

Judge Francis Connolly

STATE OF MINNESOTA
COUNTY OF HENNEPIN

DISTRICT COURT
FOURTH JUDICIAL DISTRICT

Case Type: Other Civil

PETER HUXMANN, individually and on)
behalf of all those similarly situated,)
)
) Plaintiff,)
)
v.)
)
MINNEAPOLIS PARK AND)
RECREATION BOARD,)
)
) Defendant.)

**PLAINTIFF’S RESPONSE TO
AFFIDAVIT OF NICHOLAS P.
EOLOFF**

Case No. 27-CV-07-7807

TO: HON. FRANCIS CONNOLLY, HENNEPIN COUNTY DISTRICT COURT, C-1657
HENNEPIN COUNTY GOVERNMENT CENTER, 300 SOUTH SIXTH STREET,
MINNEAPOLIS, MN 55487.

Plaintiff Peter Huxmann, through the undersigned attorney, submits this response to the Affidavit of Nicholas P. Eoloff dated August 29, 2007, which defendant submitted during the hearing of plaintiff’s motion for a stay of proceedings on August 30, 2007.

BACKGROUND

In plaintiff’s memorandum of law in support of his motion for a stay of proceedings, it was argued as follows in pertinent part:

A stay of proceedings during the pendency of plaintiff’s appeal is warranted because plaintiff will be irreparable harmed if the present traditional sidewalk is torn up and replaced with a 10’ bicycle-only path, whereas there is no evidence before the court that shows that defendant will be harmed, financially or otherwise, by a postponement of the construction of such a path from Ulysses Street to Stinson Boulevard. The court does not know if a bid was accepted nor what the terms of any such bid are, and a stay of proceedings will have no effect on the ability of defendant to carry through with the reconstruction of the path and bridge between 37th and Ulysses since that is a separate and distinct project with separate and distinct funding. There thus are no grounds on which to base the imposition of a bond.

A review of defendant's response memorandum caused plaintiff to observe in pertinent part as follows:

[D]efendant's response argument contains not a word as to what sort of bond or other conditions should be imposed and why. The trial court thus continues to have no evidence before it on which to base an imposition of a bond or other conditions, and defendant's attorney cannot be properly allowed to "testify" at the hearing on August 30th on a subject about which *nothing* has been said in defendant's response memorandum. Defendant has never even *argued* that it will be harmed, financially or otherwise, by a postponement of the construction of what we now know will be a 10' bicycle-only path and not the falsely-described 'bike/pedestrian' path. The absence of any such argument coupled with the absence of any evidence that a bid concerning the Ulysses-to-Stinson project has been accepted or even advertised should require this court to presume that a bid for the Ulysses-to-Stinson project has never been solicited, let alone accepted. The court should reject any attempt to proffer any such evidence at the hearing on August 30th and should refuse to hear any eleventh-hour attorney "testimony" about such evidence or the way and extent to which defendant stands to be harmed by a postponement of a Ulysses-to-Stinson path.

In apparent reaction to that at the hearing, defendant's attorney offered and the court accepted the Affidavit of Nicholas P. Eoloff, to which plaintiff now responds as follows:

In short, the Eoloff affidavit does not contain anything on which the court can base a determination of what, if any, bond or other conditions should be imposed if the stay is granted. In other words, the Eoloff affidavit does not contain anything which causes one to conclude that the Park Board would be harmed, financially or otherwise, if the construction of the Ulysses-to-Stinson path were to be postponed for the duration of plaintiff's appeal. Merely estimating the cost of the Ulysses-to-Stinson section tells us nothing about whether and to what extent a postponement would harm the Park Board, and it is not for the court to guess. As to why the bid process was delayed, the Eoloff affidavit is far from clear, and, *e.g.*, more detail concerning the "encroachment issue" is needed since requiring some residents to remove so-called "encroachment" while reaching a resolution of an encroachment issue with someone else begs one to think that

some residents are being treated differently than others by the Park Board (and MNDot).

Plaintiff's attorney purchased the TDKA plans on Friday, August 31, 2007, and, *inter alia*, has found nothing therein which requires the 37th-to-Ulysses project and the Ulysses-to-Stinson project to be started and worked on at the same time or, for that matter, by the same contractor. Paragraph no. 4 of Affidavit of Alfred Stanbury dated September 6, 2007 (hereinafter "Stanbury Aff. ¶ __ and/or Ex. __"). In other words, there does not appear to be any reason why the 37th-to-Ulysses project could not be commenced without also commencing the Ulysses-to-Stinson project.

On or about Tuesday, September 4, 2007, plaintiff's attorney (and, reportedly, others) received the Park Board's invitation to "open houses" which are to be held on September 18th and October 18th to "review location and design alternatives" of the bike path at issue followed by community discussions. Stanbury Aff. Ex. 1. Under the circumstances and where defendant has contended that "policy" decisions have determined the location and design of the bike path at issue, acknowledging that alternatives are still on the table and thus subject to review is curious to say the least.

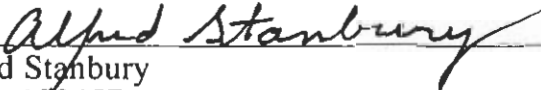
CONCLUSION

Plaintiff, again, respectfully requests an order (i) enjoining the construction of any sort of bike path from Ulysses Street to Stinson Boulevard and (ii) staying proceedings during the pendency of the appeal without the necessity to post a bond beyond the \$500 already deposited with the court to cover defendant's costs on appeal in the event that plaintiff's appeal is unsuccessful.

Respectfully submitted,

STANBURY LAW FIRM P.A.

Dated: September 6, 2007.



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