

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 MEMORANDUM OF
LAW IN SUPPORT OF MOTION FOR
TEMPORARY INJUNCTION**

Case No. 27-CV-07-7807

TO: HON. FRANCIS CONNOLLY, HENNEPIN COUNTY DISTRICT COURT, 1657
HENNEPIN COUNTY GOV’T CENTER, 300 SOUTH SIXTH STREET, MINNEAPOLIS,
MN 55487.

INTRODUCTION

Pursuant to Minn. R. Civ. P. 65, plaintiff Peter Huxmann,¹ through the undersigned attorney, submits this memorandum of law in support of his motion for a temporary injunction restraining defendant Minneapolis Park and Recreation Board (“Park Board”) from constructing a combination bike-and-pedestrian path on the northerly side of St. Anthony Parkway from Ulysses Street to Stinson Boulevard during the pendency of this action to *permanently* enjoin the construction of that bike-and-pedestrian path.

Nota Bene

From defendant’s January 3, 2007 letters to certain Parkway residents, it was reasonable for plaintiff to assume when he commenced this action that the commencement of the construction of the bike-and-pedestrian path at issue was imminent because those residents were told to remove their so-called encroachments by May 1, 2007, or the Park Board would remove and dispose of them “to make way for the construction of a new bicycle trail along the Parkway.” Exhibits 1-2 to Affidavit of Alfred Stanbury dated April 23, 2007 (hereinafter “Stanbury 4/23/07 Aff. ¶ __ and/or

¹ Plaintiff is a resident of Hennepin County, Minnesota, and owns and occupies the house and land located at 2105 St. Anthony Parkway, Minneapolis, Minnesota 55418. Defendant Park Board is a political subdivision of the City of Minneapolis, Minnesota.

Ex. __”). On April 25, 2007, however, defendant’s attorney revealed that, at the earliest, construction would begin around August 1, 2007, thus mooting plaintiff’s motion for a temporary restraining order and enabling the court to proceed directly to determining whether to grant plaintiff’s motion for a temporary injunction enjoining the construction of the bike-and-pedestrian path at issue during the pendency of the action aimed at *permanently* enjoining the construction of that bike-and-pedestrian path. That motion will be heard on May 23, 2007. Plaintiff’s initial filings did not include a memorandum of law in support of his motion for a temporary injunction because in practice it is not one of the documents a party submits to the court when seeking a temporary restraining order. D. McFarland & W. Keppell, MINNESOTA CIVIL PRACTICE § 1073 (3d ed. 1999). Plaintiff’s memorandum of law in support of his motion for a temporary restraining order was just that, a memorandum of law which supported a motion for a temporary restraining order; it was not intended to support the motion for a temporary injunction, nor was it necessary for it to do so. As a result, this memorandum of law both supports plaintiff’s motion for a temporary injunction *and* replies to defendant’s argument in opposition to that motion which was served on May 9, 2007.

PROCEDURAL HISTORY AND STATUS

By letters dated January 3, 2007, defendant told certain residents of St. Anthony Parkway to remove so-called encroachments from defendant’s Parkway property by May 1, 2007, or defendant would remove and dispose of them. Stanbury 4/23/07 Aff. Ex. 1-2. On April 23, 2007, plaintiff commenced this action by serving the following on defendant: Summons; Complaint²; Notice of Motion and Motion for Temporary Restraining Order; Memorandum of Law in Support of Motion for Restraining Order; Affidavit of Peter Huxmann (with attached DVD); Affidavit of Alfred Stanbury; proposed Temporary Restraining Order; and Notice of Motion and Motion for Temporary Injunction. The originals of the foregoing were filed on April 24, 2007, and the action was assigned to Judge Francis Connolly as Case No. 27-CV-07-7807. On April 25, 2007, during a telephone conference, Judge Connolly scheduled a hearing of plaintiff’s motion for a temporary injunction for May 23, 2007, prior to which the parties would complete the briefing of that motion. During that conference, defendant’s attorney revealed that defendant had not yet advertised for bids on the bike-and-pedestrian path at issue; later that day, defendant’s attorney sent a letter to Judge

² Exhibit 1 to Affidavit of Alfred Stanbury dated May 18, 2007 (hereinafter “Stanbury Aff. ¶ __ and/or Ex. __”).

Connolly in which she reported, *inter alia*, that the ad for bids would go out by June 1, 2007, the bids would be opened by July 10, 2007, and construction would begin around August 1, 2007. Stanbury Aff. Ex. 12. Defendant served an Answer on April 26, 2007. Stanbury Aff. Ex. 2.

FACTS

1. A July 29, 2005 *Wall Street Journal* editorial scoffed at the pork included in a \$286.4-billion highway bill, including \$3.2-million for an extension of a bike path in Duluth, Minnesota. Stanbury Aff. Ex. 4.

2. An August 11, 2005 *Northeaster* article titled “Bike trail plan upsets parkway neighbors” captured the Parkway residents’ adverse reaction to the construction of a bike path on St. Anthony Parkway between Ulysses Street and Stinson Boulevard. Stanbury Aff. Ex. 7.

3. An August 11, 2005 *Northeaster* editorial titled “Parkway bicycle trail needs more of a hearing” called for more public discussion of the Park Board’s intention to construct a bike path on St. Anthony Parkway between Ulysses Street and Stinson Boulevard. Stanbury Aff. Ex. 8.

4. Of nine examined cases in which the defendant herein was a party, defendant herein was named as “Minneapolis Park and Recreation Board” in all but one, the one exception being a 1995 case in which defendant herein was named as “City of Minneapolis, acting through its Park and Recreation Board, formerly identified as its Board of Park Commissioners.” Stanbury Aff. ¶ 8 and Ex. 9.

5. In an August 14, 2006 email, Parkway resident James Dew sent an email to defendant’s Director of Park Planning Judd Rietkerk in which he said:

Judd,

This is almost my last chance to convince someone that we are about to make a terrible mistake with the proposed bike path on St. Anthony Parkway. Please google ‘bike path safety’. This is a summary of what you will find:

The kind of bike path proposed for St. Anthony Parkway between Ulysses and Stinson is known as a sidepath, which means a two-way bikeway on one side of a street. **Sidepaths have been extensively studied. EVERY study has concluded that sidepaths with intersections are the most dangerous form of bike path and many times more dangerous than riding in streets.** The national association of transportation planners is known as AASHTO. MnDOT is a member of AASHTO. AASHTO recognizes the problems with intersecting sidepaths and strongly advises against them in the AASHTO Guide for the Development of Bicycle

Facilities. Safety mitigation techniques exist, but they are quite expensive because they mostly involve eliminating intersections. Courts have recognized the AASHTO Guide as expert and authoritative. Failure to meet the AASHTO Guide has resulted in multi-million dollar judgments. I believe the proposed bike path will be the first intersecting sidepath in Minneapolis, which is why this issue has never come up in the past. I don't believe the safety problems have been fully considered. The Park Board could make a terrible mistake which we will all regret for years to come.

To which Judd Rietkerk responded as follows:

We are aware of the safety issues you have mentioned and will make every effort to identify design solutions to make this trail as safe as we can. The action that is moving through the system does not propose solutions to all the issues that will come up in the field as we move forward. The Park Board will be consulting with engineering firms to develop the plans and specifications for the trail. Your concerns will be part of the information used to develop the final plans. Thanks for your interest in the parks and bike trails being developed in your neighborhood.

Stanbury Aff. Ex. 10 (emphasis added.).

6. On March 12, 2007, the following exchange of email correspondence occurred between Parkway resident James Dew and Steve Clark, Bicycling & Walking Project Manager, Transit for Livable Communities:

Mr. Clark,

We haven't met, but based on TLC's charter, I thought you might be interested in the safety issues concerning the proposed St. Parkway bike path extension. In a nutshell, it is a contraflow sidepath which parallels St. Anthony Parkway, a medium density traffic corridor. It will direct bicyclist across 1 major and 8 minor intersections, riding against street traffic flow, and with poor visibility. Have any of the Minneapolis Park & Rec people talked to you about this? They seem dismissive of the safety issues, but I don't think they have much experience with bike paths outside the normal parks setting. Through a fluke of history, St. Anthony Parkway, which looks like a street with wide curbs, is actually the responsibility of the Park and Rec Dept and not the usual Minneapolis traffic people, so none of the people who would ordinarily work traffic safety issues appear to have been involved. Is this something that you and TLC might be interested in pursuant to your advocacy and educational mission? Thank you for your time.

To which Steve Clark responded as follows:

Thanks for bringing this to my attention, Jim. No, I have not had any discussions with Minneapolis Parks about this facility. I'll look into this further and see if they might be open to some suggestion to making it safer. **I'm not a big fan of two-way side paths for the reasons you cite.**

Stanbury Aff. Ex. 11 (emphasis added.).

ARGUMENT

Any decisions made at the time the court grants or denies a temporary injunction are not binding on the later course of the proceedings. *Chicago Ave. Floral Co. v. Traxler*, 284 Minn. 28, 169 N.W.2d 220, 221 (1969). In other words, a hearing on a motion for temporary injunction does not have the effect of adjudicating on the merits of the issues raised by the complaint. *Independent School Dist. No. 35 v. Engelstad*, 274 Minn. 376, 144 N.W.2d 245, 248 (1966). Neither does an order granting or refusing a temporary injunction establish the law of the case. *Id.* This is so because the hearing on a motion for a temporary injunction does not include the actual trial of facts. D. McFarland & W. Keppell, MINNESOTA CIVIL PRACTICE § 1074 (3d ed. 1999). Since it is by definition a hearing, not a trial, fact questions are not determined finally. *Id.* A temporary injunction is an extraordinary equitable remedy. Its purpose is to preserve the *status quo* until adjudication on its merits. *Pickering v. Pasco Marketing, Inc.*, 303 Minn. 442, 444, 228 N.W.2d 562, 564 (1998). Because a temporary injunction is granted prior to a completed trial on the merits, it should be granted only when it is clear that the rights of a party will be irreparably injured before a trial on the merits is held. *Id.* at 444 228 N.W.2d at 564.

A party seeking an injunction must first establish that the legal remedy is inadequate and that the injunction is necessary to prevent great and irreparable injury. *Shakopee Community v. Minnesota Campaign Board*, 586 N.W.2d 406, 409 (Minn. Ct. App. 1998), *citing Cherne Indus., Inc. v. Grounds & Assocs., Inc.*, 278 N.W.2d 81, 92 (Minn. 1979). Whether a party is entitled to temporary injunctive relief requires consideration of five factors: (1) the nature and background of the previous relationship between the parties; (2) the harm to be suffered by one party if the injunction is issued as compared to the harm to be suffered by the other party if it is denied; (3) the likelihood that the party seeking the injunction will prevail on the merits; (4) public policy considerations; and (5) any administrative burden involved in enforcement of the injunction. *Id.*, *citing Dahlberg Bros., Inc. v. Ford Motor Co.*, 272 Minn. 264, 274-75, 137 N.W.2d 314, 321-22 (1965).

I. Dahlberg Factors 1, 2, 3, And 4 Weigh Decidedly In Favor Of Issuing The Temporary Injunction Plaintiff Seeks. Dahlberg Factor 5 Is Of No Consequence.

A. The Relationship Of The Parties Weighs Decidedly In Favor Of Issuing The

Temporary Injunction.

This action pits an urban landowner against an adjoining landowner where plaintiff Huxmann's land adjoins land purportedly owned by defendant Park Board, a governmental entity. Adjoining landowner Park Board is threatening to create and maintain a nuisance on land it purportedly owns but has no special right to do what a private citizen landowner could not do.

B. The Balance Of Harms Weighs Decidedly In Favor Of Issuing The Temporary Injunction.

A party requesting a temporary injunction must show irreparable harm if the injunction is not issued, while the party opposing the injunction need only show substantial harm if it is issued. *Pacific Equip. & Irrigation, Inc. v. Toro Co.*, 519 N.W.2d 911, 915 (Minn. Ct. App. 1994). In the instant action, defendant will not be harmed at all by the issuance of a temporary injunction, whereas, if a temporary injunction does not issue, a victory by plaintiff at trial will be a meaningless waste of time and money because defendant will have already constructed an immutable nuisance. Plaintiff is seeking to enjoin a threatened nuisance. An injunction will not be granted against a threatened nuisance unless it clearly appears by competent evidence that a nuisance will be brought into existence by the acts sought to be restrained and that the parties complaining will be injured unless the injunction is granted. *Trauernicht v. Richter*, 111 Minn. 149, 126 N.W. 723 (1919). If a temporary injunction issues, as it should be, construction of the sidepath proposed by defendant will at worst be postponed. Defendant has been toying with this Project for over six years, it is beyond ridiculous to think that time became of the essence all of a sudden. Although a threatened nuisance can be enjoined, a threatened nuisance does not constitute a cause of action upon which relief in the form of money damages can be granted, *i.e.*, a legal remedy does not exist in this action at this time. Even though a complaint seeks an injunction, the action may be converted to one at law for damages by the conduct of the trial. *Highview North Apartments v. Ramsey County*, 323 N.W.2d 65, 73 (Minn. 1982). If a temporary injunction is not issued to enjoin defendant from constructing the combination bike-and-pedestrian path at issue before a completion of a trial on the merits, an irreversible and thus permanent nuisance stands to be created. Where the damage to adjoining property owners cannot be measured from a pecuniary standpoint, the injury is irreparable within the meaning of the law, and equity will interpose even though the pecuniary damage is not shown to be great. *Lead v. Inch*, 116 Minn. 467, 134 N.W. 218 (1912).

C. The Likelihood Of Plaintiff's Success On The Merits Weighs Decidedly In Favor Of Issuing The Temporary Injunction.

If defendant's claim that it owns an area from 30 to 38 feet wide along the Parkway is taken as true, the relationship of the parties is one of adjoining landowners where one of the landowners happens to be a governmental body and the other landowner is a private citizen. A landowner cannot do whatever he pleases on his property just because he owns it, and, if a landowner's conduct visits a nuisance on an adjoining landowner, that landowner may bring an action to abate that nuisance pursuant to Minn. Stat. § 561.01. If a governmental landowner's decision creates an ongoing nuisance on adjoining property, as herein, the court must analyze whether the nature of the act involved a governmental exercise of discretion. According to the holding of the Minnesota Supreme Court in *Terwilliger v. Hennepin County*, 561 N.W.2d 909, 913 (Minn. 1997), the analysis should focus on whether an equivalent professional in private industry making the same decision on the same elements would be subject to the same risks of liability. In other words, if the land owned by the Park Board were instead owned by a private party, would that private party be liable to plaintiff Huxmann for creating the nuisance upon which this action is grounded?

Defendant contends that "its implementation, construction, and design decisions³ are protected by statutory discretionary immunity and therefore asks the court to either dismiss plaintiff's action "at this juncture" or at least deny plaintiff's motion for a temporary injunction because "defendant will ultimately prevail on that issue." Defendant, of course, is wrong because, from a procedural standpoint, consideration of defendant's immunity claim at this stage would be premature since it can only be properly considered within a summary judgment motion that has been duly noticed and briefed in accordance with the requirements of Minn. Gen. R. Prac. 115.03(a)-(d) and because, as a matter of law, defendant's implementation, construction, and design decisions are operational decisions which are not protected by statutory immunity. The Minnesota Supreme Court has observed that the mere labeling of a government function as either operational or planning is not dispositive as to immunity. *Nusbaum v. County of Blue Earth and State of Minnesota*, 422 N.W.2d 713, 719 (Minn. 1988). In analyzing an official immunity question, a court begins by identifying "the precise governmental conduct at issue." *Watson v. Metro.*

³ *I.e.*, defendant's decisions to locate the path on the northerly side of St. Anthony Parkway, to make two-way bicycle traffic share a 10' path with pedestrians, and to construct the path with cement rather than asphalt. Those are the decisions which defendant contends were policy decisions.

Transit Comm'n, 553 N.W.2d 406, 415 (Minn. 1996). The critical inquiry is whether the conduct involved a balancing of policy objectives. *Nusbaum*, 422 N.W.2d at 722. Discretionary immunity protects government only when it can produce evidence that its conduct was of a policy-making nature involving social, political, or economic consideration rather than merely professional or scientific judgments. *Id.* When material facts are not in dispute, whether governmental action is protected by immunity is a question of law. *Zank v. Larson*, 552 N.W.2d 719, 721 (Minn. 1996). Immunity cannot attach where the facts necessary to establish the immunity are in dispute. *Gasparre v. City of St. Paul*, 501 N.W.2d 683, 686-88 (Minn. Ct. App. 1993). The government bears the burden of proving entitlement to immunity, which is narrowly construed. *Angell v. Hennepin County Reg'l Rail. Auth.*, 578 N.W.2d 343, 346 (Minn. 1998).

Defendant has not provided and never will be able to provide sufficient evidence that its implementation, construction, and design decisions are policy decisions entitled to immunity. The only policy decision entitled to immunity was the decision years ago to establish the Grand Rounds and the subsequent decision to convert it to a bike-and-pedestrian path. Decisions concerning where, when, and how to complete or not to complete are operational functions of the decision to establish the Grand Rounds just as the city's failure to maintain a beach and warn of dangerous conditions were held to be operational functions of the decision to open the beach in *Marlow v. City of Columbia Heights*, 284 N.W.2d 388, 392 (Minn. 1979). Defendant's decisions herein involved, if anything, a balancing of professional or scientific judgments rather than a balancing of policy objectives. In *Holmquist v. State*, 425 N.W.2d 232-33 (Minn. 1988), the Minnesota Supreme Court noted that the distinction between these two types of decisions is not always clear and went on to observe in pertinent part:

That public policy decisions and the professional decisions involved in carrying out settled policies have in common the evaluation of complex and competing factors cannot be [contradicted]. It is, however, the evaluation and weighing of social, political, and economic considerations underlying public policy decisions, not the application of scientific and technical skills in carrying out established policy, which invokes the discretionary function exception affording governmental immunity.

Without citing any supporting authority, defendant baldly contends that "Minnesota courts have consistently applied the doctrine of discretionary immunity to a city's decision regarding implementation of improvement projects" Defs. Mem. at 9. Actually, the opposite is true.

See, e.g., Steinke v. City of Andover, 525 N.W.2d 173, 175 (Minn. 1994) (“implementation [of] . . . established policy to a particular fact situation . . . **is unprotected operational level conduct** albeit conduct which calls for the special knowledge and expertise of government employees and requires the exercise of professional judgment.”) (emphasis added). Defendant’s contention thus is wrong as well as unsupported and is belied by the three cases defendant cites in ostensible support for its (correct) contention that “[a] governmental unit is only entitled to immunity when ‘it can produce evidence’ that its actions were the result of planning and policy-making and” Defs. Mem. at 7. In one of those three⁴ cases--*Conlin v. City of St. Paul*, 605 N.W.2d 396, 402 (Minn. 2000)--the Minnesota Supreme Court held that the city’s evidence was insufficient to support its burden of proof on the claim of statutory immunity because, like defendant’s conclusory affidavits herein, the city’s affidavits were conclusory. The city’s deficient affidavits were described as follows in *Conlin*:

In addition, rather than explaining how and why a decision pertaining to the street sealing project was made and detailing the underlying considerations, the Erickson affidavits are conclusory. The affidavits merely identify generalized concerns and seemingly parrot back language from our case law without incorporating specific facts demonstrating that a decision was in fact made. For example, **while the city claims it considered the ‘minimal public safety concerns’ associated with the project, it does not explain what those concerns might be and how they factored into the decision.** The City claims residents would be inconvenienced by barricades, but does not explain how it arrived at this conclusion. And, as the court of appeals noted, the City claims it evaluated ‘financial considerations,’ but did not provide evidence of actual costs of the various alternatives. While none of these points, alone, might be dispositive as to the City’s statutory immunity claim, the overall lack of explanation and detail in the affidavits leaves too many questions unanswered.

Therefore, the minimal showing by the City here places this case in the ‘gray’ area noted by this court in *Angell*, making it difficult to conclude whether the decision was in fact one of planning or, rather, operation. *See Angell*, 578 N.W.2d at 347. By allowing minimal averments in an affidavit to be sufficient evidence of a planning decision, there is a risk that professional or scientific decisions, as well as nondecisions, will be

⁴ In *Angell v. Hennepin County Regional Rail. Auth.*, 578 N.W.2d 343, 346 (Minn. 1998), the Minnesota Supreme Court held that the Authority was not entitled to statutory immunity because Authority staff members were only using professional judgment in implementing its policy regarding access restriction. And in *Nusbaum v. County of Blue Earth and State of Minnesota*, 422 N.W.2d 713, 719 (Minn. 1988), the Minnesota Supreme Court held that the state traffic engineer’s decision as to where to place a sign marking the end of a reduced speed zone was not barred by the discretionary function exception to government tort liability because it did not involve any policy considerations.

one-sentence denial, which, for all practical purposes, is what defendant's attorneys have done in this instance. Most attorneys answer a complaint in good faith in accordance with Rule 8.02 by specifically admitting, denying, or claiming to lack sufficient information to admit or deny each particular allegation after conducting inquiry reasonable under the circumstances. It is not all that hard to do.


CONCLUSION

For the foregoing reasons, plaintiff moves the court for a temporary injunction enjoining defendant Minneapolis Park and Recreation Board and its agents, employees, attorneys, and those persons in active concert and participation with them from taking any action ostensibly aimed at constructing a combination bike-and-pedestrian path of any size on St. Anthony Parkway from Ulysses Street to Stinson Boulevard.

Respectfully submitted,

STANBURY LAW FIRM P.A.

Dated: May 18, 2007.


Alfred Stanbury
A.I.N. 190457
2209 St. Anthony Parkway
Minneapolis, MN 55418
(612) 789-5060
ATTORNEY FOR PLAINTIFF