

STATE OF MINNESOTA

DISTRICT COURT

COUNTY OF HENNEPIN

FOURTH JUDICIAL DISTRICT

FILED
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HENN CO. DISTRICT
COURT ADMINISTRATOR

**PETER HUXMAN, individually and on
Behalf of all those similarly situated**

Court File No: CV 07-7807

Plaintiffs,

vs.

**ORDER DENYING PLAINTIFFS' MOTION FOR
TEMPORARY INJUNCTION and
MEMORANDUM OF LAW**

**MINNEAPOLIS PARK AND
RECREATION BOARD.,**

Defendant.

The above-entitled matter came before the undersigned Judge of District Court on a Motion for a Temporary Injunction on May 23, 2007.

Karin Peterson, Esq., 10 Second St. NE, Suite 206, Minneapolis, MN 55413, appeared for and on behalf of Defendant. .

Alfred Stanbury, Esq., 2209 St. Anthony Parkway, Minneapolis, MN 55418, appeared for and on behalf of Plaintiffs.

Based upon all the files, records and proceedings held herein, the Court makes the following decision:

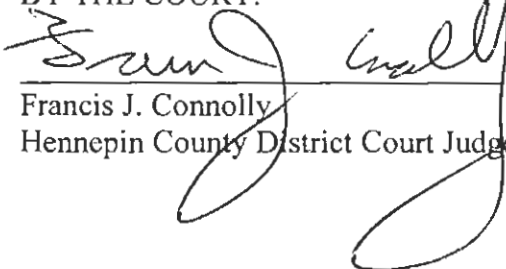
IT IS HEREBY ORDERED:

1. Plaintiff's request for a Temporary Injunction is DENIED.

2. The attached Memorandum of Law is incorporated by reference.

Dated: May 25, 2007

BY THE COURT:


Francis J. Connolly
Hennepin County District Court Judge

MEMORANDUM OF LAW

I. INTRODUCTION

Plaintiffs (“Huxman”) have brought an action for a temporary injunction and permanent injunctive relief against Defendant Minneapolis Park And Recreation Board (“Park Board”) pursuant to Rule 65.02 of the Minnesota Rules of Civil Procedure for the entry of a Temporary Injunction to stop the construction of a bike/ pedestrian path on property owned by the Park Board on St. Anthony Boulevard.

II. FINDINGS OF FACT FOR THE PURPOSES OF THIS MOTION

1. Plaintiff Huxman resides on St. Anthony Parkway.
2. The Park Board Property abuts and is in front of Huxman’s property.
3. Under the Minneapolis City Charter, the Park Board has the power and the duty to devise and adopt, and maintain parks and parkways in and adjacent to the City of Minneapolis, and from time to time to add thereto; to designate lands and grounds to be used and appropriated for such purpose; to cause the same to be platted, surveyed, and plats thereof filed in the office of the Secretary of said Board, and in the office to take possession upon obtaining title to the same or any part thereof, to hold, improve, govern and administer the same for such purposes.

Minneapolis City Charter Chapter 16 §2

4. The Park Board holds, governs and administers a system of parks and parkways known as “The Grand Rounds” which is an approximately fifty mile long loop through the City of Minneapolis.
5. St. Anthony Parkway is a part of the Park Board’s Grand Rounds. St. Anthony Parkway is owned by the Park Board. It is a 3.3 mile long linear park that is located in the

northeast corner of Minneapolis between the 37th St –Camden bridge to the west and Stinson Parkway to the east.

6. In the late 1960's, a bicycle trail was implemented as part of a "Bicycle Grand Rounds". The bicycle trail did not initially include all of the fifty miles encompassed in the Grand Rounds. The Park Board had plans, however, to complete the Grand Rounds bicycle loop.

7. In the mid 1970's, a bicycle trail was installed on much of the parkway, but a section of the parkway, including the segment between Ulysses St. NE and Stinson Blvd, was left without a bicycle trail.

8. In 2001, the Park Board applied for a grant from the Federal Transportation Project for funds to complete the Grand Rounds Bicycle Path at St. Anthony Parkway ("the Project").

9. The present area from the curb of the parkway to the property line of the residents is between thirty to thirty-eight feet wide. This expanse of land belongs to the Park Board. At present, there are sidewalks on the Park Board Property that run in front of these houses. These sidewalks are five feet wide.

10. In December 2002, the Park Board received funding from the Federal Government for the Project. Extending the bike trail from Ulysses Avenue to Stinson Parkway was a key component of the Park Board's Plan.

11. The Park Board engaged the services of a consultant to assist in developing the regional park and engineers, historians, environmental consultants and park staff worked together to devise a master plan for the Project.

12. The Park Board also sought input from the community on the proposed plan and held several meetings with the local community to discuss these issues. The community raised certain concerns about the Project at those meetings. The Park Board took these concerns into

account when creating its master plan and the plan for this Project. Specifically, issues were raised about the number of trees being destroyed on the boulevard. Several of the members of the community did not want the bike path in front of their houses. Other members wanted the bike path to be narrower than the sixteen foot path the Park Board proposed and wanted a concrete bike trail path rather than a bituminous trail.

13. The Park Board rejected the idea of putting the bike path either in the street or on the south side of the parkway. The Park Board has rarely built a bike path in a street since these paths are used for family activities and the safety of those users would be jeopardized by constructing a bike path in the street. The Park Board also decided that placing a bike trail on the north side of the street would not only be safe, but have less of an impact on the school in the area, trees and the street crossings.

14. The Park Board made certain concessions to its original plan for the bike trail. IT decided to construct the bike path of concrete just like the present sidewalks in the area. Moreover, instead of constructing a 10 foot bike path and a 6 foot pedestrian trail with plants in the middle as a divider, the Park Board altered its plans to merely widen the sidewalks to 10 feet and provide appropriate trail markings and signage.

15. On August 16, 2006, the St. Anthony Parkway Master Plan including the design specifics for the Project was approved by the full Board of Commissioners of the Park Board.

16. On September 8, 2006, the final report for the St. Anthony Parkway Master plan was issued incorporating some of the changes proposed by the community.

17. According to this plan, the Park Board will preserve the trees in the area and no tree on the residential area boulevard is slated for removal or destruction.

18. On October 11, 2006, the Metropolitan Council approved the St. Anthony Master Plan.

19. On April 23, 2007, the Minnesota Department of Transportation approved the location and design of the Project. The Department of Transportation found: "The proposed project will not significantly impact noise levels, air quality or other social/economic areas."

20. Based on these approvals and the approval from the Minnesota State Historical Preservations Officer, the Park Board is proceeding with its plans to construct this bike path.

21. The Park Board is now planning to advertise the Project for public bids on June 1, 2007, open the bids on July 10, 2007 and award the bid and begin construction on August 1, 2007.

III. ANALYSIS

Rule 65 of the Minnesota Rules of Civil Procedure authorizes a court to grant a temporary restraining order or temporary injunction "only if it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss or damage will result to the applicant before the adverse party or that party's attorney can be heard in opposition. . . ." Minn. R. Civ. P. 65.01. See also, Miller v. Foley, 317 N.W.2d 710, 712 (Minn. 1982); Paradata of Minn., Inc. v. Fox, 356 N.W.2d 852, 854 (Minn. Ct. App. 1984) (*citing* Cramond v. AFL-CIO, 267 Minn. 229, 234-35, 126 N.W.2d 252, 256-57 (Minn. 1964)). The analysis that this Court must complete in determining whether to grant a temporary restraining order is the same as that is required on a motion for a temporary injunction. See, Bio-Line, Inc. v. Burman, 404 N.W.2d 318, 321 (Minn. Ct. App. 1987); M.G.M. Liquor Warehouse Int'l, Inc. v. Forsland, 371 N.W.2d 75, 77 (Minn. Ct. App. 1985) (*citing* Eakman v. Brutger, 285 N.W.2d 95 (Minn. 1979)).

When deciding to grant or deny a temporary restraining order or temporary injunction, a court must consider five factors:

- 1) the relationship between the parties before the dispute;

- 2) the harm the plaintiff may suffer if the injunction is denied, compared to the harm inflicted on the defendant if it is granted;
- 3) the likelihood that a party will prevail on the merits;
- 4) public policy considerations; and
- 5) the administrative burden imposed on the court if the injunction issues.

Dahlberg Bros., Inc. v. Ford Motor Co., 272 Minn. 264, 274-75, 137 N.W.2d 314, 321-22 (Minn. 1965); City of Mounds View v. Metropolitan Airports Commission, 590 N.W.2d 355, 357-58 (Minn. Ct. App. 1999); Upper Midwest Sales Co. v. Ecolab, Inc., 577 N.W.2d 236, 240-41 (Minn. Ct. App. 1998). In AMF Pinspotters, Inc., v. Harkins Bowling, Inc., 260 Minn. 499, 110 N.W.2d 348 (Minn. 1961), the Minnesota Supreme Court stated:

“Injunctive relief should be awarded only in clear cases, reasonably free from doubt, and when necessary to prevent great and irreparable injury. The burden of proof rests upon the complainant to establish the material allegation entitling him to relief.”

260 Minn. 499, 110 N.W.2d 348 (Minn. 1961).

A. Nature and Background of the Relationship between the Parties Preexisting the Dispute giving rise to the Request for Relief

The need for the Court’s examination of the parties’ relationship before the litigation arises from the very nature and purpose of temporary relief—to maintain the status quo until the issue or controversy can be resolved on the merits. See, County of Winona v. City of Winona, 453 N.W.2d 710, 711 (Minn. Ct. App. 1990); Bio-Line, Inc. v. Burman, 404 N.W.2d 318, 320 (Minn. Ct. App. 1987). Therefore, the Court must consider the relationship of the parties before the controversy arose.

In this present case, Huxman is a resident of the City of Minneapolis whose home is located along the route of the Park Board's proposed bike path/pedestrian path in the area from Ulysses Avenue to Stinson Blvd. Huxman's property abuts the property owned by the Park Board.¹

The Park Board has planned to build on its own land and no private property will be used for the construction of the bike/pedestrian path. A five foot wide cement sidewalk is currently on the Park Board property. Under the approved plan, the Park Board would expand the present concrete sidewalk on its property from five to ten feet and provide appropriate trail markings and signage. The length of the bike path is 3000 feet. The Park Board held community meetings and revised its plan in response to concerns raised by the community. The Park Board also considered alternatives to the proposed path including not constructing the path. Thus, the relationship between the parties is one of adjoining landowners where one wishes to build an improvement upon its own property.

This factor therefore favors denying a temporary restraining order/temporary injunction.

B. The Harm to be Suffered by the Moving Party if the Temporary Injunction is Denied as Compared to the Harm Inflicted on the Nonmoving party if the Injunction is Granted.

Failure to show irreparable harm is grounds for denial of a temporary injunction. Morse v. City of Waterville, 458 N.W.2d 728, 729 (Minn. Ct. App. 1990). To warrant the remedy of temporary injunction, Plaintiff must make a showing of irreparable harm. Id at 729. In Miller v. Foley, the Minnesota Supreme Court denied a temporary injunction where the movant

¹ At the hearing, Plaintiff's counsel stated that approximately 40 homeowners lived along the proposed bike path. No affidavits from a homeowner (except perhaps Mr. Stanbury) have been presented to the Court that express opposition to the bike path.

would suffer loss of income because the harm was temporary and a money recovery would be an adequate remedy. 317 N.W.2d 710, 712-13 (Minn. 1982). If the moving party cannot show irreparable harm, that by itself is sufficient ground to deny a preliminary injunction. Morse v. City of Waterville, 458 N.W.2d 728, 729 (Minn. Ct. App. 1990); Gelco Corp. v. Coniston Partners, 811 F.2d 414, 418 (8th Cir. 1984). If there is an adequate remedy at law, then there is no irreparable harm. See, Miller v. Foley, 317 N.W.2d 710, 713 (Minn. 1982). In order to be irreparable, the injury must be “of such a nature that money alone could not suffice.” Morse, 458 N.W.2d at 729-30. An irreparable injury cannot be adequately compensated through money damages. Howe v. Howe, 384 N.W.2d 541, 544 (Minn. Ct. App. 1986). In order for a temporary injunction to be granted, the party seeking the injunction must show that any possible legal remedy is inadequate and an injunction is necessary to prevent irreparable injury. Ledal Italia S.A.S. v. Aveda Corp., 2000 WL 1376537 (Sept. 26, 2000).

In this case, the Court must compare Plaintiffs’ claim that they will suffer irreparable harm if the trail is constructed on the Park Board’s property in front of their homes versus the harm to the Park Board if the temporary injunction is issued.

Plaintiffs will not be harmed by the building of the bike path in front of their homes. The Minnesota Department of Transportation determined that the project would not impact noise levels, air quality or other social/economic areas. Plaintiffs go to great lengths to argue that this bike path is unsafe and dangerous. However, they have presented the Court with nothing but unsupported assertions and inadmissible hearsay. For example, Plaintiffs place great weight on a critique of a similar bike path that was proposed to be placed near MIT in Massachusetts. See, Plaintiffs’ Exhibit 19. This bike path was eventually built. At the hearing, when asked if there had been any accidents since construction of the path, Plaintiffs’ counsel stated that he was unaware of any such accidents.

The Park Board, on the other hand, will be harmed if a temporary injunction is issued, The Project has been in the planning phase for over five years. It is a key component of the Grand Rounds Plan. It will fill in the missing link in the system by extending the current path to a point where other future segments are being planned for implementation. The Park board has received all the necessary approvals and there is a short construction season, which would mean a delay in the construction and presumably incurred construction costs if the Court issued a temporary injunction.

Therefore, this factor also favors denying the temporary injunction.

C. The Likelihood that the Moving Party will Prevail on the Merits of its claims.

At this stage, there is a sufficient likelihood that the Park Board will succeed on the merits of this case and that Plaintiffs will fail.

1. Discretionary Immunity

Minnesota courts have consistently applied the doctrine of discretionary immunity to decisions regarding the implementation of improvement projects. In Chabot v. City of Sauk Rapids, the Park Board's decision as to where to locate and how to construct a bike/pedestrian path on its own property involved "policy making that can be made only by the legislative or executive branch of the government." 422 N.W.2d 708, 711 (Minn. 1988).

Plaintiffs are asserting a nuisance claim against the Park Board which arises solely out of the Park Board's decisions about the construction, design and improvement to the Grand Rounds Bicycle path on St. Anthony Boulevard. These decisions are protected by statutory discretionary immunity.

The Minnesota Legislature waived sovereign immunity for tort liability of municipalities, with some exceptions. The statute states as follows:

Subdivision 1. Scope. Section 466.02 does not apply to any claim enumerated in this section. As to any such claim every municipality shall be liable only in accordance with the applicable statute and where there is no such statute, every municipality shall be immune from liability.

Subd. 6. Discretionary acts. Any claim based upon the performance or the failure to exercise or perform a discretionary function or duty, whether or not the discretion is abused.

Subd. 6e. Parks and recreation areas. Any claim based upon the construction, operation, or maintenance of any property owned or leased by the municipality that is intended or permitted to be used as a park, as an open area for recreational purposes, or for the provision of recreational services, or from any claim based on the clearing of land, removal of refuse, and creation of trails or paths without artificial surfaces, if the claim arises from a loss incurred by a user of park and recreation property or services. Nothing in this subdivision limits the liability of a municipality for conduct that would entitle a trespasser to damages against a private person.

Minn. Stat. §466.03, subd. 1, 6.

“Whether governmental action is protected by statutory immunity is a question of law.” Conlin v. City of St. Paul, 605 N.W.2d 396, 400 (Minn. 2000). There are two types of discretionary functions: planning level and operational level. Steinke v. City of Andover, 525 N.W.2d 173, 175 (Minn. 1994). Only planning level functions are protected by statutory immunity. *Id.* Planning level functions “require evaluating such factors and the financial, political, economic and social effects of a given plan.” Unzen v. City of Duluth, 683 N.W.2d 875, 882 (Minn. Ct. App. 2004). “Operation-level decisions, in contrast, are those actions involving the ordinary, day-to-day operations of the government...” *Id.* A governmental unit is only entitled immunity when “it can produce evidence” that its actions were the result of planning and policy-making and it has the burden of proving that it engages in protected planning-level activities and is entitled to immunity. Conlin v. City of St. Paul, 605 N.W.2d 396, 402 (Minn. 2000). The court must “identify the conduct at issue” before it can determine whether it is protected. *Id.* at 400.

The court must then determine whether that conduct is operational or policy-making. Angell v. Hennepin County Reg'l Rail Auth., 578 N.W.2d 343, 347 (Minn. 1998).

The conduct at issue in this case is the Park Board's decision to locate a ten (10) foot wide, concrete bike/pedestrian path with appropriate signage and marking on property owned by the Park Board in the area from Ulysses Street to Stinson Boulevard. The evidence shows that the design, location and construction of this path was a policy making decision by the Park Board. The master plan took into consideration social, political, historical, safety and economic concerns when making its decision on where to locate the bike/pedestrian path in this area. The purpose of the project is to enhance local and regional bicycle and pedestrian access to the Grand Rounds Scenic Byway.

The project includes upgrading portions of the trail system that do not meet current design standards. If it were not built, this portion of the Scenic Byway would continue to be in poor condition with service gaps and safety issues. A location alternative was investigated and this option was disregarded for the possible loss of parking and interaction at the middle school. See, Brown Affidavit, p. 8, 9 and 10.

All of this planning by the Park Board involved policy considerations on the best use of Park Board land. See, Hills v. City of White Bear Lake, 1999 WL 451763 (holding city was entitled to discretionary immunity on its decision to relocate a ball field as the decision involved policy considerations on the best use of land). These decisions are of the type insulated by discretionary immunity. Nusbaum v. County of Blue Earth, 422 N.W.2d 713, 722 (Minn. 1988).

Minnesota courts have consistently applied the doctrine of discretionary immunity to a city's decision regarding implementation of improvement projects because the decision involved "policy-making that can only be made by the legislative or executive branch of the government." Chabot v. City of Sauk Rapids, 422 N.W.2d 708, 711 (Minn. 1988). "The judicial

branch of government should not, through the medium of tort actions, second-guess certain policy making activities that are legislative or executive in nature.” Nusbaum v. County of Blue Earth, 422 N.W.2d 713, 722 (Minn. 1988). Since the doctrine of discretionary immunity will apply in this case, the Plaintiffs’ nuisance claim will likely fail.

Due to the Park Board’s likelihood of succeeding on the merits of its defenses, this factor also favors denying the injunction.

D. Public Policy Interest

The granting of injunctive relief in this case is not in the public’s interest. The public policy of Minnesota is that a municipality is immune from liability for its discretionary acts. Minn. Stat. §466.03, subd. 6. The Park Board’s planning for this path on its own property falls within that statute. The Park Board has the duty to maintain parks and pathways and to designate lands and grounds to be used and appropriated for park and recreational purposes. The path benefits all of the residents and visitors to the City of Minneapolis. Plaintiffs’ claim that the bike path will be dangerous is unsupported by the evidence in the record. Therefore, the public policy weighs against granting the temporary injunction.

This factor therefore favors the denial of the temporary injunction.

E. Administrative Burdens imposed on the Court if the Injunction issues.

Both parties agree that there would be no administrative burden in this case resulting from the issuance of a temporary injunction.

This factor thus favors granting the temporary injunction.

IV. CONCLUSION

Plaintiffs have satisfied only one of the five Dahlberg elements and thus have not met the conditions set forth under Minn. R. Civ. Pro. Rule 65. For these reasons, Plaintiffs' request for a temporary injunction is denied. All parties will file information statements by June 24, 2007.

F.J.C.

A handwritten signature in black ink, appearing to be the initials 'F.J.C.' with a stylized flourish extending to the right.