STATE OF MINNESOTA
IN COURT OF APPEALS
A18-0858

Nell Mathews, et al.
Appellants,

vs.

City of the Village of Minnetonka Beach,
Respondent,

Vanessa Abraham, et al.,
Respondents.

Filed April 29, 2019
Affirmed in part, reversed in part, and remanded
Cochran, Judge

Hennepin County District Court
File No. 27-CV-16-18370

Patrick B. Steinhoff, Bruce D. Malkerson, Malkerson Gunn Martin LLP, Minneapolis, Minnesota (for appellants Nell Mathews, et al.)

Justin L. Templin, George C. Hoff, Hoff Barry, P.A., Eden Prairie, Minnesota (for respondent City of the Village of Minnetonka Beach)

William H. Henney, Minnetonka, Minnesota (for respondents Vanessa Abraham, et al.)

Considered and decided by Reyes, Presiding Judge; Hooten, Judge; and Cochran, Judge.

U N P U B L I S H E D O P I N I O N

COCHRAN, Judge

Appellants challenge the district court's grant of summary judgment to respondents City of the Village of Minnetonka Beach (the city), Vanessa Abraham, and Santiago Abraham and the district court's denial of their own motion for partial summary judgment regarding claims surrounding the city's grant of a permit to construct a patio. Appellants argue that the district court erred in (1) dismissing appellants' claim of slander to title; (2) concluding that the city was entitled to reimbursement of its planning fees; (3) concluding that the city complied with statutory requirements in determining appellants' administrative appeal; (4) concluding that appellants' administrative appeal was not automatically granted pursuant to Minn. Stat. § 15.99 (2018); (5) concluding that the city's denial of appellants' administrative appeal was not arbitrary; (6) granting the city's motion for summary judgment on appellants' open-meeting-law claim; and (7) denying appellants' requests for further discovery. We affirm the district court except with regard to the question of whether the city complied with the statutory requirements in determining appellants' administrative appeal. With regard to that issue, we reverse and remand to the city's board of adjustments and appeals.

FACTS

Appellants Nell Mathews and Max Hecker own and reside in a single-family home located in the City of the Village of Minnetonka Beach. Appellants' claims originate with an improvement project (the project) undertaken by the previous owners (the previous

owners) of an adjacent property (the property).[1] In April 2015, a wooden deck was removed from the property without a permit or approval from the city. In August 2015, the previous owners began work to install a stone patio in the area where the wooden deck had been. The city initially told the previous owners' contractors that they did not need a permit to install the stone patio. After appellants objected to the project, Ben Gozola, the city's planning and zoning administrator,[2] informed appellants that the previous owners would apply for a permit for the project. Gozola told appellants that, because the project did not qualify as a "structure," it did not need to meet setback requirements and that the project satisfied requirements regarding the amount of impervious-surface coverage on the property. Gozola told appellants that he would issue a grading permit for the project and informed them that they could submit an administrative appeal to the city's board of adjustments and appeals (the board) if they disagreed with his decision.

In October 2015, appellants filed an administrative appeal of Gozola's decision to approve a permit for the project. Appellants paid a $250 application fee and signed a document stating:

> Additional Costs: The applicant requests processing of this application and agrees to pay to the City of Minnetonka Beach within Thirty (30) days after billing statement mailed or delivered, the actual costs incurred by the City for engineering, planning and zoning, legal and inspection expenses reasonably and necessarily required by the City for the processing of the application.

[1] The current owners of the property, and named defendants, Vanessa and Santiago Abraham purchased the property from the previous owners after the project was completed.
[2] Gozola is employed by a private firm and serves the city under a consulting contract.

Appellants explained their position that the patio and accompanying retaining wall constituted a structure, necessitating that it meet setback requirements, and that the project improperly expanded and increased the nonconforming impervious-surface coverage on the lot. Appellants requested that the board make a determination that the project could not proceed unless it received variances from the applicable provisions of the city's zoning ordinance.

On November 9, 2015, the board held a public meeting to consider appellants' administrative appeal. Gozola presented a report explaining the basis for his conclusions that the patio and retaining walls were not structures and that the project did not increase the impervious-surface coverage. Appellants also submitted materials in advance of the hearing and addressed the board during the hearing. The board voted to deny the appeal by a vote of two-to-one with one abstention. Gozola subsequently issued a permit, allowing the previous owners to proceed with building the patio.

At some point following the vote, appellants came to believe that Gozola withheld pertinent information from the board. Appellants petitioned the city to reopen their administrative appeal. The city's attorney responded to appellants' request, stating that the request to reopen the appeal was "unusual, if not unprecedented," but that the board would schedule a meeting to consider the request.

On December 19, 2015, appellants also filed suit in district court, requesting injunctive relief and asserting that they suffered more than $50,000 in damages. Appellants claimed that the board's decision was legally defective and that, because the board failed to issue a proper decision, their administrative appeal should be deemed

granted. Appellants later filed several amended complaints adding additional claims, and the city filed a counterclaim requesting reimbursement for the costs that it incurred associated with appellants' administrative appeal.

On January 11, 2016, the board met in a closed-door meeting with their litigation attorney and Gozola. Following the closed-door meeting, the board held an open meeting to discuss whether or not to reopen the appeal. The mayor explained that the board would not be taking any comments from the public, but he opened the floor to members of the board. Two board members noted the difficulty of the situation for everyone involved, but nobody addressed appellants' arguments for reopening their administrative appeal. The board then voted to deny the request to reopen the appeal by a three-to-one vote.

At 5:00 a.m. the next morning, one of the board members sent the mayor an email stating that he felt the decision may have been influenced by the closed-door meeting. The board member wrote that, "In the closed session we discussed the merits of the City position in a lawsuit, which have to remain private due to litigation" but that the vote "seemed to be on the merits of a lawsuit," rather than the merits of the request to reopen the administrative appeal. Appellants later amended their complaint to add a claim that the city violated the open-meeting law based on this closed-door meeting.

Because Gozola works for the city under a consulting contract, the city had to pay him for the additional time that he worked on appellants' administrative appeal. The city sent appellants invoices totaling $4,200.85 for Gozola's time. That amount was later reduced to $3,530.35. Appellants did not pay the fees and argued that they should not be

charged any fees for Gozola's work. The city council discussed the issue at meetings held in September, October, and November of 2016.

On December 5, 2016, the city council held a special meeting and addressed appellants' unpaid debt for the expenses associated with their administrative appeal. Two council members voted in favor of certifying appellants' debt to the county auditor for collection with their property taxes, two council members voted against certifying the debt, and the mayor broke the tie by voting in favor of certifying the debt.

On December 19, 2016, appellants appealed the certification of the debt to their property taxes to this court. In their appeal, appellants argued that the city neither had the right to charge them any fees nor the authority to certify the debt to their property taxes. The city conceded that it did not have the statutory authority to certify the debt to appellants' property taxes for collection, but maintained that it did have the right to charge the fees and collect them by other means.

On May 8, 2017, the city passed a resolution to remove the certification of the charges to appellants' property taxes. On May 9, this court heard oral arguments on the issues. This court later issued a published opinion stating that the city did not have the authority to certify the debt to appellants' property taxes for collection. *Mathews v. City of Vill. of Minnetonka Beach*, 899 N.W.2d 881, 883 (Minn. App. 2017). This court did not reach the issue of whether the city was entitled to charge the fees and collect them by some other mechanism. *Id.*

After this court's decision, the district court heard competing discovery motions and denied appellants' motion to compel further discovery. The district court then

addressed competing summary-judgment motions. The district court granted the city's motion for summary judgment and denied appellants' motion for partial summary judgment. This appeal follows.

D E C I S I O N

On appeal, appellants argue that the district court erred in (1) dismissing appellants' claim of slander to title; (2) concluding that the city was entitled to reimbursement of its planning fees; (3) concluding that the city complied with statutory requirements in determining appellants' administrative appeal; (4) concluding that appellants' administrative appeal was not automatically granted pursuant to Minn. Stat § 15.99; (5) concluding that the city's denial of appellants' administrative appeal was not arbitrary; (6) granting the city's motion for summary judgment on appellants' open-meeting-law claim; and (7) denying appellants' requests for further discovery. We address each issue in turn after discussing the applicable standard of review.[3]

I. Standard of Review.

A district court "shall grant summary judgment if the movant shows that there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law." Minn. R. Civ. P. 56.01. A genuine issue of material fact exists if a rational trier of fact, considering the record as a whole, could find for the non-moving party. *Frieler v. Carlson Mktg. Grp., Inc.*, 751 N.W.2d 558, 564 (Minn. 2008). In opposing summary

[3] Because we reverse the board's decision due to its failure to follow statutory procedural requirements, we do not address appellants' separate argument that we should reverse because the board's denial of appellants' administrative appeal was arbitrary.

judgment, "general assertions" are not enough to create a genuine issue of material fact. *Nicollet Restoration, Inc. v. City of St. Paul*, 533 N.W.2d 845, 848 (Minn. 1995). To successfully oppose a motion for summary judgment, appellants "must extract *specific*, admissible facts from the voluminous record and particularize them" for the district court. *Kletschka v. Abbott-Northwestern Hosp., Inc.*, 417 N.W.2d 752, 754 (Minn. App. 1988), *review denied* (Minn. Mar. 30, 1988). This court applies a de novo standard of review to a district court's legal conclusions on summary judgment and views the evidence in the light most favorable to the non-moving party. *RAM Mut. Ins. Co. v. Rohde*, 820 N.W.2d 1, 6 (Minn. 2012). This court will affirm summary judgment if it can be sustained on any ground. *Doe v. Archdiocese of St. Paul*, 817 N.W.2d 150, 163 (Minn. 2012).

II. The city has statutory immunity with respect to appellants' slander-of-title claim.

Appellants brought a slander-of-title claim alleging that the city slandered the title to their property by improperly certifying their debt to their property taxes for collection. The district court determined that the city has statutory immunity with respect to appellants' slander-of-title claim under Minn. Stat. § 466.03, subd. 6 (2018). On appeal, appellants argue that the district court erred in concluding that the city has statutory immunity because its decision to certify the debt was not a policy-level decision. The city counters that the district court properly determined that the city's decision to certify the debt was a policy-level decision.

A city is immune from liability for "[a]ny claim based upon the performance or the failure to exercise or perform a discretionary function or duty, whether or not the discretion

is abused." Minn. Stat. § 466.03, subd. 6. "Government conduct is considered discretionary and thus protected by statutory immunity when the state produces evidence that the conduct was of a policy-making nature." *Schroeder v. St. Louis County*, 708 N.W.2d 497, 504 (Minn. 2006). A city is entitled to statutory immunity "when there has been a planning-level decision; that is, social, political, or economic considerations have been evaluated and weighed as part of the decision-making process." *Id.* But it is not entitled to statutory immunity for "operational-level decisions, those involving day-to-day operations of government, the application of scientific and technical skills, or the exercise of professional judgment." *Id.* "There is a 'gray area' dividing protected and unprotected decisions, but the underlying concern is whether the conduct at issue involves the balancing of public policy considerations in the formulation of policy." *Conlin v. City of St. Paul*, 605 N.W.2d 396, 400 (Minn. 2000). "Statutory immunity exists to prevent the courts from conducting an after-the-fact review which second-guesses certain policy-making activities that are legislative or executive in nature." *Watson by Hanson v. Metro. Transit Comm'n*, 553 N.W.2d 406, 412 (Minn. 1996) (quotation omitted). "The application of immunity is a question of law we review de novo." *Vassallo ex rel. Brown v. Majeski*, 842 N.W.2d 456, 462 (Minn. 2014).

In determining whether statutory immunity applies, courts first identify the challenged governmental conduct. *Schroeder*, 708 N.W.2d at 504. The conduct at issue here is the certification of the debt to appellants' property taxes for collection. The next question is whether certifying the debt constitutes a planning-level decision or an operational-level decision. *Id.*

In this case, the City Code authorized city staff to file a lien upon a property in the event that costs associated with a zoning application or appeal were not paid within a reasonable time. City of the Village of Minnetonka Beach City Code (City Code) § 227(4) (2015).[4] The city council discussed the fees in question during at least three different city council meetings in the fall of 2016. During a city council meeting in November, a council member made a motion to delay the assessment of the fees until the ongoing litigation was settled or mediation took place. The motion failed, and in December, the city went ahead with collection of the fees. The city chose to do so by certifying the debt to appellants' property taxes rather than filing a lien.

The undisputed facts demonstrate that the city made a policy-level decision to certify the debt to appellants' property taxes in order to collect fees associated with zoning decisions. The city council debated whether or not the city should certify the debt to appellants' property taxes. The city council considered the ongoing litigation between the parties and the effect that certifying the debt might have on the litigation and its potential economic costs. The city council ultimately decided to certify the debt rather than filing a lien as provided by the city's ordinance.[5]

The city council's decision to certify appellants' debt to their property taxes took into consideration the social and economic issues arising out of applications for and appeals

[4] We note that the city has amended and recodified the City Code since appellants filed their administrative appeal. We cite the version of the City Code in effect at that time.
[5] We note that the city council also charged the previous owners fees in relation to the city's review of the project. The previous owners did not pay the fees and the council voted unanimously to certify the previous owners' debt to their property taxes for collection.

of zoning permits and litigation with city residents, making it a policy-level decision. *Schroeder*, 708 N.W.2d at 504. Because the decision to certify the debt was a policy-level decision, the city is entitled to statutory immunity with respect to claims arising out of that decision. *Id.* Although the city council abused its discretion in certifying the debt, the fact that the city council abused its discretion does not negate its immunity. Minn. Stat. § 466.03, subd. 6.

Appellants argue that statutory immunity does not apply if the city's conduct was willfully and maliciously wrong. Appellants' argument confuses statutory immunity with official immunity. The Minnesota Supreme Court has explained that statutory immunity applies "even where the discretion of the governmental entity is abused" and thus differs from "official immunity, which strips the potential immunity from those who act maliciously and intentionally." *Janklow v. Minn. Bd. of Exam'rs for Nursing Home Adm'rs*, 552 N.W.2d 711, 717-18 (Minn. 1996). Accordingly, the city has statutory immunity from appellants' slander-of-title claim, and we need not address whether the city's conduct was malicious.[6]

III. The district court did not err in concluding that the city is entitled to reimbursement of costs associated with appellants' administrative appeal.

Appellants argue that the city is not entitled to reimbursement of the costs associated with their administrative appeal because reimbursement of those costs is not authorized by Minn. Stat. § 462.353, subd. 4 (2018), and the parties did not enter into a valid contract

[6] Because we conclude that the city has statutory immunity from this claim, we do not reach the issue of whether the city is also entitled to summary judgment on the merits of the slander-of-title claim.

allowing the city to recover the costs. The city counters that it had authority to collect the fees under Minn. Stat. § 462.357, subd. 6 (2018), and City Code § 227(1), (2) (2015).

To interpret a statute or an ordinance, we first assess whether the "language, on its face, is clear or ambiguous." *Am. Family Ins. Grp. v. Schroedl*, 616 N.W.2d 273, 277 (Minn. 2000). If the language is "clear and free from all ambiguity," the plain meaning controls and is not "disregarded under the pretext of pursuing the spirit." Minn. Stat. § 645.16 (2018). But if a statute or ordinance has more than one reasonable interpretation, it is ambiguous and we apply canons of statutory construction to determine its meaning. *State v. Vasko*, 889 N.W.2d 551, 556 (Minn. 2017). Each statute or ordinance is to be "construed, if possible, to give effect to all its provisions." Minn. Stat. § 645.16 (referring to statutes). Statutory construction is a legal question, which we review de novo. *Brookfield Trade Ctr., Inc. v. County of Ramsey*, 584 N.W.2d 390, 393 (Minn. 1998).

Appellants argue that Minn. Stat. § 462.353, subd. 4(a), which authorizes municipalities to recover costs that they incur reviewing applications for a permit as long as the costs are reasonable and have a nexus to the actual cost of the service, does not apply to their administrative appeal. But a separate provision provides that "[a]ppeals to the board of appeals and adjustments may be taken by any affected person upon compliance with any reasonable conditions imposed by the zoning ordinance." Minn. Stat. § 462.357, subd. 6. The city's zoning ordinance in effect at the time provided that individuals filing an administrative appeal must consent to pay the costs and expenses incurred in processing that appeal, including "City Staff time." City Code § 227(2).

The city had to pay for the time that Gozola spent reviewing appellants' administrative appeal. The condition that appellants repay the costs that the city actually incurred in considering their administrative appeal is reasonable and fair under the circumstances. *See Black's Law Dictionary* 1456 (10th ed. 2014) (defining reasonable as "[f]air, proper, or moderate under the circumstances; sensible"). We cannot conclude that it is unreasonable or unfair to require appellants to reimburse the city for the costs that the city actually incurred in considering their administrative appeal. We note that the form requesting an appeal expressly and clearly stated that appellants would be required to pay the costs associated with their administrative appeal, and appellants agreed to that condition when they signed the form.

We conclude that the requirement that appellants reimburse the city for the costs it incurred in considering the administrative appeal was a reasonable condition imposed by the city's zoning ordinance. Accordingly, even assuming that appellants are correct that Minn. Stat. § 462.353, subd. 4(a), does not independently authorize the city to collect the costs associated with appellants' administrative appeal, the city is authorized to impose the costs as a reasonable condition under Minn. Stat. § 462.357, subd. 6.[7]

IV. The board failed to follow statutory procedure.

Appellants argue that the district court erred in concluding that the board followed the procedures required by Minn. Stat. § 462.354, subd. 2 (2018), and erred in concluding

[7] Because we conclude that the city is authorized to reimbursement of its costs by statute, we do not address whether the city would also be entitled to reimbursement of its costs under a contract theory as found by the district court. *See Doe*, 817 N.W.2d at 163 (noting that appellate courts will affirm summary judgment if it can be sustained on any ground).

that Minn. Stat. § 462.357, subd. 6(1), obviated the need for the board to follow those procedures. The city argues that it did not have to satisfy the requirements of Minn. Stat. § 462.354, subd. 2, because Minn. Stat. § 462.357, subd. 6(1), authorizes the board's actions. We agree with appellants that the board was required to follow the procedures outlined under Minn. Stat. § 462.354, subd. 2, and that it failed to do so.

Minn. Stat. § 462.354, subd. 2, provides:

> In any municipality in which the planning agency does not act as the board of adjustments and appeals, the board shall make no decision on an appeal or petition until the planning agency, if there is one, or a representative authorized by it has had reasonable opportunity, not to exceed 60 days, to review and report to the board of adjustments and appeals upon the appeal or petition.

The city's planning commission acts as its planning agency, but the city council acts as the board of adjustments and appeals. *See* City Code §§ 225, 903 (2015) (establishing the planning commission and the board of adjustments and appeals). The plain meaning of the statute requires that the planning commission, or a representative authorized by the planning commission, have an opportunity to review and report to the board before the board makes its decision on an administrative appeal.

The district court concluded that the city complied with this requirement because Gozola, as the city's planning and zoning administrator, provided a report to the board. But Gozola was not authorized by the planning commission to report to the board on appellants' administrative appeal. It is undisputed that neither the planning commission nor any representative authorized by it was given an opportunity to review the

administrative appeal and report to the board. Accordingly, the district court erred in concluding that the city met the requirements of Minn. Stat. § 462.354, subd. 2.

The city argues that it was not required to satisfy the requirements of Minn. Stat. § 462.354, subd. 2, because Minn. Stat. § 462.357, subd. 6(1), authorizes the board of adjustments and appeals "[t]o hear and decide appeals where it is alleged that there is an error in any order, requirement, decision, or determination made by an administrative officer in the enforcement of the zoning ordinance." But Minn. Stat. § 462.357, subd. 6(1), does not conflict with or supersede Minn. Stat. § 462.354, subd. 2. Rather, Minn. Stat. § 462.357, subd. 6(1), details the situations under which the board may hear and decide an appeal. Minn. Stat. § 462.354, subd. 2, which specifically references Minn. Stat. § 462.357, subd. 6(1), requires that the planning agency or its representative be given the opportunity to review an appeal and report back before the board makes its decision. "[A] particular provision of a statute cannot be read out of context but must be taken together with other related provisions to determine its meaning." *Kollodge v. F. & L. Appliances, Inc.*, 80 N.W.2d 62, 64 (Minn. 1956).

Reading the statutes together shows that the board of adjustments and appeals must satisfy both the requirement of Minn. Stat. § 462.357, subd. 6(1), that the administrative appeal involve an alleged error made by an administrative officer in the enforcement of a zoning ordinance, and the requirement of Minn. Stat. § 462.354, subd. 2, that the planning agency or its representative be given an opportunity to review the issue and report to the board before it makes its decision. Because the board made its decision without giving the

city's planning agency or its representative an opportunity to review the issue and report back, the board failed to comply with the statutory procedural requirements.

V. Appellants' administrative appeal is not automatically approved pursuant to Minn. Stat. § 15.99.

Appellants argue that because the city failed to comply with Minn. Stat. § 462.354, subd. 2, the city's decision is void and their administrative appeal must be automatically granted pursuant to Minn. Stat. § 15.99, subd. 2. Appellants further contend that, because their administrative appeal should be automatically granted, the permit allowing the previous owners to build the patio was improperly granted, and the patio must now be removed. The city argues that Minn. Stat. § 15.99 does not apply to these circumstances and that remand is the proper remedy for a failure to follow the procedural requirements of Minn. Stat. § 462.354, subd. 2.

Minn. Stat. § 15.99, subd. 2(a), provides that "an agency must approve or deny within 60 days a written request relating to zoning. . . . Failure of an agency to deny a request within 60 days is approval of the request." The statute defines a "request" as a "written application related to zoning, septic systems, watershed district review, soil and water conservation district review, or the expansion of the metropolitan urban service area, for a *permit, license, or other governmental approval of an action*." Minn. Stat. § 15.99, subd. 1(c) (emphasis added). Appellants argue that their administrative appeal constitutes a "request" relating to zoning within the meaning of the statute. Appellants further argue that, because the city's denial of their administrative appeal is void, the city has in effect

failed to deny their request within 60 days and their request is thereby automatically approved under Minn. Stat. § 15.99.

This court has held that an administrative appeal from an adverse decision by a city is not a "request" for purposes of Minn. Stat. § 15.99. *Moreno v. City of Minneapolis*, 676 N.W.2d 1, 6 (Minn. App. 2004). We explained that "[a]n appeal seeks to reverse or overturn the approval of the request; it is not in itself a request for a permit, license, or approval." *Id.* Accordingly, Minn. Stat. § 15.99 does not apply to appellants' administrative appeal, and their administrative appeal is not granted pursuant to Minn. Stat. § 15.99. Because the city acknowledges that a failure to follow statutory requirements of Minn. Stat. § 462.354, subd. 2, necessitates remand, we reverse the board's decision and remand the matter to the board to make a decision after receiving input from the planning commission in compliance with the statutory requirements.

VI. The district court did not err in granting the city summary judgment on appellants' open-meeting-law claim.

Appellants argue that the district court erred in granting the city summary judgment on their open-meeting-law claim because issues of material fact exist regarding whether the board discussed non-legal issues during its closed-door litigation-strategy meeting. The city counters that it properly held a closed-door meeting to discuss confidential litigation strategies.

Minn. Stat. § 13D.01, subd. 1(b)(4) (2018), provides that all meetings of the governing body of a home rule charter city must be open to the public. But "[t]he Minnesota Supreme Court recognized that the invocation of the attorney-client privilege

may, in the proper circumstances, constitute an exception to the open-meeting law." *Brainerd Daily Dispatch v. Dehen*, 693 N.W.2d 435, 439 (Minn. App. 2005). In determining whether attorney-client privilege constitutes an exception to the open-meeting law, we must "balance the purposes served by the attorney-client privilege against those served by the Open Meeting Law." *Prior Lake Am. v. Mader*, 642 N.W.2d 729, 731 (Minn. 2002). "The exception applies when this balancing dictates the need for absolute confidentiality." *Id.* There is no bright-line rule regarding attorney-client privilege as it relates to the open-meeting law, "but instead the exception must be addressed on a case-by-case determination." *Brainerd Daily Dispatch*, 693 N.W.2d at 439 (quotation omitted). "When meetings are properly closed under the attorney-client-privilege exception, the public is denied access only to the legal advice that the attorney gives the city council regarding litigation strategy and there is to be no discussion or decisions about other city business." *Id.* at 442.

The Minnesota Supreme Court held that a district court improperly granted summary judgment in favor of a city on an open-meeting-law claim when the city council met in a closed-door meeting with an attorney before deciding whether to require an environmental assessment worksheet (EAW). *Prior Lake Am.*, 642 N.W.2d at 739-42. The supreme court noted that an administrative rule established the factors to consider before deciding whether to require an EAW and that threat of litigation was not one of those factors. *Id.* at 739. As such, the supreme court concluded that the city "arguably inserted an additional, and non-public, factor into its EAW decision." *Id.*

This court distinguished the *Prior Lake American* case in *Brainerd Daily Dispatch*, affirming summary judgment for Brainerd against an open-meeting-law claim. *Brainerd Daily Dispatch*, 693 N.W.2d at 444. In that case, Brainerd denied an organization's request to march in a parade. *Id.* at 438. After the parade, the Minnesota Civil Liberties Union agreed to look into whether Brainerd's decision violated the First Amendment and made a data-practices request relating to past parade permits and other data. *Id.* Brainerd held an open city council meeting during which its attorney recommended that the council meet with him in a closed-door meeting. *Id.*

The attorney noted that a closed-door meeting was necessary to discuss defense strategy and that nothing was pending before the city council regarding its previous decision as to the parade. *Id.* at 441. We stated that the attorney-client privilege exception to the open-meeting law "is to be employed or invoked cautiously and seldom in situations other than in relation to threatened or pending litigation." *Id.* at 440 (emphasis omitted) (quotation omitted). We noted that although litigation had not yet started, litigation was seriously threatened. *Id.* at 440-41. We also considered the affidavit from Brainerd's attorney outlining the need for a closed-door meeting to provide confidential discussion of litigation strategy. *Id.* at 441. No such affidavit was provided in the *Prior Lake American* case. *Brainerd Daily Dispatch*, 693 N.W.2d at 441.

In this case, the board had a need to discuss pending litigation with its attorney. Appellants' suit against the city was pending at the time that the city took up appellants' request for reconsideration, and the city's attorney provided an affidavit stating that he requested the closed-door meeting to discuss litigation strategy. The attorney's affidavit

further stated that the purpose of the meeting was to discuss how reopening appellants' administrative appeal might impact the ongoing litigation and the positive and negative ramifications of the board's various litigation options. We conclude that the purposes of the attorney-client privilege were legitimately served here.

Next, we must balance the city's interest in attorney-client privilege against the public's right to be informed about actions that affect the public interest. *Id.* at 442. Appellants' request to reopen their administrative appeal was pending when the city went into its closed-door meeting. Appellants argue that the board's closed-door meeting went beyond providing legal advice to deciding the ultimate issue of whether to reopen their administrative appeal. Appellants point to an email sent by a board member indicating his feeling that the closed-door meeting influenced the vote and that the board members voted based on the merits of appellants' litigation rather than the merits of their request to reopen their administrative appeal.

But, unlike in *Prior Lake American*, the merits of appellants' litigation were intrinsically tied to the pending question of whether to reopen appellants' administrative appeal. The city did not have an established standard for deciding whether to reopen the administrative appeal and the request to reopen an administrative appeal was unprecedented. Because the board had no outlined procedures for reopening an administrative appeal, the effect that such a decision would have on pending litigation was a legitimate consideration.

The email from the board member suggests that the board members may have based their decision largely, if not exclusively, on the legal advice they received regarding

appellants' litigation. The email does not suggest that any issues other than the pending litigation were discussed, and the affidavit from the city's attorney indicates that the purpose of the meeting was to discuss litigation strategies. The record does not contain any facts supporting appellants' contention that the board's discussion went beyond litigation strategy, and their "general assertions" that improper discussions took place are not enough to create a genuine issue of material fact. *Nicollet Restoration, Inc.*, 533 N.W.2d at 848.

Under these circumstances, the board needed absolute confidentiality to discuss its litigation strategy. *See Brainerd Daily Dispatch*, 693 N.W.2d at 444 (concluding that the attorney-client exception to the open-meeting law was properly invoked based on a city's need for absolute confidentiality to consider its legal options). The board's need for absolute confidentiality in discussing the pending litigation outweighed the public's interest in the board's discussion of its litigation strategies. The district court properly considered and balanced the competing factors, and we conclude that the attorney-client exception to the open-meeting law was properly invoked based on the need for absolute confidentiality.

VII. The district court did not abuse its discretion in denying appellants' motion to compel further discovery.

Appellants argue that the district court abused its discretion by denying their motion to compel further discovery because their slander-of-title and open-meeting-law claims are fact intensive and require significant discovery. They urge this court to remand the matter with instructions to allow them to conduct more depositions. The city counters that the

district court's decision to limit appellants' depositions of city officials was well within the court's discretion.

A district court "has wide discretion to issue discovery orders and, absent clear abuse of that discretion, normally its order with respect thereto will not be disturbed." *In re Comm'r of Pub. Safety*, 735 N.W.2d 706, 711 (Minn. 2007) (quotation omitted). Under Minn. R. Civ. P. 37.01(b)(2), a party may request an order compelling discovery in the event of incomplete or nonresponsive discovery requests. But discovery must be "relevant to any party's claim or defense and proportional to the needs of the case." Minn. R. Civ. P. 26.02(b).

In this case, appellants and the city filed competing discovery motions, with appellants seeking to compel and expand discovery, and the city seeking a protective order. In response to the city's motion for a protective order, appellants argued that the district court would need to determine a variety of claims, which appellants noted in parentheses included an open-meeting-law claim and "unlawfully assessing a claimed debt." In their reply memorandum to their own motion to compel discovery, appellants again briefly noted that the district court would need to review all the city's decisions, including "the unlawful assessment of a claimed debt." But appellants did not clearly articulate that they needed further discovery because of the fact-intensive nature of their slander-of-title and open-meeting-law claims. Rather, appellants argued that they needed further discovery because the board acted in bad faith and withheld information prior to its initial decision to deny their administrative appeal, requiring further discovery for their claim that the city's decision to deny their administrative appeal was arbitrary and capricious.

On appeal, appellants now argue that the lack of additional discovery hampered their slander-of-title and open-meeting-law claims because both claims are fact intensive. We have already concluded that the city has statutory immunity with respect to appellants' slander-of-title claim and that the district court properly granted summary judgment on appellants' open-meeting-law claim. Accordingly, appellants' argument that they needed further discovery regarding those claims is moot.

But we further note that appellants did not argue in district court that they needed more discovery because of the fact-intensive nature of those claims. Generally, "litigants are bound [on appeal] by the theory or theories, however erroneous or improvident, upon which the action was actually tried below." *Annis v. Annis*, 84 N.W.2d 256, 261 (Minn. 1957). A party may not "obtain review by raising the same general issue litigated below but under a different theory." *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988). Appellants may not argue on appeal that the district court erred in granting their motion to compel discovery on grounds that they did not argue before the district court.

Furthermore, even if we considered appellants' argument, discovery must be "relevant to any party's claim or defense and proportional to the needs of the case." Minn. R. Civ. P. 26.02(b). Because appellants did not clearly articulate to the district court why further discovery was relevant to their claims and proportional to the needs of the case, the district court did not abuse its discretion in denying their motion to compel discovery.

In sum, because the board failed to follow the statutory requirements of Minn. Stat. § 462.354, subd. 2, we reverse the board's decision and remand the matter to the board to reconsider whether a permit should be granted after receiving input from the planning

commission in compliance with the statutory procedural requirements. We affirm the district court in all other respects.

Affirmed in part, reversed in part, and remanded.