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STATE OF MINNESOTA  
COUNTY OF HENNEPIN

DISTRICT COURT  
FOURTH JUDICIAL DISTRICT

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Peter Huxmann, individually and  
on behalf of those similarly  
situated,  
  
Plaintiff,

HEARING TRANSCRIPT  
  
Appellate Court File  
No. A-07-1431  
D.C. File No. 27CV07-7807

vs.

Minneapolis Park and Recreation  
Board,  
  
Defendant.

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The above-entitled matter came on before the Honorable  
Francis J. Connolly, one of the judges of the above-named  
court, at the Hennepin County Government Center, Minneapolis,  
Minnesota, commencing on the 23rd day of May, 2007.

APPEARANCES:

Alfred Stanbury, Esq., Stanbury Law Firm, P.A., 2209  
St. Anthony Parkway, Minneapolis, MN 55418, appeared for and on  
behalf of the Plaintiff.

Karin E. Peterson, Esq., Rice, Michels & Walther, LLP,  
10 Second Street NE, Suite 206, Minneapolis, MN 55413, appeared  
for and on behalf of the Defendant.

Marlene T. Wexler  
Court Reporter

Nancy Schneider  
Law Clerk

## PROCEEDINGS

1  
2 THE COURT: This is Peter Huxmann v. Minneapolis  
3 Park and Recreation Board. The file number is 27-CV-07-  
4 7807. Would you first start, please, by noting your  
5 appearances.

6 MR. STANBURY: Alfred Stanbury for Peter Huxmann.

7 MS. PETERSON: Karin Peterson for the Minneapolis  
8 Park and Recreation Board.

9 THE COURT: Thank you. I have read the papers,  
10 the motion papers, and I have not looked in detail at the  
11 affidavits but I've perused some of the documents so I'm  
12 somewhat familiar with the issues. Mr. Stanbury, this is  
13 your motion so you may begin.

14 MR. STANBURY: Thank you, Your Honor.

15 THE COURT: You're welcome.

16 MR. STANBURY: In a nutshell, this concerns an  
17 intended extension of a bike system called the Grand  
18 Rounds from Ulysses Street Northeast to Stinson Boulevard,  
19 which also goes by the name of Stinson Parkway. It's  
20 about a six-tenths of a mile stretch, residential area in  
21 Northeast Minneapolis. The total Grand Round system is  
22 about 50 miles. Their plan has been in the works since  
23 about 2001.

24 On January 3rd of this year certain residents, I  
25 believe it's a total of about six residents, of St.

1 Anthony Parkway on the north side received letters from  
2 the Park Board, specifically from Tim Brown, the Parks  
3 engineer at the time, to remove certain encroachments by  
4 May 1st so that they could begin construction of this bike  
5 trail, the residents being familiar with what they were  
6 talking about because several community meetings had been  
7 held in recent years.

8 The letter also said essentially that if the  
9 encroachments, consisting of, mainly of flowers and other  
10 plantings, although one of the residents has a wrought  
11 iron fence which would have had to have been removed. If  
12 these weren't removed by May 1st of 2007, the Park Board  
13 would remove them and dispose of them so they could begin  
14 construction.

15 This was taken by the plaintiff to mean that  
16 construction, the commencement of construction was  
17 imminent and so on April 23rd this matter was sued out  
18 seeking initially a TRO and then leading, if successful,  
19 to a temporary injunction pending a resolution, a decision  
20 at trial, and what we seek at trial would be a permanent  
21 injunction against the construction of this bike path.

22 Now, as I've laid out in my papers, the path doesn't  
23 satisfy, I mean the balance, the Dahlberg factors,  
24 actually one of the Dahlberg factors, the administrative  
25 proceedings, is of no consequence because we're in

1 agreement that if in fact an injunction was issued, the  
2 Park Board's not going to defy it and begin construction  
3 anyway.

4 THE COURT: Ms. Peterson, do you agree there is  
5 no administrative burden for the court to issue an  
6 injunction?

7 MS. PETERSON: Your Honor, we would abide by any  
8 ruling that the court gave.

9 THE COURT: Thank you. Go ahead, Mr. Stanbury.

10 MR. STANBURY: Thank you. The other four  
11 Dahlberg factors weigh decidedly in my client's favor.

12 The first, the relationship of the parties is such that  
13 we have -- we don't have a situation, and it's important  
14 to understand that we don't have a situation here where  
15 ordinarily a governmental body, a municipality, would have  
16 a right-of-way over a certain portion of a person's  
17 property extending from the center line of the road into  
18 the property. That's not what exists here because of the  
19 way the Parkway is set up.

20 The Park Board owns a strip of land of about 30 to  
21 38 feet from the curb in. I initially, when I sued this  
22 out it was described as the Park Board owning that strip  
23 of land. You may have noticed in my recent submission  
24 I've taken to describing that as "purportedly owned" for a  
25 reason which I can explain. But for the purposes of this

1 motion, I think we should take it as true that they own  
2 it.

3 THE COURT: Who does, the Park Board?

4 MR. STANBURY: Pardon me? Yes. But the issue  
5 could very well come up later after development of more  
6 discovery and information, but there's some reason we  
7 believe to think that they don't own it because of the way  
8 the Park Board was chartered --

9 THE COURT: I've just been alerted by my clerk  
10 that the call came in so we'll take a very brief recess  
11 and I hope to be back in about five to six minutes.  
12 Thank you, and I do apologize.

13 (Court recessed briefly at 1:20 p.m.)

14 THE COURT: All right. Go ahead, Mr. Stanbury.

15 MR. STANBURY: Thank you. During this break,  
16 Your Honor, it allowed me to think of a couple of things I  
17 should have said before getting into the relationship of  
18 the parties which I'd like to mention them now.

19 When we had our telephone conference on April 25th, it  
20 was disclosed that ads had not even been sent out yet for  
21 bids on this bike path and also then we subsequently were  
22 informed by Ms. Peterson that construction probably  
23 wouldn't start until about August 1st, that being several  
24 months away. My take on all of that is we're not really  
25 here for a TRO but only for a temporary injunction. I

1 don't know if the court agrees with that or not but that's  
2 my take on it, because the TRO is moot, or it would be the  
3 longest TRO probably ever issued.

4 Also, that what we're talking about on this bike path  
5 is, in the bicycle world is referred to as a sidepath.  
6 It's a path adjacent to and parallel with the street.  
7 The bike path at issue is the only section, the only part  
8 of the Grand Round where the bike path would go right in  
9 front of houses. It's not true in the rest of the Grand  
10 Round as it exists at this time.

11 THE COURT: Is there any bike path in all of  
12 Minneapolis similar to this bike path?

13 MR. STANBURY: There is a very short path down in  
14 Minnehaha Parkway, I believe.

15 THE COURT: Do you have any knowledge that there  
16 have been any accidents on that bike path?

17 MR. STANBURY: I don't, Your Honor.

18 THE COURT: Go ahead.

19 MR. STANBURY: But it's also my understanding  
20 that it's a very short section and the path is not nearly  
21 as close to the homes as they would be in this one.

22 THE COURT: How long is this section?

23 MR. STANBURY: This is about six-tenths of a  
24 mile, 3000 feet, seven to nine, depending on how you  
25 count, seven to nine intersections.

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THE COURT: Okay. And you don't know how long the Minnehaha path is?

MR. STANBURY: No, I don't.

THE COURT: Go ahead.

MR. STANBURY: And also my understanding or reading of everything involved is what we have here is what's called a private nuisance. The distinguishing feature or the distinguishing, the way in which we distinguish between what are called public nuisances and private nuisances is, among other things, public nuisances can only be brought by the state.

But what we have here, in my opinion at least, is a private nuisance that also is in the nature of a public nuisance, because Peter Huxmann is not coming in here and has not brought this action so as to abate the bike path right in front of his house only. It would be silly, obviously, to construct a bike path up to Huxmann's property, stop, and then pick it up afterwards, so that's why it's been captioned as "Peter Huxmann, individually and on behalf of those similarly situated."

This is not unprecedented and I would call your attention, Your Honor, to a case I have cited within my papers and I just would like to read this into the record. It's a case titled Robinson v. Wesman, 29 N.W.2d 1. It says in there, "A person injuriously effected by a

1 "nuisance may bring action in his own name and in behalf  
2 of others similarly effected to abate the same. Even if  
3 the nuisance to some extent be regarded as a public  
4 nuisance, nevertheless, if private rights are effected  
5 thereby, an action to abate the same may be instituted by  
6 the persons whose rights are thus effected."

7 THE COURT: Are all the homeowners on this  
8 six-tenth of a mile path opposed to this bike path?

9 MR. STANBURY: I have argued or alleged that for  
10 all practical purposes they are. We've had --

11 THE COURT: So what does that mean? How many  
12 people live on this bike path, do you know?

13 MR. STANBURY: On the northern side or both  
14 sides?

15 THE COURT: On the side where this bike path is  
16 going to be, how many houses are there?

17 MR. STANBURY: I would say between 40 and 50.

18 THE COURT: Okay. And you told me six people are  
19 opposed to it now. Is that six houses or --

20 MR. STANBURY: It's six houses. There are six  
21 people where the people who were, received letters. They  
22 are the six people who have what are called encroachments  
23 in front of their houses on assertedly Park Board  
24 property.

25 THE COURT: Right. But my question is, you don't

1 know for sure as you sit here today that the other 34  
2 houses are opposed to this?

3 MR. STANBURY: No, but --

4 THE COURT: Go ahead.

5 MR. STANBURY: -- for all practical purposes they  
6 are, based on the community meetings we've had, Your  
7 Honor.

8 THE COURT: But my point is you don't have  
9 affidavits from 40 homeowners?

10 MR. STANBURY: Absolutely not.

11 THE COURT: Okay. In fact, you don't have an  
12 affidavit from one homeowner?

13 MR. STANBURY: I have an affidavit from my  
14 client.

15 THE COURT: Okay. One, Mr. Huxmann?

16 MR. STANBURY: That's correct.

17 THE COURT: All right. Go ahead.

18 MR. STANBURY: Now, as far as the relationship of  
19 the parties, the Dahlberg factor, relationship of the  
20 parties, what we have here, obviously, are adjoining  
21 landowners. The relationship is such, no different than  
22 it would be if there were private landowners. But in this  
23 case we also, one is a governmental entity and the other  
24 is a citizen with all the, whatever that implies, as far  
25 as the unequal power of the two.

1 Under the law, residents' rights are superior to a  
2 business's rights in a residential area.

3 THE COURT: But this isn't a business.

4 MR. STANBURY: I would analogize it to a  
5 business, Your Honor, in that the Minneapolis Park and  
6 Recreation Board runs the parks.

7 THE COURT: For the public good.

8 MR. STANBURY: Ostensibly, yes.

9 THE COURT: And presumably, I haven't looked, you  
10 know, in detail in the plan, but presumably this plan was  
11 adopted, the master plan was adopted for the public good  
12 and I assume -- Ms. Nelson?

13 MS. PETERSON: Peterson. There's a lot of "sons"  
14 in this state.

15 THE COURT: Ms. Peterson would tell me that this  
16 isn't a business. They're adopting, well, the plan was  
17 adopted for the public purpose and that the bike paths are  
18 for the public purpose because we want people to ride  
19 their bikes in Minneapolis. So I mean, do you really  
20 think the business analogy is there when, you know, the  
21 Park Board is there not to make a profit, right, off the  
22 parks? They're not going to be charging anyone for the  
23 bike path?

24 MR. STANBURY: No, that's correct.

25 THE COURT: Okay. So maybe the business analogy

1 is not precisely on point.

2 MR. STANBURY: Maybe not precisely, Your Honor,  
3 but some analogies are apt but not necessarily exactly on  
4 point. As far as the public good goes, we're talking  
5 about something that was set up many, many decades ago and  
6 bike paths were not the original plan. That has evolved  
7 over time.

8 But in any event, whether or not something is set up  
9 for the public good doesn't give them a free pass to do  
10 whatever they want if what something they plan to do  
11 creates what we are alleging is a nuisance.

12 THE COURT: But they did have apparently meetings  
13 with the community, did they not?

14 MR. STANBURY: Right, that's correct.

15 THE COURT: And I understand your position is  
16 they didn't listen to the community, but they did have  
17 meetings and apparently they made some concessions, did  
18 they not?

19 MR. STANBURY: If you're talking about the width  
20 of the path?

21 THE COURT: Yes.

22 MR. STANBURY: They made a concession which took  
23 the path down, I guess. It's reportedly down to 10 feet  
24 which is, the existing sidewalk is six feet, despite the  
25 fact that the engineer contends it's 5-foot sidewalk, a

1 6-foot sidewalk plus another four feet, which is to  
2 accommodate two-way bike travel and pedestrians.

3 THE COURT: Right. But my point is they  
4 apparently did have some community meetings and they did  
5 listen to the community. I know you're saying they should  
6 have listened and not done anything, but they did listen  
7 to the community and adjusted the original plan, correct?

8 MR. STANBURY: In some very narrow respects.

9 THE COURT: Right.

10 MR. STANBURY: But we still end up with a  
11 sidepath in front of the houses that crosses seven to nine  
12 intersections.

13 THE COURT: I got it.

14 MR. STANBURY: The other concession was changing  
15 asphalt to concrete.

16 THE COURT: And each of those concessions makes  
17 it at least marginally better, right?

18 MR. STANBURY: No. They may think it does. No.  
19 They may think that they conceded and appeased certain  
20 voices at these meetings, but what they've done is create  
21 a less safe path. The original path was to be 16 feet  
22 plus a 2- or 3-foot divider of grass or flowers, and a  
23 3-foot bath, total of 19 feet.

24 THE COURT: So is your position there should be  
25 no bike path at all?

1 MR. STANBURY: Absolutely, that's my position.  
2 And as I get into this, I believe and I think I've shown  
3 why in my papers.

4 THE COURT: I understand your cause of action is  
5 nuisance. Is there any allegation they violated any  
6 statute in the manner in which they reached this decision  
7 to put the bike path where the Park Board has decided it  
8 should go? Is there any allegation they violated a  
9 statute?

10 MR. STANBURY: There's no allegation at this  
11 time.

12 THE COURT: And I didn't see anything in your  
13 complaint about that.

14 MR. STANBURY: Right. If there is a statute, I  
15 know they have a common law duty to maintain sidewalks in  
16 a safe manner, and the streets as well. Whether that is  
17 provided statutorily at this time I'm not sure, but you'd  
18 end up with a sidewalk and a bike path side by side  
19 sharing where there's probably a 10-mile-an-hour speed  
20 limit on sidewalks and there's no way in the world --

21 THE COURT: For bikes?

22 MR. STANBURY: Yes. And I think the court can  
23 take judicial notice, if you've ever seen a bicyclist  
24 traveling down the street, you know that they travel at  
25 more than 10 miles an hour. Children maybe not, but

1 bicyclists, yes. Plus in this instance they're going to  
2 be hitting seven to nine intersections. I would hope --

3 THE COURT: So wouldn't they slow down for the  
4 intersections then?

5 MR. STANBURY: You'd think, wouldn't you? But if  
6 you've had an opportunity to look at the DVD that I  
7 enclosed with the Huxmann affidavit -- the Park Board  
8 hasn't looked at it. From all indications there's no  
9 mention in Ms. Peterson's papers. I assume she hasn't  
10 looked at it. If you've had an opportunity to look at it,  
11 you'll see what they're going to be up against. Plus I  
12 put in all kinds of statistical evidence and expert,  
13 indications of expert testimony --

14 THE COURT: Yes. On that point, who is  
15 Mr. Allen? There's no affidavit from him.

16 MR. STANBURY: No, I know.

17 THE COURT: I know he wrote this critique of a  
18 city planner's report defending the Massachusetts  
19 Institute of Technology's proposal, but who is Mr. Allen?

20 MR. STANBURY: It's my understanding that he is  
21 employed as an engineer and a professor out east in  
22 Waltham, Massachusetts.

23 THE COURT: But how would I know that though?  
24 That's not in the record. It just says "Attached hereto  
25 as Exhibit 17 is a true and correct copy of John Allen's

1 "May 2002 critique. See Planner Paul Schmidt's report  
2 defending MIT's proposal to build an expensive sidewalk  
3 which would cross intersections," et cetera. How do I  
4 know that John Allen is just, you know, another John Allen  
5 out there who didn't like the bike paths in his deal?

6 MR. STANBURY: Well, that's one of the exhibits  
7 in there. The other is his web page. There's no  
8 affidavit for Fred Oswald either but his stuff is in  
9 there. There's no affidavit --

10 THE COURT: But you have the burden.

11 MR. STANBURY: Pardon me?

12 THE COURT: You have the burden of this case.  
13 You have the burden of proving that I should grant the  
14 injunction, stop the Park Board. So I guess my question  
15 is how do I know -- presumably you want to tell me that  
16 Mr. Allen is Mr. Bike Path in America but I don't know who  
17 he is. I mean, I know -- all right. Let me ask you --

18 MR. STANBURY: Your Honor, if I may?

19 THE COURT: Go ahead.

20 MR. STANBURY: I don't know that at this stage I  
21 have to put in expert testimony. My point in putting the  
22 web pages in there, which refer to ASHTO, the ASHTO Guide,  
23 which is recognized, the California guy which I've quoted.  
24 All of this adds up to at least a prima facie case of the  
25 unsafe character of the bike path that they propose to

1           construct and they have put in nothing more than an  
2           affidavit of Tim Brown with conclusionary statements like  
3           we consulted with engineers, unidentified engineers, and  
4           we determined that it was safer to put the bike path where  
5           we're putting it than in the street, which is contradicted  
6           by all evidence out there.

7                   THE COURT:   But do you have any evidence that  
8           they didn't consult with engineers?  I know you're saying  
9           they don't name them, but do you have anything in the  
10          record to suggest that Mr., that their person did not do  
11          what he said he did?

12                   MR. STANBURY:  I have no -- how would I know  
13          unless, unless I was a fly on the wall, Your Honor?

14                   THE COURT:  So why shouldn't I believe he did  
15          consult with engineers?  Maybe you don't like the  
16          decision, but why should I believe he didn't?

17                   MR. STANBURY:  Taken as true, but it's still  
18          conclusionary, is it not?  And I've put in evidence at  
19          this stage which should be considered sufficient to show  
20          that it is not safe.

21                   What you're looking at is an portended bike path that  
22          is going to result in injuries that can be avoided if it  
23          is not constructed at all, and that goes to the public  
24          policy aspect.  Nowhere is it in the public interest,  
25          regardless of what one's mission statement says, nowhere

1 is it in the public interest for a governmental body to  
2 set up or construct something if there is notice or if  
3 there is some evidence, and in this case it's ample, that  
4 it's going to cause injuries, that it is dangerous, that  
5 it is hazardous. Are we suppose to wait until we get the  
6 actual proof?

7 THE COURT: In M.I.T., did they build the bike  
8 path?

9 MR. STANBURY: It's my understanding that they  
10 did build the bike path.

11 THE COURT: Did anybody die or was injured?

12 MR. STANBURY: It's my understanding that there  
13 have been some serious accidents, but I can give you no  
14 more specific information than that.

15 THE COURT: So you have nothing in the record  
16 that would tell me that, at least in Massachusetts where  
17 they did this, people were injured and it was unsafe?

18 MR. STANBURY: I'm sorry, would you repeat.

19 THE COURT: Sure. As I sit here today, it sounds  
20 like what you're telling me is, despite John Allen's  
21 critique of Paul Schmidt's report, they did build the bike  
22 path out in Boston. And my question is, after they built  
23 it, do you have any evidence that's in the record that  
24 would tell me, and you know, here's what happened, three  
25 people were injured and bikes were running into small

1 children and no one was slowing down? Is there any, do  
2 you have any evidence that what you're saying is going to  
3 happen in this case actually happened in that case?

4 MR. STANBURY: Nothing in the record, Your Honor.  
5 Just in response to your previous question, which is what  
6 I've heard, what I've learned, but it's not in the record  
7 at this moment. But also in the record, or something that  
8 is in the record is the Wachtel study of Palo Alto,  
9 California, which over the period of a few years studied  
10 three hundred and some accidents on sidepaths.

11 And I don't know if the court has ever seen a  
12 statistic like this, I know I haven't, where 15 percent of  
13 the bike paths in Palo Alto are sidepaths, at least at the  
14 time of the study. Yet 85 percent of the injuries during  
15 the period studied occurred at intersections on these  
16 sidepaths.

17 THE COURT: And why do they occur, because those  
18 people are going too fast and not slowing down for the  
19 intersections?

20 MR. STANBURY: There's a variety of reasons.  
21 First of all, what we have here is two-way travel.

22 THE COURT: On the bike path?

23 MR. STANBURY: Yeah. And the --

24 THE COURT: So bikes are going one way and people  
25 are walking the other way?

1 MR. STANBURY: No. People could be walking  
2 either way, as they can on any sidewalk.

3 THE COURT: So because the bikes and the  
4 pedestrians are side by side, that's how the accidents  
5 occur?

6 MR. STANBURY: Well, at the intersections. They  
7 are vehicle/bicycle accidents.

8 THE COURT: Okay. So bicycles hitting cars?

9 MR. STANBURY: Yes.

10 THE COURT: Okay.

11 MR. STANBURY: And I was going to say that when  
12 you have a two-way bike path on the same path but bikes  
13 can go either way, and the street that it's parallel to  
14 is, in this case at least, an undivided two-way street, a  
15 car comes up or a vehicle comes up to an intersection, the  
16 inclination for that driver is to look and see, if they're  
17 making a right-hand turn, of course, is to see whether  
18 traffic is coming from their left.

19 There is less of an inclination, although they  
20 probably should, there is less of an inclination to see,  
21 to look and determine whether a car is driving in the  
22 wrong direction in this lane that is going from their left  
23 to the right. So if a bike is coming from their right,  
24 there is an inclination not to see it.

25 We also have a topography problem in this instance.

1 The lots on St. Anthony Parkway in this section that we're  
2 talking about, not every single one of them but most of  
3 them I would say, the house is at one level, the lot comes  
4 out, slopes down, levels off, and that level, that level  
5 park down there is basically, essentially what the Park  
6 Board owns.

7 When a car drives up, particularly if you widen the  
8 path, you're going to have to back the stop sign up, a car  
9 comes up, you look to your right and you're looking  
10 essentially into the side of a wall because you're looking  
11 into the side of this hill.

12 So if you saw the DVD, you would see these cars almost  
13 invariably coming up, they don't even stop at the line for  
14 the crosswalk. They cruise right through it, possibly  
15 because they're careless drivers. In other instances it's  
16 because they literally can't see one way or the other  
17 until they get further up past the stop sign. And that's  
18 the condition that we're looking at possibly existing in  
19 this case if they're allowed to begin construction before  
20 we can get a resolution of this at trial.

21 THE COURT: Are there any allegations that they  
22 failed to comply with any requirements of either the city  
23 charter or the planning process as outlined in the master  
24 plan? Is there a meeting that they didn't have that  
25 they're required to have? Was there an environmental

1 impact statement that they were required to get and didn't  
2 get? Are there any allegations of something like that?

3 MR. STANBURY: I haven't made any such  
4 allegations. There is something mentioned about mussels,  
5 somebody did a study, but I don't think it's meaningful --

6 THE COURT: Why then --

7 MR. STANBURY: -- as far as the charter goes. If  
8 I could?

9 THE COURT: Sure.

10 MR. STANBURY: As far as the charter goes, I  
11 don't know exactly what meetings were required. All I  
12 know is that except for a couple of the initial meetings  
13 where notice was insufficient, I went to some of them, my  
14 client went to them.

15 THE COURT: How many meetings did they have all  
16 together with the community?

17 MR. STANBURY: I think maybe five. I'm not sure.  
18 The early ones were so poorly attended that it's the  
19 reason they set up the subsequent ones. For example --

20 THE COURT: And why were they poorly attended?

21 MR. STANBURY: Because of insufficient notice.

22 THE COURT: Okay. At the biggest meeting, how  
23 many people were there, do you know, Mr. Stanbury?

24 MR. STANBURY: The biggest meeting that I am  
25 personally familiar with was held at Columbia Golf Course

1 and my estimate would be a couple hundred people. And the  
2 next one was also heavily attended was at Mount Carmel  
3 Church but I don't think it was that many people. I would  
4 say maybe a hundred or more.

5 THE COURT: Were all the people at the meeting  
6 opposed to the bike path?

7 MR. STANBURY: Again, the opposition, as I recall  
8 it, you could probably count it on one hand.

9 THE COURT: The opposition to the path?

10 MR. STANBURY: Yes. Oh, no. Your question was  
11 were all opposed? I meant, I misunderstood you. The  
12 people who wanted the path or had good things to say about  
13 the plan were very, very few, five or fewer I would say.

14 THE COURT: Is this case not covered, as  
15 Ms. Peterson would have the court believe, I mean isn't  
16 this a classic case of statutory discretion?

17 MR. STANBURY: No.

18 THE COURT: Why not?

19 MR. STANBURY: Because the decisions you classed  
20 as concessions were operational, are operational  
21 decisions, not policymaking decisions.

22 THE COURT: Where to put the bike path is an  
23 operational decision?

24 MR. STANBURY: Yes, of course, because --

25 THE COURT: Isn't it an operational decision

1           whether to have asphalt or concrete? But where to put the  
2           bike path, wouldn't that be a classic example of a policy  
3           maker acting within his discretion?

4                     MR. STANBURY: No.

5                     THE COURT: Why not?

6                     MR. STANBURY: Because it's not written anywhere  
7           that it has to be on the north side of the Parkway. It  
8           could be in the street. You have other sections of the  
9           Grand Round. They go through industrial sections, they go  
10          around Columbia Golf Course, they go by railroad tracks.

11                    THE COURT: That's my point. If they can go  
12          anywhere and they've decided they should go here, isn't  
13          that a classic example of a policymaking decision?

14                    MR. STANBURY: On the contrary, it's a classic  
15          example of an operational decision. Just like the case I  
16          cited where the decision to maintain the beach was the  
17          policy decision and the decision to put up notice that  
18          there might be some metal in the sand, or whatever the  
19          problem was, those were operational. They put --

20                    THE COURT: But that case is different. They're  
21          not talking about whether they're going to have a beach,  
22          just like we're not talking about whether they're going to  
23          put up a warning sign every 20 feet that says "slow down."  
24          The decision is where they're going to put the bike path.

25                    And isn't that, just as, you know, when the Park Board

1 decides -- I don't know, I can't think of a good example  
2 -- whether they're going to have a dog park over there as  
3 opposed to over there, I mean, isn't that sort of the same  
4 thing?

5 MR. STANBURY: No. I think in that case it would  
6 be, the policy decision would be should we have dog parks  
7 or should we let the people play with their dogs wherever  
8 they want to play? But if we're going to have dog parks,  
9 then the operational plan is we'll put it over there.

10 They decided on the northerly side of St. Anthony  
11 Parkway in this section because it was safer than in the  
12 street where these bikers have been running for some  
13 30 years, and it's only 3000 feet. They decided against  
14 putting it on the southerly side for other reasons.  
15 There's a different configuration on the southerly side,  
16 some of which involves, it could be described, there are  
17 parking cutouts on the southerly side but not on the  
18 northerly side. It's a straight curb. But really, no,  
19 they don't even have to put it down the Parkway. They can  
20 route these people for 3000 feet from Ulysses Street to  
21 Stinson. They could take it down 29th.

22 THE COURT: I'm sure they could, but the question  
23 is, why should I -- the question becomes for the court,  
24 I'm sure they could, they could, I'm sure they could do  
25 lots of things. The question is why I should second guess

1           them for making their decision as to where they made it  
2           which is, you know, on this six-tenths of a mile, you  
3           know, in front of these 40 homes in St. Anthony?

4                   MR. STANBURY:   Because my client has alleged that  
5           it will be a nuisance, and also because one of the  
6           Dahlberg factors is a public policy factor.  And I've  
7           provided whether, I mean there's all kinds of time.  If  
8           the court required more, better confirmation of the  
9           quality of say a John Allen's report or his background or  
10          whatever, there's time to provide that.  I haven't  
11          retained him yet.

12                   But the fact is that all of the evidence points to a  
13          looming hazardous condition that can be avoided simply by  
14          having these bikers, at a minimum, ride down the Parkway  
15          as they have been doing for 30 years.

16                   There is, I'd also say, Your Honor, that with regard  
17          to the official immunity issue, it seems to me that this  
18          is the wrong place to raise it.  It certainly is something  
19          that has to be raised by a proper motion for summary  
20          judgment which could come later.  And I think, if I can  
21          speak for them, maybe I shouldn't, but the defendant has  
22          argued or pointed out that if you can't grant that for  
23          that reason at this juncture, at least when we get to  
24          trial it's going to, they're going to prevail on that  
25          issue anyway.

1           It seems to me to be a recognition that it is  
2 premature at this time. I'm saying that it's not even  
3 going to prevail at trial on a duly noticed motion, after  
4 discovery and everything else, because these are  
5 operational decisions that are involved here.

6           I've also made a note in my papers, observed that,  
7 although I'm sure Your Honor is fully aware of the ability  
8 of a party to obtain an expert because they're frequently,  
9 there's always somebody who will testify as an expert or  
10 attempt to testify as an expert simply because, for the  
11 money. And it's really unreasonable or there's no  
12 justification to say they'll never find an expert who will  
13 testify as to the safety aspect or that this particular  
14 proposed bike path would be safe. There's probably some  
15 chance or possibility they could find someone. I'm saying  
16 that the evidence at this stage is so overwhelming and it  
17 doesn't have to be 100 percent positive. The proof  
18 doesn't have to be beyond a certainty or a certainty.

19           Whereas you've been provided with some evidence,  
20 there's considerable evidence that all of the safety  
21 angles or aspects of this particular path, type of a path,  
22 are argued for not allowing it to be constructed, or at  
23 least at this stage not allowing it to be constructed  
24 until we can try it.

25           Unless you have a few more questions, Your Honor, I'll

1 stop at this point.

2 THE COURT: Thank you. Ms. Peterson.

3 MS. PETERSON: Yes, Your Honor. I realize that  
4 my argument on discretionary immunity would have to be  
5 brought within a summary judgment, but I wanted that  
6 argument before the court because that is an argument for  
7 likelihood of success on the merits.

8 This court has discretion to grant this temporary  
9 injunction but it should only be granted if the rights of  
10 the party would be irreparably harmed in this case. That  
11 burden has not been met by the plaintiff in this case.

12 In fact, the plaintiff cannot meet most of the prongs  
13 of the Dahlberg standard. If you go for the balancing of  
14 the harms, they say under a nuisance case you have to have  
15 a specific harm that's special to the plaintiff rather  
16 than to the public at large. There is no specific harm to  
17 the plaintiff right now. There will be no specific harm  
18 to the plaintiff down the line. Nobody has submitted an  
19 affidavit in the case that they're even going to bicycle  
20 on this path, so if the harm comes to the people using the  
21 path, they'd have to be bicycling on the path.

22 Now, they're seeking to enjoin a threatened nuisance,  
23 not a nuisance, a threatened nuisance. Page 6 of the  
24 brief for the plaintiff states, "Irreversible permanent  
25 nuisance stands to be created." Not so. That's

1 speculation and conjecture. That is not a fact that will  
2 withstand this.

3 The most that could be created before trial here is  
4 that they would widen what I thought and what Tim Brown,  
5 who was our engineer, thought was a 5-foot sidewalk to a  
6 10-foot sidewalk. That's the most that will be done. It  
7 will be placed out to bids and that's the most that could  
8 be done. It would take time. There's no irreparable harm  
9 here to the plaintiff. There's no harm at all. They  
10 don't want the bike path on Park Board property that abuts  
11 their property.

12 They are the only houses on which the bike path would  
13 run in front of them, but there are houses where it runs  
14 on the side of them. For example, in between Lake of the  
15 Isles and Dean Parkway, as you go down there, that's a  
16 double lane bike path. There's also the same kind of  
17 thing in between Calhoun and Isles on the north side.

18 I haven't gone through all the bike paths in the city  
19 to see where they are, but there are numerous bike paths  
20 like this in the city. In my recollection, we've only had  
21 one suit in the six years that I've represented the Park  
22 Board involving a park accident with a bike and that's  
23 somebody who hit a post going around the lakes.

24 All right. He claims that this is a nuisance under  
25 461.01. In the complaint, there was never any cause of

1           action in the complaint and you could specify, I could  
2           look at the complaint and say, well, it looks like a  
3           nuisance. In the complaint it never said 561.01.

4           But I realize that also even in our nuisance case that  
5           whatever you're going to give them lies in the discretion  
6           of the court. We're just not there yet.

7           But if you look at the likelihood of success on the  
8           merits, the Park Board realizes that you can't just say  
9           this is over because of the discretionary immunity at that  
10          point. Nonetheless, that argument will prevail when we  
11          are here in court, contrary to what Mr. Stanbury has said  
12          in behalf of his client, Mr. Huxmann.

13          This is something that a discretionary immunity  
14          statute was meant for. This was a planning decision. Our  
15          planning is a very long, involved process. You can go on  
16          our web site and see the complete planning that goes  
17          through. And if you would like a copy of this, I have a  
18          copy for the court, but this is public documents.

19          And then the whole process that we go through. You  
20          can tell by the process right away on our web site that  
21          there might be something we don't do, but we substantially  
22          comply with every aspect of that process. This is not a  
23          ministerial operational decision.

24          All the cases that the plaintiff has cited in this  
25          case really revolve around placement of signs, negligence,

1 failure to warn and a duty that is imposed because of  
2 that. I think that this case is more like the Puhling v.  
3 The City of Plymouth. I have a copy of it with me, Your  
4 Honor. The cite is 2006 WL-2129772 which involved the  
5 decision on the construction and design of an improvement  
6 to a drainage system, and that was a nuisance suit, but  
7 they said no, discretionary immunity applies.

8 Likewise, in Hills v. City of White Bear Lake, which  
9 provided you a copy with, that was the baseball field.  
10 That wasn't even a speculation. Those baseballs were  
11 hitting Mrs. Hills. They're hitting, errant baseballs  
12 were hitting her back and forth, and they said no, that's  
13 also discretionary immunity.

14 So the case law holds that even if this court were to  
15 find that the conduct involved a combination of  
16 policymaking and operational decisions, immunity still  
17 applies, immunity still applies. That if in addition to  
18 the professional or scientific judgment policy  
19 considerations that played a part in the making of the  
20 decision, then the planning level conduct is involved and  
21 immunity applies. The three cases that hold that are  
22 Christopher v. Albert Lea, which is 623 N.W.2d 272, Chabot  
23 v. City of Sauk Rapids, 422 N.W.2d 708, and Fisher v.  
24 County of Rock, 596 N.W.2d 646.

25 In addition, the likelihood of them succeeding on the

1 merits is very slim as they have to show a nuisance.  
2 They have to show that the injury is special or peculiar  
3 to themselves, not to the general public. They can't show  
4 that in this case. They're alleging this is going to  
5 happen. They're alleging this is unsafe. They've assumed  
6 that I never looked at the DVD. Assume nothing. I looked  
7 at that DVD. It doesn't show anything. It doesn't show  
8 anything except that you've got a dangerous intersection.  
9 We knew that. We know there are dangerous intersections  
10 throughout this city.

11 All we're trying to do is build a bike bath path on  
12 our property, on our own property. Would we rather have a  
13 16-foot one with a divider in between? Absolutely,  
14 absolutely. Can't do it. They didn't want it. We have  
15 complied with everything.

16 And if you follow the last thing, which is the public  
17 policy, and then I'll quit, Your Honor, if you look at the  
18 fourth prong, even that weighs in favor of the Park Board.  
19 A question of whether a public interest justifies a  
20 particular improvement in land is a legislative or  
21 administrative decision to which discretion would apply,  
22 discretionary immunity would apply.

23 On the last issue, the plaintiff has asked that my  
24 answer be stricken. I answered in good faith after  
25 reasonable conference with my client and I think that that

1 should not even be considered at this point by the court.

2 In closing, we would ask that no injunction issue in  
3 this case and that if we have to proceed on this case,  
4 we'd proceed. Thank you, Your Honor.

5 THE COURT: Mr. Stanbury, since it is your  
6 motion, I'll let you briefly have the last word.

7 MR. STANBURY: Thank you.

8 THE COURT: You're welcome.

9 MR. STANBURY: Balance of harms, there is no harm  
10 that's going to be visited on the defendant if you issue  
11 the temporary injunction.

12 THE COURT: Well, they'll stop the bid process.

13 MR. STANBURY: That's correct.

14 THE COURT: And that will slow down the whole  
15 construction.

16 MR. STANBURY: That's correct.

17 THE COURT: And it won't get done.

18 MR. STANBURY: That's correct.

19 THE COURT: And presumably, I mean I don't know,  
20 but it was always my understanding that things always get  
21 more expensive in construction. So isn't that, isn't that  
22 the harm right there, that to do this later would be more  
23 expensive than to do it now? I mean, isn't that the whole  
24 thing of why everybody says we should be building whatever  
25 it is we should be doing on Highway 62 now before it gets

1 more expensive, et cetera?

2 MR. STANBURY: They have a federal grant and --

3 THE COURT: Aren't those use it or lose its? I  
4 don't know but --

5 MR. STANBURY: I don't know. It hasn't been  
6 argued, has it?

7 THE COURT: I guess I raised it so --

8 MR. STANBURY: It's simply, maybe, maybe not, but  
9 it hasn't been argued. They have a federal grant and they  
10 say that they've got \$385,000 from the Met Council.

11 It's not my understanding. If you read the Met  
12 Council communication, they've essentially tabled it and  
13 they speak of it as a reimbursement that may be reimbursed  
14 later. But as I indicated earlier, they've been on this  
15 thing since 2001. As far as the listening to the  
16 community, that was one of the reasons that they had these  
17 multiple meetings, not only because of the insufficient  
18 notice, but because of everything that was raised and the  
19 palatable opposition to the bike path. They even went  
20 back to the Park Board and the Park Board itself said  
21 start over, do this, do that.

22 THE COURT: But doesn't that cut against you? I  
23 mean, that sounds like they listened, you know, they got  
24 feedback, they changed the plan. That suggests it was a  
25 more deliberative process than if they had said, you know,

1 bring on the bulldozers. I know you don't like what they  
2 finally decided but --

3 MR. STANBURY: It certainly would suggest a more  
4 deliberative process and looking out for the concerns of  
5 the community. But if you end up with something that, as  
6 we allege, will be a nuisance, then whether they were oh  
7 so concerned is irrelevant. The proof of the pudding is  
8 in the eating. What are they going to produce?

9 And as far as a threatened nuisance, of course, I've  
10 described it. It's certainly a threatened nuisance, which  
11 is why there's no adequate remedy at law because there's  
12 no money damages at this time, but threatened nuisances  
13 are not unprecedented. Should we wait until they build  
14 this thing and then bring the lawsuit? Of course not.

15 Ms. Peterson cited for Your Honor three cases. The  
16 only one I remember being in her papers, this Chabot, the  
17 other two not.

18 THE COURT: Hills is in it.

19 MR. STANBURY: Pardon me?

20 THE COURT: Hills is in the brief.

21 MR. STANBURY: Oh, that was the copy of the WL,  
22 the Westlaw that she submitted, but she then went on, I  
23 understood her to say three additional cases and I'm not  
24 saying that Hills was not. The whole official immunity  
25 question is obviously to be narrowly construed.

1           Now, I have in my papers, with respect to something  
2           that Ms. Peterson said --

3           THE COURT: I am going to have wrap it up. I'm  
4           due back in domestic violence court.

5           MR. STANBURY: Can I just --

6           THE COURT: You can make one more point. That's  
7           it.

8           MR. STANBURY: All right. Well, it would take  
9           too long to read this. I'll just refer you to page 9 of  
10          my most recent submission. It's what the Minnesota  
11          Supreme Court said in Conlin v. City of St. Paul with  
12          respect to the conclusionary nature of the City of  
13          St. Paul's affidavits. I thank you, very much.

14          THE COURT: Thank you. I hope to get my decision  
15          out, obviously a written decision, shortly, and I am well  
16          aware of the time sensitivity issues.

17          THE COURT: I will try to get it out shortly.  
18          Thank you.

19          MR. STANBURY: Thank you, Your Honor.

20          MS. PETERSON: Thank you, Your Honor.

21          (End of Proceedings.)  
22  
23  
24  
25

1 STATE OF MINNESOTA

DISTRICT COURT

2 COUNTY OF HENNEPIN

FOURTH JUDICIAL DISTRICT

3 -----  
4 Peter Huxmann, individually and  
5 on behalf of those similarly  
6 situated,

HEARING TRANSCRIPT

Appellate Court File  
No. A-07-1431

6 Plaintiff,

D.C. File No. 27CV07-7807

7 vs.

8 Minneapolis Park and Recreation  
9 Board,

10 Defendant.  
11 -----

12 I, Marlene T. Wexler, Official Court Reporter, do  
13 hereby certify that the foregoing 36 pages of typewritten  
14 material constitutes a full, true and correct transcript of my  
15 original stenographic notes, as they purport to contain, of the  
16 proceedings reported by me at the time and place hereinbefore  
17 mentioned.

18 Dated this 31st day of August, 2007.

19  
20  
21 

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