
STATE OF MINNESOTA
IN COURT OF APPEALS

NO. A07-925

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.

APPELLANTS' REPLY BRIEF AND SEPARATE SUPPLEMENTAL APPENDIX

BRIGGS AND MORGAN, P.A.

Jack Y. Perry (#209272)
Matthew J. Franken (#31092x)
2200 IDS Center
Minneapolis, MN 55402
(612) 977-8400

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

RICE, MICHELS & WALTHER, LLP

Ann E. Walther (#021369x)
Brian R. Rice (#014468x)
10 Second Street NE #206
Minneapolis, MN 55413
(612) 676-2300

**ATTORNEYS FOR RESPONDENT
MINNEAPOLIS PARK AND
RECREATION BOARD**

MINNEAPOLIS CITY ATTORNEY'S OFFICE

James A. Moore (#16883x)
Stephen H. Norton (#0335034)
City Attorney's Office
300 Metropolitan Center
333 South Seventh Street
Minneapolis, MN 55402-2453
(612) 673-2063

**ATTORNEYS FOR RESPONDENTS
CITY OF MINNEAPOLIS, MINNEAPOLIS
COMMUNITY DEVELOPMENT AGENCY,
NOW KNOWN AS MINNEAPOLIS
COMMUNITY PLANNING AND ECONOMIC
DEVELOPMENT DEPARTMENT AND
BARBARA JOHNSON**

LEONARD, STREET AND DEINARD

Carolyn V. Wolski (#199874)
Jeffrey J. Harrington (#0327890)
Suite 2300
150 South Fifth Street
Minneapolis, MN 55402
(612) 335-1500

**ATTORNEYS FOR RESPONDENT
DELASALLE HIGH SCHOOL**

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).

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	iii
ARGUMENT OVERVIEW	1
ARGUMENT	3
I. THE DISTRICT COURT HAD JURISDICTION.....	3
A. Under § 116B.12, a § 116B.03 MERA action can proceed "regardless of the administrative processes and remedies available"	3
B. Respondents' "election of remedies" argument.....	4
C. Respondents' "election of remedies" argument fails.....	6
1. The "plain[,] . . . broad language" of §§ 116B.12 and .09 forecloses Respondents' "transformation" argument	6
2. The "plain[,] . . . broad language" of § 116B.12 forecloses Respondents' "statutory . . . right[] and remed[y]" argument	8
3. The applicable rules of statutory construction otherwise foreclose Respondents' "election of remedies" argument.....	9
II. THE ACTION WAS RIPE	13
A. Respondents' ripeness argument	13
B. The resulting harms caused by barring the commencement of § 116B.03 MERA actions until all governmental approvals are in hand.....	14
C. MERA authorizes injunctive relief to prohibit "all activities that would potentially" harm the environment.....	15
D. The applicable rules of statutory construction support the same.....	16
1. RULE NO. 1: Environmental statute is to be broadly construed to effectuate its remedial purpose.....	16
2. RULE NO. 2: The Court "cannot supply that which the legislature purposely omits"	17
3. RULE NO. 3: A statutory provision must be construed in harmony with the rest of the statute	17
III. COLLATERAL ESTOPPEL DOES NOT BAR APPELLANTS' MERA CLAIMS.....	18
A. Appellants did not have a full and fair opportunity to be heard on their MERA claim.....	18
1. The issue of whether Appellants had a full and fair opportunity is properly before this Court	18
2. Appellants did not have a full and fair opportunity to be heard on their MERA claim.....	21
B. GSFA and Bergs are not in privity with Friends	25

TABLE OF CONTENTS
(continued)

	<u>Page</u>
CONCLUSION	27
CERTIFICATE OF COMPLIANCE	28

TABLE OF AUTHORITIES

CASES

Amaral v. Saint Cloud Hosp.,
586 N.W.2d 141 (Minn. App. 1998).....6

Avery v. Campbell,
157 N.W.2d 42 (Minn. 1968).....8

Balasuriya v. Bemel,
617 N.W.2d 596 (Minn. App. 2000).....26

Brunson v. Seltz,
414 N.W.2d 547 (Minn. App. 1987).....26

Cincinnati Ins. Co. v. Franck,
621 N.W.2d 270 (Minn. Ct. App. 2001).....13

Cohen v. Cowles Media Co.,
479 N.W.2d 387 (Minn. 1992).....19

Dayton Hudson Corp. v. Johnson,
528 N.W.2d 260 (Minn. App. 1995).....11

Dokmo v. Indep. Sch. Dist.
No. 11, 459 N.W.2d 671 (Minn. 1990).....5

Fort Snelling State Park Ass'n v. Minneapolis Park and Recreational Board,
673 N.W.2d 169 (Minn. 2003)..... 3-4, 6

Graham v. Special Sch. Dist.
No. 1, 437 N.W.2d 722 (Minn. 1992)..... 23-24

Harford v. University of Minnesota,
494 N.W.2d 903 (Minn. App. 1993)..... 21-22

Hart v. Bell,
23 N.W.2d 375 (Minn. 1946).....19

Holen v. Minneapolis-St. Paul Metropolitan Airports Comm'n,
84 N.W.2d 282 (Minn. 1957)..... 18-19

Margo-Kraft Distributors, Inc. v. Minneapolis Gas Co.,
200 N.W.2d 45 (Minn. 1972).....26

TABLE OF AUTHORITIES

(continued)

	<u>Page</u>
<i>Oanes v. Allstate Ins. Co.</i> , 617 N.W.2d 401 (Minn. 2000).....	19
<i>Peterson v. BASF Corp.</i> , 711 N.W.2d 470 (Minn. 2006).....	14
<i>Pirrotta v. Indep. Sch. Dist.</i> <i>No. 347</i> , 396 N.W.2d 20 (Minn. 1986).....	25
<i>Putz v. Putz</i> , 645 N.W.2d 343 (Minn. 1992).....	19
<i>Schuler v. Meschke</i> , 435 N.W.2d 156 (Minn. App. 1989).....	26
<i>Shetka v. Aitkin County</i> , 1997 WL 118134 (Minn. App. Mar. 18, 1997)	21
<i>State by Archabal v. County of Hennepin</i> , 495 N.W.2d 416 (Minn. 1993).....	Passim
<i>State by Hatch v. Employers Ins. of Wausau</i> , 644 N.W.2d 820 (Minn. App. 2002).....	9
<i>State by Powderly v. Erickson</i> , 285 N.W.2d 84 (Minn. 1979).....	9
<i>State ex. Rel. Swan Lake Area Wildlife Ass'n v. Nicollet County Board of County Commissioners</i> , 711 N.W.2d 522 (Minn. App. 2006).....	Passim
<i>State v. Corbin</i> , 343 N.W.2d 874 (Minn. 1984).....	11
<i>State v Lemmer</i> , 736 N.W.2d 650 (Minn. 2007).....	25-26
<i>Thiele v. Stich</i> , 425 N.W.2d 580 (Minn. 1988).....	18
<i>Thiele. Watson v. United Services Auto. Ass'n</i> , 566 N.W.2d 683 (Minn. 1997).....	19
<i>Wacouta Twp. v. Brunkow Hardwood Corp.</i> , 510 N.W.2d 27 (Minn. App. 1993).....	16

TABLE OF AUTHORITIES

(continued)

Page

Zander v. State,
703 N.W.2d 845 (Minn. App. 2005)..... 21-22

Zander v. Zander,
720 N.W.2d 360 (Minn. App. 2006)..... 6, 21-22

STATUTES

Minn. Stat. §§ 116B.03 Passim

Minn. Stat. § 116B.12 Passim

Minn.Stat. § 125.12.....23

Minn. Stat. § 176.061.....10

Minn. Stat. §363A.33.....11

Minn. Stat. § 582.3110

Minn. Stat. § 645.26.....11

ARGUMENT OVERVIEW

Of the several issues on appeal, further briefing is only warranted on the district court's three MERA procedural rulings. These three MERA procedural rulings, if affirmed, would materially restrict MERA even though the Supreme Court has pronounced that "[t]he potency of this rule of law . . . is vital to the protection of our natural resources." *State by Archabal v. County of Hennepin*, 495 N.W.2d 416, 426 (Minn. 1993). Not surprisingly, then, the law compels the reversal of each of the district court's three MERA procedural rulings.

Without question, the pivotal threshold procedural issue is whether the district court had jurisdiction over Appellants' § 116B.03 MERA action even though Friends had already filed its § 116B.09 MERA intervention into City's COA proceeding. Respondents' sole jurisdictional argument is that § 116B.12 imposes an implicit "election of remedies" requirement between the filing of a § 116B.09 MERA intervention and the commencement of a § 116B.03 MERA action. The plain and unambiguous statutory language at issue, together with the applicable rules of statutory construction, forecloses Respondents' "election of remedies" argument.

The next most critical procedural issue is whether Appellants' § 116B.03 MERA action was ripe even though at the time of its dismissal DeLaSalle had not yet procured all of the necessary governmental approvals for its proposed football stadium. Because Respondents accept that Friends' long-since previously filed § 116B.09 MERA intervention was ripe, Respondents had to (but did not even try to!) demonstrate that

there are compelling statutory bases to distinguish between ripeness under §§ 116B.09 and .03.

The third and final procedural issue is whether Appellants' § 116B.09 MERA action was barred by collateral estoppel due to City's prior approval of DeLaSalle's requested COA because Friends had filed its § 116B.09 MERA intervention into that administrative proceeding. Though required for collateral estoppel purposes to prove both, Respondents cannot prove either (1) that City's allowance for Friends' letter submission to City and a four-minute oral presentation to the City Council's Zoning and Planning Committee in the COA proceeding — without anything more! — provided Appellants with such a full and adequate opportunity to be heard on MERA that it precluded Appellants' § 116B.03 MERA action or (2) that all of the Appellants were in privity with Friends during City's COA proceeding.

ARGUMENT

I. THE DISTRICT COURT HAD JURISDICTION

A. Under § 116B.12, a § 116B.03 MERA action can proceed "regardless of the administrative processes and remedies available"

Respondents do not dispute either the plain language of § 116B.12 or the like holdings regarding the same in *State ex. Rel. Swan Lake Area Wildlife Ass'n v. Nicollet County Board of County Commissioners*, 711 N.W.2d 522, 525-26 (Minn. App. 2006), and *Fort Snelling State Park Ass'n v. Minneapolis Park and Recreational Board*, 673 N.W.2d 169, 177 (Minn. 2003). Accordingly, the undisputed starting point on the jurisdictional issue is the following holding from this Court's 2006 decision in *Swan Lake*, 711 N.W.2d at 525-26:

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."

(Emphasis added); *see also Fort Snelling*, 673 N.W.2d at 177 (same).

Respondents not only accept the construction of § 116B.12 as set forth in *Swan Lake* and *Fort Snelling* but they also volunteer "that Section 116B.12 means . . . that MERA does not displace remedies available outside MERA"—*e.g.*, "administrative processes and remedies." Resps. Brief at 13 (emphasis added); *id.* at 12 ("Section 116B.12 merely states that MERA does not displace rights and remedies available *outside* MERA") (italics in original; underlining added). Stated otherwise, Respondents

concede that under § 116B.12 administrative proceedings are protected from "displace[ment]" by MERA.

B. Respondents' "election of remedies" argument

Unable to distinguish the plain language of § 116B.12 and the above holdings in *Swan Lake* and *Fort Snelling*, Respondents' exclusive jurisdictional argument is that § 116B.12 implicitly imposes onto MERA's protections an "election of remedies" requirement. More specifically, a party can, according to Respondents, file either a § 116B.03 MERA action or a § 116B.09 MERA intervention, but not both. Resps. Brief at 12-13.

The entire verbatim basis for Respondents' "election of remedies" argument is as follows:

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.

Resps. Brief at 12-13 (*italics in original; underlining added*).¹

Though Respondents' "election of remedies" argument is far from lucid, it appears to be two-fold. Their first contention is that the filing of a § 116B.09 MERA intervention transforms an otherwise § 116B.12-protected "administrative . . . proceeding" into a non-administrative "separate MERA proceeding." Resps. Brief at 13. This "transformation" argument is clearly the lynchpin to Respondents' "election of remedies" argument. If and only if they succeed on this "transformation" argument does this Court have to address Respondents' second contention. Their second contention is that the purportedly transformed § 116B.09 MERA intervention is not a § 116B.12-protected "statutory . . . right[] and remed[y] now or hereafter available." To prevail on the "election of remedies" argument and defeat the district court's jurisdiction, Respondents must prevail

¹ Besides ineffectively second guessing the legislative wisdom of providing for the simultaneous pursuit of MERA's two protections (*see below*), Respondents also assert the following one-sentence argument that "acceptance of a lawsuit concerning the identical MERA claim would violate separation-of-power principles." Resps. Brief at 11 (citing *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.")). This argument is illogical. City's COA proceeding into which Friends' filed its § 116B.09 MERA intervention is not reviewed de novo. *State by Archabal*, 495 N.W.2d at 420. The district court's original review of Appellants' § 116B.03 MERA action is nowhere near "identical" to this Court's appellate review of City's COA decision. *See* Appell. Opening Brief at pp. 9-10. And the only "judia[1] refrain[t]" required here is that this Court refrain from adopting Respondents' requested amendment to the MERA statute.

on this "statutory . . . right[] and remed[y]" argument, as well as their "transformation" argument.

C. Respondents' "election of remedies" argument fails

This Court is, as with all statutory claims, bound by the plain and unambiguous statutory language at issue. *Amaral v. Saint Cloud Hosp.*, 586 N.W.2d 141, 143 (Minn. App. 1998). And, no matter how much it may disagree with the result, this Court cannot substitute its preferred language for that which has been enacted into law by the legislature. *Zander v. Zander*, 720 N.W.2d 360, 368 (Minn. App. 2006).

1. The "plain[,] . . . broad language" of §§ 116B.12 and .09 forecloses Respondents' "transformation" argument

a. Section 116B.12 cannot be read to support Respondents' "transformation" argument

Section 116B.12 provides in its entirety as follows:

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.

(Emphasis added). And this Court has already described this statutory provision as providing "plain[,] . . . broad language." *Swan Lake*, 711 N.W.2d at 525.

There is nothing in § 116B.12's "plain[,] . . . broad language" (or the discussion of the same in *Swan Lake* and *Fort Snelling*) that transforms an intervened into "administrative . . . proceeding," which is (according to Respondents) protected under § 116B.12 from "displace[ment]" by MERA, into "a separate MERA proceeding." And, with regard to their "transformation" argument, Respondents' six-page jurisdictional

argument fails to cite to any language in § 116B.12 (or these recent appellate cases) to the contrary. Resps. Brief at 9-16.

b. Section § 116B.09 cannot be read to support Respondents' "transformation" argument

There is nothing in § 116B.09 that transforms an intervened into "administrative . . . proceeding," which is (according to Respondents) protected under § 116B.12 from "displace[ment]" by MERA, into "a separate MERA proceeding," which (if Respondents' second jurisdictional argument is also accepted) is not protected under § 116B.12 from "displace[ment]." And, fatally, Respondents' entire six-page jurisdictional argument nowhere argues to the contrary. Resps. Brief at 9-16. Indeed Respondents fail to even reference § 116B.09 in their jurisdictional argument.

There is, as well, absolutely nothing in either Friends' required MERA intervention affidavit into City's COA proceeding or the writ of certiorari appeal from City's COA approval that suggests anything different. Instead, as required by § 116B.09, subd. 2, Friends' MERA intervention affidavit was, as follows, expressly filed under the caption for City's COA proceeding:

In re Appeal of the decision of the Minneapolis Heritage Preservation Commission to deny the Certificate of Appropriateness for the DeLaSalle Athletic Facility located at 25 West Island Avenue and 201 East Island Avenue within the St. Anthony Falls Historic District

APP. 0039. And the writ of certiorari appeal, as required by § 116B.09, subd. 3, was from City's COA approved in the same administrative proceeding. APP. 0057.

Case law otherwise compels the same result. Intervention means to interject oneself as a party into an existing proceeding, and it is not a stand-alone proceeding. *See,*

e.g., *Avery v. Campbell*, 157 N.W.2d 42, 45 (Minn. 1968) (intervention is intended to "grant one who is left out of a suit a right to become a party despite objection by the parties to the action in order to prevent judicial processes from being used to the prejudice of the right of interested third parties"). Moreover, Respondents have explicitly conceded in prior briefs to this Court that a § 116B.09 MERA intervention merely "superimposes" MERA's requirements into the administrative proceeding. Resps. A06-2222 Brief at 14 ("Respondents agree with Relators that the intervention superimposed MERA standards upon those proceedings and required the City Council to determine whether the proposed athletic field would violate MERA"). Hence, under case law precedent and Respondents' concession, Friends' § 116B.09 MERA intervention was necessarily into the existing administrative proceeding—*i.e.*, City's COA proceeding.

2. The "plain[,] . . . broad language" of § 116B.12 forecloses Respondents' "statutory . . . right[] and remed[y]" argument

With regard to Respondents' "statutory . . . right[] and remed[y]" argument, the only question is whether a § 116B.09 MERA intervention—if it (as discussed above) transformed the administrative proceeding into a non-administrative "MERA proceeding"—is nevertheless a "statutory . . . right[] and remed[y] now or hereafter available." The "plain[,] . . . broad language" (*Swan Lake*, 711 N.W.2d at 525) is straightforward and unambiguous. No one can (or does) dispute that a § 116B.09 MERA intervention is a "statutory right[] and remed[y]." Similarly, no one can (or does) dispute that this "statutory right[] and remed[y]" has since MERA's 1971 enactment been "now or hereafter available."

3. The applicable rules of statutory construction otherwise foreclose Respondents' "election of remedies" argument

a. RULE NO. 1: Environmental statutes are to be broadly construed to effectuate their remedial purposes

Though disagreeing with the significance that Appellants attribute to MERA's broad environmental "purpose" (Resps. Brief at 14 n.4), Respondents do not dispute that "[t]he potency of this rule of law . . . is vital to the protection of our natural resources." *State by Archabal*, 495 N.W.2d at 426; *State by Powderly v. Erickson*, 285 N.W.2d 84, 90 (Minn. 1979) ("power of eminent domain limited by the operation of MERA"). Respondents also do not dispute that MERA must, therefore, be broadly interpreted to accomplish its broad environmental protection goal. *See, e.g., 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). And, perhaps most critically, Respondents do not dispute that MERA's objectives are best achieved by maximizing — not minimizing — MERA's remedial actions.

Of course, MERA's broad environmental protection objective is maximized by the availability of filing both of MERA's protections — *i.e.*, (1) a § 116B.03 MERA action and (2) a § 116.09 MERA intervention. Yet, Respondents' arguments, if adopted, would not only preclude the filing of a § 116B.03 MERA action once a § 116B.09 MERA

intervention was filed but it would also preclude the filing of a § 116B.09 MERA intervention once a § 116B.03 MERA action is filed. Moreover, because they maintain that one cannot file simultaneous MERA actions and they define a § 116.09 MERA intervention as such a "MERA proceeding," Respondents' "election of remedies" argument would also bar the filing of more than one § 116B.09 MERA intervention per project. The former bar, which is our situation, and the latter bar are particularly egregious because § 116B.09 MERA intervention should be encouraged, not discouraged. Section 116B.09 MERA interventions should be encouraged because they are the quickest and easiest method of queering an environmentally inappropriate project or, at a minimum, requiring the intervened into administrative body to consider the environmental impacts of the project that it is reviewing. Worse yet, Respondents' expansive interpretation of privity (*see* below) would allow any individual or entity to make this election of remedies for everyone who may later join forces in opposition to the project at issue.

b. RULE NO. 2: The Court "cannot supply that which the legislature purposely omits"

Though they quibble with what both Michigan's model environmental rights act provides regarding an election of remedies and the significance of what Michigan's statute says (Resps. Brief at 14 n.4), Respondents nowhere deny that the Minnesota Legislature knows how to provide for an election of remedies when it so desires. *See, e.g.,* Minn. Stat. § 176.061, subd. 1 (providing election of remedies requirement in context of worker's compensation statutes); Minn. Stat. § 582.31 (requiring election of

remedies to enforce agricultural mortgage); Minn. Stat. §363A.33, subd. 3 (requiring commissioner of Minnesota Department of Human Rights to terminate all proceedings in the department relating to an unfair discriminatory practice charge once a civil action has been brought). At a minimum, the model Michigan statute appraised the Minnesota Legislature of the significance of this issue. Yet, Respondents are conspicuously unable to identify where either § 116B.12 or §§ 116B.03 and .09 provide for an election of remedies. And Respondents accept by their silence that, in construing this statute, this Court "cannot supply that which the legislature purposely omits." *State v. Corbin*, 343 N.W.2d 874, 876 (Minn. 1984).

c. RULE NO. 3: A statutory provision must be construed in harmony with the rest of the statute

A statutory provision must be construed by this Court in harmony with the rest of the statute. Minn. Stat. § 645.26, subd. 1. Section 116B.12 must, therefore, be interpreted consistent with the other two related provisions within the statute — namely, § 116B.03 and § 116B.09. No one has suggested that either § 116B.03 or § 116B.09 provides for an election of remedies. To be consistent with these sections, § 116B.12 must be construed, as well, not to provide for an election of remedies.

d. RULE NO. 4: The legislature is presumed to have understood what it enacted

This Court is to presume that the legislature understood that which it enacted. *Dayton Hudson Corp. v. Johnson*, 528 N.W.2d 260, 262 (Minn. App. 1995). Respondents do not give the legislature such credit. Instead Respondents' "election of remedies" argument is premised on the precise opposite presumption — that is, that the

legislature did not understand (indeed, could not possibly have understood!) that MERA plainly provides on its face for the simultaneous pursuit of its two ways of protecting the environment – *i.e.*, (1) a § 116B.03 MERA action and (2) a §116B.09 MERA intervention. And Respondents make this indictment against the legislature even though not only has this Court already ruled that § 116B.12 contains "plain[,] . . . broad language" (*Swan Lake*, 711 N.W.2d at 525) but Respondents have also volunteered "that Section 116B.12 means . . . that MERA does not displace remedies available outside MERA"—*e.g.*, administrative proceedings. Resps. Brief at 13 (emphasis added).

Notwithstanding Respondents' not so subtle attack on the legislature, this case illustrates the legislature's wisdom and foresight with regard to its provision for the simultaneous pursuit of both of the MERA protections. Despite Appellants and Friends' simultaneous pursuit of both of the MERA protections, these protections have still yet to be fully adjudicated and respected. The City Council's, at best, abbreviated findings regarding Friends' § 116B.09 MERA intervention reveal City's lack of attention to or disrespect for the environmental statute. *See, e.g.*, APP. 0036-38, Finding No. 11. And the district court's virtually analysis-free dismissal of Appellants' § 116B.03 MERA action, similar to the Hennepin County District Court's improper rejection of the § 116B.03 MERA action in *State by Archabal*, reveals the lower court's reluctance to give full meaning to the broad environmental statute. In fairness, it is certainly not easy for local governmental bodies and local district courts to apply an environmental statute to stop locally popular projects. As politicians who are acutely aware of such practical

realities, the legislature knew it had to and did provide two separate MERA protections without an election of remedies.

Moreover, Respondents have yet to explain how the as-of-yet unexplained burden from the simultaneous pursuit of the dual MERA protections outweighs the "vital[ness] [of] the protection [to] our natural resources." *State by Archabal*, 495 N.W.2d at 426. How can the local governmental bodies complain about being required by MERA to consider the environmental impacts of a local project? Governmental officials should themselves already be concerned about the adverse environmental impacts to their communities from controversial projects and welcome the statutory tools to do so. Illustratively, *State by Archabal* was commenced by such a concerned governmental official. City in particular cannot complain about any added burden. City was, through its COA requirements and its 2006 Critical Area Plan, already required to address most, if not all, of MERA's environmental protection requirements. Appells. Supp. App. 0220-271.

II. THE ACTION WAS RIPE

A. Respondents' ripeness argument

Respondents' entire ripeness argument is as follows:

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.

Resps. Brief at 22-23 (emphasis added).

In other words, § 116B.03 MERA actions are, per Respondents, not ripe until all required governmental approvals are in hand and construction is about to (or, at least, can) commence. And, coupled with their jurisdictional argument above, all of these governmental approvals are required to be analyzed without regard to MERA's environmental protections because, per Respondents, once anyone files a § 116B.09 MERA intervention into any one of several administrative proceedings no § 116B.03 MERA action can be filed.

B. The resulting harms caused by barring the commencement of § 116B.03 MERA actions until all governmental approvals are in hand

Respondents make no challenge to Appellants' pronouncement of the several problems with making § 116B.03 MERA plaintiffs wait to file their statutory action until all of the governmental approvals are in hand. By electing not to dispute any of these problems, Respondents have effectively accepted all of them as true. *Peterson v. BASF Corp.*, 711 N.W.2d 470, 482 (Minn. 2006) ("[i]t is well-established that failure to address an issue in brief constitutes waiver of that issue").

The resulting harms caused by barring the commencement of § 116B.03 MERA actions until all governmental approvals are in hand include the following:

- Unnecessary delay to project opponents
 - Rather than receiving an immediate injunction under § 116B.07, § 116B.03 MERA plaintiffs will have to wait months, if not years, for a final decision
- Unnecessary costs to project proponents
 - If MERA ultimately bars the project, then project proponents will have wasted the money spent on procuring all of the unusable governmental approvals
- Unnecessary risk to project opponents
 - Project proponents may assert that administrative approvals preclude under collateral estoppel project opponents' § 116B.03 MERA action
- Unnecessary cost to project opponents
 - Attend and argue against, as appropriate, each of the requested administrative approvals
 - Procure a prohibitively-expensive bond because TRO has to issue at the last minute to stop construction
 - Incur additional attorney fees required for last minute TRO filing

C. MERA authorizes injunctive relief to prohibit "all activities that would potentially" harm the environment

Section 116B.07 provides in its entirety as follows:

The court may grant declaratory relief, temporary and permanent equitable relief, or may impose such conditions upon a party as are necessary or appropriate to protect the air, water, land or other natural resources located within the state from pollution, impairment, or destruction. When the court grants temporary equitable relief, it may require the plaintiff to post a bond

sufficient to indemnify the defendant for damages suffered because of the temporary relief, if permanent relief is not granted.

(Emphasis added). Section 116B.07 has been expansively applied to effectuate MERA's broad environmental purpose. *See, e.g., Wacouta Twp. v. Brunkow Hardwood Corp.*, 510 N.W.2d 27 (Minn. App. 1993) (court rejected enjoined party's argument that the § 116B.03 MERA action was moot because the logging contract had been canceled, reasoning that the injunction appropriately prohibited "all activities that would potentially disrupt the eagles or the roost") (emphasis added).

Though bound by this broad and unambiguous statutory language and aware of this case law precedent, Respondents fatally ignore it. The township in *Wacouta Twp.* was not required to dismiss its § 116B.03 MERA action until the logging contract was resigned and the logging equipment was mobilized to the subject site. Hence, Appellants, like the township in *Wacouta Twp.*, need not wait until the last minute when the bulldozers arrive, to destroy historic Grove Street thereby necessitating hurried TRO filings and the issuance of a prohibitively expensive injunction bonds.

D. The applicable rules of statutory construction support the same

1. RULE NO. 1: Environmental statute is to be broadly construed to effectuate its remedial purpose

Respondents cannot and thus do not even try to reconcile its ripeness argument with MERA's broad, environmental purpose. Rather than promoting MERA's environmental objectives, Respondents' argument raises a significant barrier to one of MERA's two protections.

2. RULE NO. 2: The Court "cannot supply that which the legislature purposely omits"

The legislatively-prescribed prerequisites to the filing of a § 116B.03 MERA action and/or the issuance of injunctive relief under § 116B.07 could have, but did not, include a requirement that all government approvals first issue for the subject project. And Respondents cannot and thus do not deny that the legislature knows how to prescribe such prerequisites. The omission of this ripeness requirement must, therefore, be deemed to have been purposeful, thereby banning this Court from "supply[ing] that which the legislation purposely omit[ted]." *Wallace v. Comm'r of Taxation*, 230, 184 N.W.2d 588, 594 (Minn. 1971).

3. RULE NO. 3: A statutory provision must be construed in harmony with the rest of the statute

Respondents nowhere challenge that Friends' September 14, 2006 filing of its § 116B.09 MERA intervention was ripe. Resps. Brief at 13. Yet Respondents incongruently argue that the Appellants' § 116B.03 MERA action was not only not ripe upon their October 25, 2006 filing of this action but also not ripe when they filed this September 22, 2007 reply brief because outstanding approvals still exist. There is nothing about these two MERA protections that justifies any difference with regard to ripeness, let alone the dramatic difference proposed by Respondents. To the contrary, the statutorily-prescribed bases under § 116B.09, subd. 1 for filing a § 116B.09 MERA intervention are the same as those under § 116B.03, subd. 1 for asserting a § 116B.03 MERA action. Accordingly, Respondents are bound by what the legislature prescribed.

III. COLLATERAL ESTOPPEL DOES NOT BAR APPELLANTS' MERA CLAIMS

A. Appellants did not have a full and fair opportunity to be heard on their MERA claim

1. **The issue of whether Appellants had a full and fair opportunity is properly before this Court**

Because the district court specifically ruled that Appellants had a full and fair opportunity to be heard on their MERA claim, Respondents' reliance on *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988), is misplaced. Contrary to Respondents' argument, "the general rule is that appellate courts will not consider questions which were not . . . decided by the district court." *Holen v. Minneapolis-St. Paul Metropolitan Airports Comm'n*, 84 N.W.2d 282, 286 (Minn. 1957) (emphasis added); *Thiele*, 425 N.W.2d at 582 (same).

There can be no dispute that, whether Appellants had a full and fair opportunity to be heard on this MERA claim, the issue was "decided by the district court." In concluding that collateral estoppel barred Appellants' § 116B.03 MERA action, the district court first cited the five factors that must be met before collateral estoppel may be applied, which included the requirement that the party that is to be estopped previously had a full and fair opportunity to be heard. APP. 210-11. And, then, the district court specifically concluded that "[i]t is clear and undisputed that . . . 5) Plaintiffs were given a full and fair opportunity to be heard on the adjudicated issues." *Id.* (emphasis added). Respondents' claim that the issue of whether Appellants had a full and fair opportunity to

be heard was not "decided by the district court" is, therefore, plainly belied by the very decision from which Appellants have appealed.

Even if the issue had not been "decided by the district court," the Minnesota Supreme Court has repeatedly recognized a "well established" exception to the general rule articulated in *Thiele. Watson v. United Services Auto. Ass'n*, 566 N.W.2d 683, 687 (Minn. 1997). This exception allows the review of an issue not presented to or "decided by the district court" "when [1] the issue is plainly decisive of the entire controversy on its merits and, [2] as in a case involving undisputed facts, there is no possible advantage or disadvantage to either party in not having had a prior ruling by the trial court on the question." *Oanes v. Allstate Ins. Co.*, 617 N.W.2d 401, 403 (Minn. 2000) (applying exception to general rule and reviewing issue not raised below where there were no disputes of fact that affected a legal question and there was no possible advantage or disadvantage to either party in not having ruling from the lower court) (brackets & emphasis added). This exception has already been applied to reject a collateral estoppel argument which had not been presented or "decided by the district court." *Cohen v. Cowles Media Co.*, 479 N.W.2d 387, 390 (Minn. 1992) (allowing review of collateral estoppel issue not raised below); *see also Putz v. Putz*, 645 N.W.2d 343, 350 (Minn. 1992) (applying exception to general rule); *Watson*, 566 N.W.2d at 687 (reviewing issue not raised below where question "fits squarely within the exception to the general rule"); *Cohen v. Cowles Media Co.*, 479 N.W.2d 387, 390 (Minn. 1992) (allowing review of collateral estoppel issue not raised below); *Holen*, 84 N.W.2d at 286 (reviewing issue not raised below where exception to general rule applied); *Hart v. Bell*, 23 N.W.2d 375, 378-

79 (Minn. 1946) (court has a duty to consider issue of contract's illegality for the first time on appeal if the illegality is apparent, is in clear contravention of public policy, and if a decision thereon will be decisive of the entire controversy on its merits).

Under this well-established exception, even if the district court had not already ruled on the full and fair opportunity issue, review would be appropriate here. First, the collateral estoppel issue could well be determinative of Appellants' § 116B.03 MERA action. If this Court both found that the opportunity that Appellants were afforded by City to be heard on Friends' § 116B.09 MERA intervention was sufficient and adopted Respondents' privity argument, then Appellants' § 116B.03 MERA claim would be barred by collateral estoppel. Second, the collateral estoppel issue presents a pure issue of law, which, of course, causes no prejudice to either side. The relevant facts for Respondents' collateral estoppel argument are undisputed. Though the parties disagree as to the application of law to facts, both Appellants and Respondents tellingly sought summary judgment on the record below. And because the parties have thoroughly briefed this issue and because review of the district court's decision is *de novo*, any lack of a ruling below would be of no advantage to either party.

There is, moreover, no merit to Respondents' assertion that Appellants are seeking to apply the full and fair opportunity requirement inconsistently. Respondents base this assertion on Appellants' substantive argument that City is estopped from disputing that the proposed football stadium would destroy a historic resource — *i.e.*, the historic Grove Street — as required for their required *prima facie* showing under MERA. Appellants base their collateral estoppel argument on City's September 8, 2005 decision that an

environmental assessment worksheet (EAW) was mandatory due to the fact that the project would result in the destruction of a historic resource. That decision was unappealed from and is now final. As the party that established the rules applicable to that EAW determination, City is in no position to challenge their adequacy. This Court has made that abundantly clear. *Shetka v. Aitkin County*, 1997 WL 118134 (Minn. App. Mar. 18, 1997) (rejecting appeal by county board's that was based on alleged deficiencies in the board's own proceedings and reasoning that the county's argument "has the flavor of the child who murders its parents and then begs for mercy from the court because it is orphan").

2. Appellants did not have a full and fair opportunity to be heard on their MERA claim

a. Respondents' "lower floor" argument fails

Respondents first assert that Appellants had a full and fair opportunity to present their MERA claim before City by suggesting that some "lower floor" applies than that cited by Appellants in their opening brief. Resps. Brief at 22. But Respondents never explain what this floor might be.

Respondents cite only two cases in support of their "lower floor" argument, *Zander v. State*, 703 N.W.2d 845 (Minn. App. 2005), and *Harford v. University of Minnesota*, 494 N.W.2d 903 (Minn. App. 1993). Respondents' reliance on these two cases is misplaced.

Zander is procedurally dissimilar. This Court held that the decision that precluded the appellants' claim was not just an administrative decision but also a prior opinion of

this Court affirming that administrative decision. *Zander*, 703 N.W.2d at 854 ("this court's consideration of appellants' challenge to the Board of Water and Soil Resources' decision was a judicial determination in which appellants had the opportunity to submit written and oral argument"). In contrast, while Appellants have appealed City's decision on the COA, this Court has not yet issued a decision. As such, the "floor" set forth in *Zander* for collateral estoppel is completely inapposite.

Harford is equally distinguishable. This Court reasoned that the party to be estopped had a full and fair opportunity to be heard where the administrative proceeding (1) afforded an opportunity for three levels of review, (2) required reasoned decisions at each level, (3) allowed subpoenas and witness testimony, (4) allowed cross-examination of witnesses by an attorney, and (5) allowed presentation of oral argument by an attorney at several levels. 494 N.W.2d at 908. Here, instead, City gave Appellants' counsel but four minutes for oral argument before City Council's Zoning and Planning Committee (with no time before the City Council) and merely allowed one 15-page written submission. APP. 042; RESP. APP. 004-5.

- b. For purposes of applying collateral estoppel, City did not provide Appellants with the requisite full and fair opportunity to be heard

Respondents next contend that, for purposes of applying collateral estoppel, City provided Appellants with the requisite full and fair opportunity to be heard on this MERA claim. But a review of the cases cited by both Respondents and Appellants reveals that the opportunity afforded to Appellants by City fell far below any conceivable "floor" and

was simply not sufficient to collaterally estop Appellants from pursuing their § 116B.03 MERA claim in the district court.

Graham v. Special Sch. Dist. No. 1, 437 N.W.2d 722 (Minn. 1992), is the most recent pronouncement from the Minnesota Supreme Court on the standards required to establish that an administrative proceeding offered a full and fair opportunity to be heard. In that case, the Court found that an administrative hearing provided a full and fair opportunity where:

the hearing was presided over by an impartial hearing examiner, a former trial judge. Both parties were entitled to representation and were represented by counsel. Subpoenas were available. A record was made. The rules of evidence were followed and findings had to be (and were) established by "substantial and competent evidence." Minn.Stat. § 125.12, subd. 9 (1990). The hearing took 9 days.

437 N.W.2d at 118.²

Contrary to Respondents' argument, the distinctions between the opportunity afforded in *Graham* and that provided to Appellants here are stark. First and foremost, neither Friends nor its counsel represented GSFA and Bergs in the COA proceedings. There is no evidence to the contrary.

² Additionally, though Respondents attempt to distinguish the requirements set forth in *Graham* and in *Clapper v. Budget Oil Co.*, 437 N.W.2d 722, 726 (Minn. App. 1989), as being unique to the assertion of an individual right, they cite no legal support for this unusual argument. Nor could they. Whether a claim is being prosecuted by an individual to protect his rights or is brought by a group to protect the natural and historic resources of this State is irrelevant to the question of whether the opportunity to be heard was sufficient to preclude a different claim.

Second, the procedural protections were woefully inadequate. The hearing by City was presided over by City Council President Barbara Johnson, who is not only not an attorney or judge but also, by her own attorney's admission, had fiduciary obligations to DeLaSalle in her capacity as a member of its Executive Committee for its Board of Trustees. APP. 0198. While Friends was represented by counsel in the COA proceeding into which it had intervened under § 116B.09, that representation was severely limited. Friends' counsel was not able to present Friends' MERA case anywhere near as comprehensively as that presented in *Graham*. Rather than a nine-day hearing, Friends' attorney was given just four minutes to argue before the City Council's Zoning and Planning Committee before being cut off, and he had no opportunity whatsoever to argue before the full City Council. RESP. APP. 004-5. Counsel did not have the right to call or subpoena witnesses or cross-examine adverse witnesses. There was no requirement that City's decision be established by "substantial and competent evidence." These factors severely limited counsel's opportunity to present the MERA claim and challenge DeLaSalle's opposition to the same.

Third, and perhaps most critically, Respondents simply assume that the *State by Archabal*-prescribed "extremely high standard" of proof required for an applicant to satisfy its § 116B.04 affirmative defense burden under a § 116B.03 MERA action are also applicable in a § 116B.09 MERA intervention. Respondents say nothing about the argument that the required showing of "no feasible and prudent alternative" under § 116B.09, subd. 2 is different from the "no feasible and prudent alternative" showing under § 116B.03 because § 116B.04's "affirmative defense" burden is expressly only

provided for "[i]n any other action mentioned under section 116B.03." Respondents' failure to address this statutory argument is not by accident. If, in fact, there are different burdens of proof between the two proceedings, then even Respondents would have to concede that Appellants did not have in the COA proceeding any opportunity — let alone a full and fair opportunity — to make its § 116B.03 MERA argument under the higher standard.

B. GSFA and Bergs are not in privity with Friends

Respondents advocate a theory of privity unsupported either by case law or common sense. They argue that by intervening under §116B.09 in the administrative proceedings, Friends have precluded the GSFA and Bergs — as well as any party who would subsequently be represented by Friends' attorneys in opposition to the project — from invoking MERA to protect historic Grove Street.

Unfortunately for Respondents, Minnesota law does not so limit the ability of the citizens of this state to challenge actions that may have an adverse effect on the state's natural and historic resources. It is well established that "a commonality of interests alone is insufficient to establish privity." *Pirrotta v. Indep. Sch. Dist. No. 347*, 396 N.W.2d 20, 22 (Minn. 1986) (reversing this Court's holding that parties were in privity). Instead, "when determining whether privity exists, the proper focus is on whether the legal rights of the party to be estopped were adequately represented by the party to the first litigation." *State v. Lemmer*, 736 N.W.2d 650, 661 (Minn. 2007) (Commissioner of Public Safety, though an agency of State, was not in privity with State). Whether parties are in privity depends on whether the party to be estopped "(1) had a controlling

participation in the first action, (2) had an active self-interest in the previous litigation, or (3) had a right to appeal from a prior judgment." *Id.* (citations omitted). A party to be estopped has control of the first action if it has a choice about legal theories and proofs to be advanced on behalf of the party to the action and control over the ability to obtain review of the judgment. *Id.* (citing Restatement (Second) of Judgments § 39, cmt. c).

It cannot be disputed that neither GSFA nor Bergs had a controlling participation in the first action, an active self-interest in it, or a right to appeal from it.³ APP. 0039-40. And it was improper for the district court to make this factual determination on Respondents' motion to dismiss. *Schuler v. Meschke*, 435 N.W.2d 156, 161 (Minn. App. 1989) ("Motions to dismiss under rule 12.02 for failure to state a claim upon which relief can be granted test only the sufficiency of the pleadings. On such motions, a court may not go outside the pleadings, and all assumptions made and inferences drawn must favor the party against whom dismissal is sought") (citation omitted). Respondents have not cited a single case where an appellate court has upheld a factual determination made on a motion to dismiss that parties are in privity. *See Margo-Kraft Distributors, Inc. v. Minneapolis Gas Co.*, 200 N.W.2d 45, 46 (Minn. 1972) (appeal from summary judgment); *Balasuriya v. Bemel*, 617 N.W.2d 596, 599 (Minn. App. 2000) (appeal from summary judgment); *Brunsomman v. Seltz*, 414 N.W.2d 547, 549 (Minn. App. 1987)

³ Although it is true that GSFA and Bergs joined in the certiorari appeal of City's decision, there is no question that without Friends they would not have had the legal standing required to appeal.

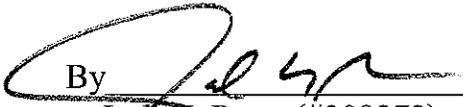
(appeal from motion for new trial). As the trial court's finding of privity was improper, it must be reversed.

CONCLUSION

Reasonable minds can certainly debate the wisdom of MERA's provision for the simultaneous pursuit of its two protections. But reasonable minds cannot debate the existence of MERA's provision for the simultaneous pursuit of its two protections. As previously ruled by this Court, § 116B.12 provides "plain[,] . . . broad language." The legislature's pronouncement on this jurisdictional is thus final and binding. Likewise, the legislature's decision not to include a requirement that all approvals first issue bars Respondents' ripeness argument. And Respondents can come no where near supporting their collateral estoppel argument. At a bare minimum, Appellants are, therefore, entitled to their day in court on the merits of their § 116B.03 MERA action.

DATED: September 24, 2007

BRIGGS AND MORGAN, P.A.

By 

Jack Y. Perry (#209272)

Matthew J. Franken (#31092X)

2200 IDS Center

Minneapolis, MN 55402-2157

(612) 977-8400

**ATTORNEYS FOR APPELLANTS
STATE OF MINNESOTA BY FRIENDS
OF THE RIVERFRONT, GROVE
STREET FLATS ASSOCIATION, AND
SID AND LOLA BERG**

CERTIFICATE OF COMPLIANCE

The undersigned counsel for Appellants certifies that this reply 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 6,992 words, excluding the Table of Contents, Table of Authorities, and Appendix.

DATED: 9/24/07



Jack X. Perry (#209272)

2082583v9