STATE OF MINNESOTA
IN COURT OF APPEALS
A07-2255

Gary Bailey,
Appellant,

vs.

Minnesota Pollution Control Agency,
Respondent,

Lake of the Woods County,
Respondent,

Minnesota Department of Natural Resources,
Respondent.

Filed November 4, 2008
Affirmed
Larkin, Judge

Lake of the Woods County District Court
File No. 39-C5-04-000209

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Considered and decided by Johnson, Presiding Judge; Hudson, Judge; and Larkin, Judge.

U N P U B L I S H E D O P I N I O N

LARKIN, Judge

This appeal centers on appellant-landowner's efforts to develop his property in Lake of the Woods County, and the regulation of wetlands on that property. Appellant challenges the district court's grant of summary judgment in favor of Lake of the Woods County, the Minnesota Pollution Control Agency, and the Minnesota Department of Natural Resources. Appellant argues that there are genuine issues of material fact in dispute regarding (1) whether there remains an economically viable use of the property at issue, (2) whether appellant has been deprived of access to his property via a public road, and (3) appellant's claim of negligent and intentional misrepresentation by a government official. We affirm.

D E C I S I O N

Appellant Gary Bailey attempted to obtain federal, state, and local permits necessary for the residential development of a parcel of land in Lake of the Woods County. After efforts to develop the parcel failed, appellant filed suit against Lake of the Woods County (county), the Minnesota Pollution Control Agency (MPCA), and the Minnesota Department of Natural Resources (DNR). As to the county, appellant asserted claims of regulatory taking, breach of contract, and negligent and intentional misrepresentation. As to the DNR, appellant asserted claims of regulatory taking and

selective prosecution. As to the MPCA, appellant asserted claims of regulatory taking and estoppel. All respondents moved for summary judgment, which the district court granted. Appellant appeals, but limits his challenge to the district court's dismissal of appellant's taking and misrepresentation claims.[1]

Summary judgment is appropriate when the evidence, viewed in the light most favorable to the nonmoving party, shows that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Osborne v. Twin Town Bowl, Inc.*, 749 N.W.2d 367, 371 (Minn. 2008). The moving party has the burden of showing the absence of a genuine issue of material fact, *Anderson v. State Dep't of Natural Res.*, 693 N.W.2d 181, 191 (Minn. 2005). To survive a motion for summary judgment, the nonmoving party must establish that there is a genuine issue of material fact through substantial evidence, which refers to legal sufficiency and not quantum of evidence. *Osborne*, 749 N.W.2d at 371. It is not enough for the non-moving party to show "some metaphysical doubt." *DLH, Inc. v. Russ*, 566 N.W.2d 60, 70–71 (Minn. 1997). In reviewing a district court's grant of summary judgment, this court must

[1] Appellant also takes issue with the district court's failure to make findings of fact and explain its legal analysis. In its memorandum of law, the district court simply concurred with the respondents' legal reasoning without specifically adopting any one of several summary-judgment theories advanced by respondents. Motions for summary judgment are governed by Minn. R. Civ. P. 56, which does not mandate findings of fact or conclusions of law. While not mandated by the rules of civil procedure, inclusion of the district court's analysis within a court order is desirable. Explanation of the district court's analysis reveals the court's consideration of the parties' arguments and the court's reasoning, thereby promoting confidence in the court's decision and facilitating appellate review. However, the absence of conclusions of law does not prevent review of the district court's grant of summary judgment in this case.

determine whether there are any genuine issues of material fact and whether the law was applied erroneously. *State by Cooper v. French*, 460 N.W.2d 2, 4 (Minn. 1990). The district court's interpretation of the law is reviewed de novo. *Bjerke v. Johnson*, 742 N.W.2d 660, 664 (Minn. 2007). An award of summary judgment should be affirmed if it can be sustained on any ground." *Winkler v. Magnuson*, 539 N.W.2d 821, 828 (Minn. App. 1995).

The Claims Against Lake of the Woods County

Appellant owns an 86-acre parcel of land in Lake of the Woods County, which he acquired in 1989. Appellant sought to develop residential lots on a 13-acre section of lakeshore property within that parcel. In furtherance of the desired development, appellant commenced construction of an access road for the proposed development, had the property rezoned for residential development, and obtained final plat approval from the county. Appellant intended the access road to become a public roadway. Appellant thereafter sold some of the lots within the development to individuals who are not parties to this lawsuit.

Construction of the access road required a "section 404" permit. 33 U.S.C. § 1344(a) (2000). After commencing construction of the road, appellant sought an after-the-fact section 404 permit from the Army Corps of Engineers. When the Army Corps of Engineers received appellant's permit request, it performed a wetland-delineation study and concluded that the 13-acre development included wetlands. The Army Corps of

Engineers denied the after-the-fact permit and ordered the road removed.[2] Appellant, and other individuals who purchased lots in the development, subsequently submitted wetland-replacement plans to the county. The county denied the replacement plans and made no effort to maintain the road following the Army Corps of Engineers' wetland-delineation and restoration order. Appellant argues that the county's denial of appellant's replacement plan amounted to an unconstitutional regulatory taking. Appellant also argues that a taking occurred because the county denied appellant access to his property via a public road.

Appellant has the burden of proving that a taking occurred. *Vern Reynolds Constr., Inc. v. City of Champlin*, 539 N.W.2d 614, 617 (Minn. App. 1995), *review denied* (Minn. Dec. 20, 1995). Whether a government entity has taken property is a question of law, which this court may review de novo. *Thompson v. City of Red Wing*, 455 N.W.2d at 512, 516 (Minn. App. 1990).

Both the federal and state constitutions forbid the taking of private property for public use without just compensation. U.S. Const. amend. V; Minn. Const. art. I, § 13. Appellant relies on both the "categorical" taking analysis from *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 112 S. Ct. 2886 (1992) and the "ad hoc" taking analysis from *Penn Centr. Transp. Co. v. New York City*, 438 U.S. 104, 98 S. Ct. 2646 (1978).

[2] This action by the Army Corps of Engineers yielded multiple federal suits. *See Bailey v. U.S. Army Corps of Eng'rs, et al.*, No. Civ. 02-639 RHKRLE, 2003 WL 21877903 (D. Minn. Aug. 7, 2003); *United States v. Bailey v. Lake of the Woods County*, 516 F. Supp. 2d 998 (D. Minn. 2007); *United States v. Bailey*, 556 F. Supp. 2d 977 (D. Minn. 2008).

To sustain a claim of categorical taking under *Lucas*, appellant must establish a complete deprivation of all economically beneficial use of the subject property, which means "'a complete elimination of value.' In other words, a property owner must demonstrate that a regulatory action resulted in a 100% diminution in value." *Wensmann Realty, Inc. v. City of Eagan*, 734 N.W.2d 623, 633 n.6 (Minn. 2007) (quoting *Lucas*, 505 U.S. at 1019–20 n.8, 112 S. Ct. at 2895 n.8) (other quotation omitted).

Summary judgment for the county was appropriate under a categorical taking analysis because appellant failed to raise a genuine issue of material fact regarding whether his entire 86-acre parcel was rendered valueless. In constitutional taking jurisprudence, the proper analysis

> does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular governmental action has effected a taking, this Court focuses rather both on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole.

Penn Cent. Transp. Co., 438 U.S. at 130-31, 98 S. Ct. at 2662, *cited with approval in Woodbury Place Partners v. City of Woodbury*, 492 N.W.2d 258, 261 (Minn. App. 1992), *review denied* (Minn. Jan. 15, 1993). In deciding whether a particular governmental action has yielded a taking, the court focuses on the parcel as a whole. *Id.*

Appellant focused his taking claim, and limited his evidence regarding depreciation in value, to the 13-acre development within appellant's 86-acre parcel. While appellant's unrefuted appraisal indicates the value of the 13-acre development decreased from $600,000 to $6,000, appellant offered no evidence that his entire 86-acre

parcel was rendered valueless as a result of the county's denial of appellant's replacement plan. To the contrary, appellant's sworn deposition testimony acknowledged that the un-developed portion of appellant's 86-acre parcel could "easily" be sold for $1,000 per acre. Accordingly, summary judgment was appropriate as a matter of law under the categorical taking analysis.

Appellant also argues that he presented sufficient evidence to establish a dispute of material fact under an ad hoc taking analysis. The ad hoc analysis requires a case-by-case analysis, in which the court reviews:

> 1) the economic impact of the regulation on the person suffering the loss, 2) the extent to which the regulation interferes with distinct investment backed expectations, and 3) the character of the government action to assess whether the complained of action effected a taking of private property for public use.

Zeman v. City of Minneapolis, 552 N.W.2d 548, 552 (Minn. 1996). When engaging in an ad hoc analysis, a distinction is drawn between interference with enjoyment of property caused by physical government activity and interference caused by government regulation of property use. *McShane v. City of Faribault*, 292 N.W.2d 253, 257 (Minn. 1980). When physical government activity causes interference, a compensable taking occurs if the activity causes a definite and measurable decrease in the value of the property and interferes with the current practical enjoyment of the property. *Id.* When, on the other hand, interference is caused by government regulation of property use, a compensable taking does not result unless the regulation deprives the property of all reasonable use. *Id.*

Further distinction is drawn between property-use regulations that are imposed to affect a comprehensive plan regarding competing land uses that create a reciprocal benefit and burden to all landowners (i.e., "arbitration" regulations) and regulations that serve to benefit a specific governmental enterprise (i.e., "enterprise" regulations).[3] *Id*. at 257-59. Enterprise regulations are excepted from the "deprivation of all reasonable use" standard that otherwise applies to land-use regulation taking claims. When a land-use regulation is designed to benefit a specific public or government enterprise, "there must be compensation to landowners whose property has suffered a substantial and measurable decline in market value as a result of the regulations." *Id*. at 258-59.

In this case, the regulations at issue are not designed to benefit a specific public or government enterprise. Nor does physical government activity interfere with appellant's enjoyment of his property. Accordingly, appellant must establish deprivation of all reasonable use of his property in order to prevail on his taking claim.

Summary judgment for the county was appropriate under an ad hoc analysis because appellant failed to raise a genuine issue of material fact regarding whether appellant was deprived of all reasonable use of his 86-acre parcel. Again, in deciding whether a particular governmental action has yielded a taking, the court focuses on the

[3] The Minnesota Supreme Court has stated that the arbitration and enterprise function analyses are not necessarily distinct from the flexible analysis in *Penn Central*. *Wensmann Realty, Inc. v. City of Eagan*, 734 N.W.2d 623, 641 n.14 (Minn. 2007). As to the interaction between the tests, the Minnesota Supreme Court has stated, "Any unfairly unequal distribution of the regulatory burden may be considered in appropriate cases under the character factor of the *Penn Central* approach and then balanced along with the other relevant factors." *Id*.

parcel as a whole. *Penn Cent. Transp. Co.*, 438 U.S. at 130-31, 98 S. Ct. at 2662. Appellant's sworn deposition testimony acknowledged that the undeveloped portion of appellant's 86-acre parcel could "easily" be sold. Appellant also testified that he used portions of the 86-acre parcel for farming, logging, and recreational purposes. Appellant's later self-serving affidavit, which alleges reasonable use is impossible, cannot rebut his sworn deposition testimony. *Banbury v. Omnitrition Int'l, Inc.*, 533 N.W.2d 876, 881 (Minn. App. 1995) ("A self-serving affidavit that contradicts earlier damaging deposition testimony is not sufficient to create a genuine issue of material fact.").

Furthermore, appellant failed to raise a genuine issue of material fact regarding appellant's alleged loss of reasonable investment-backed expectations. Appellant's claimed loss of investment-backed expectations is based upon appellant's expectations after the property was rezoned for residential use in 1998. However, "[i]n examining a property owner's investment-backed expectations, the existing and permitted uses of the property when the land was acquired generally constitute the 'primary expectation' of the landowner regarding the property." *Wensmann Realty, Inc.*, 734 N.W.2d at 637. Appellant's property was zoned for agricultural and natural-resources purposes when he acquired it in 1989. Appellant claims that he nonetheless had reasonable investment-backed expectations based upon the previous development of neighboring lakeshore property. But appellant cites no legal authority in support of this proposition.

In affirming the district court's grant of summary judgment, we note that our holding is consistent with holdings in other cases in which zoning ordinances and other

land-use regulations were not found to result in unconstitutional takings, even though property values declined significantly as a result of the restrictions. *See, e.g.*, *McShane*, 292 N.W.2d at 257. The right to use property as one wishes is subject to and limited by the proper exercise of the police power in the regulation of land use. *Village of Euclid, Ohio v. Ambler Realty Co*., 272 U.S. 365, 47 S. Ct. 114 (1926)

Finally, there is no merit to appellant's claim that a compensable taking occurred because the county eliminated public-road access to appellant's property. Appellant's deprivation-of-access argument focuses, again, only on appellant's lots within the 13-acre development within appellant's 86-acre parcel. The record undisputedly establishes that appellant can access his lots within the development via appellant's remaining 73 acres, and that appellant has public-road access to the remaining 73 acres. The district court did not err in granting summary judgment on appellant's ad hoc taking claim against the county.

The district court also granted summary judgment on appellant's claim of negligent and intentional misrepresentation. Appellant argues that the county misrepresented the character of the 13-acre section of appellant's property, leading appellant to conclude that the land was developable as residential property. Appellant also argues that the county misrepresented its intent to assume responsibility for obtaining necessary permits for the access road appellant began constructing.

The county was entitled to judgment as a matter of law on appellant's negligent and intentional misrepresentation claim because the claim is barred under the doctrine of res judicata.

> The doctrine of res judicata (claim preclusion) bars a claim when litigation on a prior claim involved the same cause of action, there was a judgment on the merits, and the claim involved the same parties or their privies. . . . In addition, the party against whom res judicata is applied must have had a full and fair opportunity to litigate the matter in the prior proceeding. . . . If those requirements are met, res judicata bars not only claims as to matters actually litigated, but also as to every matter that might have been litigated in the prior proceeding.

Nelson v. Am. Family Ins. Group, 651 N.W.2d 499, 511 (Minn. 2002) (internal citations omitted). To determine whether there was a full and fair opportunity to litigate the matter, the court considers whether both actions arise from the "same operative nucleus of facts." *Nitz v. Nitz*, 456 N.W.2d 450, 451 (Minn. App. 1990).

Prior to this action, appellant was involved in two lawsuits with the county. *See Wolf v. Gary Bailey v. Lake of the Woods County*, Lake of the Woods County No. C6-010-06 (Stipulation and Order dismissing filed Sept. 24, 2001); *Bailey v. U.S. Army Corps of Eng'rs, et al.*, No. Civ. 02-639 RHK/RLE, 2002 WL 31728947 (D. Minn. Nov. 21, 2002). In *Wolf v. Gary Bailey v. Lake of the Woods County*, purchasers of three lots in the 13-acre development sued appellant for rescission. Appellant brought a third-party action against the county and "alleged that the County (1) accepted the Sunny Beach plat, (2) provided 'advice and guidance' to him as he sought to obtain state and federal approval for the road, and (3) ultimately 'took over' the road and the responsibility for following through on the permit applications relating thereto." *Bailey*, 2002 WL 31728947, at *13. The parties eventually dismissed all claims with prejudice by stipulation. *See* Stipulation and Order filed Sept. 24, 2001. "[A] dismissal with prejudice based on a stipulation is a final adjudication on the merits" for purposes of res

judicata. *State Bank of New London v. W. Cas. & Sur. Co.*, 178 N.W.2d 614, 617 (Minn. 1970) (citing *Melady-Briggs Cattle Corp. v. Drovers State Bank of S. St. Paul*, 213 Minn. 304, 307, 6 N.W.2d 454, 457 (1942)). In *Bailey v. U.S. Army Corps of Eng'rs*, appellant's detrimental reliance claim against the county was dismissed with prejudice based upon the doctrine of res judicata, given the outcome in *Wolf*. 2002 WL 31728947, at *13.

Both prior cases included appellant and the county as parties and resulted in final adjudications on the merits. And those cases and this case involve the same operative nucleus of facts. All three cases involve appellant's attempt to develop the 13-acre section of appellant's property. All three cases involve appellant's assertions that the county misrepresented that appellant would be able to develop his property and that the county would assume responsibility for the access road on which appellant began construction. In this case, appellant neither offers new material facts nor any rationale as to why his misrepresentation claim could not have been litigated in *Wolf*. Thus, the district court did not err in granting judgment as a matter of law because appellant's misrepresentation claims are barred under the doctrine of res judicata.

Even if the claims were not barred, summary judgment was appropriate based upon the county's defense of official and vicarious immunity. "[T]he doctrine of common law official immunity provides that a public official charged by law with duties which call for the exercise of his judgment or discretion is not personally liable to an individual for damages unless he is guilty of a willful or malicious wrong." *Anderson v. Anoka Hennepin Indep. Sch. Dist. 11*, 678 N.W.2d 651, 655 (Minn. 2004) (quotation

omitted). Malice "means nothing more than the intentional doing of a wrongful act without legal justification or excuse, or, otherwise stated, the willful violation of a known right." *Id.* at 662 (quoting *Rico v. State*, 472 N.W.2d 100, 107 (Minn. 1991)). Official immunity protects "public officials from the fear of personal liability that might deter independent action and impair effective performance of their duties." *Anderson*, 678 N.W.2d at 655 (quotations omitted).

"[V]icarious official immunity protects the government entity from suit based on the official immunity of its employee." *Wiederholt v. City of Minneapolis*, 581 N.W.2d 312, 316 (Minn. 1998). "[W]hether to extend official immunity to the governmental employer is a policy question." *Pletan v. Gaines*, 494 N.W.2d 38, 42 (Minn. 1992). We apply vicarious official immunity when failure to grant it would focus stifling attention on the official's performance to the serious detriment of that performance. *Wiederholt*, 581 N.W.2d at 316 (citation omitted); *see also S.J.S. by L.S. v. Faribault County*, 556 N.W.2d 563, 565 (Minn. App. 1996), *review denied* (Minn. Jan. 21, 1997) ("If a claim is barred on immunity grounds, the governmental entity is entitled to judgment as a matter of law.").

When appellant approached the county with plans to develop his property, county employees were called upon to exercise their independent discretionary judgment as to whether appellant's plans for development constituted permissible use of the property. *See Wiederholt*, 581 N.W.2d at 315 (Minn. 1998). Likewise, any assertions that the county would assume responsibility for the road or obtain the needed permits were discretionary. Neither of the county's alleged misrepresentations stemmed from an

activity that "is absolute, certain and imperative, [or] involving merely execution of a specific duty arising from fixed and designated facts." *Rico v. State*, 472 N.W.2d 100, 107 (Minn. 1991) (citing *Cook v. Trovatten*, 200 Minn. 221, 224, 274 N.W. 165, 167 (1937)). Thus, the alleged misrepresentations were clearly protected by official immunity.

The county raised the defense of official and vicarious immunity in its memorandum of law to the district court and in its brief on appeal. To surmount the defense of official and vicarious immunity and survive a motion for summary judgment, appellant had to present a genuine issue of material fact as to whether an act of malice barred the defense. *See Soucek v. Banham*, 503 N.W.2d 153, 160-61 (Minn. App. 1993) (stating malice can be resolved on summary judgment); *Reuter v. City of New Hope*, 449 N.W.2d 745, 751 (Minn. App. 1990), *review denied* (Minn. Feb. 28, 1990) (noting that it is possible to resolve malice on summary judgment but declining to do so where the relevant facts were in substantial conflict). Appellant did not address the county's immunity claims in appellant's brief.

The only arguable assertion of malice is appellant's allegation that the county instructed appellant to continue building the road on his property while communicating to the Army Corps of Engineers that the county had ordered building activities to cease. In making this claim, appellant cites a letter to appellant from Walter Leu, a County Engineer. Appellant's claim mischaracterizes the language and purpose of the letter to such an extent that even when viewing the evidence in the light most favorable to appellant, the letter is insufficient to sustain appellant's claim. The letter neither instructs

nor encourages appellant to continue construction of the road. The letter simply advises appellant what would be necessary to bring the road into compliance with county requirements. Thus, the district court's grant of summary judgment was appropriate because appellant raised no genuine issue of material fact as to the existence of malice.

The Claims Against the Department of Natural Resources

After the Army Corps of Engineers' wetland delineation and denial of the after-the-fact section 404 permit, the DNR ordered removal of driveway fill from lots in appellant's 13-acre development. Appellant argues that the order for fill removal accomplished a regulatory taking of his property and a deprivation of appellant's right of access to his property via a public road.

The district court did not err in granting judgment as a matter of law for the DNR. Appellant's claim and proffered facts are limited to the 13-acre section of appellant's 86-acre parcel. As described in the discussion of appellant's claims against the county, appellant failed to raise a genuine issue of material fact as to the complete diminution in value, or elimination of all reasonable use, of appellant's entire property. Similarly, appellant's claim that the order for fill removal deprived him of the right to access to his property via a public road is without merit. As previously explained, appellant has access to his property via existing public roads. For these reasons the district court did not err in granting summary judgment on appellant's taking claim against the DNR.

The Claims Against the Minnesota Pollution Control Agency

Appellant argues that the MPCA's revocation of a previously issued section 401 certification amounted to a regulatory taking. When appellant was in the process of

building the road and platting the development, the MPCA issued appellant a section 401 certification. In order for the necessary federal permit or license to be issued under section 404, the Army Corps of Engineers must receive certification from the state that any resulting discharge will comply with state water-quality standards pursuant to section 401 of the Clean Water Act. 33 U.S.C. § 1341. This is referred to as a "section 401 certification." Based upon the Army Corps of Engineers' subsequent wetland delineation, the MPCA revoked appellant's section 401 certification. The MPCA concluded that revocation was appropriate because appellant had failed to fully disclose the nature of the wetlands on his property and because appellant's proposed development would endanger public health by creating a nuisance condition where septic systems installed in the wetland soil would fail and discharge untreated sewage into the water supply.

Appellant appealed the MPCA's findings to an administrative law judge (ALJ), who affirmed the MPCA's conclusions after a contested-case hearing. Appellant appeared at the hearing, represented by counsel. The ALJ found that appellant failed to accurately report the nature and scope of the wetlands and the project's location in a floodplain. The ALJ also found that the sewage-treatment systems would not function properly in wetland soils and would discharge untreated sewage into surface waters and into the groundwater, affecting potential wells. This would create a danger to human health. The ALJ recommended that the revocation of the section 401 certification be affirmed. The MPCA adopted the ALJ's findings and recommendation and revoked the certification. Appellant did not seek review of the MPCA's decision by writ of certiorari.

The ALJ's conclusion that appellant's proposed development would create a nuisance is binding in this case. The doctrine of collateral estoppel prevents relitigation of this issue. Collateral estoppel applies to administrative decisions when made in a quasi-judicial capacity. *Graham v. Special Sch. Dist. No. 1*, 472 N.W.2d 114, 115-16 (Minn. 1991). For collateral estoppel to apply,

> 1) the issue to be precluded must be identical to the issue raised in the prior agency adjudication;
> 2) the issue must have been necessary to the agency adjudication and properly before the agency;
> 3) the agency determination must be a final adjudication subject to judicial review;
> 4) the estopped party was a party or in privity with a party to the prior agency determination; and
> 5) the estopped party was given a full and fair opportunity to be heard on the adjudicated issue.

Id. at 116 (citations omitted).

The issue appellant seeks to litigate in the present case is identical to the issue litigated in the contested hearing before the ALJ. In both actions, appellant challenged the MPCA's determination that his proposed development would result in a nuisance. The factual and legal issues regarding the MPCA's determination were resolved in the administrative hearing. A finding regarding the alleged nuisance was necessary to the agency's review of the MPCA's decision to revoke the 401 certification, and the issue was properly before the agency. The agency's determination on the merits was a final adjudication subject to judicial review by means of a writ of certiorari to this court. Appellant was a party to the administrative action, and the administrative hearing provided him with a full and fair opportunity to be heard. Thus, we conclude that

collateral estoppel precludes appellant from relitigating the determination that appellant's proposed development would create a nuisance. *Id.*

Given the binding determination that appellant's proposed development would create a nuisance, summary judgment was appropriate because the enforcement of regulations in an effort to abate a nuisance does not result in an unconstitutional taking. *City of Minneapolis v. Meldahl*, 607 N.W.2d 168, 172 (Minn. App. 2000). If application of a "state regulation appears genuinely designed to prevent harm to the public and is likely to achieve that goal and the harm suffered by the property owner does not appear to be one that should be borne by the entire community, we will not find a taking." *Zeman*, 552 N.W.2d at 554. The MPCA has the statutory authority to undertake actions necessary "to prevent, control or abate water pollution." Minn. Stat. § 115.03, subd. 1(e) (2006). "Water pollution" is defined as

> the discharge of any pollutant into any waters of the state or the contamination of any waters of the state so as to create a nuisance or render such waters unclean, or noxious, or impure so as to be actually or potentially harmful or detrimental or injurious to public health, safety or welfare. . . .

Minn. Stat. § 115.01, subd. 13 (2006); *see Hall v. Stokely-Van Camp, Inc.*, 259 Minn. 101, 103, 106 N.W.2d 8, 10 (1960) (describing Minnesota's statutory law of nuisance as declaratory of common law of nuisance) (citing Minn. Stat. § 561.01 (1957). Furthermore, the improper discharge of sewage is a recognized common-law nuisance. *Highview N. Apartments v. County of Ramsey*, 323 N.W.2d 65, 71 (Minn. 1982) (discharging sewage is a classic example of a nuisance); *Huber v. City of Blue Earth*, 213 Minn. 319, 321, 6 N.W.2d 471, 472 (1942) (discharging sewage is a nuisance). Thus,

because the MPCA's revocation of the section 401 certification was an effort to prevent a nuisance and potential harm to human health, no taking occurred as a matter of law, and the district court properly granted summary judgment in favor of the MPCA.

Appellant's taking claim against the MPCA also fails for the same reasons that appellant's claims against the county and the DNR fail. Appellant raised no genuine issue of material fact regarding whether revocation of the section 401 certification rendered appellant's whole property valueless or eliminated all reasonable use of the appellant's entire property. The district court did not error in granting summary judgment on appellant's taking claims against the MPCA.

Affirmed.

Dated: _____

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The Honorable Michelle A. Larkin