This opinion is nonprecedential except as provided by Minn. R. Civ. App. P. 136.01, subd. 1(c).

STATE OF MINNESOTA
IN COURT OF APPEALS
A24-0804

State of Minnesota by Peters Sunset Beach, Inc., et al.,
Appellants,

vs.

Pope County,
Respondent.

Filed December 9, 2024
Affirmed; motion to supplement record denied and motion to strike granted
Bjorkman, Judge
Concurring specially, Larson, Judge

Pope County District Court
File No. 61-CV-22-310

James P. Peters, Law Offices of James P. Peters, PLLC, Glenwood, Minnesota (for appellants)

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Considered and decided by Larson, Presiding Judge; Worke, Judge; and Bjorkman, Judge.

NONPRECEDENTIAL OPINION

BJORKMAN, Judge

Appellants challenge the summary judgment dismissing their claims against respondent-county under the Minnesota Environmental Rights Act (MERA), Minn. Stat. § 116B.01-.13 (2022), arguing that (1) the district court erred in concluding that Minn. Stat.

§ 116B.10 does not permit an action against respondent, and (2) genuine issues of material fact preclude summary judgment as to their claim under Minn. Stat. § 116B.03. They also challenge the district court's denial of their motion to amend the complaint and move this court to consider two documents not included in the district court record. Respondent moves this court to strike references to one of the extra-record documents in appellants' reply brief. We deny the motion to supplement the record and grant the motion to strike, and we affirm.

FACTS

This appeal concerns a section of County State Aid Highway 17 that runs along the shore of Lake Minnewaska and is known as South Lakeshore Drive (the highway). The highway has two driving lanes and residential speed limits. It has no "clear zone" along its edge, so many trees and other obstacles are located near the highway. Pedestrians cross the highway to access the lake, particularly near the historic resort operated by appellant Peters Sunset Beach Inc. (Peters), which sits across the highway from the lake.

Respondent Pope County (the county) proposes to reconstruct the highway. The proposed reconstruction project (the project) involves replacing the highway with a newly paved roadway that will be within the existing right-of-way; have two ten-foot driving lanes and three-foot paved shoulders; and have the same speed limits. The project also calls for a new five-foot clear zone, necessitating the removal of trees along the highway.[1]

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[1] The Minnesota Department of Transportation (MnDOT) granted variances allowing the driving lanes to be narrower than the standard 11 feet and the clear zone to be narrower than the standard nine feet.

In September 2022, Peters and two other businesses along the highway that oppose the project, appellants Sunset Beach Cottage Owners Association Inc. and Pezhekee Inc. (collectively, the businesses), initiated this action against the county under two MERA provisions, Minn. Stat. § 116B.03 (civil action against any actor) and Minn. Stat. § 116B.10 (civil action against the state or its instrumentalities). The complaint alleges that the project will increase the roadway's impervious surface area by 30 to 40 percent and thereby adversely affect water resources, public safety, historical and cultural resources, quietude, human health, air quality, and scenic and aesthetic resources. And the complaint seeks (1) a declaration that they have made a prima facie showing under MERA that the project will cause pollution, impairment, or destruction of natural resources; and (2) a permanent injunction against the project.[2]

Meanwhile, the county continued preparations for the project. In April 2023, the county determined that the project will comply with the shoreland-management ordinance and, because of expected changes in the flood-hazard map, also comply with its floodplain-management ordinance. The businesses did not appeal those determinations. And in mid-June, the Minnesota State Historic Preservation Office preliminarily opined that the project is unlikely to adversely affect "the integrity of [Peters's historic resort]" but requested an "opportunity to review the final design plans."

[2] The businesses also sought temporary relief to prevent the county from removing trees near the highway, which the district court denied. The businesses did not appeal the denial of injunctive relief.

At the end of July, the businesses moved to amend their complaint to add allegations that the project violates the county's shoreland-management and floodplain-management ordinances and to assert those alleged violations as additional bases for their MERA claims and as independent causes of action. Almost simultaneously with the businesses' motion, the county moved for summary judgment on the MERA claims. The county also opposed the motion to amend the complaint, arguing that amendment would be futile. The district court conducted a hearing on both motions in September.

Over the next several months, while the motions were pending, the county secured various permits and approvals for the project. First, the Minnesota Pollution Control Agency (MPCA) granted the county coverage for the project under a general permit to discharge stormwater associated with construction activity; as part of the permit, the MPCA required the county to develop a storm-water pollution-prevention plan. Thereafter, MnDOT gave final approval for the project; the historic-preservation office gave its final confirmation that the project is unlikely to adversely affect the historic resort; and the county issued shoreland-alteration and floodplain-development permits for the project. The businesses appealed the permitting decisions to the county board of adjustment, which upheld the decisions. The businesses then appealed the board of adjustment's decision to the district court in a separate matter.[3]

[3] The district court affirmed the board of adjustment. *Peters Sunset Beach, Inc. v. County of Pope*, No. 61-CV-24-151 (Minn. Dist. Ct. Oct. 31, 2024). The record before the district court in this matter contains only evidence of the appeal to the board of adjustment, not the subsequent district court appeal. But the parties address the district court appeal in their briefing, and it is a matter of public record.

Shortly after the MPCA granted coverage under the general permit, the county brought it to the district court's attention, and the district court reopened the record to receive evidence of the additional developments regarding the project, including the businesses' permitting appeal. The district court took the matter under advisement in early January 2024 and thereafter issued a written decision addressing both of the pending motions. It granted summary judgment, reasoning that (1) the businesses cannot pursue relief against the county under Minn. Stat. § 116B.10 because that provision only permits an action against the state or a state agency or instrumentality; (2) the language of Minn. Stat. § 116B.03 prevents the businesses from pursuing relief against the county for any action taken pursuant to the MPCA permit, which precludes claims pertaining to water issues; and (3) the businesses' other claims under Minn. Stat. § 116B.03 concern claims of pollution, impairment, or destruction of resources outside the ambit of MERA or for which there is no evidence. And the district court denied the motion to amend the complaint as futile because (1) to the extent the proposed amendments bear on MERA claims, they fail under the MERA summary-judgment analysis; and (2) to the extent they assert non-MERA challenges to the county's exercise of its zoning authority, they are outside the district court's subject-matter jurisdiction.

The businesses appeal.

DECISION

I. We deny the businesses' motion to consider two extra-record documents and grant the county's motion to strike references to one of those documents.

The businesses move this court to consider two documents that were not presented to the district court: (1) a September 2022 email between MPCA staff regarding a conversation with the county engineer; and (2) a version of the county engineer's May 2023 report for the project, as well as metadata from the pdf of the report. The county opposes this motion to effectively supplement the record; it also notes that the businesses referred to and included an image of the email in their reply brief and moves this court to strike those portions of the reply brief.

The record on appeal consists of "[t]he documents filed in the [district] court, the exhibits, and the transcript of the proceedings, if any." Minn. R. Civ. App. P. 110.01. "An appellate court may not base its decision on matters outside the record on appeal, and may not consider matters not produced and received in evidence below." *Thiele v. Stich*, 425 N.W.2d 580, 582-83 (Minn. 1988). We will strike documents in a party's brief that are not in the appellate record. *Est. of King*, 992 N.W.2d 410, 415 (Minn. App. 2023).

The businesses first argue that we should "correct[]" the record under Minn. R. Civ. App. P. 110.05 by considering the documents they proffer. But the documents were not erroneously omitted from the record; they were never presented to the district court. As such, rule 110.05 does not apply. They next ask us to take judicial notice of the documents, invoking the principle that an appellate court may take judicial notice of "public records" and "look beyond the record where the orderly administration of justice commends it."

Eagan Econ. Dev. Auth. v. U-Haul Co. of Minn., 787 N.W.2d 523, 530 (Minn. 2010) (quotation omitted). The businesses contend the documents in question are properly subject to judicial notice because they are "public documents created by government entities." But they cite no authority permitting an appellate court to take judicial notice of documents simply because they were created by public employees. To the contrary, the orderly administration of justice commends that we confine our review to the record presented to the district court. We therefore deny the businesses' motion to supplement the record and grant the county's motion to strike the portions of the businesses' reply brief that reference the extra-record MPCA email.

II. The county is entitled to summary judgment on the businesses' MERA claims.

Summary judgment is appropriate if the record shows there is "no genuine issue as to any material fact" and the moving party "is entitled to judgment as a matter of law." Minn. R. Civ. P. 56.01. We review a grant of summary judgment de novo to determine whether genuine issues of material fact exist and whether the district court properly applied the law. *Friends to Restore St. Mary's, LLC v. Church of St. Mary*, 934 N.W.2d 130, 134 (Minn. App. 2019), *rev. denied* (Minn. Nov. 19, 2019). In doing so, we view the evidence in the light most favorable to the party against whom summary judgment was granted. *SVAP III Riverdale Commons LLC v. Coon Rapids Gyms, LLC*, 967 N.W.2d 81, 84 (Minn. App. 2021).

The businesses argue that summary judgment is unwarranted because (1) the district court erred by concluding that Minn. Stat. § 116B.10 does not permit an action against the county, and (2) there are genuine issues of material fact as to whether they are entitled to relief under Minn. Stat. § 116B.03.

A. Under the facts of this case, the businesses cannot pursue an action against the county under Minn. Stat. § 116B.10.

Interpretation of a statute is a question of law that we review de novo. *State by Smart Growth Minneapolis v. City of Minneapolis*, 954 N.W.2d 584, 590 (Minn. 2021). When interpreting a statute, we seek to "ascertain and effectuate the intention of the legislature." Minn. Stat. § 645.16 (2022). We read statutory language according to its plain and ordinary meaning. *Smart Growth*, 954 N.W.2d at 590. We also consider the statute as a whole and interpret each section in light of surrounding sections "to avoid conflicting interpretations." *White Bear Lake Restoration Ass'n ex rel. State v. Minn. Dep't of Nat. Res.*, 946 N.W.2d 373, 383 (Minn. 2020). "If the legislative intent is clear, we apply the statute's plain meaning." *Id.* at 379.

MERA announces "that each person is entitled by right to the protection, preservation, and enhancement of air, water, land and other natural resources," and provides for declaratory or equitable relief for those who seek to protect these resources "from pollution, impairment, or destruction." Minn. Stat. §§ 116B.01, .07. One means of obtaining this relief is an action "against the state or any agency or instrumentality thereof" under Minn. Stat. § 116B.10, subd. 1. The businesses argue that—as a matter of law—a county is an "agency or instrumentality" of the state under this provision because counties and other political subdivisions are creations of the state. We are not persuaded by this categorical argument for two reasons.

First, while MERA does not define "agency or instrumentality" of the state, the terms "agency" and "instrumentality" commonly indicate not merely a government creation but an entity that is part of the government in question and authorized to act on its behalf. *See The American Heritage Dictionary of the English Language* 32, 910 (5th ed. 2018) (defining "agency" as "[a]n administrative division of a government" and "instrumentality" as a "subsidiary branch, as of a government, by means of which functions or policies are carried out"); *see also In re Restorff*, 932 N.W.2d 12, 19 (Minn. 2019) ("In the absence of statutory definitions, [courts] often look to dictionary definitions to determine the plain meaning of a statute's terms."). Indeed, MERA itself distinguishes between a "political subdivision of the state" and an "instrumentality or agency of the state" by listing them separately as potential defendants in an action under Minn. Stat. § 116B.03, subd. 1. This plain language shows that the legislature did not intend for counties to be *always* subject to suit under Minn. Stat. § 116B.10.

Second, the businesses present us no reason to conclude that, despite this plain language, the county is a proper defendant in this suit. They purport to identify numerous cases allowing "MERA claims to proceed" against counties and cities; none of the cited cases involves a claim under Minn. Stat. § 116B.10, let alone embraces the interpretation of that statute that they urge. And the businesses do not assert, as a matter of fact, that even if counties are not always agencies or instrumentalities of the state, the county is acting as such for purposes of the project. Accordingly, we need not decide what facts would satisfy such an assertion.

In sum, because Minn. Stat. § 116B.10 plainly permits an action only against the state or an agency or instrumentality that is acting on behalf of the state, and the businesses advance no claim that the county is such an actor, we conclude that the businesses cannot pursue an action against the county under that provision.[4]

B. The businesses' claims under Minn. Stat. § 116B.03 fail as a matter of law.

MERA also provides that any person may bring an action "in the name of the state of Minnesota against any person" to protect "natural resources" in the state from "pollution, impairment, or destruction." Minn. Stat. § 116B.03, subd. 1. In challenging summary judgment on their claims under this provision, the businesses focus on their allegations that the project will pollute, impair, or destroy (1) water resources, (2) public safety, and (3) historical resources.[5] None of the businesses' arguments persuade us to reverse.

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[4] We also observe that the legislature not only identified the possible defendants in an action under this provision of MERA but also specified the type of decision subject to challenge—"an environmental quality standard, limitation, rule, order, license, stipulation agreement, or permit promulgated or issued by the state or any agency or instrumentality thereof for which the applicable statutory appeal period has elapsed." Minn. Stat. § 116B.10, subd. 1. The businesses do not address this equally important statutory criterion.

[5] The district court also rejected the businesses' allegations that the project will pollute, impair, or destroy cultural resources, human health, air quality, and scenic and aesthetic resources. Because the businesses do not address the district court's rejection of these bases for their MERA claim in their appellate briefs, they have forfeited any argument on those issues. *Ward v. El Rancho Manana, Inc.*, 945 N.W.2d 439, 448 (Minn. App. 2020), *rev. denied* (Minn. Sept. 29, 2020).

Water Resources

While Minn. Stat. § 116B.03 has a broad reach, *White Bear Lake Restoration*, 946 N.W.2d at 379-80, it also has an exception. "[N]o action shall be allowable [under Minn. Stat. § 116B.03] for conduct taken by a person pursuant to any . . . permit issued by [the MPCA]." Minn. Stat. § 116B.03, subd. 1. This no-action clause "bars" actions against "permit holders operating *in compliance with* a permit." *White Bear Lake Restoration*, 946 N.W.2d at 383-84.

The district court determined that the no-action clause bars the businesses from bringing a MERA claim based on the project's impact to water resources because any such impact would result from conduct the county undertook pursuant to the MPCA permit. The businesses criticize this determination but do not argue that the alleged impacts to water resources would not be the result of stormwater runoff—the conduct governed by the MPCA permit—or otherwise directly address whether the no-action clause applies.

Instead, they recount factual disputes regarding the project's anticipated effect on water resources (in particular, the increase in impervious surface area and resulting stormwater runoff), which would be material only if the no-action clause did not apply. And they cite inapposite caselaw and other MERA provisions that do not disturb application of the no-action clause. The businesses' reliance on *White Bear Lake Restoration* is misplaced; that case holds only that the no-action clause does not insulate the state agency that issues the permit, a situation that is not present in this case. 946 N.W.2d at 384-85. Similarly, their invocation of the MERA provision stating that the rights and remedies in MERA are "in addition to any administrative, regulatory, statutory, or common law rights and remedies," Minn. Stat. § 116B.12, has no bearing on whether the no-action clause applies in this instance. They also argue that "even if some aspects of the project have received permits, [they] are still entitled to pursue their broader MERA claims" regarding the project, which is a proposition *consistent* with the determination that the no-action clause bars only water-related claims. And their contention that the MPCA permitting process was flawed because the county misrepresented the project to the MPCA and they had "no meaningful chance" to participate in the MPCA permitting process, challenges the MPCA's decision to grant the permit, not the county's actions in undertaking the project pursuant to the permit.

In sum, because the businesses do not dispute that the county's conduct affecting water resources will be undertaken "pursuant to" the MPCA permit, the no-action clause bars their claims related to the project's effect on water resources.

Public Safety

If the no-action clause does not bar suit, a plaintiff may move forward with a MERA claim under Minn. Stat. § 116B.03 only if they make a prima facie showing that the defendant's conduct "has, or is likely to cause the pollution, impairment, or destruction of the air, water, land or other natural resources located within the state." Minn. Stat. § 116B.04(b). To do so, they must show "(1) a protectable natural resource, and (2) pollution, impairment or destruction of that resource." *Smart Growth*, 954 N.W.2d at 594 (quotation omitted).

With respect to the first requirement, MERA defines "natural resources" as including, but not limited to, "all mineral, animal, botanical, air, water, land, timber, soil, quietude, recreational and historical resources." Minn. Stat. § 116B.02, subd. 4. Looking principally to this definition, the district court determined that public safety is not a "natural resource" within the scope of MERA. To persuade us otherwise, the businesses advance three arguments.

First, they argue that MERA expressly recognizes recreational resources as natural resources and harm to public safety will harm recreational resources. But they did not present this argument to the district court. We generally consider only those arguments presented to and decided by the district court. *Thiele*, 425 N.W.2d at 582. Even if we entertained the argument, it would fail. The possibility that public-safety issues may impair the ability to recreate does not mean that public safety is, itself, a natural resource such that impairment of public safety can independently support a MERA claim.

Second, the businesses assert that public safety is a natural resource because it is part of the environmental review that the Federal Highway Administration (FHA) conducts for road projects. This argument is unavailing. The businesses cite only a single page from FHA's website that broadly addresses safety, not safety as a natural resource or other environmental consideration. And they identify no legal authority in support of importing FHA standards into MERA's definition of natural resources.

Finally, the businesses contend public safety should be considered a MERA natural resource because MERA "must be broadly construed to effectuate its sweeping remedial purposes." But construing the MERA definition of "natural resources" broadly does not mean that it has no limits; the resource in question must be part of the environmental milieu that MERA seeks to protect. *See Stansell v. City of Northfield*, 618 N.W.2d 814, 820

(Minn. App. 2000) (stating that "economic and cultural factors" are "beyond MERA's intended scope"), *rev. denied* (Minn. Jan. 26, 2001); *see also* Minn. Stat. § 116B.01 (describing as part of MERA's purpose "creat[ing] and maintain[ing] within the state conditions under which human beings and nature can exist in productive harmony").

In sum, because the businesses have not demonstrated that public safety is a "natural resource" within the scope of MERA, their MERA claim premised on impairment of public safety fails as a matter of law.

Historical Resources

MERA identifies "historical resources" as natural resources within its scope. Minn. Stat. § 116B.02, subd. 4. Still, a plaintiff asserting a claim under Minn. Stat. § 116B.03 must be able to show that the defendant's conduct has or is likely to pollute, impair, or destroy a historical resource. *Smart Growth*, 954 N.W.2d at 594.

The district court determined that, while the resort whose property abuts the highway is a historical resource, there are no genuine fact issues material to the question of whether the project will pollute, impair, or destroy that historical resource because the project will occur entirely within the highway's existing right-of-way. The businesses argue that several documents in the record show a fact issue.

They first point to historical documents (the most recent from 2010) that demonstrate longstanding community support for the resort, nostalgia for the highway's origin as a cartway, and opposition to any changes to the highway. None presents a fact issue as to the project's effect on a historical resource. Because the documents are all more than a decade old, none actually addresses the project itself. And more importantly, none even suggests that the highway is itself a historical resource or that its reconstruction within the existing right-of-way will adversely affect the historic resort.

The businesses also point to an expert report stating that the updated roadway will "isolat[e]" the historic resort from the lake. But this is neither an impairment of the resort's historical features nor a result of the project, as the highway already sits between the resort and the lake. Also, to the extent that the businesses argue that the project will impair the desirability and, by extension, the financial prospects of the historic resort, that economic consideration is outside the scope of MERA. *See Stansell*, 618 N.W.2d at 820 (stating that "historical resources" excludes economic and cultural factors, which are "beyond MERA's intended scope").

Finally, the businesses argue that the historical preservation office's late-2023 opinion that the project will not adversely affect the historical features of the resort cannot eliminate fact issues as to the project's effect on historical resources. They criticize that opinion as inconsistent with the office's "initial[]" statement that the project "does have the potential to adversely affect" the resort. But that statement was rendered in November 2022 as an informal response to the businesses' description of the project. That the office later formed a different opinion, after formal review of the final project plan, does not undermine that opinion or otherwise suggest a fact issue as to the effect of the project on historical resources.[6]

[6] Within the businesses' discussion of historical resources in their reply brief, they mention "quietude," which is a natural resource within the scope of MERA. Minn. Stat. § 116B.02, subd. 4. But the businesses did not address quietude in their principal appellate brief, and the discussion in their reply brief is not responsive to any argument from the county, which

In sum, the no-action clause bars a claim based on the project's anticipated effects on water resources because of the MPCA permit, and the businesses have not demonstrated a genuine issue of material fact as to a prima facie case based on the project's effect on public safety or historical resources. Accordingly, the county is entitled to summary judgment on the businesses' claims under Minn. Stat. § 116B.03.

III. The district court did not commit reversible error by denying the businesses' motion to amend the complaint.

As applicable here, the rules of civil procedure permit a party to amend a pleading only with "leave of court" or the other party's written consent. Minn. R. Civ. P. 15.01. The court must "freely" give leave to amend "when justice so requires." *Id.* But "[a] plaintiff may not amend the complaint if the proposed amendment would be futile because it would serve no useful purpose." *U.S. Bank Nat'l Ass'n v. RBP Realty, LLC*, 888 N.W.2d 699, 705 (Minn. App. 2016), *rev. denied* (Minn. Apr. 18, 2017). This is the case if "the additional claim could not survive summary judgment." *Bebo v. Delander*, 632 N.W.2d 732, 740 (Minn. App. 2001), *rev. denied* (Minn. Oct. 16, 2001). On appeal, we review the denial of a motion to amend a pleading for an abuse of discretion. *U.S. Bank*, 888 N.W.2d at 705. We will not reverse absent an abuse of discretion that is "clear," *Bebo*, 632 N.W.2d at 740, and affects a party's substantial rights, Minn. R. Civ. P. 61.

The businesses challenge the district court's denial of their motion to amend the complaint to add allegations that the county will, in completing the project, violate its

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does not address the issue in its brief. Consequently, the businesses have forfeited any argument regarding quietude. *See Ward*, 945 N.W.2d at 448.

ordinances governing shoreland and floodplain management. In denying the motion to amend, the district court construed the amended complaint as bringing both MERA claims and zoning challenges based on the county ordinances.[7]

In denying the motion to amend with respect to the MERA claims, the district court concluded that amendment would be futile because the claims amount to additional allegations of adverse impacts on water resources under Minn. Stat. § 116B.03 and therefore are barred by the no-action clause because of the MPCA permit. The businesses do not argue that the district court's MERA analysis, including its application of the no-action clause, was in error. Accordingly, they have forfeited any such argument. *See Ward*, 945 N.W.2d at 448.

In denying the motion to amend with respect to the zoning challenges, the district court determined that it lacked subject-matter jurisdiction.[8] The businesses assert that this constitutes an abuse of discretion because the district court has jurisdiction to hear MERA and zoning claims "in tandem." This argument does not persuade us to reverse because, even if the district court abused its discretion by denying the motion to amend to include

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[7] In their memorandum in support of their motion to amend, the businesses asked the district court to apply this construction.

[8] We note that the district court applied its subject-matter jurisdiction analysis only to the zoning challenges, not the MERA claims. Nor could it apply this analysis to the MERA claims, as we have repeatedly concluded "that the availability of alternative administrative processes" does not preclude a district court's jurisdiction over a MERA claim. *State ex rel. Swan Lake Area Wildlife Ass'n v. Nicollet Cnty. Bd. of Cnty. Comm'rs*, 711 N.W.2d 522, 525 (Minn. App. 2006), *rev. denied* (Minn. June 20, 2006); *see also State ex rel. Fort Snelling State Park Ass'n v. Minneapolis Park & Recreation Bd.*, 673 N.W.2d 169, 177 (Minn. App. 2003), *rev. denied* (Minn. Mar. 16, 2004).

the zoning challenges, the businesses were not prejudiced as they were able to—and did—pursue these claims in their district court permitting appeal. *See* Minn. R. Civ. P. 61.

Affirmed; motion to supplement record denied and motion to strike granted.

LARSON, Judge (concurring specially)

I concur with the opinion of the court. With respect to the businesses' motion to amend the complaint, I agree the businesses failed to argue that the district court's application of the no-action cause was an error. I write separately to note my skepticism that the no-action clause would preclude a claim regarding shoreland and floodplain management when the permit the Minnesota Pollution Control Agency issued related solely to stormwater. *See Kennedy Bldg. Assocs. v. Viacom, Inc.*, 375 F.3d 731, 744 (8th Cir. 2004) ("Requiring a direct conflict with agency action to find preemption takes cognizance of both the language in section 116B.03, subd. 1 . . . and the language of Minn. Stat. § 116B. 12 . . . .").