39 F.4th 514
United States Court of Appeals, Eighth Circuit.

Jay NYGARD; Kendall Nygard,
Plaintiffs - Appellants
v.
CITY OF ORONO, a Minnesota municipality,
Defendant - Appellee

No. 21-2941
|
Submitted: March 17, 2022
|
Filed: July 5, 2022

Appeal from United States District Court for the District of Minnesota

Attorneys and Law Firms

Gregory Martin Erickson, Erick G. Kaardal, Mohrman & Kaardal, Minneapolis, MN, Plaintiffs-Appellants.

David S. Kendall, Jared D. Shepherd, Campbell & Knutson, Eagan, MN for Defendant-Appellee.

Before GRUENDER, BENTON, and ERICKSON, Circuit Judges.

Opinion

GRUENDER, Circuit Judge.

Jay and Kendall Nygard sued the City of Orono, Minnesota after they were prosecuted for replacing a driveway without a permit. They challenged the

permit ordinance as unconstitutionally vague and raised claims of abuse of process and malicious prosecution. The district court dismissed the complaint. We reverse the district court's dismissal of Kendall Nygard's malicious-prosecution claim, but we otherwise affirm.

I.

In October 2019, Jay Nygard replaced the driveway on a property that he owned with his wife, Kendall Nygard. On October 25, after he removed the driveway and was about to pour concrete for the new one, an inspector from the City of Orono arrived and told Nygard that he needed a permit to replace the driveway. Nygard said he would apply for one, the inspector left, and Nygard continued to work on the driveway.

The next day, Nygard finished the driveway and applied for a permit. The new driveway had a narrower width than the previous one. Nygard's permit application contained an aerial photograph of the property. In the application, Nygard referenced a wind-turbine footing to provide additional information and to address concerns relating to a separate permit application. The city sent him an individualized "Builder Acknowledgement Form" ("BAF"), which listed "permit conditions," including that (1) the driveway should have a lip so that its pavement sits "a minimum of 1 5/8 in. above [the] street pavement where the two intersect"; (2) the driveway had to be "replaced 'in kind,'" meaning it had to retain its existing width; (3) the

"Wind Turbine footing" was "not permitted"; and (4) the "[h]ardcover calculations"[1] had to include a sidewalk from the driveway to the front door. The BAF stated that "[h]ardcover calculations" were "not requested or reviewed due to the replacement of the existing driveway."

Nygard emailed the city planning assistant and expressed concerns about some of the conditions. The city planning assistant replied that the city would issue the permit once Nygard signed the BAF. Nygard crossed out some of the conditions, believing they were not required under the city code or were otherwise inapplicable to his driveway. For example, he crossed off the condition that his driveway sit above the street pavement because the city code did not require driveway lips on streets that lacked curbs and gutters, his street lacked curbs and gutters, and none of his neighbors had driveway lips. He also crossed off the condition about the wind-turbine footing. He initialed the modified form and returned it to the city.

On October 31, the city planning assistant emailed Nygard, explaining that the city would grant a permit only if Nygard accepted all the conditions listed on the original BAF. Her email acknowledged some of Nygard's concerns and stated that the driveway lip

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[1] The City of Orono's website defines "hardcover" as "a hard surface that prevents or retards entry of water into the soil and causes water to run off the surface in greater quantities and at an increased rate of flow." *Hardcover Information*, City of Orono, https://ci.orono.mn.us/DocumentCenter/View/2755/Hardcover-Information-Packet-2022-pdf (last updated January 2022).

requirement was meant to assist with Nygard's "drainage concern." Nygard responded, still objecting to the conditions as inapplicable. After further similar exchanges, Jeremy Barnhart, the Orono Community Development Director, emailed Nygard on December 12 stating that he must agree to the conditions by the end of the day, or else "this matter will be turned over to the prosecuting attorney tomorrow for possible legal action." Nygard still did not acknowledge the conditions, and the next day, Barnhart emailed a city prosecutor, asking him to "file a citation to Jay Nygard and Kendall Nygard . . . for violation of [Orono City Code] section 86-66(b)." In the email, he stated that the Nygards "have completed work without a permit and have spent the last 6 weeks arguing with [Barnhart] on requirements of the permit, after they installed the improvement."

Relying on the "reports of . . . Jeremy Barnhart," a city police officer drafted a statement of probable cause, alleging that "work had been completed without having first obtained a permit on a home" owned by Jay and Kendall Nygard. The statement asserted that the driveway did not have a lip, "the driveway that had been replaced was a non-conforming width," and "the hardcover calculations exceeded a 24-inch wide sidewalk from the driveway to the front door." According to the Nygards, the police department did not inspect the property or investigate whether these statements were true, and contrary to the probable-cause statement, "the replacement driveway pavement was above the street pavement where they intersect." On December

29, the city charged Jay and Kendall Nygard with violating Orono City Code section 86-66(b), which states that a "zoning permit application for hardcover and/or land alteration shall be submitted by the individual performing the work prior to conducting any land alteration or hardcover installations on a property."

At trial, the state court dismissed the charge against Kendall Nygard, ruling that she could not be guilty of violating section 86-66(b) as someone who merely owned the property and did not perform or order any unauthorized work. Jay Nygard was acquitted because the driveway-lip condition was only a "suggestion" and "there was no basis for a zoning permit application for hardcover replacement" where the city had not requested "hardcover calculations." The city never officially granted or denied Nygard's permit application.

The Nygards sued the city in federal court under 42 U.S.C. § 1983, claiming section 86-66 is void for vagueness. They also raised a First Amendment retaliation claim, an abuse-of-process claim, and a malicious-prosecution claim. The district court dismissed all claims under Federal Rule of Civil Procedure 12(b)(6). The Nygards appeal the district court's rulings on vagueness, the abuse-of-process claim, and the malicious-prosecution claim.

II.

We review *de novo* the grant of a motion to dismiss under Rule 12(b)(6). *Martin v. Iowa*, 752 F.3d 725, 727

(8th Cir. 2014). "In analyzing a motion to dismiss, a court must accept the allegations contained in the complaint as true and make all reasonable inferences in favor of the nonmoving party." *Id.*

A.

First, the Nygards challenge the city ordinance as unconstitutionally vague, asserting a facial challenge and an as-applied challenge. The ordinance provides:

> (a) *Permits required*. It is unlawful for any person to erect, construct, enlarge, alter, repair, move, improve, remove, convert, or demolish any building or structure, or any part or portion, including but not limited to the general construction, plumbing, on-site sewage treatment system, wood stoves and fireplaces, ventilating, heating or air conditioning systems, or cause such work to be done, without first obtaining a separate building, sign, or general permit for each such building, structure or separate component from the city.
>
> . . .
>
> (b) *Zoning permit for land alteration*. A land alteration and hardcover plan shall be submitted with the site plan or certified site plan and incorporated as part of the building permit approval, including the name of the individual performing the work. If no building permit is necessary, a separate zoning permit application for hardcover and/or land alteration shall be submitted by the individual

> performing the work prior to conducting any land alteration or hardcover installations on a property, including grading, patios and retaining walls. The zoning permit shall be reviewed and approved by the city prior to issuance.

Orono City Code § 86-66.

The Nygards raise a facial challenge to the ordinance. However, "[a] vagueness challenge to [a] statute which does not involve First Amendment freedoms must be examined in the light of the facts of the case at hand." *United States v. Orchard*, 332 F.3d 1133, 1138 (8th Cir. 2003) (internal quotation marks omitted); *see Gallagher v. City of Clayton*, 699 F.3d 1013, 1015, 1021-22 (8th Cir. 2012) (holding that a "facial challenge" to an outdoor-smoking ordinance "is not properly before this court" because "smoking does not implicate the First Amendment on these alleged facts"). Here, there is no First Amendment interest that would justify deviating from the rule requiring as-applied challenges.

The Nygards rely on a plurality opinion in *City of Chicago v. Morales*, which authorized facial attacks to criminal laws outside the First Amendment context where "vagueness permeates the text of such a law." 527 U.S. 41, 55, 119 S.Ct. 1849, 144 L.Ed.2d 67 (1999). But they concede that the *Morales* plurality "expressed a different approach" from Eighth Circuit precedents. Crucially, some of these Eighth Circuit cases were decided after *Morales*. *See*, *e.g.*, *Orchard*, 332 F.3d at 1138; *Gallagher*, 699 F.3d at 1021-22. Accordingly, we decline to follow the *Morales* plurality to the extent

that it conflicts with these binding cases. *See N.Y. State Rifle & Pistol Ass'n v. Cuomo*, 804 F.3d 242, 265 (2d Cir. 2015) ("[B]ecause the test set forth by the *Morales* plurality has not been adopted by the Supreme Court as a whole, we are not required to apply it.").

We next turn to the Nygards' as-applied challenge. "To defeat a vagueness challenge, a penal statute must pass a two-part test: The statute must first provide adequate notice of the proscribed conduct, and second, not lend itself to arbitrary enforcement." *United States v. Barraza*, 576 F.3d 798, 806 (8th Cir. 2009). "One to whose conduct a statute clearly applies may not successfully challenge it for vagueness." *Parker v. Levy*, 417 U.S. 733, 756, 94 S.Ct. 2547, 41 L.Ed.2d 439 (1974). An as-applied challenge fails if the person challenging the provision "has received fair warning of the criminality of his own conduct." *Id.*

The Nygards argue that the ordinance is vague because it "fails to define its terms." They claim that the terms "erect, construct, enlarge, alter, repair, move, improve, remove, convert, . . . demolish," "hardcover and/or land alteration," and "hardcover installations" do not clearly cover a driveway replacement. *See* § 86-66. "But the [ordinance's] language gives notice of this application," *see United States v. Cook*, 782 F.3d 983, 989 (8th Cir. 2015), through the phrase "hardcover installations," § 86-66(b). The term "hardcover" is used throughout the city code and expressly includes driveways. *See* §§ 78-1683 ("The following hardcover items shall be included in proposed hardcover calculations[:] . . . (2) A driveway for all garages. . . ."), 78-1682(1)

("The portion of the shared driveway on the primary property that serves both primary and secondary property shall be considered hardcover for the primary property."), 78-571 (regulating "[h]ardcover" and referring to "driveway and sidewalk hardcover"); *cf. Am.-Arab Anti-Discrimination Comm. v. City of Dearborn*, 418 F.3d 600, 610 (6th Cir. 2005) (holding that a term was not unconstitutionally vague where it was defined elsewhere in the city code). And Nygard performed a "hardcover installation[ ]," § 86-66(b), by pouring concrete for the new driveway, thereby setting it up for use or service. *See* "Install," *Merriam-Webster's Collegiate Dictionary* 648 (11th ed. 2005) (defining "[i]nstall" as "to set up for use or service"); "Installation," *Merriam-Webster's Collegiate Dictionary* 648 (11th ed. 2005) (defining an "[i]nstallation" as "something that is installed for use"). At least as applied to a driveway replacement, the ordinance is clearer than other criminal laws that we have held were not vague. *See*, *e.g.*, *Cook*, 782 F.3d at 987-89 (holding that a statute criminalizing receipt of "anything of value" as part of a sex trafficking venture was not vague as applied to the defendant's receipt of "sexual acts"). Finally, on the day Nygard performed the work, a city inspector told him that a permit was required, and this was confirmed by Nygard's subsequent exchanges with the city. He thus "received fair warning of the criminality of his own conduct." *Parker*, 417 U.S. at 756, 94 S.Ct. 2547. The ordinance is also "sufficiently clear [such] that the speculative danger of arbitrary enforcement does not render it void for vagueness." *United States v. Birbragher*, 603 F.3d 478, 489 (8th Cir. 2010).

Therefore, the district court did not err in dismissing the Nygards' as-applied vagueness challenge.

B.

Second, the Nygards argue that under Minnesota law, the city abused the criminal process to force them to comply with inapplicable permit conditions, such as the requirement to remove the wind-turbine footing. "[A]n abuse of process is the employment of legal process for some purpose other than that which it was intended by the law to effect—the improper use of a regularly issued process." *Dunham v. Roer*, 708 N.W.2d 552, 571 n.5 (Minn. Ct. App. 2006). An abuse-of-process claim requires proof of "an [u]lterior purpose" and "the act of using the process to accomplish a result not within the scope of the proceeding in which it was issued." *Kittler & Hedelson v. Sheehan Props., Inc.*, 295 Minn. 232, 203 N.W.2d 835, 840 (1973). "'Process' is defined as '[t]he proceedings in any action or prosecution; a summons or writ, esp[ecially] to appear or respond in court.'" *Eclipse Architectural Grp., Inc. v. Lam*, 814 N.W.2d 692, 697 (Minn. 2012) (quoting "Process," *Black's Law Dictionary* 1325 (9th ed. 2009)); *see also Leiendecker v. Asian Women United of Minn.*, 834 N.W.2d 741, 753 (Minn. Ct. App. 2013) (applying the *Eclipse* definition to an abuse-of-process claim), *rev'd on other grounds*, 848 N.W.2d 224 (Minn. 2014).

The Nygards' argument on appeal meaningfully departs from the allegations in their complaint. Under the heading for the abuse-of-process count, the

complaint alleges that "Orono abused its BAF process"—not criminal process—"by including in the BAF form . . . certain 'permit conditions' city officials knew were not applicable." It then states that "Nygard objected to the City's abuse of the permit application and BAF process." The district court did not err in dismissing the claim because abuse-of-process claims target the misuse of *legal* process, not a city's *permitting* process. *See Leiendecker*, 834 N.W.2d at 753.

Even if, as the Nygards argue on appeal, their complaint could be construed as challenging the city's use of criminal process, it is not reasonable to infer that the city used criminal process to coerce the Nygards into compliance with conditions inapplicable to the driveway. "[H]ere we have an obvious alternative explanation." *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 567, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007). Barnhart referred the case to the prosecutor because the Nygards "completed work without a permit" and "spent the last 6 weeks arguing . . . after they installed the improvement." The obvious explanation is that the Nygards' apparent violation of completing work without a permit resulted in prosecution. The Nygards complain that the city's failure officially to grant or deny the permit application prevented them from seeking an administrative appeal. That argument ignores the fact that Nygard sought a permit only after he had already conducted a hardcover installation despite the ordinance's requirement to obtain a permit prior to doing so. *See* § 86-66(b). The city made extended efforts to cooperate with him after the fact but

ultimately chose to prosecute him for the violation. This course of events does not give rise to a plausible claim for relief.

C.

Finally, we address the Nygards' malicious-prosecution claim. To state a malicious-prosecution claim in Minnesota, a party must allege that "(1) the suit [was] brought without probable cause and with no reasonable ground on which to base a belief that the plaintiff would prevail on the merits; (2) the suit [was] instituted and prosecuted with malicious intent; and (3) the suit . . . ultimately terminate[d] in favor of the defendant." *Stead-Bowers v. Langley*, 636 N.W.2d 334, 338 (Minn. Ct. App. 2001). "Probable cause is a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in the belief that the person accused is guilty of the offense with which he is charged." *Allen v. Osco Drug, Inc.*, 265 N.W.2d 639, 643 (Minn. 1978) (internal quotation marks omitted). "Only reasonable belief that probable cause existed is necessary to negate a malicious prosecution claim." *Dunham v. Roer*, 708 N.W.2d 552, 569 (Minn. Ct. App. 2006) (internal quotation marks omitted).

A judicial finding of probable cause creates a *prima facie* showing of probable cause. *See id.* at 560-61, 570; *cf. Polzin v. Lischefska*, 164 Minn. 260, 204 N.W. 885, 885 (1925) (holding that a grand jury indictment is *prima facie* evidence of probable cause to

prosecute); *Jones v. Flaherty*, 139 Minn. 97, 165 N.W. 963, 964 (1917) (holding that making "a full and fair statement of the facts" to a city prosecutor who then "advise[s] the prosecution" creates a complete defense to malicious prosecution). That showing is rebutted if the plaintiff "show[s] affirmatively that [the] defendant had no reasonable ground for believing him guilty of the offense." *Polzin*, 204 N.W. at 885. The "failure to investigate" can show that probable cause is lacking, *see Allen*, 265 N.W.2d at 644, as can reliance on intentionally false statements, *see Young v. Klass*, 776 F. Supp. 2d 916, 923-24 (D. Minn. 2011) (collecting cases).

1.

We first address whether the City of Orono had a reasonable belief that probable cause existed to prosecute Jay Nygard. The district court held that there was probable cause to prosecute Jay Nygard because a Minnesota state court judge signed the charging officer's probable-cause statement. It further held that Jay Nygard's installation of hardcover without a permit supported probable cause under Orono City Code section 86-66. The Nygards argue that there was no probable cause because the police relied on false statements made by Barnhart and did not conduct an investigation.

Here, the state court judge's finding of probable cause establishes a *prima facie* defense to malicious prosecution. *See Dunham*, 708 N.W.2d at 569. Jay

Nygard fails to overcome that defense because the city knew from his communications that he had applied for a permit only after replacing the driveway. Therefore, there was more than a "reasonable ground," *Allen*, 265 N.W.2d at 643, to suspect he was guilty of failing to submit a "zoning permit application . . . prior to conducting any land alteration or hardcover installations on a property," § 86-66(b).

The Nygards' assertion that Jay Nygard's prosecution was based on falsehoods in Barnhart's reports is not accurate. Barnhart did not claim that the BAF conditions were required by the city code; rather, he asserted that the Nygards had not agreed to the requested permit conditions and that Jay Nygard had replaced a driveway without a permit. Those statements were true. Further, any failure to investigate does not defeat probable cause to prosecute Jay Nygard because the city already knew from Nygard's application and emails that he installed a driveway without a permit.

2.

Whether there was probable cause to prosecute Kendall Nygard is a closer question. Like her husband, Kendall Nygard was charged under Orono City Code section 86-66(b), which requires "the individual performing the work" to submit the permit application. The complaint alleges that Kendall Nygard lived in Florida and was not involved with the driveway replacement or the permit application. The city's correspondence was with Jay Nygard, not Kendall Nygard,

and in that correspondence, Jay Nygard repeatedly identified himself as the person who replaced the driveway. The complaint also alleges that the probable-cause statement was submitted without any investigation into Kendall's involvement.

The district court held that there was probable cause to prosecute Kendall Nygard because of the judge's probable-cause finding and because Kendall Nygard was in violation of Orono City Code section 86-36. That ordinance requires an "owner and/or occupant" of property where "work has been done in violation of any building code or zoning requirement" to obtain a permit or remove the violation within thirty days of receiving notice. § 86-36.

The plaintiffs have sufficiently alleged a lack of probable cause to prosecute Kendall Nygard, rebutting the city's *prima facie* showing. In Barnhart's email to the prosecuting attorney, he requested a citation for "Jay Nygard and Kendall Nygard" because "[t]hey have completed work without a permit." Although a judge reviewed the probable-cause statement and made a finding of probable cause, it was not entirely based on "a full and fair statement of the facts," *see Jones*, 165 N.W. at 964; accepting the complaint's factual allegations as true, *see Martin*, 752 F.3d at 727, Kendall Nygard was not involved with the driveway replacement. Barnhart and other city officials knew that Jay Nygard installed the driveway, but they had no knowledge of Kendall's involvement, and they failed to investigate it. *See Allen*, 265 N.W.2d at 641, 644 (holding that the failure to investigate the

plaintiff's claim that she had no involvement in a forged check showed a lack of probable cause in a malicious-prosecution case); *Olson v. Rogers*, 297 Minn. 506, 210 N.W.2d 232, 233 (1973) (upholding a jury verdict finding malicious prosecution where the plaintiffs were charged with furnishing alcohol to minors but the police "investigation failed to establish that [the] plaintiffs had purchased the beer" and instead showed only that the plaintiffs had attended an event where minors were drinking).

The fact that section 86-36 allows for the prosecution of property owners who fail to remedy an existing violation of the permitting requirement cannot defeat Kendall Nygard's malicious-prosecution claim because she was charged under section 86-66(b). Malicious-prosecution claims require "a want of probable cause *for the prosecution*," not a want of probable cause for unprosecuted offenses. *See Moore v. N. Pac. R. Co.*, 37 Minn. 147, 33 N.W. 334, 334 (1887) (emphasis added); *Dombrovske v. Dombrovske*, 137 Minn. 56, 57, 162 N.W. 891, 891 (1917) (noting that the question in a malicious-prosecution claim is whether there was "probable cause to believe that [the defendant] was guilty of the *offense charged*" (emphasis added)). The criminal charges and trial related to the alleged violation of failing to obtain a permit before engaging in hardcover installation, not the separate violation of failing to remedy an existing violation within thirty days. The district court therefore erred in granting the motion to dismiss as to Kendall Nygard's claim for malicious prosecution.

III.

For the foregoing reasons, we reverse the dismissal of Kendall Nygard's malicious-prosecution claim but otherwise affirm the judgment in favor of the City of Orono.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 21-2941

Jay Nygard; Kendall Nygard

Plaintiffs - Appellants

v.

City of Orono, a Minnesota municipality

Defendant - Appellee

Appeal from U.S. District Court for the
District of Minnesota
(0:21-cv-00884-NEB)

JUDGMENT

Before GRUENDER, BENTON and ERICKSON, Circuit Judges.

This appeal from the United States District Court was submitted on the record of the district court, briefs of the parties and was argued by counsel.

After consideration, it is hereby ordered and adjudged that the judgment of the district court in this cause is affirmed in part and reversed in part in accordance with the opinion of this Court.

July 05, 2022

Order Entered in Accordance with Opinion:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

2021 WL 3552251
Only the Westlaw citation is currently available.
United States District Court, D. Minnesota.

Jay NYGARD and Kendall Nygard, Plaintiffs,
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CITY OF ORONO, Defendant.

Case No. 21-CV-884 (NEB/JFD)
|
Signed 08/11/2021

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ORDER ON MOTION TO DISMISS

Nancy E. Brasel, United States District Judge

Without first obtaining a permit, as the City of Orono requires, Jay Nygard replaced the driveway of an investment property that he and his wife, Kendall Nygard, own. After Nygard[1] attempted, but failed, to obtain a permit after the fact, the City prosecuted the

[1] The Court uses "the Nygards" to refer to both plaintiffs. It uses "Nygard" to refer to Jay Nygard, the landowner who completed the work and corresponded with the City. It uses "Kendall Nygard" to refer to Plaintiff Kendall Nygard, who is Jay Nygard's wife and the joint landowner.

Nygards for completing work without a permit. The judge dismissed Kendall Nygard from the case and found Nygard not guilty. The Nygards then brought this suit, challenging both the ordinance under which the City charged them and also the prosecution itself. The City moved to dismiss. For the reasons that follow, the Court grants the motion.

BACKGROUND

Nygard wanted to replace his driveway, and so he did. But he did not first obtain a permit from the City of Orono, where his land is located. In Orono, as in most cities, it is unlawful to complete work without obtaining a permit if the city ordinances require one. Orono, Minn., Code § 86-37(1). Orono city ordinance section 86-66 requires a permit for constructing a building or structure, altering land, or installing hardcover.[2] *Id.* § 86-66. Under Section 86-66, a landowner must obtain a building permit to "erect, construct, enlarge, alter, repair, move, improve, remove, convert, or demolish any building or structure." *Id.* § 86-66(a). Even if a *building* permit is not required, a *zoning* permit may be. Under Section 86-66(b), a landowner must obtain a zoning permit before "conducting any land

[2] Hardcover is "a hard surface that prevents or [slows] entry of water into the soil and causes water to run off the surface in greater quantities and at an increased rate of flow than prior to development," and includes garages, driveways, sidewalks, and patios, among many other things. City of Orono, *Hardcover Information*, (Jan. 2021), https://ci.orono.mn.us/DocumentCenter/View/2755/Hardcover-Information-Packet-2021-pdf; Orono, Minn., Code § 78-1683.

alteration or hardcover installations on a property." *Id.* § 86-66(b). If a landowner completes work for which a permit is required without obtaining one, he or she must obtain a permit or remedy the violation within thirty days after receiving notice from the City. *Id.* § 86-36. Failure to follow these rules results not merely in a fine: it is a misdemeanor criminal offense. *Id.* § 86-42.

The Nygards jointly own an investment property in Orono. (ECF No. 1 ("Compl.") ¶¶ 3–4.) When Nygard determined he wanted to replace the driveway, he researched whether he needed a permit to do so and concluded that he did not. (*Id.* ¶¶ 6, 8–9.) Soon after, Nygard removed the driveway and was ready to begin pouring concrete for the new one. (*Id.* ¶¶ 10, 13.) Before he started, however, a City inspector arrived at the property and told Nygard that he needed a permit. (*Id.* ¶ 13.) Nygard told the inspector that he would apply for one, and the inspector left without issuing a stop work order. (*Id.* ¶¶ 16, 18.)

The next day, after completing the driveway work, Nygard applied for a permit. (*Id.* ¶ 22.) Nygard's application included an aerial photo of the property. (*Id.* ¶ 24.) On it, he labeled the portion of hardcover that he had removed, outlined the new driveway, and referenced an area unrelated to this dispute but relevant to another: footings for a wind turbine. (*Id.* ¶¶ 24, 26; *see also* ECF No. 13-3.) Nygard alleges that he referenced the wind turbine footing for informational purposes

and to address the City's possible concerns about the property's total hardcover area.[3] (Compl. ¶ 24.)

The City did not approve the permit. Instead, it sent Nygard a "Builder Acknowledgment Form" ("BAF") to sign before the permit could be approved (*Id.* ¶ 28; ECF No. 1-1 ("Compl. Ex."), Ex. 1.) The BAF listed several "conditions," including that the new driveway "should be" at least one and five-eighths inches above street level, that the former driveway's nonconforming width could remain, that the wind turbine footing was not permitted, and that the hardcover calculations (which the City did not request) should include a sidewalk from the driveway to the front door. (Compl. ¶ 30; Compl. Ex. 1.) Orono also returned Nygard's aerial photo, on which it crossed out the wind turbine footing and wrote, "Turbine Footing not permitted." (ECF No. 13-4.)

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[3] The Nygards previously sought a permit to install a wind turbine on their own property (adjacent to the investment property), which Orono rejected. *City of Orono v. Nygard*, No. A16-1618, 2017 WL 1548628, at *1 (Minn. Ct. App. May 1, 2017). The Nygards sued the City, and the Minnesota district court granted summary judgment for Orono and ordered the Nygards to remove the wind turbine. *Id.* The Nygards failed to comply, so the district court found them in contempt of court and again ordered them to remove the wind turbine. *Id.* Even still, the Nygards refused. *Id.* After an unsuccessful appeal, the Nygards removed the wind turbine but would not allow the City onto their property to verify that they had also removed the turbine's concrete pad and footings. *Id.* at *2. The district court again found the Nygards in contempt of court and ordered Nygard to prison until submission of evidence that the Nygards were in compliance, which his wife provided a few days later. *Id.*

Nygard disputed several of these conditions, as well as the notion that he needed a permit at all. (Compl. ¶ 33; Compl. Ex. 2.) Nygard crossed off the conditions that he disagreed with, initialed the remaining conditions and comments, and sent the BAF back to the City. (Compl. ¶¶ 38–42; Compl. Ex. 3.) The City responded, explaining the conditions to Nygard and telling him that it would issue a permit once he had accepted all the conditions in the BAF and the annotated aerial photo. (Compl. ¶ 43; Compl. Ex. 4.)

Nygard continued to contest the permit conditions. (Compl. ¶ 57; *see also* Compl. Exs. 5–7.) The City reaffirmed that it would only issue the permit if Nygard agreed to sign off on the conditions in the BAF. (Compl. ¶¶ 59–60; Compl. Ex. 8.) There is no allegation that the "conditions" required Nygard to complete any additional work on the driveway. To the contrary, the City told Nygard that it would issue the permit that same day if Nygard acknowledged the conditions and paid the fee. (Compl. Ex. 8.) The City threatened "possible legal action" if he did not comply. (*Id.*) Nygard continued to refuse to acknowledge the conditions, and the City continued to refuse to issue the permit. (Compl. ¶ 62.)

Finally, about eight weeks after Nygard poured the new driveway, a City official told the City prosecutor to charge both Nygards with violating Section 86-66(b) for having completed work without a permit. (*Id.* ¶ 89; Compl. Ex. 9.) The City charged the Nygards in state court with misdemeanor violations. (Compl. ¶ 105; Compl. Ex. 11.) At trial, the judge dismissed

Kendall Nygard, finding that she could not be liable for violating Section 86-66(b) simply by being an owner of the property, and she was not otherwise involved in the installation of the new driveway. (Compl. ¶¶ 108–09.) The judge found Nygard not guilty, determining that the City had no basis to require a permit. (*Id.* ¶¶ 110–11.)

The Nygards then brought this suit against the City in federal court. The Nygards allege that Section 86-66 is void for vagueness, that the City retaliated against them for First Amendment activities, and that the City abused process and maliciously prosecuted them. (*Id.* ¶¶ 152–250.) The Nygards also seek declaratory and injunctive relief requiring the City to issue a permit for the replacement driveway. (*Id.* ¶¶ 274–75; *id.* at 41.)

ANALYSIS

Rule 12(b)(6) of the Federal Rules of Civil Procedure requires the Court to dismiss a complaint if it fails to plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). When reviewing a Rule 12(b)(6) motion, a court must "tak[e] all facts alleged in the complaint as true, and mak[e] reasonable inferences in favor of the nonmoving party." *Smithrud v. City of St. Paul*, 746 F.3d 391, 397 (8th Cir. 2014). Although the factual allegations need not be detailed, they "must be enough to raise a right to relief above the speculative level." *Twombly*, 550 U.S. at 555. "A

claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). The facial plausibility standard "asks for more than a sheer possibility that a defendant has acted unlawfully." *Id.* Thus, where a complaint alleges "facts that are 'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility of entitlement to relief'" and the Court must dismiss it. *Id.* (quoting *Twombly*, 550 U.S. at 557).

I. Void for Vagueness

The Nygards bring two separate void for vagueness claims—one for each prong of the void for vagueness analysis. (Compl. ¶¶ 152–62 (Counts I and II).) A law is unconstitutionally vague if it (1) "fails to give ordinary people fair notice of the conduct it punishes" or (2) is "so standardless that it invites arbitrary enforcement." *Johnson v. United States*, 576 U.S. 591, 595 (2015) (citation omitted). A law need not define prohibited conduct with "mathematical certainty," nor must it provide "perfect clarity and precise guidance." *Grayned v. City of Rockford*, 408 U.S. 104, 110 (1972); *Ward v. Rock Against Racism*, 491 U.S. 781, 794 (1989). A void for vagueness claim can be facial or as-applied. *United States v. Stupka*, 418 F. Supp. 3d 402, 405–06 (N.D. Iowa 2019); *see Gallagher v. Magner*, 619 F.3d 823, 840–41 (8th Cir. 2010) (analyzing both an as-applied and a facial void for vagueness challenge). The

Nygards appear to be bringing both forms of challenges, and so the Court will analyze each.

A. Facial Challenge

The Nygards' facial challenge is not brought on First Amendment grounds, making it generally disfavored under well-established law. *United States v. Turner*, 842 F.3d 602, 606 n.1 (8th Cir. 2016). Understanding this hurdle, the Nygards attempt to fit the facial challenge under the plurality opinion of *City of Chicago v. Morales*, 527 U.S. 41 (1999). In *Morales*, the Supreme Court allowed a facial void for vagueness challenge to a gang loitering ordinance when (1) the ordinance had no *mens rea* requirement; (2) it infringed on constitutionally protected rights; and (3) vagueness "permeated the text" of the law. *Id.* at 55.

But even post-*Morales*, the Eighth Circuit has been reluctant to allow facial vagueness challenges that do not implicate First Amendment rights. It has repeatedly reaffirmed that non-First-Amendment void for vagueness challenges should be analyzed as applied to the plaintiff's conduct. *E.g.*, *Gallagher v. City of Clayton*, 699 F.3d 1013, 1015–16, 1021 (8th Cir. 2012) (rejecting a facial vagueness challenge, even when the ordinance at issue lacked a *mens rea* requirement) (internal quotations and citation omitted); *Musser v. Mapes*, 718 F.3d 996, 1000 (8th Cir. 2013) (noting that a vagueness challenge is "generally not" an exception to the rule that a person to whom a statute can be constitutionally applied cannot complain

about the possible unconstitutional application of the statute to others) (citations omitted).

In contrast, the Court has not found a case in which the Eighth Circuit permitted a facial voidness challenge not implicating First Amendment freedoms. Several other circuits have concluded that they are not required to apply *Morales* or have refused to extend the plurality opinion. *See*, *e.g.*, *N.Y. State Rifle & Pistol Ass'n, Inc. v. Cuomo*, 804 F.3d 242, 265 (2d Cir. 2015) (explaining that the court is not required to apply *Morales* because the plurality opinion has not garnered the support of a majority of the Supreme Court); *Phelps v. Budge*, 188 F. App'x 616, 618 (9th Cir. 2006) (noting that "federal law does not clearly require a facial analysis of all criminal statutes" and refusing to apply *Morales* when the statute at issue did not implicate constitutional rights and was not permeated with vagueness); *United States v. Cook*, 970 F.3d 866, 873 (7th Cir. 2020) (theorizing that the Supreme Court only permits non-First-Amendment facial voidness challenges when the law at issue "simply has no core" and lacks "any ascertainable standard for inclusion and exclusion") (citations omitted).

Even assuming the validity of the *Morales* approach, the Nygards' vagueness challenge does not meet *Morales*'s criteria for a facial challenge. Most notably, any potential vagueness associated with Section 86-66 pales in comparison to the vagueness of the ordinance at issue in *Morales*. That ordinance failed to specifically define what conduct was prohibited—it criminalized loitering, which the ordinance defined as

"remain[ing] in any one place with no apparent purpose." *Morales*, 527 U.S. at 56. Under that ordinance, a Chicagoan would be unable to tell whether he or she had an "apparent purpose." *Id.* at 56–57. The ordinance "added a subjective gloss to the normal meaning of the word 'loiter' "—whether one was loitering "depend[ed] upon an element that can vary with the eye of the beholder." *Agnew v. District of Columbia*, 263 F. Supp. 3d 89, 97 (D.D.C. 2017). Section 86-66, if vague at all, does not come close to being as standardless as the *Morales* ordinance. *See infra* Section I.B (explaining that Section 86-66 clearly defines prohibited conduct and does not lend itself to arbitrary or discriminatory enforcement). Vagueness does not permeate the text of Section 86-66, so the Nygards cannot bring a facial vagueness challenge.

B. As-Applied Challenge

Because the Nygards' facial void-for-vagueness challenge fails, the Court must examine the challenge "in the light of the facts of the case at hand"—in other words, as applied to the Nygards. *Gallagher*, 699 F.3d at 1021 (internal quotations and citation omitted). Someone who "received fair warning of the criminality of his own conduct from the statute in question" is not entitled to attack it because another person who engages in different conduct might not receive fair warning from the statute's language; "[o]ne to whose conduct a statute clearly applies may not successfully challenge it for vagueness." *Parker v. Levy*, 417 U.S. 733, 756 (1974).

The as-applied challenge queries whether the ordinance permits the City to make "wholly subjective judgments without statutory definitions, narrowing context, or settled legal meanings." *Metro. Omaha Prop. Owners Ass'n, Inc. v. City of Omaha*, 991 F.3d 880, 887 (8th Cir. 2021) (citing *Holder v. Humanitarian L. Project*, 561 U.S. 1, 20 (2010)). The Court concludes that it does not. Rather, even accepting the Nygards' factual allegations as true, as the Court must, the ordinance proscribes Nygard's conduct. It requires an individual to submit a zoning permit application before completing any land alteration or hardcover[4] installations on a property. Orono, Minn., Code § 86-66(b). Nygard did not apply for a permit before altering his land and installing hardcover, nor did he obtain a permit after the fact. (*See* Compl. ¶¶ 13–16, 112.) The ordinance is definite enough to give a person of ordinary intelligence notice of what is prohibited.

Additionally, because the ordinance clearly defines what is prohibited, it does not lend itself to arbitrary or discriminatory enforcement, contrary to Count II's allegations. The Nygards contend that the ordinance "confer[s] unlimited discretion on law enforcement authorities" because "almost everybody would do something that arguably violated the ordinance." (ECF No.

[4] The Nygards do not specifically argue that the term "hardcover" in Section 86-66 is vague, but if they did, this argument would fail. Other Orono ordinances define what is and is not considered hardcover. Orono, Minn., Code §§ 78-1683, 78-1684. Orono has also prepared an information sheet that defines "hardcover" and gives examples of what is included, one of which is a driveway. *Hardcover Information, supra* note 2.

16 at 17–18.) Not so. An Orono resident only violates Section 86-66 if he or she fails to obtain a permit before doing one of the things enumerated in the ordinance. *See Metro. Omaha*, 991 F.3d at 887 (holding that an ordinance was not void for vagueness when the city "may penalize property owners only for violations of applicable laws, rules, and regulations"). Further, the things one cannot do without a permit are clearly enumerated. One cannot "erect, construct, enlarge, alter, repair, move, improve, remove, convert, or demolish any building or structure," without a building permit, and one cannot alter land or install hardcover without a zoning permit. Orono, Minn., Code § 86-66. The replacement of a driveway easily falls within the alteration of land or installation of hardcover. As applied to driveway replacement, Section 86-66 is not so standardless as to lend itself to arbitrary or discriminatory enforcement. The Nygards' void for vagueness challenges fail as a matter of law.

II. First Amendment Retaliation

Count III of the Complaint is a First Amendment retaliation claim under Section 1983. (Compl. at 2.) As the Nygards noted at the hearing, this is a *Monell* claim. *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658 (1978). Under *Monell*, a municipality can only be liable for a constitutional violation based on "(1) an official municipal policy; (2) an unofficial custom[;] or (3) failure to train or supervise." *Robbins v. City of Des Moines*, 984 F.3d 673, 681–82 (8th Cir. 2021) (citation omitted). In other words, a municipality is only liable for

constitutional violations resulting from "decisions of a government's lawmakers, the acts of its policymaking officials, and practices so persistent and widespread as to practically have the force of law." *Connick v. Thompson*, 563 U.S. 51, 61 (2011) (citations omitted).

The Nygards have not sufficiently alleged a *Monell* claim. Their claim depends solely on the City's determination to prosecute them. (Compl. ¶ 186.) The Complaint contains no allegations that this allegedly retaliatory prosecution resulted from the City's official policy, unofficial custom, or failure to train or supervise its staff.[5]

At the hearing, the Nygards argued that their *Monell* clam should stand because Jeremy Barnhart, the City official who requested that the City attorney prosecute the Nygards, is a "final decision-maker" for the City. A single unconstitutional incident is not sufficient to bring a *Monell* claim, but an unconstitutional policy may be inferred "from a single decision taken by the highest officials responsible for setting policy in that area of the government's business." *Davison v. City of Minneapolis*, 490 F.3d 648, 659 (8th Cir. 2007) (internal quotations and citation omitted). Under this principle, the official in question must be "responsible

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[5] As the Nygards rightly point out, (ECF No. 16 at 19), they need not plead the buzzwords "policy" or "custom." But even if they do not use those specific words, they are not excused from their obligation to "allege facts which would support the existence of an unconstitutional policy or custom." *Doe ex rel. Doe v. Sch. Dist. of Norfolk*, 340 F.3d 605, 614 (8th Cir. 2003) (citation omitted).

for establishing final government policy respecting such activity." *Pembaur v. City of Cincinnati*, 475 U.S. 469, 482-83 (1986).

The Nygards have not plausibly alleged that Barnhart sets "final government policy" regarding prosecuting citizens for violating Orono ordinances. Regarding Barnhart, the Nygards have alleged that he is the "City of Orono Community Development Director," (Compl. ¶ 59), that he communicated with Nygard about the permitting process, (*id.* ¶¶ 59–61, 84–85), that he was familiar with the City's code and the circumstances around Nygard's application specifically, (*id.* ¶¶ 63–83), and that he told the prosecutor to charge the Nygards, (*id.* ¶ 89). Nothing in these allegations raises the inference that Barnhart sets municipal policy.

Nor is it enough that Barnhart instructed the Orono prosecutor to charge the Nygards. A municipal official may have the power to do something without being the "official responsible for establishing [municipal] policy" as to that action. *Pembaur*, 475 U.S. at 483 n.12. Barnhart could have had the power to instruct the prosecutor to charge the Nygards without being the policy-setting official regarding Orono Code violations. *Id.* Because the Nygards have not met the requirements to allege a *Monell* claim, their Section 1983 claim against the City fails.

III. Abuse of Process

Without a constitutional claim, the Nygards are left with two tort claims and a claim for a declaratory judgment. They are understandably frustrated with the City's actions. From the Nygards' view, the City allowed them to complete a driveway and then refused to issue a permit for it unless Nygard signed off on certain "conditions." The question for the Court is not whether the City's actions were frustrating, or even unfair—rather, it is whether the allegations are sufficiently tethered to the elements of the tort claims under Minnesota law.

For their abuse of process claim, the Nygards must have alleged that the City used a "process to accomplish a result not within the scope of the proceedings in which it was issued" and that the City had an ulterior motive. *Dunham v. Roer*, 708 N.W.2d 552, 571 (Minn. Ct. App. 2006) (citing *Kellar v. VonHoltum*, 568 N.W.2d 186, 192 (Minn. Ct. App. 1997)). "Process," in the context of this tort, is meant in a narrow sense. It refers to "the proceedings in any action or prosecution; a summons or writ, [especially] to appear or respond in court." *Eclipse Architectural Grp., Inc. v. Lam*, 814 N.W.2d 692, 697 (Minn. 2012) (citation omitted); *Leiendecker v. Asian Women United of Minn.*, 834 N.W.2d 741, 753 (Minn. Ct. App. 2013) (using the *Eclipse* definition of "process" for an abuse of process claim), *overruled on other grounds by* 848 N.W.2d 224 (Minn. 2014). The act of initiating a lawsuit cannot be the basis for an abuse of process claim. *Leiendecker*, 834 N.W.2d at 753. The basis must be the misuse of a

specific mechanism of litigation—process. *See id.*; Restatement (Third) of Torts § 26 cmts. a-c (2020). The only process the Nygards allege that the City abused is the permitting process, including the use of the BAF. (Compl. ¶¶ 216–31.) For example, the Nygards allege that the City "abused its BAF process by including in the BAF form, prepared for Jay Nygard's permit application, certain 'permit conditions' city officials knew were not applicable." (Compl. ¶ 219.)

Although the permitting process is a "process" in the broad sense of the word, it is not the type of "process" at which the abuse of process tort takes aim. *See Surgidev Corp. v. Eye Tech., Inc.*, 625 F. Supp. 800, 805 n.4 (D. Minn. 1986) (applying Minnesota law and dismissing an abuse of process counterclaim when there were no allegations that the plaintiff "misused discovery or other court process"); *Imholte v. US Bank, Nat'l Ass'n*, No. 19-CV-1627 (DWF/DTS), 2020 WL 362790, at *4 (D. Minn. Jan. 22, 2020) (applying Minnesota law and dismissing an abuse of process claim when the plaintiff failed to allege that the defendant misused the court's process). The Nygards have failed to state an abuse of process claim.

IV. Malicious Prosecution

To prevail on their malicious prosecution claim, the Nygards must allege (1) that the City brought the prosecution without probable cause; (2) that the City initiated and prosecuted it with malicious intent; and (3) that the Nygards prevailed in the action. *Dunham*,

708 N.W.2d at 569 (citing *Kellar*, 568 N.W.2d at 192). The Nygards have alleged that the prosecution was brought and prosecuted maliciously, and they have also alleged that the action terminated in their favor. (Compl. ¶¶ 241–44.) The only question, then, is whether they have plausibly alleged that the City brought the criminal action without probable cause.

For a malicious prosecution claim, a judge's finding of probable cause negates a claimed lack of probable cause. Restatement (Third) of Torts § 22 cmt. e (explaining that if a judge considered the evidence and determined that probable cause existed, the person or entity bringing the charge could have been "no more [wrong] than the judge," and that finding defeats civil liability); *cf. Polzin v. Lischefska*, 204 N.W. 885, 885 (Minn. 1925) (noting that a grand jury indictment is *prima facie* evidence of the existence of probable cause). A Minnesota state court judge determined that there was probable cause to charge the Nygards with violating Section 86-66 of the Orono Code, thus negating their malicious prosecution claim. (ECF No. 15 at 4, 10 (ECF pagination).[6])

Further, the Nygards have alleged facts that support the existence of probable cause as to Jay Nygard. Nygard replaced his driveway without a permit. (Compl. ¶¶ 10, 13–16.) He did not obtain a permit after the fact. (*Id.* ¶ 112.) Based on Nygard's installation of

[6] The Court may consider matters of public record, such as state court documents, without converting the motion to dismiss into one for summary judgment. *Levy v. Ohl*, 477 F.3d 988, 991 (8th Cir. 2007).

hardcover without a permit, Orono had "a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in the belief" that Nygard violated Section 86-66. *Allen v. Osco Drug, Inc.*, 265 N.W.2d 639, 643 (Minn. 1978) (internal quotations and citation omitted).

As to Kendall Nygard, who did not complete any of the work on the driveway and who was not present when the work was done, the City argues that she could be liable for the work done without a permit based on Section 86-36 of the Orono Code. That section requires an "owner and/or occupant" of a property on which work has been done without a permit to obtain a permit or remedy the violation within thirty days. Orono, Minn., Code § 86-36. Kendall co-owns the property at issue, subjecting her to possible liability for failing to obtain a permit. (Compl. ¶ 4.) While the case against Kendall Nygard was ultimately dismissed, the dismissal was not for lack of probable cause. (*Id.* ¶ 108); *see Neudecker v. Shakopee Police Dep't*, No. 07-CV-3506 (PJS/JJG), 2008 WL 11463478, at *3 (D. Minn. Mar. 25, 2008) ("The probable cause determination in a malicious prosecution claim should be based upon the decision to charge, not the result of the case, unless the specific issue of probable cause is adjudicated.") (citing Minnesota appellate court cases).

Even assuming the truth of the Nygards' factual allegations, as the Court must, the Court cannot conclude that the prosecution was without probable cause—particularly because a state court judge found probable cause to go forward with the case. Thus, the

Nygards' allegations of lack of probable cause, which relate to a legal conclusion, are insufficient to survive a motion to dismiss.[7]

V. Declaratory Judgment

Although the Nygards bring a declaratory judgment claim, both parties agree that a declaratory judgment is a remedy. (ECF No. 12 at 32; ECF No. 16 at 28.) But because the Court dismisses the Nygards' substantive claims, they are left with a "remedy in search of [a] right." *Wolff v. Bank of N.Y. Mellon*, 997 F. Supp. 2d 964, 979 (D. Minn. 2014) (internal quotations and citations omitted); *Corval Constructors, Inc. v. Tesoro Refin. & Mktg. Co.*, No. 19-CV-1277 (ECT/BRT), 2019 WL 5260483, at *5 (D. Minn. Oct. 17, 2019) ("[D]ismissal of a claim or request for a declaratory judgment is proper when there is no legal basis underlying the claim or request."). Thus, the Court dismisses the Nygards' declaratory judgment claim.

CONCLUSION

Based on the foregoing and on all the files, records, and proceedings herein, IT IS HEREBY ORDERED THAT:

1. The City of Orono's motion to dismiss (ECF No. 10) is GRANTED; and

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[7] Because the Court dismisses the Nygards' tort claims for failure to state a claim, it does not consider the City's immunity arguments.

2. The Nygards' Complaint (ECF No. 1) is DISMISSED as follows:

a. The void for vagueness claims (Counts I and II) and the malicious prosecution claim (Count V) are DISMISSED WITH PREJUDICE; and

b. The First Amendment retaliation claim (Count III), the abuse of process claim (Count IV), and the declaratory judgment claim (Count VI) are DISMISSED WITHOUT PREJUDICE.
