STATE OF MINNESOTA
IN COURT OF APPEALS
A19-0999

State of Minnesota by Smart Growth Minneapolis, et al.,
Appellants,

vs.

City of Minneapolis,
Respondent.

Filed March 9, 2020
Affirmed
Florey, Judge
Concurring specially, Johnson, Judge

Hennepin County District Court
File No. 27-CV-18-19587

Jack Y. Perry, Maren Forde, Taft, Stettinius & Hollister L.L.P., Minneapolis, Minnesota; and

Timothy J. Keane, Kutak Rock L.L.P., Minneapolis, Minnesota; and

Nekima Levy-Pounds, Minneapolis, Minnesota (for appellants)

Erik Nilsson, Interim Minneapolis City Attorney, Ivan Ludmer, Kristin R. Sarff, Assistant City Attorneys, Minneapolis, Minnesota (for respondent)

Considered and decided by Florey, Presiding Judge; Johnson, Judge; and Hooten, Judge.

S Y L L A B U S

An action under the Minnesota Environmental Rights Act (MERA) is properly dismissed for failure to state a claim for which relief can be granted when the only relief sought by the plaintiffs is environmental review that the defendant is exempt from conducting under the Minnesota Environmental Policy Act (MEPA).

O P I N I O N

FLOREY, Judge

This appeal by Smart Growth Minneapolis, the Audubon Chapter of Minneapolis, and the Minnesota Citizens for the Protection of Migratory Birds (collectively, appellants) arises from an action alleging that the 2040 comprehensive plan (the plan) adopted by respondent City of Minneapolis violates MERA, Minn. Stat. §§ 116B.01-.13 (2018). The district court granted the city's motion to dismiss, concluding that (1) appellants' requested relief is barred by Minnesota law and (2) the complaint does not state a MERA claim because it does not identify a discrete, identifiable project that is likely to cause pollution, impairment, or destruction of natural resources. Appellants challenge both conclusions. We affirm.

FACTS

I. Background

MERA was enacted in 1971, and provides citizens a civil remedy to protect the air, water, land, and other natural resources within this state. Minn. Stat. § 116B.02; *People for Envtl. Enlightenment & Responsibility (PEER), Inc. v. Minnesota Envtl. Quality Council*, 266 N.W.2d 858, 865 (Minn. 1978). MEPA, a procedural statute, was passed in 1973, along with two other pieces of legislation that were intended to complement MERA. *PEER*, 266 N.W.2d at 865. "Although the focus of each of these statutes is slightly different, together they are part of a coherent legislative policy." *Id.*

MEPA and rules adopted by the Minnesota Environmental Quality Board (EQB) govern environmental review within the state. The EQB has rulemaking authority and was

required to adopt rules implementing MEPA. *In re Envtl. Assessment Worksheet for 33rd Sale of State Metallic Leases*, 838 N.W.2d 212, 216 (Minn. App. 2013), *review denied* (Minn. Nov. 26, 2013). The EQB rules exempt "adoption and amendment of comprehensive and other plans" from mandatory environmental review, including the preparation of an Environmental Assessment Worksheet (EAW), an Environmental Impact Statement (EIS), and other Alternative Urban Areawide Review (AUAR) processes. Minn. R. 4410.4600, subps. 1, 26 (2019).

MERA provides a mechanism for citizens of the state to bring a civil action "for the protection of the air, water, land, or other natural resources . . . from pollution, impairment, or destruction." MERA states that "whenever the plaintiff shall have made a prima facie showing that the conduct of the defendant has, or is likely to cause the pollution, impairment, or destruction of the air, water, land or other natural resources located within the state, the defendant may rebut the prima facie showing by the submission of evidence to the contrary." Minn. Stat. § 116B.04(b). "[P]ollution, impairment, or destruction" is defined as conduct that "materially adversely affects or is likely to materially adversely affect the environment." Minn. Stat. § 116B.02, subd. 5.

Comprehensive planning processes and requirements for the city of Minneapolis are governed by Minn. Stat. § 473.851-.871 (2018), and the required substantive contents of comprehensive plans are governed by Minn. Stat. § 473.859. Local governmental units are required to "review and if necessary, amend" comprehensive plans "at least once every ten years." Minn. Stat. § 473.864, subd. 2. A comprehensive plan "shall contain objectives, policies, standards and programs to guide public and private land use,

development, redevelopment and preservation for all lands and waters within the jurisdiction of the local governmental unit." Minn. Stat. § 473.859, subd. 1. Comprehensive plans are submitted to the Metropolitan Council. Minn. Stat. § 473.864, subd. 2(a)-(b)(2). The Metropolitan Council reviews comprehensive plans to "determine their compatibility with each other and conformity with metropolitan system plans." Minn. Stat. § 473.175, subd. 1 (2018).

II. Procedural Posture

Appellants filed a complaint and moved for declaratory and injunctive relief on December 5, 2018. Appellants alleged that the Minneapolis City Council's scheduled approval of the plan violated MERA because it would "likely . . . cause the pollution, impairment, or destruction of the air, water, land or other natural resources located within the state." Minn. Stat. § 116B.04(b). Appellants sought a temporary restraining order (TRO) to enjoin the city from approving the plan. After a hearing, the district court denied appellants' motion for a TRO.

The city council voted to submit the plan to the Metropolitan Council on December 7, 2018. Later that month, the city moved to dismiss appellants' claim pursuant to Minn. R. Civ. P. 12.02(e) for failure to state a claim upon which relief can be granted. Appellants filed a motion for summary judgment in January 2019. After a hearing on both motions, the district court granted the city's motion to dismiss and denied appellants' summary-judgment motion. The district court concluded that appellants' complaint should be dismissed because, as a matter of law, "comprehensive plans are exempt from environmental review in Minnesota, under MEPA." The district court also determined that

dismissal was warranted because appellants did not show causation under MERA, but rather relied on unsupported assertions "that the approval of the 2040 Plan will cause 'an immediate and full build-out of the City per its 2040 Plan'" as well as "assumptions and inferences regarding projects that may take place following passage of the 2040 Plan." The district court noted that "unsupported speculations and assumptions . . . are not direct enough to implicate MERA." This appeal follows.

ISSUES

Did the district court err by granting the city's Rule 12.02(e) motion?

A. Appellants fail to state a viable claim under MERA because the only relief they seek is environmental review that the city is exempt from conducting under MEPA.

B. Appellants fail to state a viable claim under MERA because they have not pleaded facts sufficient to support a causal link between the city's comprehensive plan and "pollution, impairment, or destruction" of natural resources.

ANALYSIS

On appeal from the dismissal of a case pursuant to Minn. R. Civ. P. 12.02(e), "[w]e review de novo whether a complaint sets forth a legally sufficient claim for relief. We accept the facts alleged in the complaint as true and construe all reasonable inferences in favor of the nonmoving party." *Walsh v. U.S. Bank, N.A.*, 851 N.W.2d 598, 606 (Minn. 2014) (citation omitted). To survive a motion to dismiss, a party's claim need only be pleaded such that it is possible that some evidence could be produced, consistent with the party's theory, which would entitle that party to relief. *Id.* at 603. However, a plaintiff

must plead facts; courts are not bound by legal conclusions. *Herbert v. City of Fifty Lakes*, 744 N.W.2d 226, 235 (Minn. 2008).

A. Appellants fail to state a viable claim under MERA because the only relief they seek is environmental review that the city is exempt from conducting under MEPA.

Appellants' MERA claim sought to enjoin the city from approving the plan until the city satisfies its rebuttal or affirmative defense pursuant to MERA—namely an "exhaustive environmental review." Minn. Stat. § 116B.04(b). MERA authorizes fairly broad relief, including declaratory relief and equitable relief. Minn. Stat. § 116B.07. MERA also allows the district court to "impose such conditions upon a party as are necessary or appropriate to protect the air, water, land or other natural resources." *Id.* The issue is whether MERA authorizes the court to require the city to conduct environmental review that the city is otherwise exempt from. Here, the relief requested implicates environmental-review procedures governed by MEPA, such as AUAR processes, EIS, or EAWs—processes from which the city would otherwise be expressly exempted when adopting a comprehensive plan. Minn. R. 4410.4600, subps. 1, 26. The district court concluded that the requested relief is not available because "the clear, unambiguous exemption contained in MEPA cannot be overridden by MERA" and noted that because MEPA and its express exemptions were passed after MERA, MERA "cannot supersede the exemption." We agree.

Both parties rely on *Holte v. State*, a case involving a MERA challenge to the Minnesota Grasshopper Control Act (MGCA). 467 N.W.2d 346, 348 (Minn. App. 1991). The issue in *Holte* was whether MERA provided a vehicle to challenge the MGCA. *Id.* This court stated that, "had the legislature wished to subject the MGCA to MERA, it could

have done so explicitly," and that "MERA contains an exception for activities ordered by the commissioner of agriculture." *Id.* at 349. By statute, the later-enacted MGCA "is not subject to MERA." *Id.* Similarly, in this case, the express exemption in the later-enacted MEPA prevails over the previously enacted MERA. The city argues that "the problems of environmental review for high-level planning and the need to coordinate metropolitan-area comprehensive plans were deliberately targeted by limiting review to that of the Metropolitan Council and exempting the plans from environmental review in favor of review when projects are actually implemented." MERA provides a cause of action for citizens when governments fail to comply with MEPA's mandates. Here, the city is in compliance with the requirements of MEPA because it is exempted from environmental review. Allowing MERA to be used to force such a review is contrary to the express legislative intent manifest in such an exemption. Such a result would also be contrary to the plain language of MEPA, and would create a conflict between MERA and MEPA, which were intended to complement one another.

Cities are required to review and amend their comprehensive plans every ten years. Minn. Stat. § 473.864, subd. 2. This process is exempt from environmental review under MEPA. Minn. R. 4410.4600, subps. 1, 26. Allowing a MERA challenge to force environmental review under MEPA at the planning stage would undermine the city's planning function. Nothing in the language of MEPA suggests that the *implementation* of a comprehensive plan is similarly exempt from environmental review. The *effects* of comprehensive plans are not exempt from review. As the district court and the city noted, appellants have the option of "challenging particular development projects" enacted

pursuant to the plan under MERA and could also challenge proposed zoning decisions allowing these projects under MEPA.

Based on the plain language of both MERA and MEPA, we conclude that appellants' MERA claim cannot force environmental review of the plan pursuant to MERA because MEPA expressly exempts such review. Because MEPA was adopted subsequent to MERA and contains a specific exemption, MEPA controls. Accordingly, we affirm the district court's rule 12 dismissal of appellants' claim.

B. Appellants fail to state a viable claim under MERA because they have not pleaded facts sufficient to support a causal link between the city's comprehensive plan and "pollution, impairment, or destruction" of natural resources.

Even if a MERA action could be used to obtain environmental review of a comprehensive plan, the district court properly granted the city's motion to dismiss because appellants have failed to plead a prima facie case. The district court concluded that appellants have not sufficiently alleged that the city "has, or is likely to cause the pollution, impairment, or destruction" of natural resources because appellants "can point to no City project or action that would itself cause any pollution, impairment, or destruction of natural resources" and allege only that the approval of the plan will cause "an immediate and full build-out of the City per its 2040 Plan." We agree.

Appellants did not plead any specific facts to support their allegations that the approval of the plan is likely to materially and adversely affect the environment, or anything beyond repeated conclusory allegations that there is the "potential for and likelihood" of "*dramatic*" increases in the amount of impervious surface area and number

of residents; a loss of tree coverage leading to the "material increase in the rate and volume of stormwater runoff . . . domestic wastewater generation, potable water usage and parking needs;" and a "material decrease in aesthetic livability and bird and other wildlife habitat." Appellants claim that "potential and likely environmental effects" will include threats to "the adequacy of existing public infrastructure . . . traffic congestion . . . air quality . . . [and] aesthetic livability, tree coverage, and bird and wildlife habitat." Appellants point to a report, including graphs prepared by their expert, which concludes that "[s]ignificant environmental impacts" will result "from the change in land use and built forms," with "likely impacts" including increased noise, pedestrian traffic, vehicle traffic, vehicle congestion and idling, decreased air quality and parking constraints. Other "likely impacts" alleged include "negative impacts to existing viewsheds," longer hours of activity, reductions in privacy, increased light and glare, decreased access to light, etc. Each section of appellants' complaint makes similar conclusory allegations about "likely impacts."

The city contends that appellants have not pointed to any "discrete, identifiable projects" that are likely to materially and adversely affect the environment. Appellants appear to allege that the mere *approval* of the plan is conduct that will necessarily lead to "pollution, impairment, or destruction."

Both sides rely on *Stansell v. City of Northfield*, in which this court affirmed a district court's determination that a MERA challenge to the building of a retail store in a historical district was "speculative and tenuous" because the challenger's "chain of causation relies so heavily on economic considerations that are beyond MERA's intended

scope." 618 N.W.2d 814, 820 (Minn. App. 2000). We noted that the challenger's "causal chain is too attenuated as a matter of law." *Id.* While the concerns here are not economic, the same rationale is applicable because here, the issue is whether the City's *approval* of the plan is likely to lead to "pollution, impairment, or destruction." The mere approval of the plan without concrete steps toward its implementation is too attenuated to support the appellants' assertions.

Our cases addressing the nature of a "project" for MEPA purposes are instructive. While not directly on point, we applied similar reasoning in *Minnesotans for Responsible Recreation v. DNR*, 651 N.W.2d 533 (Minn. App. 2002) (MRR). There, the issue was whether Department of Natural Resources (DNR) system plans were "projects" for the purposes of MEPA and thus subject to environmental review. *Id.* at 538. While MEPA does not define "project," the rules governing environmental review suggest that a project is "a governmental action, the results of which would cause physical manipulation of the environment, directly or indirectly" and that the determination "of whether a project requires environmental documents shall be made by reference to the physical activity to be undertaken and not to the governmental process of approving the project." Minn. R. 4410.0200, subp. 65; *accord MRR*, 651 N.W.2d at 539. Therefore, this court reasoned that "*something more than just planning* [ ] is required before a governmental action or project may be found to exist." *MRR*, 651 N.W.2d at 539. For the purposes of MEPA, we held that a project is a "definite, site-specific, action that contemplates on-the-ground environmental changes, including changes in the nature of the use." *Id.* at 540. Applying that definition, we concluded that "the DNR's general system plans for recreation trails in

state forests" did not constitute a project, because "general system plans . . . required further approval before they could be implemented" and that even after approval, "many of the proposed trail sites will never be developed because of lack of funding, personnel, or feasibility. The system plans are too broad and speculative to provide the basis for meaningful environmental review." *Id.* at 540.

We recently applied the reasoning from *MRR* in *Metallic Leases*, 838 N.W.2d at 213. *Metallic Leases* concerned the sale of state mineral leases. 838 N.W.2d at 212. The DNR concluded that the sale of mineral leases alone did not constitute a "project" for the purpose of triggering an environmental review under MEPA. *Id.* at 213-14. Based on the reasoning from *MRR*, we agreed. We noted that "[t]o the extent that the leases grant exclusive rights to explore for and mine minerals, they also contemplate the possibility of on-the-ground physical changes to the environment." *Id.* at 217. We also noted that the leases "are somewhat site-specific;" but that "the contemplated physical changes are indefinite," that "the locations of any particular future activities are not ascertainable now," that it was "uncertain whether any of the lessees will conduct invasive exploratory activities on the leased sites," and that such activities "will depend not only on . . . [the] lessees' business decisions to pursue them, but also on their ability to obtain required approvals and permits." *Id.* at 217-18.

Here, the plan is analogous to the system plans described in *MRR*, *Stansell*, and *Metallic Leases*. Based solely on the allegations in the complaint, appellants have failed to state a claim upon which relief can be granted because they did not allege any facts surrounding adoption of the plan that are likely to materially and adversely affect the

environment. Without specific facts, the harm alleged by appellants is too speculative and attenuated to meet their burden of alleging causation under MERA.

D E C I S I O N

The district court correctly granted the city's motion to dismiss pursuant to Minn. R. Civ. P. 12.02(e) because the only relief requested by appellants under MERA is environmental review that the city is exempt from conducting under MEPA. Even if the relief requested by appellants were available, they have failed to make out a prima facie case because they did not plead facts sufficient to show that adoption of the plan is likely to materially adversely affect the environment. Thus, the harm alleged is too attenuated to sufficiently allege causation under MERA.

Affirmed.

JOHNSON, Judge (concurring specially)

I join in part B of the opinion of the court without qualification. But I respectfully disagree with the reasoning and the conclusion in part A of the opinion of the court.

The two statutes at issue in part A—the Minnesota Environmental Rights Act (MERA), which is codified in chapter 116B of the Minnesota Statutes, and the Minnesota Environmental Policy Act (MEPA), which is codified nearby in chapter 116D of the Minnesota Statutes—are two parts of "a coherent legislative policy." *People for Envtl. Enlightenment & Responsibility, Inc. v. Minnesota Envtl. Quality Council*, 266 N.W.2d 858, 865 (Minn. 1978) (*PEER*). MERA was enacted first, in 1971. *See* 1971 Minn. Laws ch. 952, §§ 1-14, at 2011-19. MEPA was enacted two years later "to complement MERA." *PEER*, 266 N.W.2d at 865; *see also* 1973 Minn. Laws ch. 412, §§ 1-7, at 895-902. The supreme court has given effect to both statutes without declaring that one statute supersedes the other. *See PEER*, 266 N.W.2d at 865. Indeed, the supreme court has stated that if the administrative agency responsible for implementing MEPA "fail[s] to comply with the mandates of MEPA . . . , MERA exist[s] to permit private citizens to bring a civil action to compel the agency to consider environmental factors." *Id.* The supreme court also has stated that the legislature did not intend for other, contemporaneously enacted environmental statutes "to supersede MERA." *Id.* Rather, the supreme court has recognized that "the legislature passed all these statutes to ensure that administrative agencies would discharge fully their environmental responsibilities." *Id.* This court has followed supreme court precedent by allowing a plaintiff to simultaneously pursue relief

under both MERA and MEPA "based on the same nucleus of facts." *White v. Minnesota Dep't. of Natural Resources*, 567 N.W.2d 724, 737 (Minn. App. 1997).

In this case, the district court reasoned that "MEPA exempts comprehensive plans from environmental review" and, without any precedent, reasoned further that the MEPA exemption "applies to environmental review under MERA." It should be noted that the MEPA exemption on which the district court relied is contained in an administrative rule, not in MEPA itself. *See* Minn. R. 4410.4600, subps. 1, 26 (2019); *see also* Minn. Stat. § 116D.04, subd. 2a(b) (2018) (authorizing environmental quality board to "by rule establish categories of actions for which [EISs] and for which [EAWs] shall be prepared as well as categories of actions for which no environmental review is required under this section"). The district court applied an administrative rule outside the context for which it was intended. To be sure, if environmental review were required by MEPA or another provision of the MEPA regulatory scheme, the MEPA exemption rule would preclude the operation of that requirement. But there is nothing in the text of MEPA or the MEPA exemption rule to suggest that the MEPA exemption rule extends to a cause of action arising under MERA.

This court's opinion in *Holte v. State*, 467 N.W.2d 346 (Minn. App. 1991), is easily distinguishable from this case. In *Holte*, we considered whether a MERA claim was barred by the Minnesota Grasshopper Control Act (MGCA), which was passed by the legislature in May 1989 and signed by the governor in June 1989, *see* 1989 Minn. Laws ch. 350, art. 10, § 2, at 3139, 3161, shortly after the state department of agriculture had determined in "the spring of 1989" that "'the increased population [of grasshoppers] *posed a risk* to

agricultural production and that there was likely to be an *emergency situation* requiring state action to eradicate the overpopulation of grasshoppers,'" *Holte*, 467 N.W.2d at 348 (quoting *Omdahl v. Hadler*, 459 N.W.2d 355, 357 (Minn. App. 1990)). We concluded that the MERA claim was barred by MGCA, reasoning in part that "swift action [was] required to confront the grasshopper emergency successfully." *Id.* at 349. It was obvious that MGCA did not share a common purpose or a common lineage with MERA, as does MEPA. Accordingly, it was quite natural for this court to conclude that MGCA superseded MERA to the extent that they conflicted with each other. But the present situation is very different because MERA and MEPA are two parts of "a coherent legislative policy." *See PEER*, 266 N.W.2d at 865. To apply *Holte* in this case is inconsistent with the supreme court's opinion in *PEER*, which speaks more directly to the interrelationship between MERA and MEPA.

In *PEER*, the supreme court held that the Power Plant Siting Act (PPSA), which at the time was codified in chapter 116C of the Minnesota Statutes, does *not* supersede MERA. *Id.* at 865-66 (citing Minn. Stat. §§ 116C.51-.69, renumbered Minn. Stat. §§ 216E.001-.18, by 1973 Minn. Laws ch. 591, § 1, at 1343-53). The supreme court reached that conclusion by applying "the general policy of statutory construction . . . of harmonizing statutes dealing with the same subject matter." *Id.* at 866. The supreme court "presume[d] that, in enacting a statute, the legislature act[s] with full knowledge of prior legislation on the same subject." *Id.* Accordingly, the supreme court reasoned as follows:

> The legislature, being aware of the existence of MERA when it passed the PPSA, cannot be assumed to have exempted PPSA proceedings from having to comply with MERA without

> express statutory language to that effect. Since such language is absent, the legislature must have intended to permit private citizens to bring or intervene in civil actions to protect the state's natural resources whenever they think the MEQC[1] has not done so adequately.

Id. The reasoning in *PEER* with respect to PPSA should apply in the same way in this case with respect to MEPA. The MEPA and PPSA statutes were enacted within days of one another, two years after the enactment of MERA. *See No Power Line, Inc. v. Minnesota Envtl. Quality Council*, 262 N.W.2d 312, 323 (Minn. 1977). In the absence of any language in MEPA expressly stating that either the act itself or the exemption rule supersedes MERA, this court should not conclude that the exemption rule bars appellants' MERA claim.

It appears that appellants elected not to petition the environmental quality board pursuant to MEPA for environmental review of the city's 2040 plan. *See* Minn. Stat. § 116D.04, subd. 2a(e) (2018); Minn. R. 4410.1100, subp. 3 (2019). If appellants had done so, the MEPA exemption rule would apply to such a petition. *See* Minn. R. 4410.4600, subps. 1, 26. But in that event, appellants nonetheless would be permitted to pursue a MERA claim. *See PEER*, 266 N.W.2d at 866. Appellants should have no less of an opportunity to pursue relief under MERA after *not* petitioning for relief under MEPA.

[1]The Minnesota Environmental Quality Council was the forerunner of the Minnesota Environmental Quality Board. *See PEER*, 266 N.W.2d at 861 n.1 (citing 1975 Minn. Laws ch. 271, § 3(7), at 744).

Thus, I would conclude that, in light of supreme court caselaw, appellants' MERA claim is not barred by the MEPA exemption rule. But the reasons stated in part B of the opinion of the court are sufficient grounds for affirming the district court's judgment. Therefore, I concur in the ultimate disposition of the appeal.