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STATE OF MINNESOTA  
IN COURT OF APPEALS

NO. A07-925

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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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**APPELLANTS' OPENING BRIEF WITH SEPARATE APPENDIX**

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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2).

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## STATEMENT OF ISSUES

1. Whether MERA permits a simultaneous § 116B.03 district court MERA action and a § 116B.09 notice of MERA intervention into a local decisionmaking procedure.
2. Whether a quasi-judicial decision of a local government collaterally estops plaintiffs in a § 116B.03 district court MERA action where the local decisionmaking process did not afford a full and fair opportunity to be heard and where parties to the district court action were not parties to the local decisionmaking procedure.
3. Whether a § 116B.03 MERA district court action is ripe for adjudication when the MERA plaintiffs have identified conduct that is likely to harm the environment, or whether the § 116B.03 district court MERA action must be delayed until all of the local permits and approvals have issued for the objected-to proposal.
4. Whether a public official can act in a quasi-judicial decisionmaking capacity when she is admittedly a fiduciary to the applicant.
5. Whether a breach of contract action can be maintained against parties that are actively pursuing a course of action that, when completed, would breach a lease and restrictive covenant.
6. Whether this Court may award injunctive relief where a MERA violation is established.
7. Whether attorneys' fees should be awarded to plaintiffs prevailing in a MERA action brought pursuant to § 116B.03.

## STATEMENT OF THE CASE

On June 5, 2006, Respondent DeLaSalle High School (DeLaSalle), on behalf of DeLaSalle and its co-applicant, Respondent Minneapolis Parks and Recreation Board (MPRB), submitted to Respondent City of Minneapolis (City) its certificate of appropriateness (COA) application. DeLaSalle requested the COA for the construction of its proposed football stadium on and across the entire eastern one-half of historic Grove Street in the residential north end of Nicollet Island.

On August 8, 2006, the City's Heritage Preservation Commission (HPC) unanimously denied DeLaSalle's requested COA.

On August 18, 2006, DeLaSalle appealed HPC's unanimous denial to the City Council.

On September 14, 2006, Appellant Friends of the Riverfront (Friends) intervened into the City Council's COA proceedings under Minn. Stat. § 116B.09 of the Minnesota Environmental Rights Act (MERA). Neither Appellant Grove Street Flats Association (GSFA) nor Appellant Sidney and John Berg (Sublessees) joined in Friends' § 116B.09 MERA intervention into the City's COA proceeding.

On September 22, 2006, the City Council reversed the HPC and approved DeLaSalle's requested COA.

On October 25, 2006, Appellants filed in district court their complaint against Respondents City, MPRB, the Minneapolis Community Development Agency, now known as the Minneapolis Community Planning and Economic Development Department (CPED), DeLaSalle and City Council President Barbara Johnson (Johnson). Their

complaint consisted of the following claims: (1) GSFA and Sublessees' breach of contract and related declaratory judgment claims against the City, MPRB and CPED (Counts I-II); (2) Appellants' Minn. Stat. § 116B.03 MERA and related declaratory judgment claims against City and DeLaSalle (Counts III-IV); and (3) Appellants' declaratory judgment claims against Johnson (Count V).

On December 12, 2006, the parties cross moved on dispositive motions. Appellants moved for summary judgment, a permanent injunction, and the recovery of their attorneys' fees on their § 116B.03 MERA and related declaratory claims. Respondents moved for Rule 12 dismissal of all of Appellants' claims. Appellants also moved to amend their complaint to add as plaintiffs the National Trust For Historic Preservation (National Trust) and the Preservation Alliance of Minnesota (Preservation Alliance). Respondents stipulated to the amendment if Appellants' § 116B.03 MERA and related declaratory judgment claims survived Respondents' motions to dismiss.

On March 7, 2007, the trial court granted Respondents' requested Rule 12 dismissal. GSFA and Sublessees' claims for breach of contract (Count I) and declaratory judgment (Count II) against City, MPRB and CPED were dismissed without prejudice. Appellants' claims for § 116B.03 MERA (Count III) and related declaratory judgment (Count IV) against City and DeLaSalle were dismissed with prejudice. Appellants' declaratory judgment claim against Johnson (Count V) was dismissed with prejudice. And Appellants' motions for summary judgment, injunction and attorneys' fees, together with their motion to amend their complaint, were denied as moot.

On May 7, 2007, Appellants appealed the trial court's ruling.

On May 10, 2007, Appellants moved to consolidate this appeal (No. A07-925) with the two related appeals (Nos. A06-222 and A07-944). Respondents countered with a motion to dismiss the appeal that related to the original football stadium design (No. A06-2222).

On June 10, 2007, this Court denied Respondents' motion to dismiss Appeal No. A06-2222, and it granted in part Appellants' motion to consolidate the appeals. This court consolidated the related appeals (Nos. A06-2222 and A07-944) but not this appeal (A07-925).

## **STATEMENT OF FACTS**

For purposes of this Court's review of the trial court's Rule 12 dismissal, the allegations in Appellants' complaint must be accepted as true. These allegations are incorporated by reference.

## ARGUMENT

### I. STANDARD OF REVIEW

On appeal, this Court reviews cases involving dismissal for failure to state a claim upon which relief can be granted pursuant to Rule 12.02(e) de novo. *Bodah v. Lakeville Motor Express, Inc.*, 663 N.W.2d 550, 553 (Minn. 2003). The question before the Court is whether the complaint sets forth a legally sufficient claim for relief. *Id.* This Court need not give deference to a trial court's decision on a legal issue. *Frost-Benco Elec. Ass'n v. Minn. Pub. Utils. Comm'n*, 358 N.W.2d 639, 642 (Minn. 1984). It must, however, consider only the facts alleged in the complaint, accepting those facts as true. Moreover, the Court must construe all reasonable inferences in favor of the nonmoving party. *Marquette Nat'l Bank v. Norris*, 270 N.W.2d 290, 292 (Minn. 1978). Review of a dismissal for lack of subject matter jurisdiction pursuant to Rule 12.02(a) is also de novo. *Burkstrand v. Burkstrand*, 632 N.W.2d 206, 208 (Minn. 2001).

A dismissal may not be upheld "if it is possible on any evidence which might be produced, consistent with the pleader's theory, to grant the relief demanded." *Martens v. Minn. Mining & Mfg. Co.*, 616 N.W.2d 732, 739-40 (Minn. 2000) (emphases added). Thus, the respondent must show "to a certainty" that there are no facts, consistent with the pleadings, sufficient to establish a right for relief. *Northern States Power Co. v. Franklin*, 122 N.W.2d 26, 29 (Minn. 1963).

## II. THE TRIAL COURT HAS SUBJECT MATTER JURISDICTION OVER APPELLANTS' § 116B.03 MERA CLAIM

### A. MERA authorizes Appellants to pursue their § 116B.03 MERA claim while Friends pursues its § 116B.09 MERA intervention into the City's COA proceeding

#### 1. MERA's environmental protection policy

By enacting MERA, the Minnesota legislature propounded a clear policy favoring the protection of the environment:

The Legislature finds and declares that each person is entitled by right to the publication, preservation, and enhancement of air, water, land, and other natural resources located within the state and that each person has the responsibility to contribute to the protection, preservation, and enhancement thereof. The legislature further declares its policy to create and maintain within the state conditions under which human beings and nature can exist in productive harmony in order that present and future generations may enjoy clean air and water, productive land and other natural resources with which the state has been endowed. Accordingly, it is in the public interest to provide an adequate civil remedy to protect air, water, land and other natural resources located within the state from pollution, impairment, or destruction.

Minn. Stat. § 116B.01.

The seminal case under MERA is *State by Archabal v. County of Hennepin*, 495 N.W.2d 416, 426 (Minn. 1993). This case illustrates the legislatively-mandated and judicially-recognized significance of MERA to the protection of Minnesota's "natural resources," which specifically include "historical resources." In *State by Archabal*, the trial court had ruled that the county's "extremely important" "prefer[ence]" for a new jail to be located "within two blocks" of the Hennepin County Government Center justified the county's destruction of the historic Minneapolis Armory to make way for the new jail. *Id.* at 424. The Supreme Court accepted immediate review of the trial court

decision. And, despite being “limited to reviewing the trial court’s factual findings under the clearly erroneous standard” (*id.* at 421), the Court reversed the trial court. In so doing, the Court left no doubt regarding its endorsement of the “paramount importance” of MERA in protecting the State’s “natural resources.”

The Court held that where there has been a *prima facie* showing that a project has or threatens to materially impair or destroy a “natural resource,” the project applicant has to meet an “extremely high standard” to establish its affirmative defense. *Id.* at 422. The Court further held that this “extremely high standard” requires a showing that “there is no feasible and prudent alternative” that would neither “itself create extreme hardship” nor itself cause “‘truly unusual factors’ or ‘community disruption of extraordinary magnitude.’” *Id.* at 422 & 426 (emphasis added). Fully aware that it had virtually closed the door on all but the most extreme circumstances for justifying the destruction of “natural resources,” the Supreme Court concluded its opinion with the following caution:

[T]he potency of this rule of law, as enunciated in MERA and [the Court’s] previous cases, is vital to the protection of our natural resources. . . . Moreover, to fashion an exception for historic [structures] such as this one is not within the province of this court.

*Id.* at 426 (emphasis added).

Because it is such a “vital” environmental protection statute, MERA must, as illustrated by *State by Archabal*, be broadly interpreted to accomplish its goals. *In re Greater Morrison Sanitary Landfill*, SW-15, 435 N.W.2d 92, 99 (Minn. App. 1989) (acknowledging that laws designed to further the state’s strong environmental policy should be liberally construed to effectuate the legislative intent to protect the

environment); *see also State by Hatch v. Employers Ins. of Wausau*, 644 N.W.2d 820, 829 (Minn. App. 2002) (acknowledging that environmental statute is remedial in nature and should be broadly construed to effectuate its remedial objectives).

## **2. The two statutorily-authorized MERA protections**

The plain language of MERA authorizes two means of initiating MERA's protections: (1) a § 116B.03 MERA claim in district court, and (2) a § 116B.09 MERA intervention into an administrative proceeding.

As is most commonly done, MERA authorizes parties seeking to protect "natural resources" to bring a § 116B.03 MERA claim in district court — such as the one brought by Appellants here. Minn. Stat. § 116B.03 (authorizing action "in the District Court for declaratory or equitable relief in the name of the State of Minnesota against any person, for the protection of the air, water, land, or other natural resources located within the state"). Following an adverse ruling on a § 116B.03 MERA claim in district court, the MERA plaintiffs have their standard appeal rights to this Court. This is, in fact, what Appellants have done here. *See* Appeal No. A07-925.

Less commonly done, but nevertheless statutorily provided for, MERA also authorizes parties seeking to protect "natural resources" to file a § 116B.09 MERA intervention into "any administrative, licensing, or other similar proceeding" — such as Friends did with the City Council's COA proceedings. Minn. Stat. § 116B.09 (authorizing intervention by filing "a verified pleading asserting that the proceeding or action for judicial review involves conduct that has caused or is likely to cause pollution, impairment, or destruction of the air, water, land or other natural resources located within

the state”). Following an adverse ruling in an administrative proceeding in which there was such a § 116B.09 MERA intervention, the MERA intervenors and those in privity therewith may appeal the administrative decision by whatever means are appropriate for the decision at issue, including in some cases to this Court by writ of certiorari under Minn. Stat. § 606.01. This is precisely what Friends did. *See* Appeal No. A06-2222.

### **3. These two MERA protections are distinct and separate**

There is no dispute regarding the significant distinction between these two statutorily-authorized MERA protections. Indeed this Court recently recognized this distinction. In response to Appellants’ motion to consolidate this appeal (No. A07-925) with the two related appeals (Nos. A06-2222 and A07-944), this Court consolidated Nos. A06-2222 and A07-944 but not No. A07-925. Tellingly, this Court did not consolidate Nos. A06-2222 and A07-925, even though the project at issue under both of those appeals was the same – namely, the original football stadium design. But this Court did consolidate Nos. A06-2222 and A07-944, even though the projects at issue under those appeals were different – *i.e.*, No. A06-222 dealt with the original football stadium design, while No. A07-944 dealt with the redesigned football stadium. Rather than grouping the appeals on the basis of the underlying project design, this Court instead separated the appeals based upon the MERA protection being asserted — that is, whether it was an appeal from a § 116B.03 MERA claim (No. A07-925) or an appeal from a § 116B.09 MERA intervention into an administrative proceeding (Nos. A06-2222 and A07-944).

The rights and remedies provided with a § 116B.03 MERA claim are, in fact, totally different from those provided with a § 116B.09 MERA intervention into an

administrative proceeding. First, while discovery is available with the filing of a § 116B.03 MERA claim, it is not with a § 116B.09 MERA intervention into an administrative proceeding. Second, a § 116B.03 MERA claim provides for a full-blown trial on the merits, but a § 116B.09 MERA intervention into an administrative proceeding does not. Typically, as with the City Council's COA proceedings, the MERA intervenor is not only limited to a brief three-to-five-minute presentation but is also barred from either cross examining opposing witnesses or examining its own lay or expert witnesses. Third, a § 116B.03 MERA claim alone provides for immediate injunctive relief. Minn. Stat. § 116B.07 (providing that the district "court may grant . . . temporary and permanent equitable relief") (emphasis added). And, fourth, a § 116B.03 MERA claim alone provides that the action be brought as a private attorney general action on behalf of the "State of Minnesota," with the recovery of reasonable attorneys' fees available if the MERA plaintiffs prevail. *See, e.g., Gillette v. Peterson*, 2004 WL 119174 (Minn. App. June 1, 2004).

**4. Section 116B.12 and case law precedent authorize the pursuit of a § 116B.03 MERA claim "regardless of the administrative processes and remedies available"**

Section 116B.12 specifically authorizes a party to proceed with its § 116B.03 MERA claim in district court even where a related administrative proceeding is pending or anticipated and without regard for whether the § 116B.03 MERA plaintiff is or anticipates participating in the related administrative proceeding. The statutory language provides that "[t]he 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).

Relying on this clear and unambiguous statutory language, this Court and the Supreme Court have both recently held that a § 116B.03 MERA claim is not barred by pending or available administrative processes and remedies, regardless of whether the MERA plaintiffs were or were anticipated to participate in those administrative proceedings. *State ex. rel. Swan Lake Area Wildlife Ass’n v. Nicollet County Bd. of County Commissioners*, 711 N.W.2d 522 (Minn. App. 2006); *Fort Snelling State Park Ass’n v. Minneapolis Park and Recreation Board*, 673 N.W.2d 169 (Minn. 2003).

The *Swan Lake* case before this Court just last year involved a dispute over the elevation of a dam. A party seeking to raise the elevation of the dam brought a § 116B.03 MERA claim against the county, which wanted to maintain the dam at a lower elevation. The county argued that remaining administrative procedures under Minnesota’s drainage statutes precluded the district court’s jurisdiction over the MERA plaintiff’s § 116B.03 MERA claim, and it moved for dismissal under Rule 12. This Court affirmed the district court’s refusal to dismiss the statutory claim. *Id.* at 525. This Court noted that “the plain language of MERA provides that its remedies ‘shall be in addition to any administrative . . . rights and remedies now or hereafter available.’” *Id.* (quoting Minn. Stat. § 116B.12). This Court thus held that, “in light of the broad language of Minn. Stat. § 116B.12, we conclude that the District Court has subject matter jurisdiction over Respondent’s § 116B.03 MERA action regardless of the administrative processes and remedies available . . . .” Thus, the District Court properly denied

Appellant's Motion to Dismiss for lack of subject matter jurisdiction." *Id.* at 525-26 (emphasis added).

Three years earlier, the Supreme Court had rejected a similar jurisdictional argument in *Fort Snelling*, 673 N.W.2d at 177. As with this Court in *Swan Lake*, the Supreme Court cited Minn. Stat. § 116B.12 and reasoned that this statutory language expressly authorized a § 116B.03 MERA claim "regardless of administrative processes." *Id.*

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." Indeed, for the projects opponent to do otherwise would be to run the risk that the final resolution of these "administrative processes" would somehow adversely impact its § 116B.03 MERA claim.

A § 116B.09 MERA intervention into an administrative proceeding fits squarely within § 116B.12 and this recent case law precedent. The filing of the statutory intervention does not magically transform the administrative proceeding into something other than an "administrative process." Rather the only change is that MERA's protections are superimposed into that "administrative process." Indeed, as reflected in appeal Nos. A06-2222 and A07-944, the appeal of an adverse administrative proceeding

in which there has been a § 116B.09 MERA intervention proceeds in the exact same manner as if there was no intervention. Thus, § 116B.12, *Swan Lake* and *Fort Snelling* all dictate that the district court has subject matter jurisdiction over a § 116B.03 MERA claim “regardless of the administrative processes and remedies available,” including an “administrative process” in which one of the § 116B.03 MERA plaintiffs has intervened pursuant to § 116B.09.

**5. Sections 116B.03 and 116B.09 fail to otherwise require an election of remedies**

MERA is modeled on Michigan’s Environmental Protection Act (Michigan EPA). *State ex. rel. Wacouta v. Brunkow Hardwood Corp.*, 510 N.W.2d 27, 30 (Minn. App. 1993). As with MERA, the Michigan EPA authorizes a party seeking to prevent the destruction of natural resources to intervene in administrative, licensing or other proceedings:

If administrative, licensing, or other proceedings and judicial review of such proceedings are available by law, the agency or the Court may permit the Attorney General or any other person to intervene as a party on the filing of a pleading asserting that the proceeding or action for judicial review involves conduct that has, or is likely to have, the effect of polluting, impairing, or destroying the air, water, or other natural resources or the public trust in these resources.

Mich. Stat. § 324.1705.<sup>1</sup>

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<sup>1</sup> Minn. Stat. § 116B.09 likewise provides:

[I]n any administrative proceeding, . . . any natural person residing within the state, or any association, organization or other legal entity having . . . , members residing within the state shall be permitted to intervene as a party upon the filing of a verified pleading asserting that the proceeding or action

But the similarities in these two statutes end there. The Michigan EPA provision authorizing intervention also specifically provides that “the doctrines of collateral estoppel and *res judicata* may be applied by the Court to prevent multiplicity of suits.” *Id.* In contrast, § 116B.09 contains no such limitation on the “multiplicity of suits.”

More critically, MERA contains absolutely no language requiring a MERA plaintiff to elect to file either (1) a § 116B.03 MERA claim in district court or (2) a § 116B.09 MERA intervention into an administrative proceeding. This omission is intentional. If the Minnesota legislature had intended to require an election of remedies between § 116B.03 and § 116B.09, then it would have included it in the plain language of the statute. Indeed, because the legislature knew – based on the model statute – how to so “prevent multiplicity of suits” but elected not to do so, this Court is required to construe the omission as being intentional. *State v. Corbin*, 343 N.W.2d, 874, 876 (Minn. App. 1984) (in construing statute, court “cannot supply that which the legislature purposely omits”). Moreover, the legislature did the exact opposite. The legislature enacted § 116B.12 to ensure that the § 116B.03 MERA claim in district court would proceed “regardless of the administrative processes and remedies.” And, in so providing, the legislature must be presumed to have known that such “administrative processes and remedies” included the § 116B.09 MERA intervention into an administrative proceeding. Minn. Stat. § 645.16.

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for judicial review involves conduct that has caused or is likely to cause pollution, impairment, or destruction of the air, water, land or other natural resources located within the state.

**B. Collateral estoppel does not apply**

**1. Collateral estoppel could not apply to the City's COA proceeding**

A hearing before an administrative body acting in a quasi-judicial capacity may provide the requisite opportunity to grant its decision preclusive effect. *Zander v. State*, 703 N.W.2d 845, 853 (Minn. App. 2005). But, where factors that ensure a full and fair opportunity to be heard are not present, a trial court commits reversible error when it dismisses a claim based on collateral estoppel. *Clapper v. Budget Oil Co.*, 437 N.W.2d 722, 726 (Minn. App. 1989) (reversing summary judgment based on collateral estoppel where the prior administrative hearing before Minnesota Department of Jobs and Training was not bound by rules of evidence or procedure, hearsay was admissible, there was no provision for a jury, and the emphasis at hearing was on speedy resolution of the claim).

Because the City Council's COA proceeding in which the City Council rejected the superimposed MERA requirements due to Friends' § 116B.09 MERA intervention did not provide the requisite full and fair opportunity for Friends to be heard on these requirements, the trial court committed reversible error by giving it preclusive effect. The opportunity afforded § 116B.09 MERA intervenor Friends before the City Council fell far, far short of what is required to give the City Council's decision preclusive effect. The hearing before the City Council was not presided over by an impartial hearing examiner, such as a former trial judge. Instead, it was presided over by councilmembers, chief of whom, City Council President Johnson, had admitted fiduciary obligations to

DeLaSalle. APP. 0198.<sup>2</sup> There was no opportunity for a jury. The rules of evidence were not in effect and subpoenas were not available. In fact, Friends was not even allowed to orally argue its position. Neither live testimony nor, of course, cross examination of witnesses was allowed. Findings were not required to be (and were not) supported by substantial and competent evidence. There was no opportunity for a jury. And the City Council's entire COA proceeding lasted but minutes. *Compare Graham v. Special School Dist. No. 1*, 472 N.W.2d 114, 118 (Minn. 1991) (administrative hearing provided full and fair opportunity to be heard where it was presided over by impartial hearing examiner, a former trial judge; parties were represented by counsel; subpoenas were available; rules of evidence were followed; findings had to be established by substantial and competent evidence; and the hearing took nine days). Because of the deficiencies in the proceedings before City Council, as a matter of law its decision cannot collaterally estop Appellants' claims in district court, and the trial court's holding to the contrary should be reversed.

**2. Collateral estoppel could not apply to GSFA and Sublessees because there was not the requisite privity between them and § 116B.09 MERA intervenor Friends**

To be estopped, a party "must have its interests sufficiently represented in the first action so that the use of collateral estoppel is not inequitable." *Miller v. Northwestern Nat'l Ins. Co.*, 354 N.W.2d 58, 61 (Minn. App. 1984). A party's interests are sufficiently

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<sup>2</sup> Any judge in her position would have recused herself. Johnson did not and, not surprisingly, voted in favor of DeLaSalle.

represented where they have “controlling participation and active self-interest in the litigation.” *Brunson v. Seltz*, 414 N.W.2d 547, 550 (Minn. App. 1987).

There is simply no privity between Friends, who intervened under § 116B.09 in the COA proceedings before the City Council, and GSFA and Sublessees, who did not. And there is no record evidence of privity between Friends and GSFA and Sublessees. Neither the trial court’s nor Respondents’ naked say so make it a record fact.

The *Miller* case is particularly instructive. It involved a claim for indemnification by an individual who had been held liable for fraudulent misrepresentation in a prior action against a company in which he was the majority shareholder and its insurer. The insurer moved for summary judgment against the company on the basis that the insurance policy did not provide coverage for intentional misrepresentation. It argued that there was no coverage for the company because the company was in privity with the plaintiff and was therefore collaterally estopped by the prior judgment. The trial court granted the motion, but this Court rejected the trial court’s reasoning and reversed. This Court reasoned that it was not clear on the record whether the interests of the company and the individual were identical and that there was at least one other shareholder in the corporation whose interests were not represented. The record did not disclose the extent of the individual’s ownership of the company or the company’s involvement in the prior litigation. According to this Court, where the insurer simply stated there was an identical interest and the company stated that there was none “[t]hat raises a fact issue.” *Miller*, 354 N.W.2d at 62. Because the record was inadequate to assess whether the company’s

interests were represented in the prior litigation, “the trial court did not, nor could it have on the record before it, address all factors” required to establish collateral estoppel. *Id.*

The same reasoning applies here. In support of their motion to dismiss, Respondents asserted that the parties’ interests were identical, and Appellants asserted that they were not. Respondents submitted no facts to substantiate their bald assertion of privity. Thus, on their motion to dismiss, there was no record to analyze whether GSFA and Sublessees had a “controlling participation and active self-interest in” the COA proceedings before the City Council. Not surprisingly, then, the trial court’s memorandum in support of its order reveals no such analysis. It simply conclusorily finds that the parties to the action were either parties or in privity with parties to the City Council’s COA proceedings. At best for Respondents, this “raises a fact issue” that renders the dismissal improper. *Miller*, 354 N.W.2d at 62.

### **III. APPELLANTS’ § 116B.03 MERA CLAIM IS RIPE**

MERA is not a statute of last resort. It specifically provides for “temporary and permanent” injunctive relief to prevent the destruction of a “natural resource” or the violation of an “environmental standard, limitation [or] rule” before the bulldozers are lined up on the property. Minn. Stat. § 116B.07.

There is no dispute that, once a project is submitted for administrative approval, it is sufficiently understood and defined under MERA for a concerned party to file a § 116B.09 MERA intervention into the administrative proceeding. In other words, it is at that time “ripe” for MERA review. And there is no logical basis for “ripeness” to exist earlier for the filing of a § 116B.09 MERA intervention into an administrative proceeding

than for the filing of a § 116B.03 MERA claim in district court. Hence, the later action must be “ripe” no later than when the statutory intervention can be filed. This is logical because the existence of the administrative proceeding ensures that the project is sufficiently definite.

More pragmatically, the later in the permitting process that the project opponents must wait before their § 116B.03 MERA claim is deemed “ripe,” the more costly the process will be for them. The reason is simple. For any significant project, the project proposers will need to procure several governmental approvals, often from several different governmental bodies. For example, DeLaSalle’s project requires at least the following:

<b>APPROVAL REQUIRED</b>	<b>REVIEWING PARTY</b>	<b>APPEAL</b>
1. Environmental Assessment Worksheet (EAW)	• The City	• This Court (within 60 days)
2. Certificate of Appropriateness (COA)	• HPC	• City Council (within 10 days) • This Court (within 60 days)
3. Conditional Use Permit (CUP)	• Planning Commission	• City Council (within 10 days) • District Court
4. Street Vacation	• City Council	• District Court
5. Site Plan	• Planning Commission	• City Council (within 10 days) • District Court
6. Variances	• Planning Commission	• City Council (within 10 days) • District Court
7. Removal of restrictive covenant removals	• Metropolitan Council	• This Court (within 60 days)

Moreover, these approvals frequently proceed, as with DeLaSalle's project, one approval at a time. Indeed, the EAW process prohibits any other final approvals until the environmental review is complete. Minn. R. 4410.0300.

A project opponent relying on a § 116B.03 MERA claim cannot prudently sit back and not respond to or challenge the various governmental approvals along the way. This is because (1) some of the approvals (*e.g.*, the negative declaration on the need for an environmental impact statement (EIS) and the COA) must be appealed by writ of certiorari to this Court within 60 days of the decision; (2) the record for review is often limited to the administrative record before the administrative agency (*Trisko v. City of Waite Park*, 566 N.W.2d 349, 352 (Minn. App. 1997)); and (3) the project developer will attempt to use any unappealed from successful rulings as collateral estoppel for later approvals and challenges thereto. Thus, unless they can file their § 116B.03 MERA claim in district court and procure injunctive relief pursuant to § 116B.07, the project opponents would have to incur the considerable expense of lost time and opportunity in participating in the project's administrative processes.

Indeed, if they had to literally wait, as suggested by the trial court, until all of the project's necessary approvals were in place, then the project opponents would likely have to bring an 11<sup>th</sup> hour temporary restraining or temporary injunction motion and, if successful, come up with a costly supersedes bond. Such extraordinary costs are often show stoppers for the typical project opponent with more modest means. And these barriers to the enforcement of MERA could be easily avoided by the earlier allowance of a § 116B.03 MERA claim, together with a preemptive motion for injunctive relief under

§ 116B.07. Every person and entity included in the application submission and review process – e.g., (1) the project proposers; (2) the project opponents; and (3) the quasi-judicial and judicial decisionmakers – would benefit. Everyone benefits by knowing as early in the permitting process as possible whether MERA protections either bar or restrict a project. Conversely, everyone loses by forcing the long and costly administrative process to be concluded only to then find out that MERA bars the project.

Not surprisingly, then, neither the trial court nor Respondents could cite below to a single case in which a court has dismissed a MERA claim as unripe. In fact, Minnesota courts have acknowledged that MERA is not limited to situations where environmental harm is imminent, but instead applies broadly to prevent conduct where harm is likely. In *Wacouta Twp. v. Brunkow Hardwood Corp.*, 510 N.W.2d 27 (Minn. App. 1993), this Court affirmed an injunction imposed by the trial court pursuant to MERA even where the primary threat to the protected resource was eliminated. *Wacouta* involved a § 116B.03 MERA action in district court brought by the township to prevent logging that would have destroyed bald eagle habitat. After the MERA plaintiffs brought their § 116B.03 MERA action, one of the defendants agreed not to log, canceled the logging contract, and was dismissed from the action. *Id.* at 29. Despite the elimination of this threat, the trial court still permanently enjoined under MERA the remaining defendant from any conduct that would destroy, disturb or impair the bald eagles or their roosts. *Id.* On appeal, the enjoined party argued that the § 116B.03 MERA action was moot because the logging contract had been canceled. This Court rejected this argument, reasoning that the injunction appropriately prohibited “all activities that would potentially disrupt the

eagles or the roost.” *Id.* (emphasis added.) This Court also acknowledged that “MERA protects natural resources from conduct that has or is likely to have a material adverse effect on the environment.” *Id.* at 30 (emphasis added).

#### **IV. APPELLANTS ARE ENTITLED TO THEIR REQUESTED MERA RELIEF**

Other than their unpersuasive procedural defense (*see* above), Respondents have no substantive defense to Appellants’ § 116B.03 MERA claim. Because the substantive merits are already before this Court in Appeal No. A06-2222 and because that ruling is statutorily required to issue (by no later than December 18, 2007) well before this appeal is likely to be heard, Appellants do not repeat those arguments here. The record is, however, clear that Appellants met their *prima facie* MERA showing and Respondents have utterly failed to meet their “extremely high standard” affirmative defense. *Compare State by Archabal*, 495 N.W.2d at 423-26.

Assuming that this Court rules in favor of Petitioners in No. A06-2222 before this appeal is decided, Appellants will at that time be entitled to their requested MERA relief – *i.e.*, (1) permanent injunctive relief, and (2) the recovery of their reasonable MERA attorneys’ fees.

##### **A. If Petitioners prevail under MERA in the related appeals, then Appellants are entitled to permanent injunctive relief**

A permanent injunction is appropriate to prevent a MERA violation. Minn. Stat. § 116B.07 (court may grant permanent injunctive relief to protect natural resources from pollution, impairment, or destruction). In *State ex rel. Wacouta Township*, 510 N.W.2d at 31, this Court affirmed an injunction that prevented a landowner from taking any action

within 500 meters of bald eagle roosts on its property that would destroy, disturb, or impair the eagles or their roosts. Recognizing that the eagles and their roosts were a protectible natural resource under MERA, the court held that the trial court properly enjoined the landowner. *Id.* If Petitioners prevail under MERA in their appeals of the City's approvals, this court should likewise enjoin Respondents from taking any actions that would destroy or impair historic Grove Street.

**B. If Petitioners prevail under MERA in the related appeals, Appellants are entitled to recover their reasonable MERA attorneys' fees**

Generally, absent statutory authority or a specific contractual provision, "fees are not recoverable." *Casey v. State Farm Mut. Auto. Ins. Co.*, 464 N.W.2d 736, 739 (Minn. App.), review denied (Minn. Apr. 5, 1991). But this rule is subject to several exceptions. The trial court may award fees without specific statutory authority when a party brings a lawsuit that ultimately benefits a class of people. This exception was recognized in *Busse v. Board of County Comm'rs, Sibley County*, 308 Minn. 184, 189, 241 N.W.2d 794, 797 (1976), in which a clerk brought suit against the county over salaries. The Supreme Court awarded attorneys' fees, noting "it would be unfair to saddle the clerk with attorneys' fees for representing his office." *Id.* at 191, 241 N.W.2d at 798.

More specifically, the right of a party acting as a private attorney general to recover her attorneys' fees is a staple of Minnesota law. "It is widely recognized that a dual purpose underlies private attorney general statutes: The award should eliminate financial barriers to the vindication of a plaintiff's rights." *Liess v. Lindenmeyer*, 354 N.W.2d 556, 558 (Minn. 1984). Granting attorneys' fees for the pursuit of private

attorney general actions is “based on the rationale that counsel fees should be awarded by the court when the legal services have provided a benefit to a class of persons, not just the particular litigant.” *Martin v. Hancock*, 466 F. Supp. 454, 456 (D. Minn. 1979).

The award of attorneys’ fees for private attorney general actions is critical because MERA provides, by statute, for a private attorney general action. Section 116B.01 provides:

The legislature finds and declares that each person is entitled by right to the protection, preservation, and enhancement of air, water, land, and other natural resources located within the state and that each person has the responsibility to contribute to the protection, preservation, and enhancement thereof. The legislature further declares its policy to create and maintain within the state conditions under which human beings and nature can exist in productive harmony in order that present and future generations may enjoy clean air and water, productive land, and other natural resources with which this state has been endowed. Accordingly, it is in the public interest to provide an adequate civil remedy to protect air, water, land, and other natural resources located within the state from pollution, impairment, or destruction.

(Emphasis added).

The Supreme Court has confirmed that MERA plaintiffs are acting as private attorneys general by bringing suit in the name of the State and for the benefit of the public at large. *PEER, Inc. v. Minnesota Environmental Quality Council*, 266 N.W.2d 858 (Minn. 1978). The Court explained that the public benefit from MERA private attorney general actions is that “[t]he destruction of protectible environmental resources . . . is . . . injurious to all present and future residents of Minnesota.” *Id.* at 869. The Court further explained the importance of the right to file a private attorney general action under MERA:

In MERA, the legislature stated “its policy to create and maintain within the state conditions under which man and nature can exist in productive harmony in order that present and future generations may enjoy \* \* \* [the] natural resources with which this state has been endowed.” Section 116B.01. . . . The encouragement of citizen suits to protect the environment from impairment or pollution reflects the legislature’s conviction that while individuals will be vigilant in their attempts to prevent the destruction of their homes and private property, since the environment belongs to no one, no one will protect it unless private attorneys-general are permitted to sue on behalf of the public interest.

*Id.* at 869 n.16 (emphasis added).

The Court subsequently reaffirmed that MERA was created “to establish a private right of action by which ‘any person residing within the state’ might sue – in the name of the state – any person for declaratory or equitable relief to protect the state’s natural resources.” *State by Schaller v. County of Blue Earth*, 563 N.W.2d 260, 264 (Minn. 1997). Not surprisingly, then, this Court has since ruled that the recovery of attorneys’ fees is appropriate under MERA by affirming a district court’s award of such fees. *Gillette*, 2004 WL 1191764.

Respondents’ opposition to Appellants’ attorneys fees claim simply notes that MERA does not specifically authorize fees and dismisses this Court’s recent *Gillette* opinion, wherein MERA fees were recovered, as unpublished. But Defendants do not dispute that in *Gillette* this Court affirmed an award of MERA attorneys’ fees. *Id.* Respondents do not dispute that MERA provides for a private attorney general action. And Respondents do not dispute that fees are generally available to a plaintiff who successfully prosecutes a private attorney general action or a claim “on behalf of a class, that benefits a group of others.”

Here, Appellants brought suit to protect one of the State's most highly sensitive historic and river areas from unnecessary destruction. For daring to insist that the federal, state and local river protection and heritage preservation laws be enforced, Appellants (as well as their counsel) have been publicly vilified by DeLaSalle and its ardent supporters. And, in order to effectively prosecute their MERA action for the benefit of the state, each Appellant has already had to expend enormous personal and financial resources.

If such personal and financial burdens are the price that MERA plaintiffs must shoulder on their own without the right to at least recover their reasonable attorneys' fees and costs against the MERA violators, then MERA will have little usefulness or life. But, as this Court suggested in *PEER* and *State by Schaller* and ruled in *Gillette*, Appellants are entitled to recover their fees and costs incurred in successfully prosecuting their MERA claims.

**V. JOHNSON IS DISQUALIFIED FROM ACTING IN HER COUNCILMEMBER CAPACITY ON DELASALLE'S PROJECT**

**A. Johnson's admitted dueling fiduciary duties**

There is no factual dispute regarding the existence of Johnson's dueling fiduciary duties to the project applicant – *i.e.*, DeLaSalle – and the project's quasi-judicial decisionmaker – *i.e.*, the City. At all relevant times, Johnson has been both (1) an Officer on the Executive Committee of DeLaSalle's Board of Trustees and (2) the City Council President and its presiding officer. And, in both capacities, Johnson admittedly owes fiduciary duties to both entities. Johnson's lawyer straight up admits "her fiduciary duty to DeLaSalle." APP. 0198. And, in describing her "fiduciary duty to DeLaSalle,"

Johnson's lawyer admits that she has a "similar fiduciary duty to the City of Minneapolis." *Id.*

Equally significant, Johnson's lawyer admits that, because of "her fiduciary duty to DeLaSalle," Johnson has a duty "to act in the best interest of DeLaSalle." *Id.* Of course, Johnson cannot simultaneously "act in the best interests of DeLaSalle" and "act in the best interests of [the City]." Recognizing this obvious and irreconcilable conflict, Johnson weakly argues that "it's not in the best interests of DeLaSalle to push [the project] ahead" if the project is something "that the City cannot approve." *Id.* (emphasis added). The problem for Johnson is that she, in her quasi-judicial decisionmaker capacity with the City, is not deciding whether "the City cannot approve" the project. Every project applicant would love it if the quasi-judicial decisionmaker's standard of review was whether "the City cannot approve" of their project. But, the reality is that in reviewing requested approvals for projects, Johnson and the rest of the City Council decisionmakers are exercising their broad discretionary authority over the requested approvals for the project.

**B. Johnson has a disqualifying conflict of interest**

Johnson's status as both an Officer on the Executive Committee of DeLaSalle's Board of Trustees and President of the City Council presents a conflict of interest which disqualifies her from acting in her city councilmember capacity on DeLaSalle's proposal. Any contention to the alternative is wholly without merit.

The statutes on which the trial court and Respondents mistakenly rely are completely irrelevant to the issue here. One applies only to "a public officer who is

authorized to take part in any manner in making any sale, lease, or contract in official capacity.” Minn. Stat. § 471.87. This is obviously limited in its application solely to self-dealing on the part of public officers. Since there is no “sale, lease, or contract” at issue here, this statute is clearly irrelevant. Moreover, while the other statute does refer to decisions that would affect an official’s financial interest, nothing in the statute expresses approval of conflicts such as that presented here where an official is precluded from discharging her duties because of fiduciary obligations to an organization whose interests are at issue. Minn. Stat. § 10A.07

The Supreme Court addressed the issue of a disqualifying conflict of interest in *Lenz v. Coon Creek Watershed Dist.*, 153 N.W.2d 209, 219 (Minn. 1967). The Court gave the following “purpose” and test for such a disqualifying conflict:

The purpose behind the creation of a rule which would disqualify public officials from participating in proceedings in a decision-making capacity when they have a direct interest in its outcome is to ensure that their decision will not be an arbitrary reflection of their own self interests. There is no settled general rule as to whether such an interest will disqualify an official. Each case must be decided on the basis of the particular facts present. Among the relevant factors that should be considered in making this determination are:

- (1) The nature of the decision being made;
- (2) The nature of the pecuniary interests;
- (3) The number of the officials making the decision or interests;
- (4) The need, if any, to have the interested persons make the decision; and
- (5) The other means available, if any, such as the opportunity for review, that serve to ensure that the officials will not act arbitrarily to further their selfish interest.

(Emphasis added). *Lenz* broadly disqualifies public officials that have “a direct interest in its outcome,” not a “direct [pecuniary] interest in its outcome.”

No reported Minnesota court has faced the conflict of interest created by the elected official’s fiduciary relationship with or fiduciary obligations to the applicant. But courts in other jurisdictions have acknowledged that personal interests of this type create a conflict of interest that requires the disqualification of the public official. For example, in *Friends Retirement Concepts v. Board of Educ., Borough of Somerville*, 811 A.2d 962, 964 (N.J. Super. 2002), the court found a disqualifying conflict of interest on the part of a school board member who was also a commissioner of an organization seeking the board’s approval to build two lighted baseball fields on land owned by the board. According to the court, the board member “had an ‘indirect personal interest’ in the outcome of the proposal” in light of his dual roles, and should have abstained from all deliberations that occurred with respect to the proposal. *Id.* at 969 (emphasis added).

Where the public official sits as a quasi-judicial decisionmaker, the Code of Judicial Conduct provides clear guidance. Canon 3D of the Minn. Code of Judicial Conduct specifically provides that a judge has a disqualifying conflict where she is “an officer, director or trustee of a party.” There is no reason that a quasi-judicial decisionmaker should not be held to this same judicial standard. Indeed, Canon 3D simply provides a fundamental illustration of what constitutes a disqualifying conflict of interest.

As an Officer on Executive Committee to DeLaSalle’s Board of Trustees (which approved the proposed athletic facility), Johnson has a similar “indirect personal interest”

in approving DeLaSalle's applications to City Council, including the school's prior application for a certificate of appropriateness and its future applications for, among other approvals, a CUP, variances, and a street vacation. Johnson's personal interest alone creates a conflict that precludes her from presiding over City Council's proceedings on DeLaSalle's proposal.

Johnson erroneously bases her disqualification defense on *Rowell v. Board of Adjustment of the City of Moorhead*, 446 N.W.2d 917, 919 (Minn. App. 1989). But *Rowell* involved a claim that a public official who was a financially-contributing member of a church that sought a zoning variance should be disqualified from evaluating its application. This Court held that he should not be disqualified, as mere membership in the church, "without evidence of a closer connection," was insufficient. *Id.* at 21. Notably, this reasoning acknowledges that disqualification would be appropriate where evidence of "a closer connection" is present. And there can be fewer "closer connection[s]" than that between fiduciaries such as the relationship of a board trustee of the applicant to the applicant.

**C. Johnson has disqualifying prejudgment bias**

"Prejudgment of issues of adjudicative fact may be grounds for disqualification if the circumstances indicate the decisionmaker's opinion is unlikely to be changed by the hearing." 21 Minn. Prac. § 8.03.2. Such a situation exists as a matter of law where the decisionmaker is "an officer, director or trustee of a party" to the proceeding. *See, e.g.*, Canon 3D Minn. Code of Jud. Conduct.

As a member of the Executive Committee, Johnson has fiduciary obligations to DeLaSalle. See, e.g., *Currie v. School Dist. No. 26 of Murray Co.*, 27 N.W. 922, 923 (Minn. 1886) (recognizing fiduciary relationship between trustee and school). “An officer of a nonprofit corporation owes a fiduciary duty to that corporation to act in good faith, with honesty in fact, with loyalty, in the best interests of the corporation, and with the care of an ordinary, prudent person under similar circumstances.” *Shepherd of the Valley Lutheran Church v. Hope Lutheran Church*, 626 N.W.2d 436, 441 (Minn. App. 2001) (citing Minn. Stat. § 317A.361 (2000)), review denied (Minn. July 24, 2001). As the “bearer of a fiduciary duty, the law impose[s]” on an officer of a corporation, “the highest standard of integrity in his dealings with the other officers.” *Id.* (citing *Wenzel v. Mathies*, 542 N.W.2d 634, 640 (Minn. App. 1996) (holding that a fiduciary duty is owed to all persons who have equal interests and concerns in the corporation and are subject to harm)); see also *Miller v. Miller*, 222 N.W.2d 71, 78 (Minn. 1974). Because she is obligated to act in the “best interest” of DeLaSalle, Johnson is unable in her city councilmember capacity to independently evaluate DeLaSalle’s proposal. To be true to her fiduciary obligations to the school (including her Executive Committee votes in favor of the proposal), Johnson must in her city councilmember capacity continue to vote in favor of the proposal.

By way of example, Johnson’s city councilmember decision-making role with regard to DeLaSalle’s requested certificate of appropriateness is analogous to a judge ruling on a matter in which she has a personal interest. As the President of the City Council, Johnson presided over and voted on the evaluation of DeLaSalle’s application

for a certificate of appropriateness for its project, a process the Minnesota Supreme Court has acknowledged—and Respondent have conceded—is quasi-judicial in nature. *Billy Graham Evangelistic Ass'n*, 667 N.W.2d at 123 (city's evaluation of application for certificate of appropriateness for destruction of historical property was quasi-judicial). Such a role is expressly forbidden by the Code of Judicial Conduct. Minn. Code of Judicial Conduct, Canon 3D (requiring disqualification of a judge where she has an “interest that could be substantially affected by the proceeding” or is “an officer, director or trustee of a party” to the proceeding). Just as it would be inappropriate for a judge to preside over the review of a land use decision from an applicant for which she was serving as a trustee, it was inappropriate for Johnson to preside over the quasi-judicial proceeding. Johnson should have followed City Attorney's advise and recused herself from the proceedings on DeLaSalle's certificate of appropriateness application.

**D. Johnson has had and continues to have disqualifying ex parte communications**

Minnesota law expressly prohibits decisionmakers from engaging in *ex parte* communications. For example, a judge shall not initiate, pursue, or consider *ex parte* communications, or consider other communications made to the judge outside the presence of the parties concerning pending or impending proceedings. Minn. Code Jud. Conduct, Canon 3A(7)(d). In the administrative context, appellate courts will reverse decisions tainted by *ex parte* communications. *In re Petition of Northern States Power Co.*, 414 N.W.2d 383, 384-86 (Minn. 1987) (affirming vacation of public utilities commission order where one of the five commissioners had been discussing employment

with utility at the same time that the commission had considered and approved utility's proposed rate increases); *Meinzer v. Buhl 66 C&B Warehouse Distrib., Inc.*, 584 N.W.2d 5, 7 (Minn. App. 1998) (reversing reemployment insurance judge's decision where judge and opposing party discussed evidence after claimant left the room).

Johnson actively participated as an Officer on the Executive Committee of DeLaSalle's Board of Trustees. In so doing, she engaged in scores of *ex parte* discussions with DeLaSalle regarding the project. Tellingly, she received correspondence advocating strongly for the project and discussing strategies to address the anticipated objections to the facility on historical grounds — that is, the very same issue in the COA proceeding in which she has already presided and voted. APP. 0143-144.

The legal advice given to Johnson by City Attorney properly advised that, in light of the *ex parte* communications in which Johnson engaged, she should recuse herself in her city councilmember capacity from presiding over and voting on DeLaSalle's proposal. APP. 0156. According to City Attorney, “[i]n the interest of fairness and impartiality, officials who are charged with making quasi-judicial decisions should avoid ‘*ex parte*’ communications with interested parties. Council members, however, must balance the need for a fair proceeding with the right of constituents to petition their elected officials.” *Id.* at APP. 0152.

Moreover, Johnson's improper *ex parte* communications strongly suggest that City Council's COA decision was improperly influenced. *Hard Times Café, Inc.*, 625 N.W.2d at 174 (in light of *ex parte* communications and other procedural irregularities, court held

that it “cannot avoid the conclusion that [city council’s decision may have been improperly influenced”). Thus, as advised by City Attorney, she “should” have voluntarily recused herself.

**VI. SUBLESSEES ARE ENTITLED TO PURSUE THEIR CONTRACT CLAIMS REGARDING THE GROUND LEASE AND SUBLEASES**

Respondents’ argument below regarding the applicability of the ground lease and subleases is nonsensical, as it merely establishes that Block 4 has not been leased. But Sublessees are not arguing that Block 4 is part of the leased property. The relevant part of the ground lease and subleases is not the property being conveyed, but the restrictions applicable to the other property on Nicollet Island — *i.e.*, Block 4. It is undisputed that the City, acting by and through the MPRB, acquired ownership rights over Block 4 over 20 years ago. As such, the City is undoubtedly capable of devoting Block 4 to the uses specified in the Agency Plan and the Board Plan.

City's actions approving DeLaSalle's COA clearly indicate its willingness and intent to violate the terms of the ground lease and sublease. As such, it has anticipatorily breached these contracts. *Space Center v. 451 Corp.*, 298 N.W.2d 443, 450 (Minn. 1980) (anticipatory breach of a contract occurs "where one party to an executory contract, before the performance is due, expressly renounces the same and gives notice that he will not perform it . . ."). Accordingly, Sublessees are entitled to seek breach of contract damages at this time.

## CONCLUSION

The trial court's decision must be reversed. MERA does not require a plaintiff to choose between either a § 116B.03 action in district court or a § 116B.09 intervention in an administrative proceeding and an appeal of the administrative decision. Rather, § 116B.12 and case law confirm that a § 116B.03 MERA action may proceed regardless of the remaining administrative proceedings. Nor are respondents collaterally estopped by the § 116B.09 intervention, as the administrative proceeding in which Friends intervened pursuant to § 116B.09 did not provide a full and fair opportunity to be heard. Moreover, Plaintiffs' § 116B.03 MERA action must be deemed to be ripe so as to accomplish the statutory objective of enjoining actions that are "likely" to adversely impact the environment.

Additionally, the facts here are undisputed that Johnson wears two hats – one as a City Council member, and one as an Officer on the Executive Committee of DeLaSalle's Board of Trustees. Because of the conflicting obligations she has toward the City and DeLaSalle, it was improper for Johnson to wear both hats at the same time. Local decisionmakers, particularly those acting in quasi-judicial capacities, must act commiserate with the quasi-judicial responsibility and power entrusted to them. Accordingly, Johnson should be precluded from playing any role on behalf of City in the evaluation of DeLaSalle's application for the approvals necessary for its proposed athletic facility.

Finally, because MERA violations have been established, the Court should enjoin Respondents from engaging in activities that would cause the destruction of historic

Grove Street and award Appellants their attorneys' fees incurred in protecting this resource.

DATED: August 6, 2007

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**CERTIFICATE OF COMPLIANCE**

The undersigned counsel for Appellants certifies that this brief complies with the requirements of Minn. R. App. P. 132.01 in that it is printed in a 13-point, proportionately spaced typeface utilizing Microsoft Word 2003 and contains 9,254 words, excluding the Table of Contents, Table of Authorities, and Appendix.

DATED: 8-6-07

  
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