THE PROJECT

5. Within their agriculturally-zoned property in §§ 7 and 18 of Township, Heins "propose[] to construct and operate a new 1,992 animal unit swine farrowing facility (4,980 sows) . . .[,] consisting of two barns, an animal mortality composting building, one storm water basin, and a livestock watering well" (Project). Ex. A at 1 and 2 ¶ G.

6. In addition to the local benefits arising from its estimated \$12 million in construction costs, the Project "will be hiring 15 full-time employees with a payroll of \$800,000 per year." Ex. H at 4.

C. THE CONTEXT

1. The Minnesota Pollution Control Agency's (MPCA) ongoing environmental review for the Project

a. MPCA's deadline to determine the need for a discretionary environmental impact statement (EIS) for the Project is September 3, 2018

7. Because it is for a feedlot "of 1,000 animal units or more," the Project is subject to a mandatory environmental assessment worksheet (EAW). Minn. R. 4410.4300, subp. 29(A).

8. MPCA is the designated responsible governmental unit (RGU) for the EAW for the Project. *Id.*

9. On April 30, 2018, MPCA's EAW for the Project was publicly noticed for public comment. Ex. A.

10. On June 6, 2018, MPCA extended to July 3, 2018 the public comment period on its EAW for the Project. Ex. W.

11. On July 13, 2018, MPCA extended by 30 days its Minn. R. 4410.1700, subp. 2- required 30-day deadline on its determination of the need for a discretionary EIS for the Project. Ex. L.

12. In granting its 30-day extension on its determination of the need for an EIS for the Project, MPCA expressly relied upon the following two public "comments" regarding karst: "[(1)] a sinkhole reported to be within 300 feet east of the proposed manure storage area and [(2)] other karst features within one-half mile of the proposed facility that may present possible environmental impact." *Id.* (emphasis and bracketed information added).

13. As to these two public "comments" regarding karst, MPCA arranged for a two-hour site inspection on July 26, 2018.

14. With its 30-day extension thereof, MPCA is required to make its "decision on the need for an EIS" by September 3, 2018.

b. The compelling record, including its precedential bases, for MPCA's issuance of a negative declaration on the need for an EIS for the Project

15. Per Minn. R. 4410.2000, subp. 1, the "purpose" for an EIS is as follows:

The purpose of an EIS is [(1)] to provide information for governmental units, the proposer of the project and other persons to evaluate proposed projects which have the potential for significant environmental effects, [(2)] to consider alternatives to the proposed projects, and [(3)] to explore methods for reducing adverse environmental effects.

(Emphasis and bracketed information added).

16. Per Minn. R. 4410.2000, subp. 3, a "discretionary EIS" is only required as follows:

An EIS shall be prepared:

A. when RGU determines that, based on the EAW and any comments or additional information received during the EAW comment period, the proposed project has the potential for significant environmental effects; or

B. when the RGU and proposer of the project agree that an EIS should be prepared.

(Emphasis added).

17. "'Shall' is mandatory." Minn. Stat. § 645.44, subd. 16.

18. Per Merriam-Webster's Dictionary, "significant" generally means "having or likely to have influence or effect: important." Ex. Z.

19. And, as defined by an administrative law judge for purposes of Minn. R. 4410.2000, subp. 3, "[t]he term 'significant' is an important limitation in law . . . it requires a showing that a potential impact is serious and material. It is further not merely incidental and cannot be readily mitigated" (emphasis added)).

20. In determining whether the Project has "the potential for significant environmental effects," Minn. R. 4410.1700, subs. 1 and 6 further impose, as follows, the "standard for decision on need for an EIS":

Subpart 1. **Standard for decision on need for EIS.** An EIS *shall* be ordered for projects that have the potential for *significant* environmental effects.

* * *

Subp. 6. **Standard.** In deciding whether a project has the potential for significant environmental effects, the RGU *shall* compare [(a)] the impacts that may be reasonably expected to occur from the project with [(b)] the criteria in this part.

(Bold in original; underlining, italics and bracketed information added).

21. And, per Minn. R. 4410.1700, subd. 7, the "criteria" for determining this "standard" is, in full, as follows:

Subp. 7. **Criteria.** In deciding whether a project has the potential for significant environmental effects, the following factors *shall* be considered:

A. type, extent, and reversibility of environmental effects;

B. cumulative potential effects. The RGU shall consider the following factors: whether the cumulative potential effect is significant; whether the contribution from the project is significant when viewed in connection

with other contributions to the cumulative potential effect; the degree to which the project complies with approved mitigation measures specifically designed to address the cumulative potential effect; and [(4)] the efforts of the proposer to minimize the contributions from the project;

C. the extent to which the environmental effects are subject to mitigation by ongoing public regulatory authority. The RGU may rely only on mitigation measures that are specific and that can be reasonably expected to effectively mitigate the identified environmental impacts of the project;
and

D. the extent to which environmental effects can be anticipated and controlled as a result of other available environmental studies undertaken by public agencies or the project proposer, including other EISs.

(Bold in original; underlining and italics added).

22. As applied to the Project, there is no "potential for significant environmental effects."

23. First and foremost, when compared, for example, with MPCA's strikingly similar EAW for a much larger 3,600 animal unit swine facility (*compare* Ex. A *with* Ex. C), which resulted in MPCA's issuance of a negative declaration on the need for an EIS (Ex. D), there is nothing in MPCA's EAW for the Project which even arguably suggests that the Project has "the potential for significant environmental effects" (Ex. A).

24. Second, MPCA is, unless it specifies therein its reason(s) for not doing so, bound by its prior determinations on the need for an EIS for other comparable swine facilities. *See, e.g., In re Detailing Criteria and Standards for Measuring an Elec. Util.'s Good Faith Efforts in Meeting Renewable Energy Objectives under Minn. Stat. 216B.1691*, 700 N.W.2d 533, 539 (Minn. App. 2005) ("although an agency is not bound to follow its past decisions, it must provide a reasonable basis for departure from precedent"); *In re Petition of N. States Power Gas Util. For Auth. to Change its Schedule of Gas Rates*, 519 N.W.2d 921, 925 (Minn. App. 1994) ("[a]n

agency must either conform to its prior norms and decisions or explain the reason for its departure from such precedent").

25. That MPCA is bound by its prior determinations on the need for an EIS for other comparable swine facilities is particularly important because of (1) its uniform issuance of negative declarations on the need for an EIS for swine facilities of 1,000 or more animal units (Ex. B) following its September 14, 2002 Generic Environmental Impact Statement (GEIS) for large feedlots (Ex. X) and (2) the similarities between the environmental issues with each such swine facility (*compare* Ex. A *with* Ex. C).

26. Third, the Project's 1,992 animal unit size does not support its need for an EIS.

27. To the contrary, MPCA has issued a negative declaration on the need for an EIS on at least 10 larger swine facilities (Ex. B at 19-23), including its May 25, 2018 negative declaration on the need for an EIS for the above-discussed much larger 3,600 animal unit swine facility (Ex. D), and it did the same for 11 other swine facilities of comparable size – *i.e.*, $\geq 1,800$ animal units (Ex. B at 16-19).

28. Fourth, none of the Project's standard feedlot environmental impacts, including without limitation (1) manure generation, storage and periodic land spreading, (2) surface and ground water impacts, (3) dead animal composting and (4) odor, do not support its need for an EIS. Ex. A.

29. Rather, MPCA has, following its GEIS (Ex. X), both (1) exempted from mandatory environmental all swine facilities of less than 1,000 animal units and (2) issued a negative declaration on the need for an EIS on each and every swine facility of 1,000 or more animal units (Ex. B).

30. And, as required by Minn. R. 4410.1700, subp. 7(c) to be considered in its determination of the need for an EIS for the Project, the Project's above-identified standard feedlot environmental impacts are otherwise mitigated by, for example, (1) MPCA's required review and approval of not only (a) the Project's construction plans for its manure basin (Minn. R. 7020.2100) but also (b) its manure management plan, including the availability and adequacy of the manure spreading acres (Minn. R. 7020.2225), (2) the Minnesota Department of Natural Resources' (DNR) required review and approval of the Project's water use, including the adequacy of well protections (Minn. Stat. § 103G.265), (3) Minn. R. 7020.2003's prohibition on any surface water discharge, (4) the Minnesota Board of Animal Health's review and approval of the Project's animal mortality composting operations (Minn. R. 1721.0740), and (5) MPCA's statutorily-required "protocol" for responding to "citizen complaints" regarding "livestock odor" through MPCA's monitoring of the Project for its compliance with the state's ambient air quality standards for hydrogen sulfide (Minn. Stat. § 116.0713(a)(1)).

31. Fifth, given that the Project's three karst opponents raised nothing but generalized, non-site specific regional karst concerns (Ex. O), MPCA's (1) initial site specific dismissal of karst concerns in its EAW (Ex. A at 13-14), (2) July 26, 2018 site inspection of the two public "comments" regarding karst, (3) availability of mitigation measures to address these two public "comments" and (4) negative declarations on the need for an EIS for all other feedlots in the karst region (Ex. B) constitute compelling evidence of the lack of any actual karst concerns with the Project.

c. MPCA's anticipated issuance of its negative declaration on the need for an EIS for the Project on or before September 3, 2018

32. Based, then, upon MPCA's EAW (Ex. A at 13-14) and its prior negative declarations on the need for an EIS for all comparable swine facilities (Ex. B), including those in

the karst region (*id.*), MPCA is anticipated to issue its negative declaration on the need for an EIS on or before September 3, 2018.

2. The Project's three karst opponents' July 3, 2018 petition to MPCA for a contested case hearing on their karst concerns with the Project

33. Even though the Project has, per MPCA's EAW for the Project (Ex. A at 13-14), no "potential for significant environmental effects" as it relates to karst, three special interest organizations — *i.e.*, (1) Responsible Agriculture for Karst Country (RAKC), (2) Land Stewardship Project (LSP) and (3) Minnesota Center for Environmental Advocacy (MCEA) — petitioned MPCA on July 3, 2018 for a contested case hearing on its karst concerns with the Project (Ex. O), including a requested temporary and permanent injunction on MPCA's approval of its permit for the Project.

34. But, whether or not it grants the petition, MPCA is, with respect to this petition, highly unlikely to reverse its own EAW findings on karst (Ex. A at 13-14) and its anticipated negative declaration on the need for an EIS.

3. The Project's applied-for land use approval

- a. **County's "approval or denial" of Heins' July 25, 2018 requested conditional use permit (CUP) for the Project is required to issue on or before November 2, 2018, unless its deadline is properly extended to on or before January 2, 2018**

35. On July 25, 2018, Heins submitted to County their requested CUP for the Project.
Ex. T.

36. While County can immediately proceed with its review of and public hearings on Heins' requested CUP, Minn. R. 4410.3100, subp. 1(B) "prohibits" County from issuing its "final approval" of Heins' requested CUP until after MPCA concludes its environmental review of the Project, presumably with its issuance of a negative declaration on the need for an EIS.

37. And, per Minn. Stat. § 15.99, subd. 2, County has 60 days (or up to 120 days if its 60-day deadline is properly extended) following MPCA's issuance of its negative declaration on the need for an EIS to "approve or deny" Heins' requested CUP for the Project.

b. County's anticipated approval of Heins' requested CUP for the Project on or before November 2, 2018

38. The Project is an expressly provided for "conditional use" in its agriculture zone. Ex. V at 47 ("Feedlots greater than 999 animal units").

39. Per Heins' requested CUP for the Project (Ex. T), the Project satisfies not only (a) County's Zoning Ordinance (Ordinance) § 604.05's "Performance Standards" for the Project (Ex. V at 47-49) but also (b) Ordinance § 504.01's "Criteria for Granting Conditional Use Permits" (*id.* at 33-34).

40. On this basis alone, County is compelled to approve of Heins' requested CUP for the Project. *Yang v. Cty. of Carver*, 660 N.W.2d 828, 832 (Minn. App. 2003) ("A County's denial of a conditional use permit is arbitrary where the applicant establishes that all of the standards specified by the zoning ordinance as conditions of granting the permit have been met" (citations omitted)).

41. And Heins will propose and agree to accept any and all reasonable conditions to address County's concerns, if any, with the Project.

42. Because of this, County will not be able to deny Heins' requested CUP based upon its concerns with the Project which are proactively addressed by Heins' proposed reasonable conditions on the Project. *Loncorich v. Buss*, 868 N.W.2d 755, 761 (Minn. App. 2015) ("If a conditional use permit applicant demonstrates to the governing body that imposing a reasonable condition would eliminate any conflict with the ordinance's standards and criteria, it

follows that the governing body's subsequent denial would be arbitrary" (quoting *RDNT, LLC v. City of Bloomington*, 861 N.W.2d 71, 78 (Minn. 2015)).

43. Based, then, upon the Project's satisfaction of County's CUP requirements and Heins' willingness to propose reasonable conditions which will address County's concerns, if any, with the Project, County is anticipated to approve of Heins' requested CUP for the Project on or before November 2, 2018.

D. DEFENDANTS' FIVE INITIAL MISSTEPS

44. MPCA's environmental review and contested case processes, like County's CUP process, are designed to identify and address legitimate concerns with the Project.

45. And, per Minn. R. 4410.3100, MPCA's environmental review process is required to be completed before any "formal approvals" of the Project can issue.

46. But, apparently concerned that (1) MPCA's environmental review process would end with a negative declaration on the need for an EIS for the Project, (2) the three karst opponents' petition for a contested case hearing would end with MPCA's issuance of its permit for the Project and (3) County would issue its CUP for the Project, the neighborhood opponents to the Project turned to Board to use Township's statutorily-prescribed land use controls to try to stop the Project.

47. Yet, in the process of trying to use Township's statutorily-prescribed land use controls to try to stop the Project, Defendants took several missteps, each of which needs to be immediately corrected prior to Board's next special meeting at 8:00 p.m. on August 2, 2018, so that Board does not compound its initial missteps.

1. **MISSTEP NO. 1: Board's June 14, 2018 removal of Melbostad from Board's deliberations regarding the Project**

48. Board's removal of one of its three Board Supervisors from its deliberations on a particular matter due to that Board Supervisor's alleged disqualifying conflicts of interests with regard to that matter requires that the Board Supervisor being removed have a direct pecuniary or contractual interest as to that matter. *Lenz v. Coon Creek Watershed Dist.*, 153 N.W.2d 209, 219 (Minn. 1967) (evaluating nature of pecuniary interest in determining whether official should be disqualified); *Nolan v. City of Eden Prairie*, 610 N.W.2d 697, 700 (Minn. App. 2000) (no conflict of interest when no pecuniary or contractual interest in project); *Ruhland v. City of Eden Valley*, No. A13-0110, 2013 WL 3285019 at *7 (Minn. App. July 1, 2013) (affirming rezoning decision of city council and holding that presence of applicant's brother-in-law on city council and support of father-in-law, the city's public works director, did not invalidate decision because "there is no evidence that either individual had a direct interest in the outcome of the zoning decision, much less a pecuniary interest," and thus did not have a conflict of interest under the factors established by the Minnesota Supreme Court in *Lenz*, 153 N.W.2d at 219 (emphasis added)).

49. At its regularly-scheduled monthly meeting on June 14, 2018, Board discussed its removal of Melbostad from its then-anticipated deliberations regarding the Project because of his alleged disqualifying conflicts of interest therein due to his past and ongoing employment with Heins' existing non-Project related farming operations.

50. Yet, in Township's record of its June 14, 2018 Board meeting, there is not, and could not be, any evidence that Melbostad has a direct pecuniary or contractual interest in the Project.

51. Melbostad has, in fact, no direct pecuniary or contractual interest in the Project.

52. Due, nevertheless, to Melbostad's alleged disqualifying conflicts of interest as to the Project, Landsom moved, Gjere seconded and they unanimously (2-0) approved of Melbostad's removal from Board's then-anticipated deliberations regarding the Project.

2. **MISSTEP NO. 2: Board's July 2, 2018 extension of its June 14, 2018 removal of Melbostad from (1) its then-anticipated future deliberations regarding the Project to (2) its actual deliberations regarding its possible hiring of legal counsel for its possible enactment of a feedlot moratorium, which were thus demonstrably about the Project**

53. Between Board's June 14, 2018 meeting and the unspecified date of its alleged public notice of its July 2, 2018 Special Meeting regarding its possible hiring of legal counsel for its possible enactment of a feedlot moratorium, Eiken contacted an attorney with the Minnesota Association of Townships (MAT) about not only (1) the requirements for Board's noticing of a special meeting outside of its regularly-scheduled meetings to discuss its possible hiring of legal counsel for its possible enactment of a feedlot moratorium but also (2) the requirements for Township's enactment of a feedlot moratorium. Ex. K.

54. "The MAT attorney told [Eiken] [Board] could hold a meeting within 5 days' notice as long as it was posted on the building where [Board] hold[s] monthly meeting." *Id.*

55. And, "[r]eading the meeting laws, [Eiken] think[s] this [July 2, 2018 Board meeting] would be considered a special meeting." *Id.*

56. As it relates to Township's possible enactment of a feedlot moratorium, MAT explains as follows:

Moratorium:

From time to time a township may encounter a particular type of use for which it is uncertain how to proceed. Further, changes in how development is actually occurring as opposed to how it was projected to occur may trigger the need to modify the comprehensive plan and zoning ordinance and the township will want to prevent further problems from occurring until the revisions can be made. Or, a community that is considering the adoption of its first comprehensive plan and zoning ordinance may simply want time to do things right without changes in the

town's make-up occurring during the planning process. In these situations, it may be helpful to adopt what the statutes call an "Interim Ordinance", but what is more commonly referred to as a moratorium. Moratoriums can be imposed on a particular use, or in some situations, they can be used to prevent any type of new development.

To be enforceable, the moratorium must be adopted as a formal ordinance, following the ordinance procedures of Minn. Stat. § 365.125. The ordinance should clearly define the area and types of uses to which it is to apply. It should also provide an effective date and duration. Minn. Stat. § 462.355, subd. 4, authorizes an initial one year period for the ordinance to be in effect, with extensions being authorized by action of the board for an additional eighteen month period.

Imposing some sort of development moratorium, however, cannot be done solely for the purpose of stalling. One of the requirements for imposing an interim ordinance is that a study be conducted with the intent of ultimately adopting planning and zoning revisions to address the identified problem(s). Courts have routinely struck down attempts to impose a moratorium when no study is actually be conducted and no other work on revising the planning and zoning documents is occurring.

Ex. M at 15-16 (emphasis added). MAT otherwise explains, as follows, the restrictions on Township's enactment of a feedlot moratorium:

A. MORATORIUMS

1. Local governments are statutorily authorized to adopt an interim ordinance that may regulate, restrict, or prohibit any use, development, or subdivision for a certain period. Interim ordinances often take the form of a moratorium prohibiting all or particular types of uses. Moratorium ordinances were upheld by the courts as a valid exercise of local zoning authority before the statutes expressly authorized such a restriction.
2. The authority to enact interim ordinances **must** be exercised for the purpose of protecting the planning process.
3. A municipality **may not** arbitrarily enact an interim moratorium ordinance to delay or prevent a single project.

Ex. N at 12 (emphasis added; footnotes omitted); *see, e.g.*, Ex. AA (five years of Ripley Township's highlighted legal fees of \$20,560.98 resulting from its enactment of a feedlot moratorium and zoning).

57. Because Board's possible enactment of a feedlot moratorium could not be, per MAT, "arbitrarily enact[ed] . . . to delay or prevent a single project" such as the Project (Ex. N at 12), Board's July 2, 2018 Special Meeting regarding its possible hiring of legal counsel for its possible enactment of a feedlot moratorium should not have been about the Project.

58. But, even though its possible hiring of legal counsel for its possible enactment of a feedlot moratorium should not have been about the Project, these deliberations of Board, through Landsom and Gjere, were demonstrably about the Project.

59. That is, because Melbostad's only alleged disqualifying conflicts of interest related to the Project, Board necessarily made its possible hiring of legal counsel for its possible enactment of a feedlot moratorium about the Project by extending its June 14, 2018 removal of Melbostad from (1) Board's then-anticipated deliberations regarding the Project to (2) Board's actual deliberations regarding its possible hiring of legal counsel for its possible enactment of a feedlot moratorium.

60. At the start of Board's July 2, 2018 Special Meeting regarding its possible hiring of legal counsel for its possible enactment of a feedlot moratorium, Board told Melbostad that, because these deliberations were demonstrably about the Project, he could sit at Board's table, but he needed to physically remove himself from Board's table and speak from the public's area if he wanted to speak to Board on the issue.

61. And, as he was directed to do by Board, Melbostad physically sat with the public when he addressed Board regarding its possible hiring of legal counsel for its possible enactment of a feedlot moratorium.

62. At the close of Board's July 2, 2018 Special Meeting, Landsom moved, Gjere seconded and they unanimously (2-0) approved of the tabling of the meeting until Board's next regularly-scheduled meeting at 8:00 p.m. on July 12, 2018.

3. **MISSTEP NO. 3: The July 12, 2018 pre-meeting meeting of Board (i.e., Landsom and Gjere), together with Eiken and Halverson, in violation of Minnesota's Open Meeting Law**

63. Minnesota's Open Meeting Law requires full transparency of all of Board's proceedings. *See Prior Lake American v. Mader*, 642 N.W.2d 729, 735 (Minn. 2002) (setting forth purpose of open meeting law) (quoting *St. Cloud Newspapers, Inc. v. Dist. 742 Cmty. Schs.*, 332 N.W.2d 1, 4 (Minn. 1983)).

64. Included therein, Board is required to publicly notice its meetings in which a quorum of Board discusses matters before it. Minn. Stat. 13D.01; Minn. Stat. 13D.04.

65. At Board's regularly-scheduled meeting at 8:00 p.m. on July 12, 2018, but after the initial portion thereof in which, as discussed below, Board, without Melbostad, (1) formally hired its legal counsel for its possible enactment of a feedlot moratorium and (2) delayed its deliberations on its possible enactment of a feedlot moratorium until its next special meeting at 8:00 p.m. on August 2, 2018, Board, without Melbostad but with Eiken and Halverson, admitted to Melbostad that it, consisting of Landsom, Gjere, Eiken and Halverson, had had a pre-meeting meeting with Township's subsequently formally hired legal counsel Kevin P. Lee (Lee).

66. Board, without Melbostad but with Eiken and Halverson, volunteered to Melbostad that Board, without Melbostad but with Eiken and Halverson, met around 7:00 p.m. on July 12, 2018 to both (1) informally hire Lee as Township's legal adviser for its possible enactment of a feedlot moratorium and (2) receive Lee's legal counsel on how Board should proceed at the regularly-scheduled meeting at 8:00 p.m. on July 12, 2018.

67. With regard to Board's failure to invite Melbostad to this pre-meeting meeting with Lee, Board, without Melbostad but with Eiken and Halverson, explained to Melbostad that it believed that its June 14, 2018 removal of him from its deliberations regarding the Project, including its July 2, 2018 extension thereof, had relieved it of its responsibility to invite him to the pre-meeting meeting, thereby necessarily conceding that Board's pre-meeting meeting was about the Project.

68. Board, without Melbostad but with Eiken and Halverson, also volunteered to Melbostad that it knew that it could get sued for its pre-meeting meeting with Lee.

69. At Board's regularly-scheduled meeting at 8:00 p.m. on July 12, 2018, Landsom and Gjere both blatantly and unabashedly read from, with Lee's clarifications thereof, the script which was given to them by Lee during their pre-meeting meeting with him.

70. Per Lee's pre-meeting meeting script to them, Gjere moved, Landsom seconded and they unanimously (2-0) approved of Board's hiring of Lee as its legal counsel for its possible enactment of a feedlot moratorium.

71. Also per Lee's pre-meeting meeting script to them, Gjere moved, Landsom seconded and they unanimously (2-0) approved of Board's Special Meeting at 8:00 p.m. on August 2, 2018 for its deliberations regarding its possible enactment of a feedlot moratorium.

72. Consistent with its premonition that it may be sued for its pre-meeting meeting with Lee, Board's pre-meeting meeting with Lee violated Minnesota's Open Meeting Law as Board gave no public notice thereof and thus did not hold that meeting publicly.

4. **MISSTEP NO. 4: Board's July 12, 2018 continued removal of Melbostad from its actual deliberations regarding its possible hiring of legal counsel for its possible enactment of a feedlot moratorium, which were thus demonstrably about *the Project***

73. Consistent with its July 2, 2018 extension of its June 14, 2018 removal of Melbostad from its then-anticipated deliberations regarding the Project to its actual deliberations regarding its possible hiring of legal counsel for its possible enactment of a feedlot moratorium, which were thus demonstrably about the Project, Board, without Melbostad but with Eiken and Halverson, excluded Melbostad from Board's invite list for its pre-meeting meeting with Lee, and it then directed Melbostad at the beginning of its regularly-scheduled meeting at 8:00 p.m. July 12, 2018 to a seat away from Board's table and with the public.

74. As he was directed, Melbostad sat away from Board's table and with the public during this meeting.

75. Because Board's only alleged basis for continuing to remove Melbostad from its deliberations regarding its possible hiring of legal counsel for its possible enactment of a feedlot moratorium was his alleged disqualifying conflicts of interest related to the Project, Board thereby again reaffirmed that its deliberations regarding its possible hiring of legal counsel for its possible enactment of a feedlot moratorium were about the Project.

5. **MISSTEP NO. 5: Board's formal hiring of Lee as Township's counsel at its regularly-scheduled meeting at 8:00 p.m. on July 12, 2018 was arbitrary and capricious**

76. Because Board's deliberations regarding its hiring of its legal counsel for its possible enactment of a feedlot moratorium were, as discussed above, demonstrably about the Project, Board had to ensure that its legal counsel was able to zealously advise it consistent with its above-discussed duty to only enact a feedlot moratorium which is "not arbitrarily enacted . . . to delay or prevent a single project" such as the Project. Ex. N at 12.

77. In other words, Board could not hire legal counsel who was already unretractably committed "to delay or prevent" the Project. *Id.*

78. Yet, by the time of its regularly-scheduled meeting at 8:00 p.m. on July 12, 2018, Board actually and/or constructively knew that Lee had already unretractably committed himself "to delay or prevent" the Project.

79. That is, because of his required disclosures (Minn. R. Prof. Cond. 1.7), Lee would have had to have disclosed to Board before he was hired that he (1) was a "Senior Staff Attorney" with the MCEA (Exhs. Q and U) and (2) the lead lawyer on behalf of the Project's three karst opponents — *i.e.*, RAKC, LSP and MCEA — in their July 3, 2018 filing with MPCA of a 33-page Petition for a Contested Case Hearing against the Project (Ex. O), which expressly sought "to delay and prevent" the Project (*id.*).

80. Indeed, with Lee's July 3, 2018 public filing of the petition (*id.*), Board was otherwise constructively aware of the same.

81. In either case, Board knew before hiring him as its legal counsel for its possible enactment of a feedlot moratorium, which was demonstrably about the Project, that Lee had a disqualifying conflict of interest in simultaneously representing (1) the Project's three karst opponents — *i.e.*, RAKC, LSP and MCEA — "to delay and prevent" the Project and (2) Board "to [not] delay and prevent" the Project.

82. And Board simply cannot reconcile (1) its June 14, 2018, July 2, 2018 and July 12, 2018 removal of Melbostad from its deliberations regarding the Project due to his purported disqualifying conflicts of interest with the Project due to his non-Project related farm employment with Heins with (2) its July 12, 2018 hiring of Lee to advise it on its deliberations regarding the Project despite its disqualifying conflicts of interest with the Project due to his

ongoing representation of the Project's three karst opponents — *i.e.*, RAKC, LSP and MCEA — "to delay or prevent" the Project.

83. In fact, as evidentiary (though circumstantial) proof of its knowing hiring of legal counsel, who was already unretractably committed "to delay or prevent" the Project, to advise Board to violate its duty to only consider a feedlot moratorium which is "not arbitrarily enacted . . . to delay or prevent a single project" such as the Project, Board misleadingly announced to the public at its July 12, 2018 regular meeting that Lee was nothing more than an attorney with the University of Minnesota Law School's Environmental and Energy Law Clinic. Ex. U.

E. THE SETTLEMENT EFFORTS

84. Because of their lifelong friendship, Al Hein met individually with Landsom on July 20, 2018 to discuss with him not only (1) the above-discussed missteps but also (2) constructive solutions for moving forward so as to address the neighborhood concerns but without further compounding the missteps to date such as directing the neighborhood opponents to the Project to, like the three karst opponents to the Project, use the above-described existing protections before MPCA and County to assert their concerns with the Project.

85. And, on July 23, 2018, Al Hein likewise met individually with Gjere for the same two purposes.

86. In his ongoing effort to find a solution, Al Hein met individually with Landsom twice again on July 24, 2018.

F. DEFENDANTS' TWO ADDITIONAL MISSTEPS

87. But, rather than trying to find a constructive solution for moving forward, Landsom and Gjere compounded their initial missteps.

1. **MISSTEP NO. 6: Through Landsom and Gjere, Board's second violation of Minnesota's Open Meeting Law**

88. Recognizing their missteps in arbitrarily and capriciously (1) hiring Lee as Board's legal counsel for its deliberations regarding its possible enactment of a feedlot moratorium and (2) considering its possible enactment of a feedlot moratorium as being about the Project, Landsom admitted to Al Hein on July 24, 2018 that he and Gjere discussed on or before July 23, 2018 how to resolve these missteps.

89. Per Landsom and Board's resulting public notice of its July 28, 2018 Special Meeting (Ex. BB) and its August 2, 2018 agenda (Ex. CC), Landsom and Gjere decided during their discussions on or before July 23, 2018 to (1) publicly notice Board's July 28, 2018 Special Meeting "to discuss and act on hiring an attorney to represent the Township" (Ex. BB) and (2) publish its August 2, 2018 agenda as being about (a) "[s]ubstitution of counsel" and "considering an ordinance for an interim ordinance to protect the planning process" (Ex. CC).

90. Board did not, however, publicly notice Landsom and Gjere's private meeting, even though they clearly met to discuss and act on Township's business.

91. And, while it purported to state a proper purpose for its possible enactment of its moratorium, Board continued to do so "to delay or prevent" the Project as proven by its failure to inform Melbostad of the July 26, 2018 Special Meeting.

2. **MISSTEP NO. 7: Through Landsom and Gjere, Board's third violation of Minnesota's Open Meeting Law**

92. Besides his reference to several other non-noticed meetings between him and Gjere, Landsom audaciously called Gjere in front of Al Hein on the evening of July 24, 2018.

93. And, even though Al Hein had in his prior discussions with Landsom explained the Open Meeting Law's prohibition on such non-noticed substantive discussions between them regarding Board business, Landsom and Gjere unabashedly discussed their intentions with regard

to Board's July 23, 2018 scheduled deliberations (1) on July 28, 2018 of the substitution of counsel and (2) on August 2, 2018 of the enactment of a moratorium.

94. Indeed, expressly identifying the distinct possibility of their disqualifying violations of the Open Meeting Law due to their multiple unnoticed meetings, Landsom strongly encouraged Gjere to find a face-saving solution to their missteps, including the Project's reduction in size to 2,500 sows.

95. Yet, in colorful and personally offensive language, Gjere rejected Landsom's pleas.

96. Landsom discussed, as well, Halverson's reliance on the Project's opponents in the giving of her advice and direction to Board, including the June 14, July 2 and July 12, 2018 removal of Melbostad and the July 12, 2018 hiring of Lee.

CAUSES OF ACTION

COUNT I: DECLARATORY JUDGMENT

(Defendants' arbitrary and capricious June 14, 2018 removal of Melbostad from Board's then-anticipated deliberations regarding the Project)

1. Melbostad had no disqualifying conflicts of interest regarding Board's then-anticipated deliberations regarding the Project.

2. Defendants' June 14, 2018 removal of Melbostad from Board's then-anticipated deliberations regarding the Project was arbitrary and capricious.

COUNT II: DECLARATORY JUDGMENT

(Defendants' arbitrary and capricious extension on July 2 and 12, 2018 of their June 14, 2018 removal of Melbostad from (1) Board's deliberations regarding the Project to (2) Board's deliberations regarding its possible hiring of legal counsel for its possible enactment of a feedlot moratorium, which were thus demonstrably about the Project)

3. Melbostad had no disqualifying conflicts of interest regarding Board's deliberations regarding its possible hiring of legal counsel for its possible enactment of a feedlot moratorium, which were thus demonstrably about the Project.

4. Defendants' July 2, 2018 and July 12, 2018 extension of Board's June 14, 2018 removal of Melbostad from Board's then-anticipated deliberations regarding the Project to its actual deliberations regarding its possible hiring of legal counsel for its possible enactment of a feedlot moratorium, which were thus demonstrably about the Project, was arbitrary and capricious.

5. And Defendants' anticipated July 26, 2018 and August 2, 2018 extension of Board's June 14, 2018 removal of Melbostad from Board's then-anticipated deliberations regarding the Project to its actual deliberations regarding its possible "substitution of counsel" and its possible enactment of a feedlot moratorium, which would thus be demonstrably about the Project, would likewise be arbitrary and capricious.

COUNT III: DECLARATORY JUDGMENT

(Defendants' multiple and ongoing violations of Minnesota's Open Meeting Law)

6. For their first violation of Minnesota's Open Meeting Law, Defendants' July 12, 2018 pre-meeting meeting with Lee was not publicly noticed and thus was not publicly held.

7. It was instead an intentionally private meeting between Landsom and Gjere, together with Eiken and Halverson, on one hand, and Lee, on the other hand, regarding the very same topic on Board's agenda for its regularly-scheduled meeting at 8:00 p.m. on July 12, 2018

(Ex. P) — *i.e.*, Board's possible hiring of legal counsel for its possible enactment of a feedlot moratorium.

8. And, given that he is a self-described "experienced litigator" (Ex. R) with "many years of practicing commercial litigation in Maryland" (Ex. Q), and he was being hired to represent a public entity, Lee no doubt knew of Minnesota's Open Meeting Law, including the need to, among other things, publicly notice the pre-meeting meeting (Ex. P).

9. Worse yet, Board's July 12, 2018 violation of Minnesota's Open Meeting Law was demonstrably premeditated because Lee's offices out of both Minneapolis (Ex. R) and St. Paul (Ex. Q) are nearly three hours away from Township's Town Hall in Mabel, MN.

10. As intended, the result of Board's lack public notice of the pre-meeting meeting is that Defendants and Lee were improperly permitted to shield their pre-meeting meeting discussions from the public.

11. As proven by its July 23, 2018 public notice and agenda (Exhs. BB-CC) and its discussions right in front of Al Hein, Board, through Landsom and Gjere, have since on or about July 20, 2018 through at least July 24, 2018 repeatedly violated the Open Meeting Law by their above-discussed serial non-noticed meetings to discuss Board matters.

12. The statutorily-prescribed penalties for Defendants' blatant violation of Minnesota's Open Meeting Law include without limitation Defendants' payments to Heins of (1) non-reimbursable penalties, (2) Heins' reasonable attorneys' fees and costs incurred in pursuing Defendants' violations of Minnesota's Open Meeting Law and (3) the disqualification of Landsom and Gjere for their at least three violations thereof.

COUNT IV: DECLARATORY JUDGMENT

(Defendants' arbitrary and capricious hiring of legal counsel who cannot properly advise Board as to its duty)

13. Before hiring Lee as its legal counsel for its possible enactment of a feedlot moratorium, Board knew that Lee was unable to properly advise it per its duty.

14. Board's arbitrary and capricious hiring of Lee must be rescinded prior to its August 2, 2018 meeting.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs request the full relief:

1. A declaration of Defendants' arbitrary and capricious June 14, July 2 and July 12, 2018 removal of Melbostad from Board's deliberations, and his immediate reinstatement for Board's deliberations, including Board's August 2, 2018 possible enactment of a feedlot moratorium;


2. A declaration of Defendants' July 12, 2018 and July 20-24, 2018 violations of Minnesota's Open Meeting Law, and an order requiring Defendants to pay Plaintiffs their (a) non-reimbursable penalties, (b) their reasonable attorneys' fees and costs incurred herein, and (c) the disqualifications of Landsom and Gjere;

3. A declaration of Defendants' arbitrariness and capriciousness in Board's July 12, 2018 hiring of Lee as its legal counsel for its possible enactment of a feedlot moratorium, and the immediate rescission of their hiring of Lee as its legal counsel prior to or at its 8:00 p.m. August 2, 2018 Special Meeting for its possible enactment of a feedlot moratorium; and

4. All other proper legal and equitable relief, including temporary and permanent injunctive relief.

DATED: July 26, 2018

BRIGGS AND MORGAN, P.A.

By:  _____

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**ATTORNEYS FOR PLAINTIFFS
ALVIN H. AND MERILEE HEIN**

ACKNOWLEDGMENT

The undersigned acknowledges that sanctions may be imposed pursuant to Minn. Stat. § 549.211, subd. 3.


/s/ Jack Y. Perry _____

Jack Y. Perry

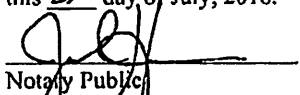
VERIFICATION

STATE OF MINNESOTA)
) ss.
COUNTY OF FILLMORE)

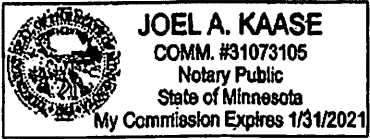
I, Alvin H. Hein, have read the contents of the above Verified Complaint for Declaratory and Other Relief. Based on my personal knowledge, the facts stated therein, including the attached exhibits, are true, excepting those facts which are stated upon information and belief. Based upon reliable information, I believe that the facts stated upon information and belief are true.


Alvin H. Hein

Subscribed and sworn to before me
this 25th day of July, 2018.



Notary Public
Commission Expires: 1-31-21



STATE OF MINNESOTA
COUNTY OF FILLMORE

DISTRICT COURT
THIRD JUDICIAL DISTRICT
CASE TYPE: Zoning/Other Civil

Alvin H. and Merilee Hein,

Court File No. _____
The Honorable _____

Plaintiffs,

v.

Newburg Township, Newburg Township
Board of Supervisors, Newburg Township
Board Chair Oswald Landsom, and Newburg
Township Board Supervisor Mark Gjere,

Defendants.

**PLAINTIFFS' MEMORANDUM OF
LAW IN SUPPORT OF THEIR
MOTION FOR TEMPORARY
RESTRAINING ORDER**

INTRODUCTION

With this motion, Plaintiffs Alvin H. and Merilee Hein (Heins) seek an immediate temporary restraining order (TRO) against (1) Defendant Newburg Township (Township), (2) Defendant Newburg Township Board of Supervisors (Board), (3) Defendant Newburg Township Board Chair Oswald Landsom (Landsom), and (4) Defendant Newburg Township Board Supervisor Mark Gjere (Gjere) (collectively, Defendants) prior to Board's Special Meeting at 8:00 a.m. on August 2, 2018. Heins seek to enjoin Defendants from (1) continuing to remove Board Supervisor Steve Melbostad (Melbostad) from Board's August 2, 2018 deliberations regarding its possible enactment of a feedlot moratorium, (2) continuing to be represented by Kevin P. Lee (Lee) during Board's August 2, 2018 deliberations regarding its possible enactment of a feedlot moratorium, and (3) continuing with Board's deliberations regarding its possible enactment of a feedlot moratorium with Landsom and Gjere who have both committed more than three disqualifying Open Meeting Law violations. And this Court can accomplish all three objectives by simply imposing Heins' requested indefinite stay on Board's August 2, 2018

Special Meeting until this Court has time to adequately address the merits of the serious and multiple allegations of misconduct against Defendants.

The need for this immediate relief is urgent and compelling. But for the TRO, Heins and the rest of Township's 442 citizens will be (1) wrongfully denied the input and vote of one of their three elected Board Supervisors, (2) represented by a Board that is being counseled to violate its duty to not "arbitrarily enact [a moratorium] . . . to delay or prevent a project" such as the Project, and (3) represented by a Board consisting of two Board Supervisors who have committed at least three disqualifying conflicts of interest. Stated otherwise, the integrity of Defendants' representative government is at issue, and there is no counterbalancing downside to the requested TRO.

FACTS

The relevant facts are as set forth in Heins' Verified Complaint for Declaratory and Other Relief (Verified Complaint).

ANALYSIS

I. THE DAHLBERG TRO FACTORS

Rule 65 of the Minnesota Rules of Civil Procedure governs the issuance of temporary injunctive relief. *See* Minn. R. Civ. P. 65.01-.04. "A temporary injunction is an extraordinary equitable remedy. Its purpose is to preserve the status quo until adjudication of the case on its merits." *Miller v. Foley*, 317 N.W.2d 710, 712 (Minn. 1982). The district court has "broad discretion" in determining whether a TRO should issue. *Metro. Sports Facilities Comm'n v. Minn. Twins P'ship*, 638 N.W.2d 214, 220 (Minn. App. 2002).

The five TRO factors are well established:

1. The nature and background of the relationship between the parties pre-existing the dispute giving rise to the request for relief;

2. The harm to be suffered by plaintiff if the temporary restraint is denied as compared to that inflicted on defendant if the injunction issues pending trial;
3. The likelihood that one party or the other will prevail on the merits;
4. The public interest; and
5. The administrative burdens involved in judicial supervision and enforcement of the temporary decree.

Dahlberg Bros., Inc. v. Ford Motor Co., 272 Minn. 264, 274-75, 137 N.W.2d 314, 321-22 (1965); *Eakman v. Brutger*, 285 N.W.2d 95, 97 (Minn. 1979) (applying *Dahlberg* factors to TROs). While all five factors may be considered, the main focus is on the likelihood of success on the merits and the injury that will be suffered by the moving party in the absence of a TRO. See 2A David F. Herr & Roger S. Haydock, *Minnesota Practice* § 65.5 (2012).

II. EACH DAHLBERG FACTOR STRONGLY SUPPORTS THE ISSUANCE OF HEINS' REQUESTED TRO

A. FACTOR NO. 1: The parties' relationship weighs heavily in favor of the issuance of the TRO

A TRO is intended to "preserve the 'status quo ante' relationship between the parties," meaning the status quo between the parties as it existed prior to the parties' dispute. See *Queen City Constr., Inc. v. City of Rochester*, 604 N.W.2d 368, 372 (Minn. App. 1999) (citing *Dahlberg*, 137 N.W.2d at 322). This factor evaluates the understanding among the parties as to what each might reasonably expect of the other as a result of the relationship of the parties. See *Dahlberg*, 137 N.W.2d at 322. To that end, evidence that "the parties' relationship could be maintained while awaiting trial on the merits" weighs in favor of granting a TRO. See *Dailey v. City of Long Lake*, No. C3-98-1663, 1999 WL 118633, at *2 (Minn. App. Mar. 9, 1999).

With Heins' TRO motion, this Court can preserve the status quo of the parties' relationship pending the requisite proceeding on the merits of Heins' serious allegations of misconduct against Defendants. Defendants have no counter argument.

B. FACTOR NO. 2: The balance of harms weighs heavily in favor of the issuance of the TRO

1. Heins will suffer irreparable harm

A significant factor in determining whether injunctive relief should be granted is whether the moving party will be irreparably harmed in the absence of an order. *See Cherne Indus., Inc. v. Grounds & Assocs. Inc.*, 278 N.W.2d 81, 92 (Minn. 1979) ("where the injury to the moving parties would be certain and irreparable if the application for a temporary injunction was denied, and if the injunction was granted the injury to the opposing parties, even though the final decree should be in their favor, would be inconsiderable, a temporary injunction will be issued to preserve the status quo until a trial on the merits . . . "); *Town of Burnsville v. City of Bloomington*, 264 Minn. 133, 139, 117 N.W.2d 746, 750 (1962). Notably, the mere *threat* of irreparable harm is sufficient. *Cherne Indus.*, 278 N.W.2d at 92.

Without their requested TRO, Heins will lose their representative government on an issue which directly affects their constitutionally protected property rights. *See Northpointe Plaza v. City of Rochester*, 465 N.W.2d 686, 689 (Minn. 1991) ("Minnesota recognizes a constitutionally protected property interest in an application for a land use permit which, as here, is conditioned only upon compliance with the zoning ordinance") (citing *Snyder v. City of Minneapolis*, 441 N.W.2d 781, 792-93 (Minn.1989)). Having their wrongfully removed duly elected official — *i.e.*, Melbostad — present and participating in Board's August 2, 2018 deliberations is a critical right of a representative republic. *Cf. Reynolds v. Sims*, 377 U.S. 533, 565 (1964) (recognizing that "representative government is in essence self-government through the medium of elected representatives of the people, and each and every citizen has an inalienable right to full and effective participation in the political processes . . ."). Having their land use rights affected by their government's blatantly improper legal representation is likewise fundamental. *See*

Northpointe Plaza, 465 N.W.2d at 689. And having two statutorily-disqualified elected officials — *i.e.*, Landsom and Gjere — deciding issues affecting their property is similarly improper. Minn. Stat. § 13D.06, subd. 3 (legislatively mandating forfeiture of office for three intentional open meeting law violations).

2. Defendants will suffer no legally cognizable harm

Conversely, Defendants cannot even arguably raise a counterbalancing adverse impact to them in being forced to delay Board's August 2, 2018 deliberations on its possible enactment of a feedlot moratorium. Per Minn. R. 4410.3100's "prohibition," there is no possibility of any interim "formal approval" of the Project.

C. FACTOR NO. 3: Heins are likely to succeed on the merits of their claims

Heins need only show a likelihood of success on the merits, which is a threshold easily met in this case. *See Dahlberg*, 137 N.W. 2d at 321. This factor does not require a strong or even a fair showing of the probability of success. "[I]f a plaintiff makes even a doubtful showing as to the likelihood of prevailing on the merits, a district court may consider issuing a temporary injunction to preserve the status quo until trial on the merits." *Metro. Sports Facilities Comm'n*, 638 N.W.2d at 226 (emphasis added).

As to the impropriety of their anticipated continued removal of Melbostad from Board's August 2, 2018 deliberations regarding its possible enactment of a feedlot moratorium, Defendants have no real defense. Rather, their sole justification to date for Melbostad's removal is contrary to both (1) Supreme Court precedent (Ver. Comp. ¶¶ 46-50) and (2) MAT direction (*id.* ¶ 54).

As to the impropriety of their anticipated continued receipt of legal counsel at Board's August 2, 2018 Special Meeting on its deliberations regarding its possible enactment of a feedlot moratorium from an attorney who is unretractably committed "to delay or prevent" the Project,

Defendants have no real defense. Rather, MAT has accurately described the case law precedent, which requires that it not "arbitrarily enact [a moratorium] . . . to delay or prevent a project" such as the Project.

And, as to the impropriety of Landsom and Gjere continuing to deliberate on August 2, 2018 despite their at least three disqualifying Open Meeting Law violations, Defendants have no defense. There are few more basic obligations than for Board Supervisors to honor their public notice and hearing obligations. And, here, Landsom and Gjere defiantly continued their violations even after being educated and warned by Heins against doing so.

D. FACTOR NO. 4: The requested TRO will serve the public interest

As it relates to the fair governance protections sought by this TRO, the public is 100% aligned with Heins. The improper removal of an elected official, the employment of unretractably biased legal counsel and the continued voting of statutorily-disqualified Board Supervisors adversely affects all Township citizens alike as they all have their representative governance fundamentally compromised. Thus, while these citizens may differ amongst themselves on the merits of the Project, they are united in favor of fair governance.

E. FACTOR NO. 5: The administrative burden of the requested TRO is slight

The only administrative requirement arising from Heins' requested TRO is Defendants' public notice of Board's indefinite suspension of its deliberations regarding its possible enactment of a feedlot moratorium. And, because Defendants' public notice requires but a single 8½" x 11" paper announcement posted on its Town Hall (*see, e.g.*, Exhs. BB-CC), there is virtually no administrative burden arising therefrom.

III. NO TRO BOND SHOULD BE REQUIRED

The purpose of a TRO bond is to require the party seeking temporary injunctive relief to pay for any harm caused by the erroneous grant of a temporary restraining order. *See Hubbard*

Broad., Inc. v. Loescher, 291 N.W.2d 216, 220 (Minn. 1980). A trial court has wide discretion in setting the amount of a bond (see *Paradata of Minn., Inc. v. Fox*, 356 N.W.2d 852, 855 (Minn. App. 1984)), and it may waive the requirement that the movant post a bond. See *Ecolab, Inc. v. Gartland*, 537 N.W.2d 291, 296-97 (Minn. App. 1995).

As discussed above, there will be no harm to Defendants if the requested TRO is granted in order to maintain the status quo. This Court should therefore exercise its discretion and waive any requirement that Plaintiffs post a bond or other security as a condition to the issuance of the TRO.

CONCLUSION

As set forth in their Verified Complaint, Heins have done everything they could to avoid this TRO motion, including repeatedly meeting with Landsom and Gjere between July 20-24, 2018 to try to educate them on their missteps. Heins' requested TRO will provide the parties with the much needed forum and time to resolve their disputes without further pitting neighbor against neighbor in a town of only 444.

DATED: July 26, 2018

BRIGGS AND MORGAN, P.A.

By: /s/ Jack Y. Perry

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**ATTORNEYS FOR PLAINTIFFS
ALVIN H. AND MERILEE HEIN**

ACKNOWLEDGMENT

The undersigned acknowledges that sanctions may be imposed pursuant to Minn. Stat. § 549.211, subd. 3.

/s/ Jack Y. Perry

Jack Y. Perry

10930743v6

STATE OF MINNESOTA
COUNTY OF FILLMORE

DISTRICT COURT
THIRD JUDICIAL DISTRICT
CASE TYPE: Zoning/Other Civil

Alvin H. and Merilee Hein,

Court File No. _____
The Honorable _____

Plaintiffs,

v.

**[PROPOSED] ORDER GRANTING
TEMPORARY RESTRAINING ORDER**

Newburg Township, Newburg Township
Board of Supervisors, Newburg Township
Board Chair Oswald Landsom, and Newburg
Township Board Supervisor Mark Gjere,

Defendants.

This matter came before the Court upon Plaintiffs Alvin H. and Merilee Hein's (Heins) Motion for Temporary Restraining Order. Based upon a full consideration of all of the files and proceedings, herein, including the memorandum and verified complaint submitted with this motion, Heins' motion is **GRANTED**, and, accordingly, **IT IS HEREBY ORDERED THAT:**

1. An indefinite stay is imposed on Defendant Newburg Township Board of Supervisors' (Board) August 2, 2018 Special Meeting until this Court has time to adequately address the merits of the serious and multiple allegations of misconduct against Defendants Newburg Township (Township), Board, Newburg Township Board Chair Oswald Landsom (Landsom), and (4) Newburg Township Board Supervisor Mark Gjere (Gjere) (collectively, Defendants);
2. No bond shall be required;
3. This Order shall remain in effect until further Order of the Court.

DATED: _____, 2018

BY THE COURT:

Judge of District Court