

*This opinion will be unpublished and  
may not be cited except as provided by  
Minn. Stat. § 480A.08, subd. 3 (2018).*

**STATE OF MINNESOTA  
IN COURT OF APPEALS  
A19-1111**

Friends of Tower Hill Park,  
Appellant,

vs.

Foxfire Properties, LLC, et al.,  
Respondents,

Vermilion Enterprises, LLC, et al.,  
Respondents.

**Filed March 2, 2020  
Affirmed  
Bjorkman, Judge**

Hennepin County District Court  
File No. 27-CV-18-20111

Erik F. Hansen, Elizabeth M. Cadem, Martin C. Melang, Burns & Hansen, P.A.,  
Minneapolis, Minnesota (for appellant)

Joseph J. Christensen, Kenneth J. Smith, Christensen & Laue, P.A., Edina, Minnesota (for  
respondents Foxfire Properties, LLC, et al.)

Howard R. Roston, Emily A. Unger, Fredrikson & Byron, P.A., Minneapolis, Minnesota  
(for respondents Vermilion Enterprises, LLC, et al.)

Considered and decided by Johnson, Presiding Judge; Bjorkman, Judge; and Slieter,  
Judge.

## **UNPUBLISHED OPINION**

**BJORKMAN**, Judge

Appellant challenges the dismissal of its action under the Minnesota Environmental Rights Act (MERA), Minn. Stat. §§ 116B.01-.13 (2018), seeking declaratory and injunctive relief regarding respondent-developers' planned construction project. Appellant argues that the district court erred by applying collateral estoppel based on prior municipal proceedings regarding the project. We affirm.

### **FACTS**

Respondents Vermilion Development and Vermilion Enterprises, LLC (collectively, Vermilion) plan to construct a 14-story mixed-use building (the project) on University Avenue in Minneapolis, approximately one-half block away from the Prospect Park Water Tower, which is commonly known as the Witch's Hat Tower. Appellant Friends of Tower Hill Park opposes the project, claiming it will impair views of and from the tower.

The Witch's Hat Tower was built in 1914 on the highest natural point in the Twin Cities. It was designed to serve the dual purposes of observation deck and water tower, though it has since ceased operation as a water tower. In 1997, the Witch's Hat Tower was placed on the National Register of Historic Places because of its association with the Twin Cities' early water system and its unique architecture.

In May 2018, Vermilion submitted a land-use application to the City of Minneapolis. Vermilion requested rezoning, a conditional-use permit, variances, and approval of the project's site plan and plat. The city's planning and economic development

department (CPED) considered public comments and prepared findings on each aspect of the application. In doing so, the CPED addressed the impact of the project on views of and from the Witch's Hat Tower:

The most significant landmark building affected by the proposed development is the Witch's Hat Tower in Tower Hill Park, located ½ block from the proposed site. The tower is a locally-designated historic landmark and is listed on the National Register of Historic Places. The applicant has provided documentation demonstrating the ways in which the proposed development would obscure views to the tower from the public realm. According to illustrations provided by the applicant the most impacted view of the tower that would be altered or obscured is along University Ave SE to the SE of the site. Modeling indicates that this view would be equally obscured by a 4-story building, a height which would be allowed by right [under existing zoning]. Significant views of public spaces and notable buildings would not be obstructed from the tower or from Tower Hill Park, most notably, the view of Downtown Minneapolis.

The CPED recommended approving the project. The city's planning commission adopted the CPED's findings and approved the project.

Trina Porte appealed the planning commission's decision, as did Eric Amel and Gayla Lindt, appellant's founding member and vice chair. Both appeals argued that the city needed to further analyze the project's impact on views from and of the Witch's Hat Tower and possibly reject the project because of that impact. After a public hearing, the city council substantially denied the appeals, adopting the CPED's findings and approving the project. The city council imposed several conditions to address concerns raised in the appeals, including two related to the Witch's Hat Tower: (1) Vermilion "shall work with the property owners of directly adjacent property to implement screening and other

measures to reduce the visual impact of the [project],” and (2) Vermilion “shall confer with a historical consultant to identify and mitigate to the extent practical any potential impact on nearby historic properties, including the Witch’s Hat water tower.” None of the challengers appealed the land-use decision.

Approximately two weeks later, appellant filed a petition requesting that the city prepare an environmental assessment worksheet (EAW) for the project. The petition asserted that the project “will cause serious adverse environmental effects to the natural resources (including historic and esthetic resources) of Tower Hill Park and the Prospect Park Water Tower, as defined in [MERA].” The city denied the EAW petition. Appellant did not appeal that decision.

In December, appellant initiated this MERA action, seeking a declaration that “the Witch’s Hat Tower and its viewshed are natural resources and cannot be impaired pursuant to MERA” and an injunction prohibiting Vermilion from proceeding with the project.<sup>1</sup> Vermilion asserted collateral estoppel, pointing to the extensive public record of the city’s proceedings, and moved to dismiss under Minn. R. Civ. P. 12.02(e). The district court granted the motion and dismissed the action. This appeal follows.

## **D E C I S I O N**

A district court may dismiss a complaint when the plaintiff fails to state a claim upon which relief can be granted. Minn. R. Civ. P. 12.02(e). On appeal, we consider

---

<sup>1</sup> Respondents Foxfire Properties, LLC, The Tower Hill Building, LLC, and 3350 Uni-Prop LLC (the entities selling the underlying real estate to Vermilion) were dismissed from the litigation by stipulation.

de novo whether the complaint sets forth a legally sufficient claim for relief, taking the facts alleged in the complaint as true and drawing inferences in favor of the nonmoving party. *Walsh v. U.S. Bank, N.A.*, 851 N.W.2d 598, 606 (Minn. 2014). We also independently analyze statutory language, *Caldas v. Affordable Granite & Stone, Inc.*, 820 N.W.2d 826, 836 (Minn. 2012), and whether collateral estoppel precludes litigation of a claim, *Hauschildt v. Beckingham*, 686 N.W.2d 829, 837 (Minn. 2004).

Collateral estoppel is a common-law doctrine that bars “relitigation of previously determined issues.” *State by Friends of the Riverfront v. Minneapolis*, 751 N.W.2d 586, 589 (Minn. App. 2008), *review denied* (Minn. Sept. 23, 2008). The doctrine is based on the principle that “a right, question or fact distinctly put in issue and directly determined . . . cannot be disputed in a subsequent suit between the same parties or their privies.” *Hauschildt*, 686 N.W.2d at 837 (quotation omitted). We do not apply the doctrine “rigidly” but consider the substance, procedural safeguards, and parties involved in the prior and current proceedings. *Friends of the Riverfront*, 751 N.W.2d at 589. “[O]ur focus is on whether the application would work an injustice.” *Id.*

Appellant challenges the district court’s determination that its MERA claim is barred by collateral estoppel, arguing that (1) MERA precludes application of the doctrine and (2) the city’s land-use and EAW proceedings do not justify application of the doctrine.

**I. MERA does not preclude application of collateral estoppel based on the city’s quasi-judicial administrative proceedings.**

Appellant principally argues that MERA itself precludes application of collateral estoppel based on a prior municipal proceeding because “[t]he broad language of Minn.

Stat. § 116B.12 makes clear that, whatever remedies a plaintiff may pursue elsewhere, MERA claims are ultimately the province of the Minnesota Courts.” This argument is unavailing for two reasons.

First, it is contrary to principles of statutory interpretation. “The goal of all statutory interpretation is to ascertain and effectuate the intention of the legislature.” *Caldas*, 820 N.W.2d at 836. Absent ambiguity, we discern legislative intent from the plain language. *State Farm Mut. Auto. Ins. Co. v. Lennartson*, 872 N.W.2d 524, 529 (Minn. 2015). And unless that plain language expressly declares or necessarily implies an intent to abrogate the common law, we presume the statute is consistent with the common law. *Ly v. Nystrom*, 615 N.W.2d 302, 314 (Minn. 2000); *see also Urban v. Am. Legion Dep’t of Minn.*, 723 N.W.2d 1, 5 (Minn. 2006) (stating presumption that statutes “creating new causes of action” do not abrogate the common law).

Nothing in the plain language of Minn. Stat. § 116B.12 indicates the legislature intended to abrogate collateral estoppel. The legislature enacted MERA in 1971 to establish a new private right of action, empowering citizens to obtain declaratory or injunctive relief to protect the state’s “natural resources” from “pollution, impairment, or destruction.” *State by Schaller v. County of Blue Earth*, 563 N.W.2d 260, 264 (Minn. 1997); *see* Minn. Stat. § 116B.03, subd. 1. In doing so, the legislature recognized that it was not writing on a blank slate: “No existing civil or criminal remedy for any wrongful action shall be excluded or impaired by [MERA]. The rights and remedies provided [in MERA] shall be in addition to any administrative, regulatory, statutory, or common law rights and remedies now or hereafter available.” Minn. Stat. § 116B.12.

We are not persuaded that this provision precludes application of collateral estoppel based on administrative proceedings. It merely indicates that MERA is nonexclusive—MERA does not displace existing rights, and existing rights cannot substitute for the MERA right to protect natural resources from pollution, impairment, or destruction. If an administrative body fully and fairly considered a MERA claim, nothing in Minn. Stat. § 116B.12's terms bars application of collateral estoppel to preclude its relitigation.

Second, appellant's argument is contrary to existing caselaw. Our supreme court has expressly held that collateral estoppel, like the related doctrine of res judicata, may apply to administrative decisions made in a quasi-judicial capacity. *Graham v. Special Sch. Dist. No. 1*, 472 N.W.2d 114, 115-16 (Minn. 1991) (citing *McKee v. County of Ramsey*, 245 N.W.2d 460, 462 n.1 (Minn. 1976)). After *Graham*, Minnesota courts have consistently applied collateral estoppel to bar litigation of issues previously addressed in a quasi-judicial proceeding. *E.g.*, *Villareal v. Indep. Sch. Dist. No. 659*, 520 N.W.2d 735, 737 (Minn. 1994) (school board); *Zander v. State*, 703 N.W.2d 845, 854 (Minn. App. 2005) (Minnesota Board of Water and Soil Resources); *Cent. Baptist Theological Seminary v. City of New Brighton*, 487 N.W.2d 528, 532 (Minn. App. 1992) (Minnesota Department of Natural Resources), *review denied* (Minn. Aug. 27, 1992). Indeed, we have applied collateral estoppel in almost precisely the circumstance presented here—a city council's quasi-judicial decision to approve a construction project over MERA-based objections. *Friends of the Riverfront*, 751 N.W.2d at 592.

The nature of quasi-judicial decision-making protects against concerns that application of collateral estoppel will cause injustice. A quasi-judicial decision is the

functional equivalent of a court decision in terms of procedural safeguards, resolution of a specific dispute, finality, and the availability of judicial review. See *Graham*, 472 N.W.2d at 118-20 (analyzing procedural safeguards); *Friends of the Riverfront*, 751 N.W.2d at 590-92 (same); see also *Minn. Ctr. for Envtl. Advocacy v. Met. Council*, 587 N.W.2d 838, 842 (Minn. 1999) (stating that a quasi-judicial decision involves investigation into a disputed claim and weighing of evidentiary facts, application of those facts to a prescribed standard, and a binding decision on the disputed claim); accord *McKee*, 245 N.W.2d at 462 n.1 (“One factor which apparently influences the decision to accord administrative decisions res judicata effect is the availability of judicial review.”).

These procedural safeguards distinguish the administrative decisions to which collateral estoppel may apply from those that do not preclude subsequent MERA litigation. As appellant asserts, we held in *State by Fort Snelling State Park Ass’n v. Minneapolis Park & Rec. Bd.* that the appellant’s civil action under MERA “was authorized regardless of administrative processes.” 673 N.W.2d 169, 177 (Minn. App. 2003), review denied (Minn. Mar. 16, 2004). But we did so because, even though the prior administrative process addressed the historic-preservation claim at issue in the MERA action, the process “did not involve hearings or agencies acting in judicial or quasi-judicial capacities,” which may provide a “basis for estoppel.” *Id.* Similarly, we held that “the broad language of Minn. Stat. § 116B.12” means that a district court is not deprived of subject-matter jurisdiction to address a drainage-based MERA claim simply because there is an alternative administrative process available to address drainage issues. *State ex rel. Swan Lake Area Wildlife Ass’n*, 711 N.W.2d 522, 525 (Minn. App. 2006) (citing *Fort Snelling*, 673 N.W.2d



at 177). In contrast, when an administrative agency actually considered and approved a wetland-replacement plan through a quasi-judicial process that involved receipt of evidence and argument, we applied collateral estoppel to prevent the appellant from relitigating MERA issues. *Zander*, 703 N.W.2d at 854-55.

Here, the parties do not dispute that the city acted in a quasi-judicial capacity in approving Vermilion's land-use application and denying appellant's EAW petition. We agree. See *Interstate Power Co. v. Nobles Cty. Bd. of Comm'rs*, 617 N.W.2d 566, 574 (Minn. 2000) (stating that a decision on a land-use application regarding a particular property is quasi-judicial); *In re Env'tl. Assessment Worksheet for 33rd Sale of State Metallic Leases*, 838 N.W.2d 212, 216 (Minn. App. 2013) (addressing review of final decision whether to complete EAW), *review denied* (Minn. Nov. 26, 2013). Accordingly, we are not persuaded that Minn. Stat. § 116B.12 precludes application of collateral estoppel as a matter of law.

**II. The district court did not err by concluding that the city's prior proceedings satisfy the elements of collateral estoppel.**

Collateral estoppel may apply based on a prior quasi-judicial proceeding if (1) the issues in the prior and current proceedings are "identical," (2) the issue to be precluded was "necessary to the [prior] adjudication and properly before the agency," (3) the prior decision was a final determination subject to judicial review, (4) the estopped party was a party or in privity with a party to the prior determination, and (5) "the estopped party was given a full and fair opportunity to be heard on the adjudicated issue." *Graham*, 472 N.W.2d at 116.

Appellant argues that the circumstances of this case do not warrant application of collateral estoppel. Appellant does not dispute the privity and full-and-fair-hearing elements. But appellant contends (1) the issues addressed in the city’s land-use and EAW proceedings are not identical to the issues in its MERA claim, (2) the issues in its MERA claim were not “necessary” to the city’s decisions, and (3) the city’s decisions were not final. We address each of these arguments in turn.

**A. The city’s proceedings addressed the same issue appellant presents in this MERA action.**

Collateral estoppel requires that the issues in the prior and current proceedings are “identical.” *Friends of the Riverfront*, 751 N.W.2d at 589. “For collateral-estoppel purposes, issues are identical when the issues presented by [the current] litigation are in substance the same as those resolved in the previous litigation.” *All Finish Concrete, Inc. v. Erickson*, 899 N.W.2d 557, 567 (Minn. App. 2017) (quotation omitted).

A MERA claim presents two threshold issues. *State by Powderly v. Erickson*, 285 N.W.2d 84, 87 (Minn. 1979). The first is whether the claim implicates a “natural resource,” which may be a “historical resource.” *Friends to Restore St. Mary’s, LLC v. Church of Saint Mary, Melrose*, 934 N.W.2d 130, 134 (Minn. App. 2019) (quoting Minn. Stat. § 116B.02, subd. 4), *review denied* (Minn. Nov. 19, 2019). The second issue is whether the defendant’s conduct will lead to “the pollution, impairment, or destruction of that resource.” *Id.* (quoting Minn. Stat. § 116B.04(b)). Resolution of this question turns on whether the conduct in question will “materially adversely affect the environment.” Minn. Stat. § 116B.02, subd. 5; *see Schaller*, 563 N.W.2d at 265 (approving a five-factor

balancing test for assessing “material, adverse effect” because “[a]lmost every human activity has some kind of adverse impact on a natural resource,” and MERA cannot “prohibit[] virtually all human enterprise” (quotation omitted)). A MERA plaintiff must satisfy both of these elements to establish a prima facie case. Minn. Stat. § 116B.04(b).

The essence of appellant’s MERA claim is that (1) the Witch’s Hat Tower, including its viewshed, is a historical resource, and (2) the project will impair that resource by impeding views of and from the Witch’s Hat Tower.<sup>2</sup> The city largely accepted the historical significance of the tower but extensively addressed the second—equally dispositive—issue both in approving the land-use application and in denying the EAW petition.

### **Land-Use Proceeding**

The record reflects that the city considered the likely effect of the project on views of and from the Witch’s Hat Tower at every stage of the land-use proceeding. First, the CPED made express findings regarding the project’s impact on the tower. It found that most views would be unaffected, and that the project would not impair views of the tower appreciably more than other structures permitted under existing zoning. And the CPED found that the project would not impair views from the tower because the project would not obstruct “[s]ignificant views of public spaces and notable buildings . . . most notably, the view of Downtown Minneapolis.” The planning commission considered and adopted these findings in approving the project.

---

<sup>2</sup> Appellant does not contend, and there is no evidence, that the project will otherwise impair or destroy the Witch’s Hat Tower.

Second, the two appeals raised the MERA issue again. The appeals faulted the planning commission for not further considering the impact of the project on the views of and from the tower and urged the city council to consider the project's impact on "views of the Witch's Hat within its immediate vicinity and . . . how the water tower is perceived within the urban skyline" and the tower's "viewshed." The Amel-Lindt appeal cited MERA as a reason for considering these impacts. The planning commission conducted a public hearing at which Porte, Amel, and Lindt had an opportunity to present their arguments regarding the project's impact on views of and from the Witch's Hat Tower. And the city council considered those arguments, ultimately acknowledging that some "screening" measures are warranted but accepting the CPED's finding that the project will have minimal visual impact on the neighboring tower.

Appellant contends the city's analysis of the project's impact on Witch's Hat Tower views cannot preclude its MERA action because the city's written decision did not expressly reference MERA and the concept of "material, adverse effect." We are not persuaded. The city expressly addressed the very factual issue that is the basis for appellant's MERA claim—whether the project impairs views of and from the tower. *See Graham*, 472 N.W.2d at 116-17 (holding former teacher's defamation claim collaterally estopped because previous quasi-judicial decision addressed the same underlying factual issue regarding the teacher's conduct). We discern no meaningful distinction between the city's determination that the project will have no more than minimal impact on such views, particularly with the conditions it imposed to mitigate that impact, and a determination that the project will have no material, adverse effect on the viewshed.

## **EAW Proceeding**

The EAW petition raised three issues but focused principally on appellant's MERA claim. The petition expressly invoked MERA. It cited *Schaller*'s five-factor test for assessing the "material, adverse effect" standard, stating: "We are petitioning for an EAW to determine if [the project] 'materially and adversely affects the environment' as described by these five factors." And the petition highlighted impairment of "views *from* and *of* the historic Tower" as the central concern.

In evaluating the petition, the city was charged with considering whether, "because of the nature or location of [the project], there may be potential for significant environmental effects." Minn. Stat. § 116D.04, subd. 2a(e) (2018); Minn. R. 4410.1100, subp. 6 (2019). Environmental effects are considered broadly, including effects on "artifacts or natural features of historic, geologic, or aesthetic significance." See Minn. R. 4410.0200, subp. 23 (2019) (defining "environment"). The city applied the EAW standard and found no potential for significant environmental effects, rejecting appellant's argument that the project will materially, adversely affect views from and of the tower—the same issue appellant presents in its MERA action.

### **B. The issue of the project's effect on views from and of the tower was properly before the city.**

A quasi-judicial decision precludes relitigation of an issue only if the issue was "necessary to the agency adjudication and properly before the agency." *Graham*, 472 N.W.2d at 116 (citing *United States v. Utah Constr. & Min. Co.*, 384 U.S. 394, 86 S. Ct. 1545 (1966)). Even if the agency did not have jurisdiction to decide the precise legal claim

to be precluded, collateral estoppel may apply if a controlling issue was presented to the agency and within its purview to decide. *Id.* at 117; *see also Cent. Baptist*, 487 N.W.2d at 532 (concluding that this requirement was satisfied when “considerations” that were “critical” to the prior quasi-judicial decision and were also “critical” to the current claim).

The issues appellant raises in its MERA claim were properly before the city in both the land-use proceeding and the EAW proceeding.

### **Land-Use Proceeding**

As discussed above, the city repeatedly addressed the project’s impact on views of and from the Witch’s Hat Tower. It was required to, and did, consider such impacts as part of its standard land-use analysis. *See* Minneapolis, Minn., Code of Ordinances (MCO) §§ 525.340 (requiring consideration of whether proposed use will be “injurious to the use and enjoyment of other property in the vicinity” before issuing a conditional-use permit), 548.110 (requiring consideration of “[p]reservation of views of landmark buildings, significant open spaces or water bodies” before issuing conditional-use permit to increase maximum height) (2018). Accordingly, the project’s impact on the Witch’s Hat Tower, including the viewshed, was both properly before the city and necessary to its appraisal of Vermilion’s application. And the appeals again asked the city to consider the issue, pointing to city policy and state law, including MERA. That appellant disagrees with the city’s finding that the expected impact of the project on views of and from the Witch’s Hat

Tower would be minimal, does not change the fact that the issue was properly presented and actually decided.<sup>3</sup>

### **EAW Proceeding**

The city was required to grant an EAW in response to appellant's petition if (1) the project was not exempt and (2) "because of the nature or location of a proposed project, the project may have the potential for significant environmental effects." Minn. R. 4410.1000, subp. 3.B (2019). The EAW petition therefore properly presented both of those issues to the city, and the city decided both. Appellant is correct that the city could have denied the petition based solely on a determination that the project was exempt because all governmental decisions had been made. *See* Minn. R. 4410.4600, subp. 2.B (2019). But since a failure on either factor would have required the city to deny the petition, both factors were properly before the city to decide.

### **C. The city rendered final decisions on the merits.**

Collateral estoppel applies only if the prior quasi-judicial decision was final and subject to judicial review. *Friends of the Riverfront*, 751 N.W.2d at 589. The finality

---

<sup>3</sup> Appellant also suggests that it faced a catch-22, in which it was required to "participate" in the administrative proceedings to "exhaust administrative remedies" but risked losing its MERA claim to collateral estoppel if it did so. We disagree. Appellant was not required to present its MERA claim in the land-use proceeding to exhaust administrative remedies because a MERA claim is not an administrative remedy. *Compare Zaluckyj v. Rice Creek Watershed Dist.*, 639 N.W.2d 70, 76 (Minn. App. 2002) (affirming denial of mandamus petition regarding ditch repair because petitioners failed to exhaust administrative ditch-repair remedies), *review denied* (Minn. Apr. 16, 2002), *with Swan Lake*, 711 N.W.2d at 525 (recognizing that administrative process regarding drainage is distinct from and need not be used before a MERA action). Appellant elected to present its MERA claim in the land-use proceeding and in the EAW proceeding, and elected not to appeal either decision.

factor is necessary for the quasi-judicial decision to be the equivalent of a court decision, making application of the preclusive doctrine fair and equitable. *See In re Application of N. States Power Co.*, 440 N.W.2d 138, 142 (Minn. App. 1989).

### **Land-Use Proceeding**

Appellant argues that the city's land-use decision was not final because the approval was contingent on ongoing conditions. We disagree. When a city's governing body—here, the Minneapolis City Council—makes a quasi-judicial decision regarding a land-use matter, it is subject to judicial review in district court. *See* Minn. Stat. § 462.361, subd. 1 (2018). Appellant cites no authority for the proposition that attaching conditions to the decision alters that result, and we discern none. To the contrary, the city's ordinances expressly contemplate that the city will issue land-use decisions that include conditions. *See* MCO §§ 525.350 (permitting the city to impose conditions and require guarantees as “reasonable and necessary to protect the public interest” when issuing a conditional-use permit), .510 (same for a variance) (2018). Appellant could have challenged the city's approval of the project, including the conditions it attached to that approval, in district court. *See* Minn. Stat. § 462.361, subd. 1. But appellant declined to do so.

### **EAW Proceeding**

Regarding the EAW decision, appellant argues that the city's denial of the petition “ultimately rests on its zoning decisions,” and therefore is also not final. This conditional argument is unavailing because the city's land-use decision was final. But it also fails on its own merit because denial of an EAW petition is a final appealable decision, regardless of the reason for the decision. Minn. Stat. § 116D.04, subd. 10 (2018).



In sum, appellant has not demonstrated that the district court erred in applying collateral estoppel to dismiss this MERA action.

**Affirmed.**