

No. A07-925

**State of Minnesota
In Court of Appeals**

**STATE OF MINNESOTA BY FRIENDS OF THE RIVERFRONT, GROVE STREET FLATS
ASSOCIATION, AND SIDNEY AND LOLA BERG,**

Appellants,

vs.

**CITY OF MINNEAPOLIS, MINNEAPOLIS PARK AND RECREATION BOARD,
MINNEAPOLIS COMMUNITY DEVELOPMENT AGENCY (NOW KNOWN AS MINNEAPOLIS
COMMUNITY PLANNING AND ECONOMIC DEVELOPMENT DEPARTMENT),
DELASALLE HIGH SCHOOL, AND BARBARA JOHNSON,**

Respondents.

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STATEMENT OF LEGAL ISSUES

1. Whether the District Court properly dismissed Appellant's Minnesota Environmental Rights Act (MERA) claims because it lacked subject matter jurisdiction to review the Minneapolis City Council's quasi-judicial decision.

The District Court dismissed Appellants' MERA claims, ruling that it lacked subject matter jurisdiction to review the City Council's quasi-judicial decision.

Handicraft Block, Ltd. P'Ship v. City of Minneapolis, 611 N.W.2d 16 (Minn.2000)
Dokmo v. Indep. Sch. Dist. No. 11, 459 N.W.2d 671 (Minn. 1990)
Lam v. City of St. Paul, 714 N.W.2d 740 (Minn. Ct. App. 2006)
Minn. Stat. § 116B.03, § 116B.09

2. Whether the District Court properly dismissed Appellants' MERA claims under the doctrine of collateral estoppel.

The District Court dismissed Appellants' MERA claims on grounds that the claims were collaterally estopped by the City Council's quasi-judicial decision.

Zander v. State, 703 N.W.2d 845 (Minn. Ct. App. 2005)

3. Whether the District Court properly determined that Appellants' MERA claims could also be dismissed on the alternative theory of ripeness.

The District Court determined that Appellants' MERA claims could also be dismissed on the alternative theory of ripeness.

4. Whether the District Court properly denied as moot Appellants' request for injunctive relief and for costs, disbursements, and attorneys fees.

The District Court denied as moot Appellants' request for injunctive relief and for costs, disbursements, and attorneys fees.

5. Whether the District Court properly dismissed the prospective contract claims asserted by Appellants Bergs and Grove Street Flats Association (GSFA) on ripeness grounds.

The District Court dismissed the prospective contract claims asserted by the Bergs and GSFA on ripeness grounds.

STATEMENT OF THE CASE

This is an appeal from the Hennepin County District Court, the Honorable Marilyn Brown Rosenbaum presiding.

Respondent DeLaSalle High School (DeLaSalle) applied to Respondent City of Minneapolis (City) for a Certificate of Appropriateness (COA) in order to construct an athletic facility that will be shared by DeLaSalle and the public through Respondent Minneapolis Park and Recreation Board (MPRB) programming. Appellant Friends of the Riverfront (Friends) intervened in the City proceedings under the Minnesota Environmental Rights Act (MERA). The Minneapolis City Council rejected Friends' MERA arguments and granted DeLaSalle's COA application.

After the Friends intervened in the City proceedings and *after* the City Council made its determinative conclusion under MERA, Appellants filed this action in Hennepin County District Court under MERA. Shortly thereafter, Appellants obtained a writ of certiorari from the Court of Appeals for review of the City Council's decision. That appeal is No. A06-2222, which has been consolidated with No. A07-944.¹

On Respondents' Motion to Dismiss, the District Court dismissed Appellants' Complaint based on subject matter jurisdiction, collateral estoppel, and ripeness grounds. This appeal followed.

¹ DeLaSalle later sought City approval of an Amended COA. Appellants also intervened in that proceeding under MERA, and after their claims were rejected by the City, again appealed to the Court of Appeals (No. A07-944).

STATEMENT OF FACTS

Athletic Facility Proposed by DeLaSalle and MPRB

DeLaSalle has proposed, on behalf of itself and MPRB, to construct an athletic facility on Nicollet Island. (APP. 0003 (Am. Compl. ¶ 12).) The proposed athletic facility consists of one regulation-size football field, which can also be used as a regulation-size soccer field or as three junior soccer fields, and seating for up to 750 spectators. (APP. 0034 (City Council's Findings of Fact #2).) The project calls for vacating and closing a portion of Grove Street, and re-grading it to connect the DeLaSalle property on the south side of the right-of-way with the MPRB property on the north side of the right-of-way to create a level surface for the playing field. (*Id.*) Use of the new athletic facility will be shared by DeLaSalle and the public through MPRB programming. (APP. 0034 (Preamble) and 0078-80 (Reciprocal Use Agreement §§ 8-11).)

Friends' Intervention as a Party to Proceedings Before the City

DeLaSalle applied to the City for a COA (required for projects that will change the nature or appearance of property in a designated historic district) to construct the athletic facility. (APP. 0034 (City Council's Findings of Fact #2).) DeLaSalle's application triggered a process whereby evidence was presented, arguments were made, and hearings were held before the MPRB, the City's Heritage Preservation Commission (HPC), and the City Council. (*See id.* (Preamble).)

On August, 8, 2006, the HPC denied DeLaSalle's COA application. (APP. 0034.) DeLaSalle appealed the HPC's decision to the Minneapolis City Council. (*Id.*)

On September 14, 2006, Friends invoked MERA's intervention provision, Minn. Stat. § 116B.09, and intervened as a party to the City proceedings. (*See* APP. 0039-56.) Accompanying the Notice of Intervention, Appellants' attorney submitted a 15-page letter brief to the Chair of the City's Zoning and Planning Committee. (*Id.*) By intervening under MERA, Friends raised the issue of whether the proposed athletic facility will violate MERA by causing "pollution, impairment, or destruction of . . . natural resources located within the state."² Minn. Stat. § 116B.09, subd. 1. (*See, e.g.*, APP. 0048.)

Friends also appeared September 14, 2006 at the Zoning and Planning Committee's hearing on DeLaSalle's appeal of the HPC decision. (APP. 0034.) At the hearing, Appellants' attorney spoke and argued in favor of upholding the HPC's decision. (Respondents' Appendix ("RESP. APP.") 001-5.) As required by MERA, the City Council considered the alleged impairment, pollution, or destruction of a natural resource and whether DeLaSalle had shown that there is no "feasible and prudent alternative consistent with the reasonable requirements of the public health, safety, and welfare and the state's paramount concern for the protection of its . . . natural resources from pollution, impairment, or destruction." Minn. Stat. § 116B.09, subd. 2. The City Council rejected Friends' MERA claims. (*See* APP. 0036-38 (City Council's Finding of Fact #11).) On September 22, 2006, the City Council found:

² "Natural resources" includes "historical resources." Minn. Stat. § 116B.02, subd. 4. The issue of whether Grove Street is a "historical resource" was not addressed in the motion to dismiss and Respondents reserve all arguments on that issue.

The MPRB and the Community Advisory Committee (CAC) examined alternative sites on and off the island and they concluded that **there are no reasonable alternatives** that allow the Project to meet the siting, design, and programmatic criteria adopted by the MPRB and DeLaSalle High School. The City has reviewed the materials DeLaSalle submitted in its application and appeal and presented at the Heritage Preservation Commission and Zoning and Planning Committee hearings, and the record of the MPRB proceedings, and **concurs with the MPRB findings that there are no reasonable alternatives**, and makes the following specific findings regarding alternatives . . .

(Id. (emphasis added).)

After itself conducting de novo review of alternative sites, the City Council concluded that constructing the athletic facility at the proposed location would not violate MERA: “[T]here is no feasible and prudent reasonable alternative consistent with the reasonable requirements of the public health, safety, and welfare and the paramount concern for the protection of historical resources.” *(Id. (Findings of Fact #11(h)).)* The City Council also granted DeLaSalle’s application for a COA. (APP. 0033.)

Additional Approvals Needed

After the City granted a COA, the proposed athletic facility still required additional City approvals, including approval of street vacation, a conditional use permit, and site plan review. (APP. 0002 (Am. Compl. ¶ 4).) The project also required approval by the Metropolitan Council under a 1992 agreement, and by the MPRB under a Reciprocal Use Agreement with DeLaSalle. (*See* APP. 0067 (1992 Agreement at 1), 0074 (Reciprocal Use Agreement at § 2.6).)

Complaint Filed in District Court

This lawsuit was commenced in the district court on October 25, 2006, *after* the Friends had intervened in the City proceedings and *after* the City Council had made its determinative conclusion under MERA. (RESP. APP. 006-16.) As in the MERA intervention before the City, Appellants claimed in their MERA lawsuit that: (1) DeLaSalle cannot show that no feasible and prudent alternative exists to constructing the facility at the planned location (*see* APP. 0007-9 (Am. Comp. ¶¶ 34, 39(c), 40(c))), and (2) the proposed athletic facility will violate certain environmental quality standards, limitations and/or rules (*see* APP. 0008-9 (Am. Compl. ¶¶ 35, 39(d), 40(d))). Additionally, the Amended Complaint alleged breach of contract claims against the City Respondents, and that Respondent Johnson, a member of the Minneapolis City Council, has a conflict of interest.³ (*See* 0007, 0009 (Am. Compl. ¶¶ 28-32, 41-42).)

Petition for Writ of Certiorari to the Minnesota Court of Appeals

On November 21, 2006, Appellants filed a Petition for Writ of Certiorari with the Minnesota Court of Appeals, seeking review of the City Council's determination under MERA. (*See* APP. 0057-66 (Petition For Writ of Certiorari; Petitioner's Statement of the Case; Writ of Certiorari).) The writ of certiorari issued the same day. (*See id.*)

Motions in District Court

The parties filed several motions in the District Court: (1) Respondents filed a Joint Motion to Dismiss; (2) Respondent Barbara Johnson filed a Motion to Dismiss; (3)

³ This claim is the subject of Johnson's concurrent appellate brief.

Appellants filed a Motion for Summary Judgment and Permanent Injunction; and (4) Appellants filed a Motion to Amend their Complaint. (APP. 0202.)

On January 9, 2007, the District Court held oral argument on the motions. (APP. 0202.) On March 5, 2007, the District Court issued its Order: (1) granting Respondents' Joint Motion to Dismiss; (2) granting Respondent Johnson's Motion to Dismiss; (3) denying Appellant's Motion for Summary Judgment and Permanent Injunction; and (4) denying Appellant's Motion to Amend their Complaint. (APP. 203.) As a result, Counts I and II (breach of contract and related declaratory judgment claims by the Bergs) were dismissed without prejudice; Counts III and V (MERA and related declaratory judgment claims) were dismissed with prejudice; and Count IV (claim against Barbara Johnson) was dismissed with prejudice. (*Id.*)

This Appeal

On May 7, 2007, Appellants filed a Notice of Appeal from the District Court's Order. (APP. 0213-15.)

STANDARD OF REVIEW

Whether a court has subject matter jurisdiction is reviewed de novo. *Irwin v. Goodno*, 686 N.W.2d 878, 880 (Minn. Ct. App. 2004); *Mowry v. Young*, 565 N.W.2d 717, 719 (Minn. Ct. App. 1997). On a motion to dismiss for lack of subject matter jurisdiction under Minn. R. Civ. P. 12.02(a), the court determines whether it has the authority to consider an action. *See Irwin*, 686 N.W.2d at 880. "Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action." Minn. R. Civ. P. 12.08(c).

The dismissal of a complaint for failure to state a claim under Minn. R. Civ. P. 12.02(e) is reviewed de novo. *Bodah v. Lakeville Motor Express, Inc.*, 663 N.W.2d 550, 553 (Minn. 2003). The court considers whether “it appears to a certainty that no facts, which could be introduced consistent with the pleading, exist which would support granting the relief demanded.” *Northern States Power Co. v. Franklin*, 265 Minn. 391, 395, 122 N.W.2d 26, 29 (1963). While a complaint’s well-pleaded allegations must be accepted as true and viewed most favorably to the plaintiff, liberal pleading rules are not a substitute for substantive law. *North Star Legal Found. v. Honeywell Project*, 335 N.W.2d 186, 188 (Minn. Ct. App. 1984). A claim that fails to set forth a legally sufficient claim for relief must be dismissed. *See Bodah*, 663 N.W.2d at 553; *Martens v. Minnesota Mining & Mfg. Co.*, 616 N.W.2d 732, 748 (Minn. 2000).

LEGAL ARGUMENT

The District Court correctly dismissed each claim in this action. **First**, the District Court properly dismissed Appellants’ MERA claims on three grounds:

- The District Court dismissed Appellants’ MERA claims because it lacked subject matter jurisdiction to review the City Council’s quasi-judicial decision. The exclusive means for judicial review of a quasi-judicial decision is by a writ of certiorari, which Appellants had already obtained.
- The District Court dismissed Appellants’ MERA claims under the doctrine of collateral estoppel. The City Council had already made a controlling determination on the MERA claims raised by Appellants.
- The District Court dismissed Appellants’ MERA claims on the alternative grounds of ripeness because construction of the athletic facility was not possible until all required governmental approvals had been obtained.

Second, the District Court correctly denied as moot Appellants' request for injunctive relief and for costs, disbursements, and attorneys fees. **Third**, the District Court properly dismissed on ripeness grounds the prospective contract claims asserted by the Bergs and GSFA because the claimed breach—construction of the athletic facility—had not occurred and could not occur until several governmental approvals had been obtained.

In this appeal, Appellants engage in rather unorthodox appellate advocacy by asking this Court to: (1) look beyond the trial court's basis for dismissal and to consider the merits of their claims; (2) consider arguments not made below; and (3) accept unpublished and mischaracterized legal authority. This Court must reject Appellants' efforts and affirm the decision of the District Court.

I. THE DISTRICT COURT CORRECTLY CONCLUDED THAT IT LACKED SUBJECT MATTER JURISDICTION OVER THE MERA CLAIMS

MERA offers two routes for pursuing a MERA claim: (1) an action in the district court for the protection of natural resources from pollution, impairment, or destruction, Minn. Stat. § 116B.03, subd. 1; and (2) intervention as a party to administrative proceedings involving conduct that has caused or is likely to cause pollution, impairment, or destruction of natural resources, Minn. Stat. § 116B.09, subd. 1. In the case below, the administrative intervention route had been fully, finally, and unsuccessfully pursued when Appellants brought the very same MERA claims via the lawsuit route. In these particular circumstances, the District Court correctly ruled that Appellants were not permitted to proceed down MERA's civil action path.

As the District Court noted, Appellants “have perfected their Writ and cannot now duplicate their claims” and their “decision to intervene and proceed with the Writ was an election for an exclusive remedy.” (APP. 0210.) The District Court recognized that the City Council’s approval of the COA was a quasi-judicial decision that could be reviewed only by the writ of certiorari pending before the Court of Appeals. (*Id.*) Based on Appellants’ MERA intervention and their decision to obtain a writ of certiorari, the Court concluded that it lacked subject matter jurisdiction over Appellants’ MERA claims.

The District Court got it exactly right. Appellants asked the District Court to decide the same issue that had already determined by the City Council, namely, whether under MERA there is a feasible and prudent alternative to constructing the athletic facility at the planned location. Appellants did not dispute that the City Council’s determination was a quasi-judicial decision. Indeed, the Minnesota Supreme Court has held that heritage preservation proceedings before the Minneapolis City Council are quasi-judicial. *Billy Graham Evangelistic Ass’n v. City of Minneapolis*, 667 N.W.2d 117, 123 (Minn. 2003); *Handicraft Block, Ltd. P’Ship v. City of Minneapolis*, 611 N.W.2d 16, 20-24 (Minn. 2000). Appellants also did not dispute that the City Council’s quasi-judicial determination could be reviewed only by a writ of certiorari to the Court of Appeals. *See Soo Line R.R. Co. v. City of Minneapolis*, 625 N.W.2d 834, 836 n.1 (Minn. Ct. App. 2001) (“The City’s historical-preservation-designation proceedings are quasi-judicial in nature and reviewable by this court on a writ of certiorari.”).

Appellants’ sole argument on appeal is that MERA allows them to first raise their claims in an administrative proceeding and, after receiving an unfavorable decision in the

administrative proceeding, to then pursue the same claim in the district court. (*See* Appellants' Br. at 7-15.) This argument is unsupported by law or common sense. To accept Appellants' position would invite results that no legislature could intend: two (or more) bites at the apple, gamesmanship, misuse and waste of judicial resources, potentially conflicting decisions, and confusion. Clearly, MERA allows *a choice* between two paths, but MERA does not allow a party to pursue a MERA lawsuit after it has lost the same MERA claim in an administrative proceeding. Were it otherwise, parties would be allowed to gamble in an administrative proceeding and, if the result was not to their liking, to then maintain an action in district court. This is not the law.

The District Court correctly reasoned that because the City had issued a final decision on the MERA claims, principles of subject matter jurisdiction prohibited Appellants from duplicating their MERA claims in a lawsuit. And where the Court of Appeals had accepted review of the City's final decision, acceptance of a lawsuit concerning the identical MERA claim would violate separation-of-powers principles. *See Dokmo v. Indep. Sch. Dist. No. 11*, 459 N.W.2d 671, 674 (Minn. 1990) ("Constitutional principles of separate governmental powers require that the judiciary refrain from a de novo review of administrative decisions.").

Appellants' heavy reliance on *State by Archabal v. County of Hennepin*, 495 N.W.2d 416 (Minn. 1993), is misplaced. (Appellants' Br. at 7-8.) *Archabal* has no place in this appeal because it addressed the *merits* of a MERA claim, something the District Court did not do in this case. *Archabal* did not involve the procedural lawsuit-following-intervention posture involved in this case.

Likewise, Appellants' assertion that a district court action provides "distinct and separate" rights and remedies as compared to an intervention is without merit. (Appellants' Br. at 10-11.) This argument actually makes Respondents' point that MERA allowed Appellants to choose between intervention and a lawsuit. In the end, the right to have a determination that conduct violates MERA does not differ in a district court action versus an administrative intervention. Furthermore, it cannot be said that this Court "recognized [a] distinction" between the two MERA paths in consolidating the appeals in Nos. A06-2222 and A07-944, but not consolidating those appeals with this one. (Appellants' Br. at 10.) Rather, it appears that this Court consolidated two of the three appeals because they involve a common record and share the same standard of review.

Additionally, Appellants' reliance on Minn. Stat. § 116B.12 is misplaced. (Appellants' Br. at 11-14.) Rejecting Appellants' argument below, the District Court observed that Section 116B.12 "cannot be interpreted to allow [Appellants] to proceed with the intervention in the administrative proceedings and the Writ, and to then be allowed to commence this parallel civil action in district court." (APP. 0210.) This is exactly right. Section 116B.12 merely states that MERA does not displace rights and remedies available *outside* MERA:

No existing civil or criminal remedy for any wrongful action shall be excluded or impaired by sections 116B.01 to 116B.13. The rights and remedies *provided herein* shall be in addition to any administrative, regulatory, statutory, or common law rights and remedies now or hereafter available.

Minn. Stat. § 116B.12 (emphasis added). Contrary to Appellants' contention, this section does not allow simultaneous MERA actions.

Nor is Appellants' position supported by *Swan Lake Area Wildlife Ass'n v. Nicollet County Bd. of County Comm'rs*, 711 N.W.2d 522 (Minn. Ct. App. 2006) (availability of an administrative procedure under drainage statute did not preclude a MERA action) or *Fort Snelling State Park Ass'n v. Minneapolis Park and Recreation Bd.*, 673 N.W.2d 169 (Minn. 2003) (project approval under the Minnesota Historic Sites Act did not preclude a MERA action). These cases actually support **Respondents' argument** that Section 116B.12 means only that MERA does not displace remedies available outside MERA. Neither case involved an intervention under Section 116B.09 or a quasi-judicial decision. And neither case supports Appellants' position that one MERA remedy can be pursued after the same MERA question has been raised and decided in a separate MERA proceeding.

Appellants attempt to misrepresent *Swan Lake* and *Fort Snelling* by making it seem like the courts said things they did not say. For instance, consider this imaginative twist in Appellants' brief:

Neither the Supreme Court in *Fort Snelling* nor this Court in *Swan Lake* made any arguable suggestion that these decisions would be different if the § 116B.03 MERA plaintiffs were or were anticipated to participate in the "administrative processes." This is not surprising because, logically, both courts had to assume that if a project opponent goes to the trouble of asserting a § 116B.03 MERA claim against a project, then that same opponent is also going to be involved in all of the project's "administrative processes."

(Appellants' Br. at 13.) This interpretation of the case law does not hold water. To start, the courts in *Fort Snelling* and *Swan Lake* did not hypothesize on whether their decisions would have been different because the plaintiffs in those cases did not intervene in administrative proceedings under MERA. Courts do not issue advisory opinions based on hypothetical facts. *See In re Schmidt*, 443 N.W.2d 824, 826 (Minn. 1989). Moreover, there is absolutely nothing to substantiate Appellants' contention that these courts would have "had to assume" that the plaintiffs would "be involved in all of the project's 'administrative processes.'" Logic compels no such assumption.⁴

In sum, because the Minnesota Court of Appeals has exclusive certiorari jurisdiction to review the City Council's quasi-judicial decision, this Court must affirm the District Court's dismissal of Appellants' MERA claims for lack of subject matter jurisdiction. *See Lam v. City of St. Paul*, 714 N.W.2d 740, 743 (Minn. Ct. App. 2006) (finding certiorari jurisdiction was proper to review quasi-judicial act); *Mowry v. Young*, 565 N.W.2d 717, 719-21 (Minn. Ct. App. 1997) (finding certiorari was exclusive means to review quasi-judicial decision); *Naegle Outdoor Adver., Inc. v. Minneapolis Cmty. Dev. Agency*, 551 N.W.2d 235, 236-37 (Minn. Ct. App. 1996) (finding "sole remedy" for review of quasi-judicial decision is to appeal by writ of certiorari).

⁴ Appellants' subsidiary arguments can be easily dispatched. To start, Appellants' resort to MERA's "purpose" must be rejected. (*See* Appellants' Br. at 7-9.) Whatever MERA's purpose may be, it does not answer the procedural question posed here. Appellants' reliance on *Michigan's* Environmental Protection Act is equally unavailing. (*See id.* at 14-15.) Michigan's statute has no bearing on whether Appellants may maintain simultaneous MERA actions. Michigan's statute merely states the obvious – that collateral estoppel and res judicata apply. The absence of this language from MERA does not mean that collateral estoppel and res judicata do not apply in Minnesota. (*See also supra* Part II (demonstrating the applicability of collateral estoppel in this case).)

II. THE DISTRICT COURT PROPERLY DISMISSED THE MERA CLAIMS UNDER THE DOCTRINE OF COLLATERAL ESTOPPEL

Even if this Court does not agree with the District Court's conclusion that it lacked subject matter jurisdiction over Appellants' MERA claim, the dismissal must nevertheless be affirmed on the alternative ground relied on by the District Court – that Appellants' MERA claim is barred by the doctrine of collateral estoppel. (APP. 0210-11.)

The Minnesota Supreme Court has held that collateral estoppel may apply to an administrative decision when an agency acts in a judicial or quasi-judicial capacity. *Graham v. Special Sch. Dist. No. 1*, 472 N.W.2d 114, 115-16 (Minn. 1991); *Zander v. State*, 703 N.W.2d 845, 854 (Minn. Ct. App. 2005). Collateral estoppel bars relitigation of an issue that has already been litigated when: (1) the issue to be precluded is identical to the issue raised in the prior agency adjudication; (2) the issue was necessary to the agency adjudication and properly before the agency; (3) the agency determination was a final adjudication subject to judicial review; (4) the estopped party was a party or in privity with a party to the prior agency determination; and (5) the estopped party was given a full and fair opportunity to be heard on the adjudicated issue. *Falgren v. State Bd. of Teaching*, 545 N.W.2d 901, 905 (Minn. 1996); *Graham*, 472 N.W.2d at 115-16.

The District Court found that each of the five factors existed here: "It is clear and undisputed that 1) the issues to be precluded are identical to the issues raised in the Minneapolis City Council decision; 2) the issues were necessary to the Minneapolis City Council decision and were properly before the Minneapolis City Council; 3) the

Minneapolis City Council's determination was a final decision subject to judicial review; 4) Plaintiffs were a party or in privity with a party to the Minneapolis City Council decision; and 5) Plaintiffs were given a full and fair opportunity to be heard on the adjudicated issues." (APP. 0210-11.)

Appellants challenge only the findings on factors four (privity) and five (full and fair opportunity). (See Appellants' Br. at 16-19.) Both challenges must be rejected.

A. GSFA/Bergs Were in Privity With Friends

There is no merit to Appellants' assertion that there is "no record evidence of privity" between Friends and GSFA/Bergs. (Appellants' Br. at 18.) The record actually shows that while only the Friends were identified as intervenors in the City proceedings, the Friends, the Grove Street Flats Association and the Bergs—the plaintiffs below and Appellants herein—are all identified as relators in the certiorari review of the City's decision now pending before this Court (Appeal No. A06-2222). (APP. 0057-66.)

Furthermore, those in privity include non-parties "whose interests are represented by a party to the action." *Margo-Kraft Distrib., Inc. v. Minneapolis Gas Co.*, 294 Minn. 274, 278, 200 N.W.2d 45, 48 (1972) (quotation omitted); *Balasuriya v. Bemel*, 617 N.W.2d 596, 600 (Minn. Ct. App. 2000). The identity of parties is a matter of substance, not form. See *Chicago, R.I. & P.R. Co. v. Schendel*, 270 U.S. 611, 620 (1926). The basic requirement in every case is that the estopped party's interests must have been sufficiently represented in the first action so that application of collateral estoppel is not inequitable. *Brunsomman v. Seltz*, 414 N.W.2d 547, 550 (Minn. Ct. App. 1987).

There can be no question that Friends, when they intervened in the City proceedings, represented the interests of the Bergs and GSFA. First, under MERA, one claims that a particular action will cause pollution, impairment or destruction of the State's natural resources, not that there will be injuries unique to a particular person or group. Therefore, the injury is the same no matter who you are, and regardless of whether you live on Nicollet Island (as all Appellants do) or in Duluth. Second, the MERA issues raised by Appellants below were identical to those raised by Friends before the City. Third, Appellants alleged facts identical to those alleged by Friends. Fourth, all of the parties have been, and continue to be, represented by the same attorneys in all proceedings. *See Margo-Kraft*, 294 Minn. at 280, 200 N.W.2d at 48 (pointing to common counsel as support for privity determination). Given these facts, one must ask: If GSFA/Bergs are not in privity with Friends, what stops any other person from relitigating these same MERA issues *ad infinitum*? Under Appellants' theory, there would be no end to MERA lawsuits over this project. Yet that is precisely what the doctrine of collateral estoppel is designed to avoid.

Relying on *Miller v. Northwestern National Insurance, Co.*, 354 N.W.2d 58 (Minn. Ct. App. 1984), Appellants contend the record is inadequate to assess whether privity exists. (Appellants' Br. at 18-19.) In *Miller*, Jim Miller had sued Miller Construction (of which he was a majority shareholder) and an insurance company for indemnification for losses he incurred as a result a prior court finding that he had made intentional misrepresentations. *Miller*, 354 N.W.2d at 60. While the insurance company made no cross-claim against Miller Construction, it nevertheless moved for summary

judgment against Miller Construction, asserting that its insurance policy excluded coverage for intentional fraud and relying on the prior court finding that Jim Miller had made intentional misrepresentations. *Id.* at 60-61. The issue became whether Miller Construction was in privity with Jim Miller in order to bind it to that prior court finding. *Id.* at 61-63. The Court of Appeals focused on whether the “interests” of Miller Construction and Jim Miller were “identical.” *Id.* at 62. Based on the facts of the case, the Court of Appeals found that a fact issue existed because Jim Miller had sued Miller Construction: “[I]t is not clear on this record that their interests were identical in this litigation. Miller’s current suit seeking indemnity from...Miller Construction is evidence of conflict.” *Id.* at 62.

Miller is of no assistance to Appellants. Unlike *Miller*, there is no evidence of conflict of interests between GSFA/Bergs and Friends. As explained above, GSFA/Bergs and Friends allege the same facts, assert the same claims, and share the same counsel. This is a very different situation from *Miller* where the one side was suing the other for indemnification. In such a situation, there may be “evidence of conflict.” *Id.* at 62. There is no similar evidence of conflict here.

B. Appellants Had a Full and Fair Opportunity to Be Heard in the City Proceedings

There is equally no merit to Appellants’ contention that they have not received a full and fair opportunity to be heard. (Appellants’ Br. at 16-17.) To start, Appellants failed to raise this argument below. Rather, Appellants argued only that there was no privity and no “final judgment.” (See APP. 0113-15.) Appellants are not allowed to raise

on appeal a theory not raised below. *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988); *Thayer v. Am. Financial Advisers, Inc.*, 332 N.W.2d 599, 604 (Minn. 1982).

Even if this Court chooses to reach this new issue on appeal, it is clear that Appellants had a full and fair opportunity to be heard before the City Council. Appellants have admitted that they had a full and fair opportunity to be heard because they asserted, when they moved for summary judgment in this case and when they appealed the City's decision in Appeal No. A06-2222, that the evidence they presented to the City proves that MERA has been violated. (*See* RESP. APP. 019 ("Because of this extensive prior review of DeLaSalle's proposal (together with the public record regarding the same), there is no shortage of record materials to rely upon for Plaintiffs' motion."))

Furthermore, it is undisputed that Appellants: (1) were represented by counsel; (2) submitted a comprehensive 15-page letter brief to the Zoning and Planning Committee in support of their MERA claim (APP. 0042-56); (3) presented oral argument before the Zoning and Planning Committee in support of their MERA claim (RESP. APP. 001-5); (4) offered evidence in support of their arguments (*see* APP. 0042-56); and (5) had their arguments heard by an impartial body (the Zoning and Planning Committee of the City Council and City Council⁵). A record was made (filed in Appeal. No. 06-2222) and detailed written findings were issued by the City (APP. 0034-38). And now, Appellants

⁵ There is no merit to Appellants' argument that City Council Chairwoman Barbara Johnson should have been disqualified. Additionally, there can be no claim that the Zoning and Planning Committee is not impartial because Chair Johnson does not serve on that Committee. That Committee is comprised of Councilmembers Schiff, Remington, Goodman, Samuels, Gordon, and Roy. *See* <http://www.ci.minneapolis.mn.us/council/standing-committees/zoning-and-planning.asp>.

are obtaining judicial review of the City's decision by writ of certiorari (Appeal No. 06-2222). Unquestionably, the facts reveal that Appellants have had, and continue to receive, a full and fair opportunity to be heard.

This Court's decision in *Zander v. State*, 703 N.W.2d 845 (Minn. Ct. App. 2005), is illustrative. In *Zander*, landowners were collaterally estopped from relitigating MERA issues in district court because they had a full and fair opportunity to be heard in front of an agency acting in a quasi-judicial capacity. *Id.* at 854-55. The Court found a "full and fair opportunity to be heard" existed because the landowners had submitted written arguments and evidence to the agency, and had presented written and oral arguments to the Court of Appeals on review. *Id.* A full and fair opportunity existed despite the fact that the landowners were denied a hearing before the agency. *Id.* If the landowners in *Zander* had a full and fair opportunity, Appellants surely have too.

Nevertheless, Appellants contend that they did not receive a full and fair opportunity. (Appellants' Br. at 16-17.) Each of their arguments is without merit. First, Appellants baldly assert that they had no "impartial hearing examiner," but fail to cite any support for their assertion that the Zoning and Planning Committee and the City Council are partial bodies. Second, while Appellants contend that they had "no opportunity for a jury" in the City proceedings, they fail to acknowledge that there is never an opportunity for a jury in quasi-judicial proceedings.⁶ This reality of

⁶ Interestingly, Appellants moved for **summary judgment** in this case, which is an acknowledgement on their part that there were no jury issues. In any event, Appellants have not shown that they would have had a right to a jury in their district court proceedings. *See, e.g., Citizens For A Safe Grant v. Lone Oak*, 624 N.W.2d 796 (Minn.

administrative law does not diminish the preclusive effect of quasi-judicial decisions. Third, although Appellants complain that the “rules of evidence were not in effect,” they cite no support for that assertion and point to no prejudice. Fourth, while Appellants assert that “Friends was not even allowed to orally argue its position,” it is undeniable that Appellants’ counsel appeared before the Zoning and Planning Committee on September 14, 2006 and argued Friends’ position. (RESP. APP. 001-5.) Finally, Appellants state that the “City Council’s entire COA proceeding lasted but minutes,” but they neglect to acknowledge that the preceding Zoning and Planning Committee meeting on the COA lasted approximately three hours.

Appellants’ reliance on *Graham v. Special School Dist. No. 1*, 472 N.W.2d 114 (Minn. 1991), and *Clapper v. Budget Oil Co.*, 437 N.W.2d 722 (Minn. Ct. App. 1989), is unavailing. *Graham* involved a teacher termination proceeding, a unique type of proceeding that involves individual rights and is very different from the administrative proceeding involved here. *See Graham*, 437 N.W.2d at 118. The only things present in *Graham* not present here were the availability of subpoenas and the rules of evidence, but Appellants have shown no prejudice resulting from the absence of these items. *See id. Clapper*, a “speedy” unemployment-compensation proceeding, was another unique proceeding involving individual rights. *Clapper*, 437 N.W.2d at 726. Unlike the present case, *Clapper* apparently did not involve letter briefs, the creation of a record, or the

Ct. App. 2001) (court trial on MERA claims); *State ex rel. Wacouta Township v. Brunkow*, 510 N.W.2d 27 (Minn. Ct. App. 1993) (same); *State by Archabal v. County of Hennepin*, 495 N.W.2d 416 (Minn. 1993) (same); *State by Powderly v. Erickson*, 285 N.W.2d 84 (Minn. 1979) (same).

issuance of detailed written findings. Furthermore, neither *Graham* nor *Clapper* set the floor for a full and fair opportunity to be heard. See, e.g., *Zander*, 703 N.W.2d at 845 (finding full and fair opportunity to be heard); *Harford v. Univ. of Minnesota*, 494 N.W.2d 903, 908-09 (Minn. Ct. App. 1993) (same), *implied overruling on other grounds recognized by Shaw v. Bd. of Regents*, 594 N.W.2d 187 (Minn. Ct. App. 1999).

Ironically, Appellants' position on collateral estoppel shifts when it suits them. On their motion for summary judgment, Appellants' argued that DeLaSalle should be collaterally estopped on an issue arising out of an administrative proceeding relating to an Environmental Assessment Worksheet (EAW). (RESP. APP. 020-23.) Appellants argued that DeLaSalle had a full and fair opportunity because (1) DeLaSalle's counsel "submitted a letter to City planning staff regarding the issue" and (2) DeLaSalle "and its entourage attended all of the hearings" regarding the EAW. (RESP. APP. 022-23.) It is clear that under their own legal analysis, Appellants had a full and fair opportunity in the COA administrative proceeding before the City

III. THE DISTRICT COURT CORRECTLY FOUND THE MERA CLAIMS UNRIPE

The District Court also dismissed Appellants' MERA claims under a second alternative theory that the claims were unripe for adjudication. (APP. 0211.) "[A]n underlying justiciable controversy is essential to a court's exercise of jurisdiction." *Cincinnati Ins. Co. v. Franck*, 621 N.W.2d 270, 273 (Minn. Ct. App. 2001).

Under MERA, a person may maintain a civil action only when there is "conduct" that violates or is likely to violate environmental quality standards, or "conduct" that

materially adversely affects or is likely to materially adversely affect the environment. Minn. Stat. §§ 116B.03, subd. 1 (civil actions), 116B.02, subd. 5 (definition of pollution, impairment or destruction). In this case, the “conduct” that Appellants seek to enjoin under MERA is the construction of the athletic facility. At the time the City Council granted a COA for the athletic facility, several additional approvals from the City, Metropolitan Council, and MPRB had to be obtained before the facility could be built. (See supra p. 5.) Without such approvals, the athletic facility could not be built and there were no justiciable MERA claims.

IV. APPELLANTS ARE NOT ENTITLED TO INJUNCTIVE RELIEF OR ATTORNEYS FEES

Appellants’ claims for injunctive relief and attorneys fees are meritless. First, the District Court did not address these issues because dismissal of Appellants’ Complaint made the issues moot. (See APP. 0212.) Because the District Court did not address these issues, Appellants cannot argue on appeal that they are entitled to injunctive relief or attorneys fees. *Thiele*, 425 N.W.2d at 582 (declining to consider applicability of a statute of limitations on appeal “if it was not passed on by the trial court”).

Second, as a matter of law, Appellants could never be entitled to attorneys fees because MERA does not authorize the award of attorneys fees and costs. It is a “fundamental principle of law deeply ingrained in our common law jurisprudence that each party bears his own attorney fees in the absence of a statutory or contractual exception.” *Ly v. Nystrom*, 615 N.W.2d 302, 314 (Minn. 2000). It has long been held that “attorney fees are not recoverable in litigation unless there is a specific contract

permitting or a statute authorizing such recovery.” *Barr/Nelson, Inc. v Tonto’s, Inc.*, 336 N.W.2d 46, 53 (Minn. 1983). “Plainly, the legislature knows how to specifically authorize the recovery of attorneys fees . . . when it intends such recovery.” *In re Wang*, 441 N.W.2d 488, 496 (Minn. 1989). Nothing in MERA expressly or by implication abrogates the common law rule that Appellants bear their own attorneys fees and costs.

Moreover, none of the cases Appellants rely on authorize an award of attorneys fees or costs under MERA. To start, *Busse v. Board of County Comm’rs*, 308 Minn. 184, 241 N.W.2d 794 (1976), is inapplicable because it is not a MERA case and it created a “narrow exception” for a clerk of a county court to collect attorneys fees in a case where the clerk had to hire a private attorney to sue the county over deputies’ salaries because the county attorney had a conflict of interest. Similarly, *Liess v. Lindemyer*, 354 N.W.2d 556 (Minn. Ct. App. 1984), is inapplicable because it is not a MERA case and the plaintiff sued under Minnesota’s private attorney general statute, which specifically authorizes an award of attorneys fees. Likewise, *Martin v. Hancock*, 466 F. Supp. 454 (D. Minn. 1979), is inapplicable because it is not a MERA case and the plaintiff sued under the Federal Civil Rights Attorney’s Fees Awards Act, which also specifically authorizes an award of attorneys fees.⁷ Furthermore, *People for Env’tl. Enlightenment and Responsibility (PEER), Inc. v. Minnesota Env’tl. Quality Council*, 266 N.W.2d 858, 869 n.16 (Minn. 1978) and *Schaller v. County of Blue Earth*, 563 N.W.2d 260, 264 (Minn. Ct. App. 1997), had nothing to do with awarding attorneys fees and the portions

⁷ *Martin* itself denied an award of attorneys fees to the plaintiff.

cited by Appellants stand for nothing more than the proposition that MERA expressly permits a private right of action.

Appellants rely heavily on the unpublished opinion of the Minnesota Court of Appeals in *Gillette v. Peterson*, No. A03-997, 2004 WL 1191764 (Minn. Ct. App. June 1, 2004). This reliance is misplaced for many reasons. To begin, *Gillette* is an unpublished opinion and is therefore “not precedential.” Minn. Stat. § 480A.08, subd. 3(b). Furthermore, while the trial court apparently awarded attorneys fees, there is no indication that the award of fees was appealed. Moreover, the Court of Appeals provided absolutely no analysis of the issue of attorneys fees and costs under MERA and did not explicitly state that such fees and costs are awardable. Given that it is a “fundamental principle of law deeply rooted in our common law” that each party bears its own attorneys fees, and that it is presumed that statutes like MERA are consistent with the common law, *Ly*, 615 N.W.2d at 314, it is inconceivable that when deciding *Gillette* the Court of Appeals intended to allow attorneys fees under MERA without providing some analysis of the issue. And even if the Court of Appeals intended to create a new exception to the American Rule on attorneys fees under MERA, it did not have the authority to do so. As the Minnesota Court of Appeals has explained: “If an exception to the American Rule is to be adopted in Minnesota . . . a clear expression of that change should be made by the **supreme court or the legislature; it is not our role to do so.**” *See In re Trusteeship of Williams*, 631 N.W.2d 398, 409 (Minn. Ct. App. 2001) (emphasis added).

Because an award of attorneys fees and costs under MERA is not authorized by statute or case law, Appellants' claim for attorneys fees and costs under MERA must be rejected.⁸

V. BERGS' CONTRACT CLAIMS FAIL

In their Complaint, Appellants Sidney and Lola Berg claimed breach of contract against the City, CPED, and the MPRB. Their theory was as follows: (a) Certain parts of Nicollet Island are subject to a 1985 Ground Lease between CPED and the MPRB; (b) CPED and the Bergs are parties to a 1991 Ground Sublease for land that the Bergs occupy on Nicollet Island; (c) the Ground Sublease provides that the parties will devote certain land to uses identified in two plans, referred to as "the Agency Plan" and "the Board Plan"; (d) the Agency Plan and Board Plan "necessarily incorporate" several other general plans for the area, and **if the athletic facility is constructed**, it will not be consistent with some of those plans; (e) therefore, the City, CPED and MPRB are in breach of the Ground Lease and Ground Sublease. (*See* APP. 0004-7 (Am. Compl. ¶¶ 15-22, 28-32).)

When Appellants commenced the action below, several governmental approvals were required before the athletic facility could be constructed. Respondents argued that prospective governmental approvals could not constitute breach of the Ground Lease and

⁸ Appellants attempt to sway this Court by appealing to emotions. For example, without support, Appellants contend that they and their counsel have been "publicly vilified" by DeLaSalle and its supporters for "daring" to bring this case. (Appellants' Br. at 27.) Given all the verbal bomb-throwing that Appellants have tossed DeLaSalle's way, this is the pot calling the kettle black. In any event, public vilification is not the standard for determining whether attorneys fees are awardable under MERA.

Ground Sublease. (See APP. 0026-27 (Mem. in Supp.)) Appellants made no response to that part of Respondent's motion to dismiss. (See APP. 106-118 (Mem. in Opp'n); see also APP. 0166 (Reply Mem. in Supp.)) The District Court then dismissed the contract claims, without prejudice, on ripeness grounds:

The contract claims brought by the Bergs must be dismissed. Any claimed breach is prospective, no breach has yet occurred, and a breach cannot be alleged until all government approvals have been obtained and/or all hearings have been held, appealed and finally adjudicated.

(APP. 0211.)

Now, in their Opening Brief in this appeal, Appellants (a) comment on an argument that Respondents made below in response to Appellants' motion for summary judgment, and (b) make an "anticipatory breach" argument that was not raised below. (Appellant's Br. at 35.)

The District Court's dismissal of this claim must be affirmed because the claim was not ripe. See *Lee v. Delmont*, 228 Minn. 101, 110, 36 N.W.2d 530, 537 (1949) ("Issues which have no existence other than in the realm of future possibility are purely hypothetical and are not justiciable. Neither the ripe nor the ripening seeds of controversy are present.") Furthermore, Appellants are not allowed to raise on appeal a theory not raised below. *Thiele*, 425 N.W.2d at 582. Finally, and in any event, "anticipatory breach" applies to contracts that involve interdependent obligations. *Sheet Metal Workers Local #76 Credit Union v. Hufnagle*, 295 N.W.2d 259, 262 (Minn. 1980). The Ground Lease and the Ground Subleases in this case do not involve interdependent obligations; they merely incorporate the Agency Plan and the Board Plan by reference.

Therefore, the new anticipatory breach theory does not apply to the facts alleged by Appellants.

CONCLUSION

Based on the foregoing, Respondents respectively request that this Court affirm the decision below dismissing Appellants' Complaint.

Dated: Sep. 10, 2007


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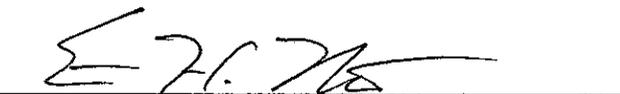
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CERTIFICATE OF COMPLIANCE

The undersigned counsel for Respondents certify that this brief complies with the requirements of Minn. R. Civ. App. P. 132.01 in that it is printed in a 13-point, proportionately spaced typeface utilizing Microsoft Word 2000 and contains 7,431 words, excluding the Table of Contents, Table of Authorities, and Appendix.

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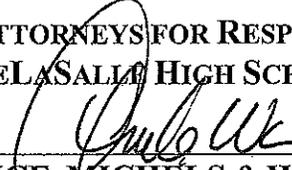
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