STATE OF MINNESOTA

COUNTY OF DODGE

DISTRICT COURT
CIVIL DIVISION
THIRD JUDICIAL DISTRICT

State of Minnesota by Griselda Cuomo and Linda Jerviss,

Plaintiffs,

vs.

City of Kasson, a Minnesota Municipal Corporation,

Defendant.

Court File No. 20-CV-13-431

ORDER AND MEMORANDUM

The above-entitled matter came before the Honorable Christina K. Stevens, Judge of District Court, at the Olmsted County Government Center, Rochester, Minnesota, on the 11th day of July, 2013, on Plaintiffs' Motion for a Temporary Injunction. Erik Hansen of Patrick Burns & Associates, Minneapolis, Minnesota, and Anthony Moosbrugger of Moosbrugger Law Offices, Kasson, Minnesota, appeared on behalf of Plaintiffs. Shelley Ryan and George Hoff of Hoff, Barry, & Kozar, P.A., Eden Prairie, Minnesota, appeared on behalf of Defendant.

Based upon all of the evidence presented, arguments of counsel, and the entire file herein, this Court, being fully advised, makes the following:

ORDER

1. Plaintiffs' Motion for a Temporary Injunction is **GRANTED**. Defendant is temporarily enjoined from demolition of the Kasson Elementary School located at 101 3rd Avenue, Kasson, Minnesota, in whole or in part, pending further determination of this Court.

2. Plaintiffs shall post cash or bond in the amount of $50,000.00 by 3:00 p.m. on September 26, 2013. Said bond is to defray costs, in the form of damages that may be incurred by Defendant if Plaintiffs do not prevail on the merits.

3. A telephone scheduling conference shall occur on October 16, 2013, at 3:00 p.m.

4. The attached memorandum is incorporated herein.

September 6, 2013

BY THE COURT:

Christina K. Stevens
Judge of District Court

MEMORANDUM

BACKGROUND

The Kasson Public School, an "alphabet plan" school building,[1] was constructed in 1918 and served as a public school for the Kasson-Mantorville School District until it was closed in 1996. After several years of nonuse by the School District, the School was sold to the City of Kasson in 2005. Shortly after acquiring the School, the City commissioned a "space needs study and facility master plan" that ultimately recommended, among other things, relocating the city hall, library, and police department to the vacant School building. The aged building required significant renovation before city facilities could relocate to the School, and initial renovation estimates were approximately $3,295,936.00. Alternatively, the cost of demolishing the School and constructing a new building on the site was $3,399,000.00.

Armed with this information, the Kasson City Council began exploring possible methods of financing the School renovation. In 2006, after a recommendation by the Kasson Economic Development Authority, the City authorized a $3,900,000.00 bond referendum to raise funds for the School's renovation. By a vote of 1,026 to 904, City residents rejected the referendum proposal to fund the School's renovation by the issuance of general obligation bonds. Following the referendum's defeat, the City resolved to demolish the School, as it saw "no other economically viable uses" for the vacant building. Numerous preparations were made for demolition of the School, including an inspection of the building which determined that asbestos, lead, and other hazardous materials were present throughout. Additionally, in connection with

[1] The "alphabet plan" school building layout became prevalent in the early 20th Century and was defined by its footprint, which commonly "took the form of letters of the alphabet." This particular school layout heralded the introduction of additional "functional spaces" within a school, including "lunchrooms and . . . vocational training rooms." *An Honor and an Ornament: Public School Buildings in Michigan*, Mich. Dep't of History, Arts and Libraries 18 (2003), *available at* http://www.michigan.gov/documents/hal_mhc_shpo_Hist_Schools_summmary_75269_7.pdf.

assessing the need for an environmental assessment worksheet, the City adopted the opinion of a historian that the School was not historically significant.

In response to the City's plan to demolish the School, the Kasson Alliance for Restoration (KARE) brought suit under the Minnesota Environmental Rights Act (MERA), seeking to enjoin the demolition, arguing that the School is a historical resource. The court issued a temporary injunction on June 7, 2007, barring demolition of the School pending resolution of the matter. After negotiations between the City and KARE, the parties entered into a Settlement Agreement in 2008. Among other things, the Settlement Agreement required the City and KARE to complete a reuse study of the School building. The parties agreed that if the study identified "one or more viable, sustainable uses that . . . can be implemented within a reasonable period of time," then the City would not demolish the School until after August 31, 2011. Following the Settlement Agreement between the City and KARE, the court dismissed KARE's complaint with prejudice on September 24, 2008. It should be noted that during the pendency of the KARE case, the School building was placed on the National Register of Historic Places.

In 2009, a team was assembled to conduct a reuse study, per the 2008 Settlement Agreement. Later that same year, the team came back with their report, which recommended "that the community of Kasson should accept the challenge of rehabilitation [sic] the 1918 Kasson Public School Building as a multi-use library/community center." The City appointed a Citizen Task Force to investigate the reuse study recommendations and consider potential uses for the School building. Towards this end, the Citizen Task Force conducted a survey of Kasson citizens, and the results revealed that 58 percent of those who responded were in support of

reusing the School. The survey also showed that, of those who supported reusing the School, a majority favored using it as either a library or community center.

In 2010, the City created a Library Building Committee to consider reuse of the School as a public library, consistent with the reuse study recommendation. The Committee consulted with an architect who estimated this renovation would cost between $4,969,000.00 and $6,116,000.00. After this point, it is unclear what actions the City took towards implementing the reuse study recommendation. The City indicates that it applied for at least three grants to obtain funding, none of which were received. Beyond this, however, there is little information on other efforts undertaken by the City to accomplish reuse of the School building.

In any event, following a recommendation from the Kasson Public Library Board of Trustees, the City opted to continue with its plan to demolish the School and construct a new library facility in its place. After briefly listing the School for sale with no success, the City advertised demolition bids, for which it received ten bids ranging from $161,400.00 to $385,000.00. Shortly thereafter, the City accepted and suspended the lowest bid. During this time, the City also submitted an application to the Federal Emergency Management Agency for funds to construct a multi-purpose library and emergency shelter on the School site after demolition. The grant application sought $3,375,000.00 in FEMA funding, or 75 percent of the total project cost. The City is optimistic about this grant and contends that failure to complete demolition of the School will jeopardize its application for the same.

Upon learning of the City's plan to move forward with demolition of the School, Griselda Cuomo, Linda Jervis, and Marlyn Schroeder brought suit against the City to enjoin the demolition, asserting that the School is a historical resource—much as KARE did in 2007. On May 22, 2013, the Honorable Judge Joseph F. Wieners granted a Motion for Temporary

Injunction, enjoining demolition of the School pending further determination of the court. On June 5, 2013, after discovering that the plaintiffs failed to effectuate the requisite legal notice in bringing their action, as required by Minn. Stat. § 116B.03, subd. 2, the court dismissed the case for want of subject matter jurisdiction, and the temporary injunction was vacated.

On June 7, 2013, Griselda Cuomo and Linda Jervis filed the complaint in the present case, once again seeking to enjoin demolition of the School as a historical resource under MERA.[2] Along with their complaint, Plaintiffs also filed a Motion for Temporary Injunction pending resolution of this matter.

ANALYSIS

STATEMENT OF THE LAW

The purpose of a temporary injunction is to maintain the status quo until the parties have an opportunity to try their case on the merits. *Pickering v. Pasco Marketing, Inc.*, 228 N.W.2d 562, 565 (Minn. 1975). A temporary injunction may only be granted by the court where the moving party demonstrates "sufficient grounds" for the injunction. Minn. R. Civ. P. 65.02. (2012). Minnesota case law sets forth the required analysis the court must engage in when deciding whether "sufficient grounds" exist to justify the issuance of an order for temporary injunction. First, the moving party must show that it will suffer irreparable harm if the court declines to issue a temporary injunction and that it has no adequate remedy at law. *Unlimited Horizon Mktg., Inc. v. Precision Hub, Inc.*, 533 N.W.2d 63, 66 (Minn. App. 1995). An injury is irreparable if an award of monetary damages "alone could not suffice," *Morse v. City of Waterville*, 458 N.W.2d 728, 729 (Minn. App. 1990), and harm that the public would suffer may be considered in this analysis. *Metro. Sports Facilities Comm'r v. Minnesota Twins P'ship*, 638 N.W.2d 214, 225 (Minn. App. 2002) (finding no abuse of discretion where the district court

[2] Marlyn Schroeder, who was among the plaintiffs in the case dismissed on June 5, is not a party to the present case.

"consider[ed] harm to the public when deciding whether to grant . . . injunctive relief"). Failure to demonstrate irreparable harm is a sufficient basis on which to deny a motion for temporary injunction. *Morse*, 458 N.W.2d at 729. Second, if a party has shown irreparable harm, the court must then consider each of the five *Dahlberg* factors.

Irreparable Harm

There can be no question that Plaintiffs will suffer irreparable harm if a temporary injunction is not granted. There are two dimensions to the harm that would occur, and each is sufficient on its own to grant a temporary injunction. First, if the City is not enjoined, the demolition of the School would destroy the very subject matter of this litigation—it is difficult to imagine a harm that is more irreparable than this. More troubling, however, is the second dimension to the harm—if a temporary injunction is not granted, demolition of the School would not only result in the destruction of a mere building, but of a potentially invaluable historical landmark. If, as Plaintiffs contend, the School is a historical resource, then a failure to enjoin demolition would deprive the people of Minnesota of an irreplaceable monument whose benefits transcend the tangible.[3] Such things cannot be replaced, and once destroyed are forever gone. A monetary award would not remedy the harm. These harms, taken together, satisfy the threshold requirement of irreparable harm.

Dahlberg Factors

The second step of this analysis requires consideration of the now-ubiquitous *Dahlberg* factors, which are as follows:

1. The nature and background of the relationship between the parties preexisting the dispute giving rise to the request for relief;

[3] "History is the witness that testifies to the passing of time; it illumines reality, vitalizes memory, provides guidance in daily life and brings us tidings of antiquity." Marcus Tullius Cicero, *De Oratore II* ix. 36–38.

2. The harm to be suffered by plaintiff if the temporary restraint is denied as compared to that inflicted on defendant if the injunction issues pending trial;

3. The likelihood that one party or the other will prevail on the merits when the fact situation is viewed in light of established precedents fixing the limits of equitable relief;

4. The aspects of the fact situation, if any, which permit or require consideration of public policy expressed in the statutes, State and Federal; and,

5. The administrative burdens involved in judicial supervision and enforcement of the temporary decree.

Dahlberg Bros., Inc. v. Ford Motor Co., 137 N.W.2d 314, 321–22 (Minn. 1965) (citations omitted). A consideration of each factor leads to the conclusion that there are "sufficient grounds" for a temporary injunction in this case.

1. Relationship Between the Parties

This factor is designed to ascertain the current status of the parties in relation to one another, and then determine whether entering a temporary injunction will maintain that relationship "until adjudication of the case on the merits." *Pac. Equip. & Irr., Inc. v. Toro Co.*, 519 N.W.2d 911, 915 (Minn. App. 1994); *Yager v. Thompson*, 352 N.W.2d 71, 74 (Minn. App. 1984). More simply put, this factor looks to whether granting an injunction will truly maintain the status quo. *Yager*, 352 N.W.2d at 74.

For quite some time now, the City has been making preparations to demolish the School and construct a new public facility in its stead. The School remains intact, but the City has made its desire to demolish the building known. Plaintiffs are actively seeking to prevent demolition of the School, which is what prompted them to bring the present action. Granting a temporary injunction will preserve this status quo until a resolution on the merits—the City will be prevented from demolishing the building and Plaintiffs will be allowed to proceed without

having their claim rendered moot. Therefore, this factor weighs in favor of granting a temporary injunction.

2. Comparative Harms

The second *Dahlberg* factor requires the court to consider "the harm to be suffered by the moving party if the preliminary injunction is denied as compared to that inflicted on the non-moving party if the injunction issues pending trial." *Yager*, 352 N.W.2d at 74. Generally, the moving party must show "irreparable harm" to prevail on this factor, and the non-moving party need only show "substantial harm" to bar an injunction altogether. *Toro Co.*, 519 N.W.2d at 915.

As discussed, Plaintiffs will suffer irreparable harm if a temporary injunction is not granted. In order to overcome Plaintiffs' showing of irreparable harm, the City must demonstrate that it will suffer a substantial harm if enjoined from demolishing the School. The City identifies a number of harms that it will suffer, should this occur: (1) potential loss of FEMA funding, (2) risk of losing bargain bid prices for demolition, and (3) additional maintenance costs incurred in connection with preserving the School pending resolution on the merits. While these harms are significant, they do not rise to the level of "substantial harm." The first harm, jeopardizing FEMA grant funding, is a speculative and impermanent injury. While the City is optimistic that they will receive the grant funds, it is far from certain.[4] Moreover, even if the City does lose FEMA funding because of the temporary injunction, the record is devoid of any evidence that suggests the City would be unable to apply for similar funding in the future. The latter two harms, loss-of-bargain and additional maintenance costs, are adequately protected with Plaintiffs positing of a bond. Because Plaintiffs have demonstrated that they will suffer irreparable harm if

[4] An email correspondence between Anne Danysh, agent of the City, and Matti Gurney, Minnesota Homeland Security and Emergency Management employee, is enlightening in this respect. In the relevant email, Ms. Gurney indicates that there has been "considerable interest" in the grant funding that the City is applying for, and they may "end up ranking projects and funding would be dependent on how the applicant ranked." Aff. Anthony Moosbrugger Ex. A (June 28, 2013).

a temporary injunction is not granted, and the City will not suffer substantial harm if a temporary injunction *is* granted, this factor weighs in favor of granting a temporary injunction.

3. Success on the Merits

This particular factor requires the court to assess the moving party's likelihood of success on the merits. *Toro Co.*, 519 N.W.2d at 915. Even where the moving party makes a "doubtful showing as to the likelihood of success on the merits," the court can nonetheless issue a temporary injunction if the other factors weigh in favor of doing so. *See Minnesota Twins P'ship*, 638 N.W.2d at 226. Plaintiffs bring their claim for equitable relief under the MERA, and in order to make a prima facie case they must establish that (1) the School is "a protectable resource" within the meaning of MERA, and (2) the City's proposed actions "will inflict a material adverse effect on the protectable resource." *State ex rel. Fort Snelling State Park Ass'n v. Minneapolis Park & Recreation Bd.*, 673 N.W.2d 169, 174 (Minn. App. 2003); Minn. Stat. § 116B.04 (2012).

A. Protectable Resource

Protected natural resources, for the purposes of MERA, include "all mineral, animal, botanical, air, water, land, timber, soil, quietude, recreational and *historical* resources." *Id.* (emphasis added). The term "historical resource" is not defined in MERA, but the Minnesota Supreme Court has referred to criteria considered by the National Park Service in selecting sites to be placed on the NRHP for guidance. *State by Powderly v. Erickson*, 285 N.W.2d 84, 88 (Minn. 1979). Under these criteria, the National Park Service considers the following characteristics of a site:

> The quality of significance in American history, architecture, archeology, engineering, and culture is present in districts, sites, buildings, structures, and objects that possess integrity of location, design, setting, materials, workmanship, feeling, and association and

(a) that are associated with events that have made a significant contribution to the broad patterns of our history; or

(b) that are associated with the lives of persons significant in our past; or

(c) that embody the distinctive characteristics of a type, period, or method of construction, or that represent the work of a master, or that possess high artistic values, or that represent a significant and distinguishable entity whose components may lack individual distinction; or

(d) that have yielded, or may be likely to yield, information important in prehistory or history.

36 C.F.R. § 60.4 (2012). The fact that a site has already been placed on the NRHP using these criteria may be considered to determine whether a site is a historic resource. *See State by Archabal v. Cnty. of Hennepin*, 495 N.W.2d 416, 418 (Minn. 1993) (noting that the Minneapolis National Guard Armory was on the NRHP when determining whether the Armory was a "historic resource").

The National Register of Historic Places registration form prepared by Daniel J. Hoisington in 2007 provides a wealth of information on the history of the School, from which it is evident that the building falls within the NRHP criteria. *See* Aff. Daniel J. Hoisington Ex. B. Specifically, the School served as the sole educational institution in Kasson for forty years, and is significant for its "association with the broad patterns of our history in the areas of education and social history." *Id.* The school embodied an era of rapid development in the American Midwest in the early 20th Century, where new federal policies and the advent of the railroad were a boon to rural communities like Kasson. *Id.* At the center of this particular community was the School, and it played a significant role in an important era of Minnesota history. For example, in the early 20th Century the federal government began vigorously promoting "the teaching of agriculture" through extension programs. *Id.* The School was used in connection with these programs to provide agricultural education in the community, which in turn contributed to

economic growth in Dodge County. *See id.* Because the School is "associated with events that have made a significant contribution to the broad patterns of our history"—the development of Midwestern agricultural communities in the early 20th Century—Plaintiff has made a prima facie showing that it is a historical resource protected by MERA.

At this juncture, it is worth noting that this court is not alone in its assessment of the School's historical character. As both Plaintiffs and the City have pointed out, on December 6, 2007, the School was listed on the NRHP. While the City has expressed its misgivings about this determination and purports to have requested the School's removal from the NRHP, the fact that the School was listed carries some weight. It represents a determination by the National Park Service that the School falls within the previously mentioned criteria, and is therefore worthy of protection as a historic place. Independent of the National Park Service determination, however, Plaintiffs have made a prima facie showing that the School is a historic resource. For present purposes, removal from the NRHP would not be dispositive, and the City's efforts to have the School removed are of no particular consequence.[5]

B. Material Adverse Effects

After showing that the subject matter in question is a protectable resource, a plaintiff seeking equitable relief under MERA must show that the defendant's proposed actions "will inflict a material adverse effect on the protectable resource." *Fort Snelling State Park*, 673 N.W.2d at 174; Minn. Stat. § 116B.04 (2012). When determining whether the proposed actions of a defendant will have a material adverse effect on a protectable resource, Minnesota courts traditionally weigh the following five factors:

[5] Indeed, simply requesting removal does not guarantee that a location listed on the NRHP will ultimately be stricken from the register. Among the possible reasons warranting removal, the National Park Service must determine that the challenged location no longer meets the NRHP criteria or did not meet them in the first place. 36 C.F.R. § 60.15 (2013).

> (1) The quality and severity of any adverse effects of the proposed action on the natural resources affected;
>
> (2) Whether the natural resources affected are rare, unique, endangered, or have historical significance;
>
> (3) Whether the proposed action will have long-term adverse effects on natural resources, including whether the affected resources are easily replaceable . . . ;
>
> (4) Whether the proposed action will have significant consequential effects on other natural resources . . . ;
>
> (5) Whether the affected natural resources are significantly increasing or decreasing in number, considering the direct and consequential impact of the proposed action.

See, e.g., *Fort Snelling State Park*, 673 N.W.2d at 176 (quoting *State by Schaller v. County of Blue Earth*, 563 N.W.2d 260, 267 (Minn. 1997)). These factors are not exclusive, nor is it necessary for all five factors to weigh in favor of finding a material adverse effect. *Id.*

Applied to the present case, the above-listed factors leave no doubt that the City's proposal to demolish the School would have a materially adverse effect on the building, which is a protectable resource. First, demolition would result in "adverse effects" whose "quality and severity" would be second-to-none. Proposals to photograph the School and retain building plans do little to mitigate the severe impact that demolition would have on the School as a historic resource. Second, as a protected historic resource, the School is "rare, unique, and endangered" by its very nature. Items and places of historic character derive their value from events and circumstances long past, which we cannot recreate. Third, because the School is an irreplaceable historic resource, destruction of it would have a long-term, adverse effect on the building—it would be permanently destroyed and any historic character would be lost to time. The final two factors are not particularly relevant to the present case.

Considering the discussed factors, Plaintiffs have made a prima facie showing that the City's proposal to demolish the School would have a materially adverse effect upon the same. As such, Plaintiffs have made a prima facie case for equitable relief under MERA: they have shown that (1) the School is a protectable resource and (2) the City's proposed actions would materially adversely affect it. The City, however, has raised a number of defenses that must be considered in assessing the merits of Plaintiffs' claim.

C. Defenses Asserted by the City

There are three primary defenses asserted by the City: (1) an affirmative defense provided by MERA, (2) claim preclusion (also known as res judicata), and (3) issue preclusion (also known as collateral estoppel).[6]

i. the MERA affirmative defense

A defendant may defeat a claim for equitable relief under MERA by showing that (1) there is no "feasible and prudent alternative" to the challenged course of conduct, and (2) the conduct is "reasonably required for promotion of the public health, safety, and welfare in light of the state's paramount concern for the protection of" its natural resources. Minn. Stat. § 116B.04 (2012). Economic concerns, without more, are not a defense to a MERA claim. *Id.* Cases applying the affirmative defense make it clear that the "protection of natural resources is to be given paramount consideration," and the defense is not available "unless there are truly unusual factors present" or the burdens imposed on the community by alternatives reach an "extraordinary magnitude." *Archabal*, 495 N.W.2d at 422 (quoting *Powderly*, 285 N.W.2d at 88).

[6] The City also argues that Plaintiffs' claim should not be heard because it is an improper attempt to reopen a judgment and is an untimely attempt to intervene in the KARE case. These arguments are premised on the notion that Plaintiffs are barred from bringing their current claim by the twin doctrines of claim and issue preclusion. Because the court concludes that these doctrines do *not* operate to bar Plaintiffs' case from being heard, the City's latter two arguments are not addressed.

a. feasible and prudent alternative

Plaintiffs assert that there are a number of alternative sites for the library-shelter that the City seeks to construct. The City counters by arguing that the alternative sites identified by Plaintiffs are inadequate because they are not sufficiently large, not centrally located, or serve another public purpose. In an email sent on June 19, 2013, however, Anne Danysh, agent of the City, indicates that "[t]he City is considering 8 other locations" for the library-shelter rather than the current location of the School. Aff. Anthony Moosbrugger Ex. A (June 28, 2013). This suggests that there are feasible alternatives to demolishing the School, despite the City's earlier protests, and therefore the City has not satisfied the first element of the statutory affirmative defense to a MERA claim.

b. promotion of public health, safety, and welfare

Even if there are no feasible and prudent alternatives to demolishing the School, the City has not demonstrated that doing so is "reasonably required for promotion of the public health, safety, and welfare in light of the state's paramount concern" for protecting natural resources. The City attempts to satisfy this element by arguing that construction of the library-shelter fulfills an existing need for a severe weather shelter in the city, and therefore promotes public health, safety, and welfare. The court does not dispute this—severe weather is an ever-present concern and a matter to be taken seriously. But simply demonstrating the existence of a public safety purpose is not sufficient, because this purpose must then be considered in light of the state's interest in protecting natural resources. Only "truly unusual factors" or a burden of "extraordinary magnitude" on the community can overcome the state's interest here. *Archabal*, 495 N.W.2d at 422.

There are no such truly unusual factors, nor would alternatives to building the proposed library-shelter on the School site impose a burden of extraordinary magnitude on the residents of the city of Kasson. If the City is prevented from demolishing the School, they will be burdened by continued maintenance costs. These costs represent an economic concern and, alone, cannot overcome the state's interest in protecting natural resources. In addition, the maintenance costs are hardly a "truly unusual" factor—they are an entirely ordinary consequence of caring for an aging structure. While the costs may be higher because of the School's age and state of disrepair, the fact that maintenance must be paid cannot be considered extraordinary.

Another consequence of being enjoined from demolishing the School is that the City will need to consider another location for the library-shelter and potentially jeopardize its eligibility for a FEMA grant. The court is not convinced that there is no reasonable alternative to building where the School is located. As already discussed, there may be suitable alternate sites available for construction. The primary benefit of building the library-shelter on the School site is that it is centrally located. Building the library-shelter elsewhere will result in it being less centrally located and require citizens to travel greater distances for shelter. Even so, the evidence does not support the conclusion that the shelter's utility would be so seriously undermined as to render it a burden of extraordinary magnitude on the community if it were to be constructed at an alternate location. Constructing the proposed library-shelter within or immediately around the city limits will not result in a significantly increased distance of travel for city residents.[7] In light of the state's weighty interest in protecting natural resources, demolition of the school is not reasonably required to promote public safety where it appears that adequate alternate sites are available.

[7] The City of Kasson occupies approximately three square miles. *Kasson (city), Minnesota*, U.S. Dep't of Comm., http://quickfacts.census.gov/qfd/states/27/2732498.html (last visited Aug. 5, 2013).

Thus, the City has also failed to establish the second element of the statutory affirmative defense to a MERA claim.

ii. claim preclusion

In general terms, claim preclusion—also known as res judicata—is an equitable doctrine that permits a party one opportunity to fully litigate his claims against a given opposing party. *See Hauschildt v. Beckingham*, 686 N.W.2d 829, 840 (Minn. 2004). If a party has already had a full and fair opportunity to litigate his case, subsequent claims may be barred. *Id.* The doctrine will prohibit a subsequent claim where: "(1) the earlier claim involved the same set of factual circumstances; (2) the earlier claim involved the same parties or their privies; (3) there was a final judgment on the merits; (4) the estopped party had a full and fair opportunity to litigate the matter." *Id.* All four elements must be satisfied in order for claim preclusion to apply. *Id.*

Here, the City argues that Plaintiffs' claim is precluded because there was a final resolution—by way of a settlement—of the claim by KARE against the City, which arose from the same set of circumstances. There is little disagreement about whether the same set of factual circumstances is at issue and whether there was a final judgment on the merits. Rather, the dispute is over whether Plaintiffs are in privity with KARE. Because this is the dispositive element in the present case, whether Plaintiffs are in privity with KARE is the only element warranting discussion.

This element of privity is satisfied if the same parties are involved in the present case, or if one of the parties is in privity with a party from the previous case. *Hauschildt*, 686 N.W.2d at 840. The law surrounding whether parties are in privity is unclear at best. In the end, parties are only in privity with one another if the interests of the absent party were "sufficiently represented in the first action so that the application of [claim or issue preclusion] is not inequitable." *State*

ex rel. Friends of Riverfront v. City of Minneapolis, 751 N.W.2d 586, 592 (Minn. App. 2008) (finding privity because plaintiffs intervened in previous city council proceedings and had interests identical to another party). Recognizing this, the Minnesota Court of Appeals has observed that an absent party is in privity with another where the absent party "'(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.* (quoting *State v. Lemmer*, 736 N.W.2d 650, 661 (Minn. 2007)).

Here, even if any of the aforementioned circumstances are present, the application of claim preclusion would be inequitable. First, there is no indication that Plaintiffs were directly or indirectly involved with the previous case. Although the KARE case was brought in the name of the State of Minnesota, the idea that Plaintiffs interests were sufficiently represented is a fiction. There is an ancient and storied policy of requiring that everyone be given their "day in court" that should not be abrogated by mechanical application of claim preclusion. *See, e.g.*, *Beutz v. A.O. Smith Harvestore Products, Inc.*, 416 N.W.2d 482, 485 (Minn. App. 1987), *aff'd and remanded*, 431 N.W.2d 528 (Minn. 1988) (quoting *Gollner v. Cram*, 102 N.W.2d 521, 525 (1960)). Second, if Plaintiffs are precluded from bringing their claim under MERA, it is unclear whether anyone else can or will bring a suit to enjoin demolition of the School. In the event that no one else does, the City's destruction of a historic building will occur without a trial on the matter. It would not be equitable to permit this. At issue here are serious matters of public policy, as set down in MERA itself, and permitting demolition without a trial would work an injustice on the people of Minnesota. Because of this, it would be inequitable to find privity between Plaintiffs in the present case and KARE, and the doctrine of claim preclusion does not apply.

Even if all four elements of claim preclusion were satisfied in the present case, the court would decline to apply it on the basis that it would be inequitable to bar Plaintiffs' claim. The doctrine of claim preclusion should not be "rigidly applied" where its application "would work an injustice on the party against home the doctrine[] [is] urged." *Hauschildt*, 686 N.W.2d at 837. Neither will the court apply claim preclusion where it would "contravene[] an overriding public policy" to do so. *Wilson v. Comm'r of Revenue*, 619 N.W.2d 194, 198 (Minn. 2000). The United States Supreme Court has cautioned that the doctrine should be "invoked only after careful inquiry" lest it "blockades unexplored paths that may lead to truth." *Brown v. Felsen*, 442 U.S. 127, 132 (1979); *Hauschildt*, 686 N.W.2d at 837 (quoting *Felsen* with approval). The City incorrectly asserts that claim preclusion is an "absolute bar" to relitigation of a claim. While many cases purport to say this, the fact remains that there is an equitable "safety valve" permitting the court to hear a claim where it would be inequitable not to. *See, e.g.*, *Felsen*, 442 U.S. at 132; *Hauschildt*, 686 N.W.2d at 837; *Wilson*, 619 N.W.2d at 198; *Johnson*, 420 N.W.2d at 613.

Many of the same concerns discussed when considering the equitability of finding privity between Plaintiffs and KARE apply with equal force when assessing the equitability of precluding Plaintiffs' claim. That Plaintiffs were not directly or indirectly involved in the previous KARE case is concerning to the court. The aforementioned concerns about whether anyone else will be motivated and able to challenge demolition of the School also causes the court to question the equitability of preclusion. More importantly, however, is the fact that an important public policy concern is at play in this case. In drafting MERA, the legislature espoused a strong public policy in favor of protecting natural resources, going so far as to refer to it as a "paramount concern." Subsequent cases interpreting MERA have made it clear that the

legislature meant what it said, and the policy in favor of protecting natural resources may only be contravened in truly extraordinary cases. *See, e.g.*, *Archabal*, 495 N.W.2d at 422 (noting that the statutory defense to a claim for equitable relief under MERA is only available where "there are truly unusual factors present" or the burdens imposed on the community by alternatives reach an "extraordinary magnitude"). Considering the circumstances of the present case and a strong public policy in favor of protecting natural resources, the court concludes that it would be inequitable to bar Plaintiffs' case by application of claim preclusion.

iii. issue preclusion

The doctrine of issue preclusion—also referred to as collateral estoppel—is closely related to claim preclusion, but operates to preclude re-litigation of individual *issues* rather than entire claims. *See Hauschildt*, 686 N.W.2d at 837. Issue preclusion applies to bar re-litigation of an issue if "(1) the issue [is] identical to one in a prior adjudication; (2) there was a final judgment on the merits; (3) the estopped party was a party or was in privity with a party to the prior adjudication; and (4) the estopped party was given a full and fair opportunity to be heard on the adjudicated issue." *Id.* (quoting *Care Inst., Inc.-Roseville v. County of Ramsey*, 612 N.W.2d 443, 446 (Minn. 2000)).

With the exception of the first element, which is not in dispute, these elements are identical to those of claim preclusion. As such, the same analysis applies and the court finds that there is a lack of privity between Plaintiffs and KARE. Additionally, even if all elements for issue preclusion were satisfied, it would be inequitable to apply the doctrine for the reasons previously discussed in the context of claim preclusion.

4. Statutory Public Policy

The fourth *Dahlberg* factor requires the court to consider whether there are circumstances "which permit or require consideration of public policy expressed in the statutes." *Dahlberg*, 137 N.W.2d at 321–22. Plaintiffs brought the present case against the City requesting equitable relief under MERA. In the very first section of MERA, the legislature "declares its policy to create and maintain within the state conditions under which human beings and nature can exist in productive harmony in order that present and future generations may enjoy clean air and water, productive land, and other natural resources with which this state has been endowed." Minn. Stat. § 116B.01 (2012). The court is permitted to consider this important public policy when hearing a claim for equitable relief brought under the statute. *See* Minn. Stat. § 116B.04 (2013) (stating that the court may consider the "state's paramount concern" for protecting natural resources when assessing the merits of the statutory affirmative defense).

Granting a temporary injunction will advance the public policy outlined in MERA. By enjoining the City from demolishing the School before a resolution on the merits, the court ensures that a potentially protected resource is not destroyed before a trial. At trial, the protected status of the School and whether the City's proposed actions will adversely affect it will be decided. Thereafter, the City will either be free to continue with demolition or definitively barred from doing so by MERA. Until that time, however, it would be premature for the City to proceed with demolition. If the School is demolished before trial, the public policy outlined in MERA would not be served because a potentially protected resource would be destroyed before a resolution on the merits of a claim provided by MERA itself. Considering the facts of this case and the public policy stated in MERA, this factor weighs in favor of granting a temporary injunction.

5. Administrative Burdens

The final *Dahlberg* factor requires the court to consider the administrative burdens that issuing a temporary injunction will impose. *Dahlberg*, 137 N.W.2d at 321–22. There is no evidence that the court will be required to undertake an unreasonable administrative burden by granting this temporary injunction. Similar temporary injunctions were granted in previous litigation, involving the current Plaintiffs and KARE. There is no indication that the court was administratively burdened in those cases, and there is no reason to believe otherwise in the present case. This factor therefore weighs in favor of granting a temporary injunction.

Bond

When a temporary injunction is granted, the applicant must post bond "in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained." Minn. R. Civ. P. 65.03 (a); *see also* Minn. Stat. § 116B.07 (2012) (stating that, when granting a temporary injunction under MERA, the court "may require the plaintiff to post a bond sufficient to indemnify the defendant for damages suffered because of the temporary relief"). In setting the bond amount, the court takes a "prospective view of damages" and "attempt[s] to determine the damages likely to accrue as a result of an erroneous injunction." *Eide v. Bierbaum*, 472 N.W.2d 193, 194 (Minn. Ct. App. 1991); *State by Drabik v. Martz*, 451 N.W.2d 893, 897 (Minn. Ct. App. 1990) (discussing the bond requirement in the context of a MERA claim, noting that it is not optional).

The City has demonstrated that it will suffer damages and incur a number of additional costs if enjoined from demolishing the School. First, the City will need to reject the bids it has received for demolition of the School. If the City is ultimately allowed to demolish the School, it

will need to solicit new bids, which may not be as favorable as the current bids. In other words, the City may suffer loss-of-bargain damages. Second, because the City will be prevented from demolishing the School, they will incur additional maintenance and upkeep costs. This includes insurance for the building and potential repairs, given the current condition of the structure. Considering the potential harm the City would suffer if wrongfully enjoined from demolishing the School, the court determines that a bond in the amount of $50,000.00 will provide adequate security.

CONCLUSION

A temporary injunction barring the City from demolishing the School until resolution on the merits is appropriate in this case. Plaintiffs will suffer irreparable harm—destruction of a potentially protected historic building—if an injunction is not granted, and the five *Dahlberg* factors all weigh in favor of granting an injunction. First, a temporary injunction will help maintain a status quo in the relationship between the parties. Second, Plaintiffs will suffer irreparable injury if an injunction is not granted, whereas the City's injuries if enjoined from demolishing the School would not rise to the level of substantial harm. Third, Plaintiffs have shown a likelihood of success on the merits that is not significantly diminished by the City's asserted defenses. Fourth, the explicit public policy of protecting natural resources outlined in MERA favors granting a temporary injunction. And finally, there is no evidence that granting a temporary injunction would impose an unreasonable administrative burden on the court. Based on the aforementioned, the court finds that a temporary injunction is warranted pending resolution of the case on the merits.

C.K.S