

STATE OF MINNESOTA  
COUNTY OF DODGE

DISTRICT COURT - CIVIL DIVISION  
THIRD JUDICIAL DISTRICT

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State of Minnesota  
By Kasson Alliance For Restoration, Inc.

Plaintiff,

vs.

**MEMORANDUM IN SUPPORT  
OF PLAINTIFF'S MOTION FOR  
TEMPORARY RESTRAINING ORDER  
AND TEMPORARY INJUNCTION**

City of Kasson,  
A Minnesota Municipal  
corporation,

Defendants.

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**I. INTRODUCTION**

The Minnesota Environmental Rights Act (Minn. Stat., Chap. 116B) implements a strong legislative policy aimed at protecting the state's natural resources against impairment or destruction. The Act's expressly extends to "historical resources," which are included in the definition of natural resources.

The 1918 Kasson Public School is such an historical resource. It appears to be eligible for entry on the National Register of Historic Places (maintained by the federal

government), and experts in history who are familiar with the property agree that it is one of the most important historical sites in Kasson.

Despite this, recent actions of the Kasson City Council have put in motion a process that, unless enjoined, will result in the School's demolition, even though there are simple and reasonable alternatives available by which to preserve it. Plaintiff believes that the City Council's actions are clearly contrary to the Minnesota Environmental Rights Act (MERA), and plaintiff has vigorously attempted to persuade the Council to alter its position. Because the Council has refused to do so, plaintiff now has no recourse but to seek declaratory and injunctive relief as authorized under MERA.

## **II. ISSUES**

1. Is plaintiff entitled to summary judgment on its claim under the Minnesota Environmental Rights Act that proposed actions on the part of the City of Kasson would destroy or significantly impair a historical resource?

2. In the event that summary judgment is not appropriate, is plaintiff entitled to a temporary injunction on its MERA claim?

## **I. THE RECORD ON WHICH THIS MOTION IS BASED**

1. Plaintiff's Complaint.

- 2 Affidavit of Daniel J. Hoisington, with exhibits.
3. Affidavit of Diane O'Brien Berge.
4. Affidavit of Susan Roth.
5. Affidavit of Kenton E. Spading, with exhibits.

#### **IV. FACTS**

Kasson Alliance for Restoration (K.A.R.E.), the plaintiff in this action, is a nonprofit membership organization that was formed to protect and improve historic sites in and around the Kasson area. Plaintiff seeks means and avenues by which to enhance the historic features of Kasson that support and improve the quality of life.

The Kasson Public School, located at 101 Third Avenue Northwest, was constructed in 1917–1918. Affidavit of Kenton E. Spading, ¶¶2–4. The School was previously owned, operated and maintained by the Kasson/Mantorville school district, but it was sold to the City of Kasson in 2006 for \$1.00. In November 2006, the Kasson City Council approved a resolution to demolish the school. *Id.*, ¶4, 7.

One of the oldest and finest structures in all of Dodge County, the School has served as a significant public building for nearly a century, providing a visual, social and educational focal point for Kasson. It encompasses a full city block, where the restored Old Historic City Water Tower (which is on the National Register of Historic Places) also resides. Not only was the School a center of learning for Kasson, it was also a center of cultural and community activity. Spading Affidavit, ¶¶4–6.

The School consists of three two-story brick buildings with clay tile roofs. Its main entrance is neoclassical, while the remainder leans toward the Prairie School style. The buildings, connected by hallways, contain approximately 10,000 square feet in each wing and 8,000 in the central building. *Id.*, ¶4. It was designed by Nels Jacobson, Jr., of Owatonna; Jacobson and his brother went on to design numerous schools, along with other public and private buildings in Minnesota, elsewhere in the Midwest, and in Florida. Spading Affidavit, ¶3. Jacobson was an important figure in Minnesota architecture during the first half of the twentieth century, in part because he was deeply influenced by the work of the nationally renowned architectural firms of Louis H. Sullivan and Purcell, Feick, and Elmsie, translating their ideas into buildings that dot the landscape of southeastern Minnesota. For example, the Jacobson-designed Federated Insurance Companies Building in Owatonna was included in a Minneapolis Institute of Arts tour, “Unified Vision: The Architecture and Design of the Prairie School,” which also featured buildings by Sullivan and Purcell, Feick, and Elmsie. Affidavit of Daniel J. Hoisington, ¶6.

It is clear from a number of professional evaluations that the School buildings are physically and structurally sound, and a good candidate for rehabilitation and reuse. *Id.* For example, in 2004 the city of Kasson itself asked Kane and Johnson Architects of Rochester to perform a “space needs study.” The Kane and Johnson firm provided the city with a report summarizing its conclusions. (That report appears on the city’s Web site ; a copy is attached to the Spading Affidavit as Exhibit 1.) It states in part that

The re-use of the old Elementary School for City Hall and Library use would serve to preserve and restore a major piece of Kasson History! The location of the building is ideal for City Hall as well as Library use and off street parking is available. The exterior of the building is in good condition considering its age and with minor work could be restored. The interior of the building would require major renovation but we anticipate that this could be more cost effective than construction of a new building on a new site.

City of Kasson Space Needs Study and Analysis submitted by: David I. Kane and Kevin T. Blondo, February 1, 2005, at 3. The report goes on to state with respect to the building's suitability for alternative uses: "At this time, however, it seems clear that the building will accommodate the necessary functions" (i.e., renovation for use by the library and city hall offices). *Id.* at 4. It appears very likely that other alternative uses for the property exist as well. See Affidavit of Diane O'Brien-Berge, ¶¶2-4; Spading Affidavit, ¶10.

A number of experts in Minnesota history and historic preservation also concur that the Kasson Public School is an important historical resource. Among them is Susan Roth, who serves as the National Register Historian in the State Historic Preservation Office (SHPO), part of the Minnesota Historical Society. Affidavit of Susan Roth, ¶1. Roth is one of the preeminent experts in the state on the identification, evaluation, and registration of Minnesota's historical resources, particularly those that may be eligible for inclusion on the National Register of Historic Places. The National Register is a

compilation of significant historical and cultural resources maintained by the United States government. *Id.* According to Roth, “there is a distinct likelihood that the old Kasson Public School is qualified for the National Register of Historic Places.” *Id.*, ¶3. She goes on to note that the SHPO has not had sufficient time to fully evaluate the historic significance of the School, but that on the basis of her preliminary review, “a detailed evaluation is unquestionably warranted.” *Id.*, ¶4.

Daniel Hoisington has also conducted a preliminary review of the School property from the perspective of its historical significance. Hoisington is a well-known expert in local and state history. See Hoisington Affidavit, ¶1 and Exhibit 1. Among other things, he has evaluated many properties for possible inclusion on the National Register, and has performed many historic surveys, including others related to school buildings. *Id.* In his affidavit, Hoisington expresses his “strong belief that the school would qualify for the National Register of Historic Places.” *Id.*, ¶3.

According to Hoisington, “it seems clear that [the School] has considerable local historic significance because of its role in the education of several generations of Kasson residents.” *Id.*, ¶5. In addition, it has potentially even broader significance within the state, because (as noted above) it was designed by architect Nels Jacobson of Owatonna, an important figure in Minnesota architecture during the first half of the twentieth century. *Id.*, ¶6. Hoisington concludes that not only does the School have “significant historic importance,” but it also retains “a high level of historic integrity,” meaning that it is in “generally fine condition, with relatively few changes to the exterior since its

construction in 1917–18.” *Id.*, ¶7.

Corroborating these professional assessments is the recent decision of the Preservation Alliance of Minnesota to include the Kasson Public School on its list of the state’s Ten Most Endangered Historic Places for 2007. See the organization’s Web site at <[www.mnpreservation.org/angered2007/](http://www.mnpreservation.org/angered2007/)>. The Preservation Alliance is a statewide private non-profit organization advocating the preservation of Minnesota's historic resources.

Despite the School’s historical significance and value to the community, however, various actions taken over the last several months by the Kasson City Council now threaten its existence. Although the City has made no definitive decision as to the future of the School site, the City plans on demolishing the structure and simply retaining the site as a staging area for potential future development of some undetermined kind. It has not pursued any significant research or investigation into alternatives that would allow this beautiful historic structure to be preserved. The Kasson City Council has adopted a resolution to solicit bids for the demolition of the School, which are to be opened and accepted as early as May 23, 2007. For reasons that have never been made clear, and are not revealed in the City Council's official records, the Council has determined that demolition is the only viable option.

There has been some discussion about building another structure on the site to house the library, police station, post office, and/or a new city hall. But this remains largely speculative. Furthermore, there are numerous other sites throughout the city of Kasson

owned by the City. These sites give the City ample alternatives for building public facilities, particularly since they are more centrally located, align better with the traffic flow, and would be more consistent with the neighborhood.

Through conversation and by certified mail, the City of Kasson has informed K.A.R.E. that all future communications about the School must be made through legal counsel. Thus it is readily apparent that negotiations to preserve the School among the City of Kasson, K.A.R.E., and other concerned citizens of Kasson have come to a standstill.

## **II. ARGUMENT**

### **A. THE MINNESOTA ENVIRONMENTAL RIGHTS ACT**

The Minnesota Environmental Rights Act, Minn. Stat. chap. 116B (MERA), establishes procedures and remedies aimed at ensuring “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. The strength of the legislative purpose is unmistakable. The Supreme Court has referred to “the potency of th[e] rule of law” enunciated in MERA, and stated that it “is vital to the protection of our natural resources.” *State by Archabal v. County of Hennepin*, 495 N.W.2d 416, 426 (Minn. 1993).

In order to fully implement the statute's protections, the Legislature included a private right of action, permitting "[a]ny person residing within the state" to maintain a civil action "for the protection of the air, water, land, or other natural resources located within the state, whether publicly or privately owned, from pollution, impairment, or destruction." Minn. Stat. §116B.03, subd. 1. MERA defines "natural resources" as including "all mineral, animal, botanical, air, water, land, timber, soil, quietude, recreational *and historical* resources." Minn. Stat. §116B.02, subd. 4 (emphasis added). Among the other remedies authorized by MERA are declaratory relief and temporary and permanent injunctions. Minn. Stat. §116B.07.

The statutory framework that exists for disposing of an action brought under MERA is relatively straightforward. First, the plaintiff must make a *prima facie* showing that the conduct of the defendant "has or is likely to cause the pollution, impairment, or destruction of . . . resources located within the state." Minn. Stat. §116B.04. According to the Supreme Court, this requirement is satisfied where the plaintiff proves the existence of a protectable natural resource, and that the resource is threatened with pollution, impairment, or destruction. *Archabal, supra*, 495 N.W.2d at 421, citing *State by Powderly v. Erickson*, 285 N.W.2d 84, 87–88 (Minn. 1979). MERA sets out two types of pollution, impairment, or destruction that can trigger the remedies found in the

statute: “(1) ‘any conduct by any person which violates, or is likely to violate,’ any environmental quality standard, permit, or similar rule; and (2) ‘any conduct which materially adversely affects or is likely to materially adversely affect the environment.’”

*State by Schaller v. County of Blue Earth*, 563 N.W.2d 260, 264 (Minn. 1997), quoting Minn. Stat. §116B.02, subd. 5.

Once the plaintiff presents a *prima facie* case, the defendant may offer evidence seeking to rebut it, or can attempt to prove an affirmative defense. *Archabal*, 495

N.W.2d at 422; §116B.04. An affirmative defense under MERA is established *only* by showing

that there is no feasible and prudent alternative and the conduct at issue is consistent with and reasonably required for promotion of the public health, safety, and welfare in light of the state’s paramount concern for the protection of its air, water, land and other resources from pollution, impairment or destruction. Economic considerations alone shall not constitute a defense hereunder.

Minn. Stat. §116B.04.

**1. Plaintiff has a *Prima Facie* Case Under MERA with Respect to the Proposed Demolition of the School.**

In the instant action, plaintiff can conclusively establish a *prima facie* case pursuant to the criteria provided by MERA. It is very likely that the 1918 Kasson Public

School is a protected historical resource within the meaning of the statute, and is certain that the City of Kasson's plan for the destruction of the School will inflict a materially adverse effect on the historic site.

There is little doubt that this School is a valuable historical resource and thus protected by MERA, as demonstrated by the earlier factual summary and the accompanying Affidavits of Susan Roth, Kenton Spading, and Daniel Hoisington. Both Roth and Hoisington have extensive experience in the evaluation of historic properties and the assessment of their eligibility for the National Register of Historic Places.

The Minnesota Supreme Court has twice dealt with cases arising under MERA involving historical resources. In both, the Court unhesitatingly concluded that the properties at issue were protected by the statute. The Minneapolis Armory—the subject of *Archabal*—was already on the National Register; the Court held that the Armory was “undoubtedly a ‘natural resource’ within the protection of MERA.” 495 N.W.2d at 418. Even more relevant to the present case is *Powderly* where the court found that nineteenth-century row houses in Red Wing were also protected, even though they had received no official historic designations of any kind.

In *Powderly*, the Court considered for the first time what criteria should be applied in deciding whether a particular property qualified as an historical resource under

MERA. The Court concluded that where a site or structure was eligible for inclusion on the National Register of Historic Places, pursuant to the criteria found in 36 CFR §800.10(a), the property would almost certainly fit the definition of an historical resource. See 285 N.W.2d at 87–88. Thus, because the row houses at issue in *Powderly* did seem to qualify under the National Register criteria, even though they were not yet listed on the Register, the Court concluded they were protected by MERA. Exactly the same analysis applies in the present case, given that the affidavits of both Susan Roth and Daniel Hoisington make it clear that the School is likely to satisfy the National Register standards.

Because there can be little question that the Kasson School is a protected historical resource under MERA, in order to establish a *prima facie* case, plaintiff need only show that the actions proposed by the City of Kasson would either violate an environmental quality standard, permit, or similar rule, or have a materially adverse effect on the historic site. Minn. Stat. §116B.02. Given that the City proposes to demolish the School, it can hardly be doubted that the latter criterion is satisfied.

Where a party proposes to demolish an historic resource, it is self-evident that "materially adverse effect" will be inflicted, as the Supreme Court readily found in both *Powderly I* and *Archabal*---both cases where historic property was to be razed. See

*Powderly I*, 285 N.W.2d at 87 ("in the instant case, there is no dispute the demolition would destroy the row houses," and therefore, "the only issue is whether they are protectable natural resources within the meaning of MERA."); *Archabal*, 495 N.W. 2d at 421 ("in this case, it is clear that appellant Archabal met her burden: the Armory is an historic resource; and it is equally clear that the Armory's value as an historic resource will be destroyed by the alterations" proposed by the defendant, which effectively called for its demolition).

**2. Defendant City of Kasson Cannot Plausibly Establish an Affirmative Defense Under MERA.**

As noted, once plaintiff establishes a *prima facie* case, the defendant may defeat a MERA claim only by proving the affirmative defense described in Minn. Stat. §116B.04. Under the statutory criteria found there, defendant “must show two things,” *Archabal*, 495 N.W.2d at 422, namely, “that there is no feasible and prudent alternative and the conduct at issue is consistent with and 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 from pollution, impairment, or destruction.” §116B.04. The statute states emphatically that “[e]conomic considerations alone shall not constitute a defense hereunder.” *Id.* The Supreme Court has adopted a rigorous interpretation of this section of the law, commensurate with the priority the statute assigns to the protection of natural resources:

In deciding whether defendants have established an affirmative defense under MERA, the trial court is not to engage in wide-ranging balancing of compensable against non-compensable impairments. Rather, protection of natural resources is to be given paramount consideration, and those resources should not be polluted or destroyed *unless there are truly unusual factors present in the case or the cost of community disruption from the alternatives reaches an extraordinary magnitude.*

*Archabal*, 495 N.W.2d 2d at 422, quoting *Powderly*, 285 N.W.2d at 88 (emphasis added).<sup>1</sup> The *Archabal* Court concluded by stating that its precedents, “taken together, establish an extremely high standard for defendants to meet in establishing an affirmative defense,” and that application of this standard “means that, in the absence of unusual or extraordinary factors, the trial court must enjoin environmentally destructive conduct if a feasible and prudent alternative is shown.” 495 N.W.2d at 423.

In *Archabal*—the action involving the Minneapolis Armory— the Supreme Court applied the two components of the affirmative defense in the factual context of that case, noting that the defendant would be required to prove “1) that there is no ‘feasible and prudent’ alternative site to the Armory block for the proposed PSF [public safety facility, i.e., jail]; and 2) that the building of the PSF on the Armory site is required for health, safety, or welfare reasons, taking into account the state’s strong commitment to the environment.” *Id.*

A simple restatement of this articulation using the facts of the present case readily demonstrates the difficulty faced by the City of Kasson in establishing an affirmative

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<sup>1</sup> In explaining this standard, the Court referred with approval to a decision of the United States Supreme Court: “In order to protect natural resources to the fullest extent possible the [Supreme C]ourt required that truly extraordinary disruption be demonstrated before a prudent and feasible alternative to an environmentally destructive action would be refused.” *Archabal*, 495 N.W.2d at 422, citing *Citizens to Preserve Overton Park, Inc., v. Volpe*, 401 U.S. 402 (1976.)

defense under MERA. Part 1 of the test described in *Archabal* requires the City to show that there is no feasible and prudent alternative to destroying the Kasson Public School. Part 2 directs the City to prove that the destruction of the property is required for health, safety, or welfare reasons, taking into account the state's strong commitment to the environment. The City of Kasson cannot satisfy either of these requirements, as the Supreme Court's *Archabal* opinion makes clear.

Almost certainly, there are feasible and prudent alternatives available, involving other locations for City facilities. There are numerous sites already owned by the City of Kasson, in and around downtown for example.

Furthermore, destruction of the School is certainly not "required for health, safety, or welfare reasons, taking into account the state's strong commitment to the environment." *Archabal*, 495 N.W.2d at 422. The School is a sound building with many potential uses and purposes that would allow it's historic stature to be maintained.

In sum, under any interpretation of the facts, "truly unusual factors" could not be present here, nor could the "cost of community disruption from the alternatives" to the continued preservation of the Kasson Public School "reach[] an extraordinary magnitude." Thus under MERA and the decisions of the Supreme Court construing it,

declaratory and injunctive relief is appropriate with respect to the proposed destruction of the School by the City of Kasson.

**B. THE COURT SHOULD ISSUE A TEMPORARY INJUNCTION PREVENTING DEMOLITION OF THE SCHOOL.**

Plaintiff respectfully submits that MERA, taken in conjunction with other state and federal laws, strongly suggests that a temporary injunction should issue, prohibiting the City from proceeding with efforts to demolish the School, pending an opportunity to consider the merits of plaintiff's claim. The factors to be considered in assessing a temporary injunction request under MERA were discussed by the Court of Appeals in *State by Drabik v. Martz*, 451 N.W. 2d 893 (Minn. App. 1990). The *Drabik* Court applied the well-known criteria from *Dahlberg Bros., Inc. v. Ford Motor Co.*, 137 N.W.2d 314, 321-22 (Minn. 1965):

- (1) The nature . . . of the relationship between the parties.
- (2) The harm to be suffered by [plaintiff] if the temporary restraint is denied as compared to that inflicted upon the [defendant] if the injunction issues pending trial.
- (3) The likelihood that one party or the other will prevail on the merits.
- (4) The aspects of the fact situation, if any, which permit or require consideration of public policy expressed in statutes.

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

*Drabik*, 451 N.W.2d at 895. Application of these factors to the instant case demonstrates that plaintiff is entitled to a temporary injunction.

1. **The Relationship of the Parties.** On two separate grounds, this factor favors plaintiff. First, plaintiff is pursuing this MERA action in the name of the state, pursuant to the authority provided in Minn. Stat. §116B.03. It therefore acts in effect as an agent of state policy, the private right of action reflecting the fact that in MERA actions, more may be at stake than purely private interests, that the state's natural resources are of concern to "present and future generations" of Minnesotans.

The City of Kasson is a political subdivision of the state. It therefore has an elevated responsibility to observe and implement priorities established by the Legislature, including those reflected in MERA and properly the subject of litigation brought under that statute. As the Supreme Court in *County of Freeborn v. Bryson*, 243 N.W. 2nd 316 (Minn. 1976) stated (also a MERA action, involving a county road project):

Indeed, as a political subdivision of the state, the County has a greater duty than does a private individual to see that legislative policy is carried out. As a creature of the state deriving its sovereignty from the state, the County should play a leadership role in carrying out legislative policy.

*County of Freeborn*, 243 N.W.2d at 321.

In addition to the fact that a MERA plaintiff acts in effect as an agent of the state in enforcing the policies favoring the protection of natural resources, and that as a political subdivision, the City of Kasson has a heightened responsibility to observe those policies, plaintiff has a special relationship to the Kasson Public School based on its nonprofit status to protect and improve the historic resources in the Kasson area. Plaintiff is therefore directly affected by any actions the City of Kasson might take with respect to the School. Thus, the first *Dahlberg* factor clearly favors plaintiff.

2. **Balance of Harms.** If a temporary injunction is not granted, a unique and irreplaceable historical resource will be destroyed before a hearing on the merits can occur. Plaintiff would therefore suffer irreparable harm.

In contrast, the prospect of serious harm to the City of Kasson if a temporary injunction issues seems small. The temporary injunction would simply maintain the status quo, one that has already existed for several years. The City of Kasson has no urgent or overriding need to destroy the school.

On balance, therefore, failure to issue the temporary injunction could cause an irreparable impairment to a unique natural resource. Granting the temporary injunction will almost certainly cause no serious harm to the City of Kasson. Consequently, the second *Dahlberg* factor also favors plaintiff.

**3. Likelihood that Plaintiff Will Prevail on the Merits.** For the reasons described earlier in this Memorandum, plaintiff submits that it has a strong prospect of prevailing on the merits.

**4. Relevant Policies Expressed in the Statutes.** As noted, state law contains numerous and explicit policy declarations reflecting a commitment to the protection of natural resources. MERA in particular was enacted to provide an effective means of advancing these policies. Plaintiff is not aware of any legislative policy that encourages the destruction or impairment of natural resources. Moreover, “MERA specifically contemplates temporary injunctions to protect natural resources.” *Drabik*, 451 N.W. 2nd at 897.

In addition to the general policies encouraging citizens and governmental agencies to protect natural resources, there are various federal and state policies relating specifically to the preservation of historical resources. As indicated earlier, the National Historic Preservation Act and rules promulgated under it urge all units of government to protect historical resources. 16 U.S.C. §470; 36 C.F.R. §800. Minn. Stat. §138.51 states that it is “in the public interest to provide for the preservation of historic sites, buildings, structures, and antiquities of state and national significance for the inspiration, use, and benefit of the people of this state.”

Minn. Stat. §471.193, subd. 1 also promotes the protection of historical resources by government agencies. According to this statute,

The legislature finds that the historic, architectural, archaeological, engineering, and cultural heritage of the state is among its most important assets. Therefore, the purpose of the section is to authorize local governmental bodies to engage in a comprehensive program of historic preservation, and to promote the use and conservation of historic properties for education, inspiration, pleasure, and the enrichment of the citizens of this state.

In light of the strong state policy favoring protection of natural resources, and the myriad legislative declarations that historical resources are of great value and should be preserved, the fourth *Dahlberg* factor strongly supports plaintiff's temporary injunction request.

**5. Administrative Burdens on the Court.** There is no reason whatsoever to believe that the City of Kasson will not abide by a temporary injunction should this Court issue one. The injunction would require only that the City of Kasson refrain from destroying or impairing the 1918 Kasson Elementary School. It would not impede other activities of the City of Kasson in the exploration of sites suitable for City facilities. Consequently, there would appear to be virtually no administrative burdens involved in judicial supervision of a temporary injunction, and the fifth *Dahlberg* factor thus also favors a temporary injunction.

**C. IF THE COURT GRANTS A TEMPORARY INJUNCTION, ANY BOND REQUIRED SHOULD BE MINIMAL.**

Minn. R. Civ. P. 65.03 states that the Court is to require security from the applicant before issuing a temporary injunction. Plaintiff submits, however, that MERA expressly modifies this requirement, and that a bond is not automatically necessary when a temporary injunction is granted in a MERA action because Minn. Stat., § 116B.07 states that “[w]hen the court grants temporary equitable relief, it *may* require the plaintiff to post a bond sufficient to indemnify the defendant for damages suffered because of the temporary relief, if permanent relief is not granted” (emphasis added).

This Memorandum described previously how issuance of a temporary injunction would not expose defendant to any significant harm, given the limited relief sought by plaintiff. In fact, the City of Kasson would arguably save money by not incurring the costs of demolition. For this reason, there is no need for a large bond. More fundamentally, if this Court were to make plaintiff’s posting of a significant bond a condition of a temporary injunction, it would make the protections of MERA effectively meaningless.

Plaintiff, is a nonprofit organization of modest means. It could not possibly sustain the cost of a substantial bond. See O'Brien-Berge Affidavit, 4. Therefore, imposition of such a requirement would in this case—and in virtually every other action that could arise under the citizen-enforcement procedures of MERA—render the legislative policy impotent. Rarely if ever would average citizens be able to obtain temporary injunctive relief, and in most such cases, the natural resource to be protected would, at minimum, be seriously impaired before the Court could hear the case on the merits.

In fact, this might well be why the word “may” is used in §116B.07. If the Legislature had meant for the mandate of Minn. R. Civ. P. 65.03 to apply inflexibly in all MERA actions, it is hard to see why it would have used discretionary language in the statutory reference to the bond. It therefore seems reasonable to infer that the Legislature did want trial courts to exercise discretion with respect to imposing bond (discretion which exists under Rule 65.03 in any event, security to be “in such sums as the court deems proper”). And because §116B.07 is a statute—a statute specifically relating to actions under MERA—the canons of statutory construction indicate that it is to be given precedence over Rule 65.03. See Minn. Stat. §645.26.

This interpretation is expressly supported by the Court of Appeals decision in *Drabik*. Even though the defendant was a private party, and was faced with significant construction delays and expenses should a temporary injunction issue; the Court nonetheless sustained the trial court's imposition of a temporary injunction bond in the amount of only \$1,000.

Plaintiff would also observe that Rule 65 contemplates other options for the Court when a temporary injunction is issued, including ordering “the trial of the action on the merits to be advanced.” Rule 65.02(c). Indeed, this alternative has often been used in historic preservation cases, so as to minimize the potential impact on defendant of granting the temporary injunction. See, e.g., *Powderly, supra*, 285 N.W.2d at 87, noting that the suit under MERA was not commenced until late July, yet was tried to the court in mid-August.

Finally, it can reasonably be inferred from the policy embodied in MERA and other statutes cited above that the justification for a significant bond is least compelling in cases where governmental bodies are defendants, as a consequence of their duty to observe state and federal policies. This is particularly true where the effect of imposing a bond requirement would in practice disable the plaintiff's ability to pursue the action.

Plaintiff therefore respectfully requests that the Court not impose a substantial bond or other security in the event it concludes a temporary injunction is appropriate.

### **III. CONCLUSION**

For the reasons described in this Memorandum, plaintiff respectfully asks that its a temporary injunction be granted.