

No. A07-1431

**STATE OF MINNESOTA
IN COURT OF APPEALS**

PETER HUXMANN, individually and
on behalf of all others similarly situated,

Appellant,

v.

MINNEAPOLIS PARK AND RECREATION BOARD,

Respondent.

APPELLANT'S BRIEF

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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.**

A.76 (emphasis added).

The Park Board's January 3, 2007 letters caused Huxmann to assume that construction of the bike trail would begin on or shortly after May 1, 2007, and thus was imminent. *Id.* On April 23, 2007, he commenced this action by serving the following on the Park Board: Summons; [Verified] Complaint; 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. A.15-40. In his *verified* Complaint, Huxmann set out the following allegations:

I

That plaintiff Peter Huxmann is, and at all times mentioned was, residing at 2105 St. Anthony Parkway, Minneapolis, Hennepin County, Minnesota 55418. Defendant Minneapolis Park & Recreation Board is, and at all times mentioned was, a political subdivision of the City of Minneapolis, Minnesota.

II

That on or about May 1, 2007, defendant will begin constructing a combination bike-and-pedestrian path of, potentially, some sixteen feet in width on the northerly side of St. Anthony Parkway from Ulysses Street to Stinson Boulevard in Minneapolis, Minnesota.

III

That said bike-and-pedestrian path will be offensive to plaintiff's senses, will obstruct plaintiff's free use of his property, will interfere with plaintiff's comfortable enjoyment of his property, and, in short, will foist a permanent nuisance upon all residents of St. Anthony Parkway between Ulysses Street and Stinson Boulevard.

IV

That defendant's construction of said bike-and-pedestrian path will create unsafe conditions for pedestrians, bike riders, drivers of vehicles, joggers, playing children, and pets, the likelihood and significance of which, on information and belief, has been ignored by the defendant.

V

That the construction of said bike-and-pedestrian path will *de-beautify* the historically significant section of St. Anthony Parkway between Ulysses Street and Stinson Boulevard by causing the death or removal of beautiful trees and the substitution of asphalt or concrete for substantial amounts of green space.

VI

That for all practical purposes the intended bike-and-pedestrian path is passionately opposed by all of the residents of St. Anthony Parkway between Ulysses Street and Stinson Boulevard.

VII

That said bike-and-pedestrian path, a purportedly necessary extension of the Grand Round, would be the *only* section of the Grand Round passing through and right in front of homes in a residential area.

VIII

That inoffensive, safe, and much less costly if not cost-free bike path routes exist as alternatives to constructing the offensive, unsafe,

and very costly bike-and-pedestrian path on the northerly side of St. Anthony Parkway between Ulysses Street and Stinson Boulevard.

IX

That the seven intersections and dual-level topography of many of the lots on St. Anthony Parkway between Ulysses Street and Stinson Boulevard are incompatible with the combination bike-and-pedestrian path which defendant intends to begin constructing on or about May 1, 2007.

X

That unless defendant is restrained from constructing said bike-and-pedestrian path, plaintiff will suffer permanent and irreparable harm to his property and himself.

XI

That the exact amount of plaintiff's damages cannot be determined and, therefore, plaintiff does not have an adequate remedy at law.

A.17-19 (emphasis in original).

The originals of Huxmann's pleadings were filed on April 24, 2007, and the case was immediately assigned to Judge Francis Connolly, who at once scheduled a telephone conference with counsel for April 25, 2007. During that telephone conference, the Park Board's attorney revealed that the Park Board had not yet advertised for bids for the construction of the bike path and later that day sent a letter to Judge 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. A.77. That revelation mooted Huxmann's motion for a temporary restraining order and enabled the court to proceed directly to determining whether to grant his motion for a temporary injunction enjoining the construction of the path during the pendency of the action aimed at *permanently* enjoining the construction of a combination bike-and-pedestrian path on St. Anthony Parkway from Ulysses Street to Stinson Boulevard. A.19 (emphasis added). Judge Connolly scheduled a hearing of Huxmann's motion for a temporary injunction for May 23, 2007, prior to which the parties were to complete the briefing of that motion. The Park Board

was to brief and did brief an opposition to Huxmann's motion by May 9, 2007, and Huxmann was to brief and did brief the support for his motion by May 18, 2007. A.44-174. The Park Board served a [sham] Answer on April 26, 2007.¹ A.41-43. With no specificity, the Park Board denied all allegations set out in the 11-paragraph Complaint except Huxmann's address and the extent to which the Parkway residents oppose the bike path, allegations about which the Park Board claimed to lack sufficient information to admit or deny. The Park Board flatly denied the rest of the allegations without any qualifications² whatsoever, and thus, in signing the Answer, the Park Board's attorneys certified that those denials of factual contentions were warranted on the evidence after an inquiry reasonable under the circumstances. *See* Minn. R. Civ. P. 11.02(b).

Huxmann's motion for a temporary injunction was heard as scheduled on May 23, 2007,³ and, on May 25, 2007, the court filed an Order Denying Plaintiffs' Motion for Temporary Injunction and Memorandum of Law. A.1-14.

The commencement of this appeal followed on July 24, 2007. A.225.

In the meantime . . .

On August 16, 2007, Huxmann served and filed a motion to stay proceedings during the pendency of this appeal. The motion was heard on August 30th, at which time the Park Board's attorney disclosed that bids had been advertised only two days

¹ "A 'sham pleading' . . . is one that is in good form, but false in fact, and not pleaded in good faith." BLACK'S LAW DICTIONARY 1375 (6th ed. 1990).

² Notably, the Park Board denied the undeniable when it denied that the intended path would be the only section of the Grand Rounds passing through and right in front of homes in a residential area, that locating the path on the northerly side of St. Anthony Parkway between Ulysses Street and Stinson Boulevard will create unsafe and downright dangerous conditions, and that the path for all practical purposes is opposed by all Parkway residents. A.42. In addition to the *Northeaster* article titled "Bike trail plan upsets parkway neighbors," anybody who attended the community meetings in 2005 and 2006 knows that the opposition was palpable. That resort to a general denial made the Park Board's attorneys subject to the obligations set forth in Rule 11 pursuant to Rule 8.02.

³ The transcript of the hearing can be found at A.175-210 and is cited herein as "A. __ or __-__ (Hearing Tr., p. __ or pp. __-__)".

earlier, would be opened on September 27th, the contract would be awarded on October 3d, and construction would start by October 5th. In other words, time was never of the essence when the trial judge pushed out his denial of Huxmann's motion less than two days after hearing it and conceding he had not looked in detail at the affidavits and was only somewhat familiar with the issues.

STANDARD OF REVIEW

The sole issue on appeal from an order denying a motion for a temporary restraining order is whether there was a clear abuse of the district court's discretion. *Earth Protector, Inc. v. City of Hopkins*, 474 N.W.2d 454, 455 (Minn. App. 1991). "In deciding whether the [temporary injunction] determination made by the district court should be sustained on appeal, [the appellate courts] consider the likelihood that one party or the other will prevail on the merits when the fact situation is viewed in light of established precedents fixing the limits of equitable relief. [The appellate courts] also evaluate the relationship between the parties preexisting the dispute and the relative hardships that would result if the temporary restraint were denied or issued." *Berggren v. Town of Duluth*, 304 N.W.2d 24, 26 (Minn. 1981) (citations omitted); *see also Bell v. Olson*, 424 N.W.2d 829, 832 (Minn. App. 1988) (listing factors to be considered on review). 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). The purpose of a temporary injunction 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 228 N.W.2d at 564.

ARGUMENT

Huxmann 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). 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. If a temporary injunction is not issued to enjoin the Park Board from constructing the bike path at issue before a completion of a trial on the merits, an irreversible and thus permanent nuisance will 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).

L A TEMPORARY INJUNCTION SHOULD ISSUE ENJOINING THE RESPONDENT FROM CONSTRUCTING A BIKE PATH ON ST. ANTHONY PARKWAY BETWEEN ULYSSES STREET NE AND STINSON PARKWAY BECAUSE ALL OF THE DAHLBERG FACTORS WEIGH DECIDEDLY IN FAVOR OF SUCH ISSUANCE.

In this case, *Dahlberg* Factors 1, 2, 3, and 4 weigh decidedly in favor of issuing the

temporary injunction Huxmann seeks. As for *Dahlberg* Factor 5 (administrative burden), Huxman argued that enforcing a temporary injunction would not cause any administrative burden where it is impossible to imagine that the Park Board, a governmental body, would commit constructive civil contempt by commencing the construction of the bike path at issue if it were enjoined from doing so. The Park Board agreed (A.56 and 43M), leaving the trial court with no choice but to hold that this factor favored granting the temporary injunction since “there would be no administrative burden in this case resulting from the issuance of a temporary injunction.” A.13.

A. Relationship Of The Parties.

The trial court held that this *Dahlberg* Factor favored denying Huxmann’s motion for a temporary injunction for the following reasons:

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.

¹ At the hearing, Plaintiffs 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.

A.8.

That “analysis” is almost a word-for-word replication of what the Park Board argued, *to wit*:

Plaintiffs are residents of the City of Minneapolis whose homes are located along the route of the Park Board's proposed bike/pedestrian path in the area from Ulysses Avenue to Stinson Boulevard. The Plaintiffs' property abuts property owned by the Park Board. The Park Board's property consists of an area from 30 to 38 feet wide which runs from the curb of the street to the edge Plaintiffs' property lines. Brown Aff. ¶ 27. The Park Board has planned to build a bike/pedestrian path on its land. None of the Plaintiffs' property will be used for the construction of the bike/pedestrian trail. Moreover, a five (5) foot wide cement sidewalk is currently on the Park Board property. *Id.* at ¶ 28. Under the approved plan for this area, the Park Board would expand the present concrete sidewalk on its property from five (5) to ten (10) feet and provide appropriate trail markings and signage. *Id.* at ¶¶ 28-32. Furthermore, in planning and designing this Project, the Park Board held community meetings and revised its plan in response to concerns raised by the community. *See generally*, Brown Aff. Exhibit B. The Park Board also considered alternatives to the proposed bike/pedestrian path including, but not limited to, not constructing the path. *Id.* Exhibit D, p. 8-9.

A.43J-43K.

Simply put, this action pits an urban landowner against an adjoining landowner where Huxmann's land adjoins land purportedly owned by Park Board, a governmental entity. Adjoining landowner Park Board is threatening to create and maintain a permanent nuisance on land it purportedly owns despite having no special right to do what a private citizen landowner could not do. In addition to ignoring the fact that the sidewalk is 6' wide, (A.62) and the fact that affidavits (and other exhibits) expressing opposition to the bike path were indeed submitted (A.25 and 172-173),⁴ the trial judge did not even acknowledge that the following exchange occurred at the motion hearing:

STANBURY: Now, as far as the relationship of the parties, the Dahlberg factor, relationship of the parties, what we have here, obviously, are adjoining landowners. The relationship is such, no different than it would be if

⁴ Opposition to the bike path was expressed in the *verified* complaint, and, as a result, such opposition did not have to be expressed in an affidavit, *see* Minn. R. Civ. P. 65.01, but even so, opposition was also expressed in Huxmann's two affidavits, the intersection DVD, and exhibits like the *Northeaster* editorial, the *Northeaster* article, and the work and emails of Parkway resident Dew which the trial judge, obviously, neither read nor viewed.

there were private landowners. But in this case we also, one is a governmental entity and the other is a citizen with all the, whatever that implies, as far as the unequal power of the two. Under the law, residents' rights are superior to the business's rights in a residential area.

COURT: But this isn't a business.

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

COURT: For the public good.

STANBURY: Ostensibly, yes.

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

PETERSON: Peterson. There's a lot of 'sons' in this state.

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

STANBURY: No, that's correct.

COURT: Okay. So maybe the business analogy is not precisely on point.

STANBURY: Maybe not precisely. Your Honor, but some analogies are apt but not necessarily exactly on point. As far as the public good goes, we're talking about something that was set up many, many decades ago and bike paths were not the original plan. That has evolved over time. But in any event, whether or not something is set up for the public good doesn't give them a free pass to do whatever they want if [that] something they plan to do creates

what we are alleging is a nuisance.

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

STANBURY: Right, that's correct.

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

STANBURY: If you're talking about the width of the path?

COURT: Yes.

STANBURY: They made a concession which took the path down, I guess. It's reportedly down to 10 feet which is, the existing sidewalk is six feet, despite the fact that the engineer contends it's 5-foot sidewalk, a 6-foot sidewalk plus another four feet, which is to accommodate two-way bike travel and pedestrians.

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

STANBURY: In some very narrow respects.

COURT: Right.

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

COURT: I got it.

STANBURY: The other concession was changing asphalt to concrete.

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

STANBURY: No. They may think it does. No. They may think that they conceded and appeased certain voices at these meetings, but what they've done is create a

less safe path. The original path was to be 16 feet plus a 2- or 3-foot divider of grass or flowers, and a 3-foot path, total of 19 feet.

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

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

A.183-187 (Hearing Tr., pp. 9-13).

This *Dahlberg* factor supports granting the temporary injunction.

B. Balance Of Harms.

The trial court held that this *Dahlberg* Factor favored denying Huxmann's motion for a temporary injunction for the following reasons:

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.

A.9-10.

As before, the trial judge's "analysis" is almost a word-for-word replication of what the Park Board argued, *to wit*:

The Plaintiffs assert that they will suffer irreparable harm if the bike/pedestrian trail is constructed on the Park Board's property in front of Plaintiffs' homes. Plaintiffs have no facts to support their assertion. It is difficult to see how Plaintiffs will be harmed by the expansion of the sidewalk in front of their homes with its intended new use as a bike/pedestrian path with appropriate markings and signage. In fact, it is especially difficult to see how the Plaintiffs will be irreparably harmed when MnDOT expressly determined; "The proposed project will not Significantly impact noise levels, air quality or other social/economic areas." Brown Aff. Exhibit D p. ii. The Park Board, on the other hand, will be harmed if a temporary injunction issues. This Project has been in the planning for over five years. It is a key component of the Grand Rounds Plan. Rietkerk Aft. ¶ 5. 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. *Id.* The Park Board has received approvals from the Metropolitan Council, MnDOT and SHPO for this Project including, but not limited to, the location and design of the Project. Moreover, the construction season in this state is short; if a temporary injunction were to issue the Park Board would not be able to begin construction on this scenic byway.

A.43K-43L.

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, the Park Board has not shown that it will be harmed at all by the issuance of a temporary injunction, whereas, if a temporary injunction does not issue, a victory by Huxmann at trial will be a meaningless waste of time and money because the Park Board will have already constructed an immutable nuisance. Huxmann is seeking to enjoin a threatened nuisance. If a temporary injunction issues, as it should be, construction of the sidepath proposed by the Park Board will at worst be postponed. It is beyond ridiculous to think that time became of the essence all of a sudden where the Park Board has been toying with its project for over six years. If a temporary injunction is not issued to enjoin the Park Board from constructing the bike path at issue before a completion of a trial on the merits, an irreversible and thus permanent nuisance stands to be created. And once

again, the trial judge did not even acknowledge that the following exchange occurred at the motion hearing:

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

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

STANBURY: That's correct.

COURT: And that will slow down the whole construction.

STANBURY: That's correct.

COURT: And it won't get done.

STANBURY: That's correct.

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

STANBURY: They have a federal grant and --

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

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

COURT: I guess I raised it so --

STANBURY: It's simply, maybe, maybe not, **but it hasn't been argued. . . .**

A.206-207 (Hearing Tr., pp. 32-33) (emphasis added).

This *Dahlberg* factor supports granting the temporary injunction.

C. Likelihood Of Success On The Merits.

The trial court held that this *Dahlberg* Factor favored denying Huxmann's motion for a temporary injunction for the following reasons:

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 often 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.

A.12-13 (emphasis added).

That "analysis," too, is an almost word-for-word replication of what the Park Board argued, *to wit*:

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 markings on property owned by the Park Board in the area from Ulysses Street to Stinson Boulevard. The evidence amply demonstrates that the design/location/construction of this bike/pedestrian path was a policy making decision by the

Park Board. . . . This plan is replete with evidence that the Park Board 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 historic Grand Rounds Scenic Byway T. . . . The no-build alternative does not fulfill the project purposes. Under the no-build alternative, this important portion of the Grand Rounds National Scenic Byway would continue to be a facility in poor condition, with service gaps and safety issues. During the public process, a location alternative was investigated in the Residential Segment. Placing the bicycle trail at the south side of the parkway was debated. The possible loss of parking and interaction at the middle school were among the reasons for disregarding this option. Brown Aff. Exhibit Dp. 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 451763,12 (holding city was entitled to discretionary immunity on its decision on relocation of ballfield as the decision involved policy considerations of the best use of land and the feasible means to control risks). These decisions are of the type insulated by discretionary immunity. *See Nusbaum v. County of Blue Earth*, 422 N.W.2d 713, 722 (Minn.]988).

Moreover, 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 Sank Rapids*, 422 N.W.2d 708, 711 (Minn. 1988). '[T]he 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*, 422 N.W.2d at 722.

A.43G-43I.

While municipalities are generally liable for their torts, the legislature has provided for limited exceptions of immunity. *See* Minn. Stat. §§ 466.02, 466.03. One such exception applies when the municipality's alleged tortious conduct constitutes a discretionary function, whether or not that discretion was abused. Minn. Stat. § 466.03, subd. 6. This type of immunity, called "statutory immunity,"⁵ protects policy-making, or discretionary activities that are legislative or executive in nature. *Johnson v. State*, 553

⁵ In earlier cases, immunity under Minn. Stat. § 466.03, subd. 6, was sometimes called "discretionary immunity." *See, e.g., Watson by Hanson v. Metropolitan Transit Comm'n*, 553 N.W.2d 406, 409 n. 1 (Minn. 1996).

N.W.2d 40, 46 (Minn. 1996). Determining whether statutory immunity applies requires a careful examination of the challenged governmental activity. *Nusbaum v. County of Blue Earth*, 422 N.W.2d 713, 719 (Minn. 1988). The analysis may involve some difficulty because "almost every act involves some measure of discretion, and yet undoubtedly not every act of government is entitled to [statutory] immunity." *Cairl v. State*, 323 N.W.2d 20, 23 (Minn. 1982). 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). This court has consistently interpreted the statutory immunity narrowly. *See, e.g., Zank v. Larson*, 552 N.W.2d 719, 721 (Minn. 1996); *Holmquist v. State*, 425 N.W.2d 230, 231 (Minn. 1988). Statutory immunity applies only when the challenged government activity originated from a balancing of political, social and economic factors. *See id.* at 722; *Zank*, 552 N.W.2d at 721. In contrast, operational or day-to-day decisions involving the application of scientific or technical skills are not protected by statutory immunity. *Nusbaum*, 422 N.W.2d at 722. Merely labeling an activity as policy-based or operational, however, is insufficient. Courts must focus on the nature of the government decision, "applying the exception only where the decision involved a balancing of policy objectives rather than merely a professional or scientific judgment." *Id.* at 719-20. Implementing a policy, in contrast to formulating the policy itself, is often not subject to statutory immunity. *Holmquist*, 425 N.W.2d at 234.

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 Huxmann for creating the nuisance upon which this action is grounded?

In analyzing an official immunity question, a court begins by identifying “the precise governmental conduct at issue.” *Watson v. Metro. 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 Park Board has not provided and never will be able to provide sufficient evidence that its path location and width 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/or bike/pedestrian path. Decisions concerning where, when, and how to complete or not to complete the Grand Rounds 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). The Park Board’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, the Park Board baldly contended, and the trial court blithely held, that “Minnesota courts have consistently applied the doctrine of discretionary immunity to a city’s decision regarding implementation of improvement projects” A.43I. 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). The Park Board’s contention and the trial court’s holding thus are wrong as well as unsupported and are belied by the three cases the Park Board cited 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” A.43G. In one of those three⁶ cases, *Conlin v. City of St. Paul*, 605

⁶ 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.

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 Erichson 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 bootstrapped into planning decisions and thus protected by statutory immunity. Such a minimal showing is also troubling because it conflicts with this court's precedent that statutory immunity should be narrowly construed, *see Angell*, 578 N.W.2d at 346, and that the party seeking immunity has the burden of proof, *see Steinke*, 525 N.W.2d at 175. As we are not convinced that these conclusory affidavits satisfy the City's burden of proof on this issue, we affirm the court of appeals and hold that the City is not entitled to statutory immunity for its failure to use warning signs or other protective measures following the street sealing project.

Id. (emphasis added).

The May 2, 2007 Affidavit of Timothy P. Brown (A.43O-43S) is a conglomeration of conclusory statements and inadmissible hearsay, yet the trial judge ignored that while

dismissing all of Huxmann's exhibits as constituting "unsupported assertions and inadmissible hearsay." Paragraph Nos. 6, 8, 9, 10, 12, and 14 of Brown's affidavit constitute a meaningless listing of the community meetings that were held in 2005 and 2006 without any meaningful detail as to what transpired at those meetings. Paragraph Nos. 3 and 27 should have been stricken on the grounds that Brown was not competent to testify as to defendant's ownership of land and the length of the Parkway and bike path. Paragraph Nos. 11, 13, 15, and 16 should have been stricken as inadmissible hearsay in that Brown was not competent to testify as to what action the Park Board's planning committee did or did not take. Paragraph Nos. 24, 25, and 26 are conclusory, and in Paragraph 28 Brown put his overall credibility and competence in question by saying that the sidewalk is 5' wide when it actually is 6' wide. At the same time, the benign May 9, 2007 Affidavit Of Douglas (Judd) Rietkerk (A.43T-43U) accomplished nothing. In Paragraph No. 5 of that affidavit, *e.g.*, Rietkerk attested that the 37th Avenue NE to Stinson Parkway bike trail is a "key component" of the Grand Rounds and will fill in a "missing link" in the system. However, the instant action only concerns the path that the Park Board proposes to construct between Ulysses Street and Stinson Boulevard. The path between 37th Avenue NE and Ulysses Street already exists and thus will not "fill in" anything. The much shorter Ulysses-to-Stinson portion at but 6/10 of a mile is hardly a "key component" of the 50-mile Grand Rounds system. Bicyclists can continue to pedal up and down that 6/10 of a mile of street as they have done for many years. In Paragraph No. 6, Rietkerk simply points out that, whether they know it or not, the Federal Highway Administration, the Minnesota State Historical Preservation Office, and the Metropolitan Council approved the construction of what is known in the law as an attractive nuisance. The involvement of those organizations can and will be addressed at trial as well as, *inter alia*, why Mn/DOT's so-called "approval" does not contain one word about AASHTO's unmistakable aversion to sidepaths with intersections despite the fact that Mn/DOT is a member of AASHTO.

Where the doctrine of discretionary immunity will never serve as a basis for

dismissing this action, the issue at trial will be whether the proposed path would be an inherently dangerous nuisance, and, as to that, it is highly likely that Huxmann will prevail over a defendant who, *inter alia*, will be unable to produce expert testimony to support the decision to locate the 3000-foot path on the northerly side of St. Anthony Parkway rather than on the St. Anthony Parkway roadway or some other street.

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

STANBURY: No.

COURT: Why not?

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

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

STANBURY: Yes, of course, because —

COURT: **Isn't it an operational decision whether to have asphalt or concrete?** But where to put the bike path, wouldn't that be a classic example of a policy maker acting within his discretion?

STANBURY: No.

COURT: Why not?

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

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

STANBURY: On the contrary, it's a classic example of an operational decision. Just like the case I cited where the decision to maintain the beach was the policy

decision and the decision to put up notice that there might be some metal in the sand, or whatever the problem was, those were operational. . . .

A.196-198 (Hearing Tr., pp. 22-24) (emphasis added).

This *Dahlberg* factor supports granting the temporary injunction.

D. Public Policy.

The trial court held that this *Dahlberg* Factor favored denying Huxmann's motion for a temporary injunction for the following reasons:

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.

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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.

A.9 and 13.

And yet again, the trial court's "analysis" is an almost word-for-word replication of what the Park Board argued, *to wit*:

The public policy of this state 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 bike/pedestrian path on its own property falls within the purview of this statute. In addition, the Park Board has the duty under the Minneapolis City Charter to maintain parks and parkways and to designate lands and grounds to be used and appropriated for park and recreational purposes. Peterson Aff. Exhibit 1. The Park Board's duty is to serve the public. To that end, the Park Board plans to construct and improve a portion of the Grand Rounds bicycle path on its own property along St. Anthony Parkway. This recreational bicycle path benefits all of the residents of and visitors to the City of Minneapolis.

Therefore, the public policy factor weighs heavily in support of the Park Board's position that a temporary injunction should not issue.

A.43M.

Constructing something that is hazardous, as the Park Board blithely proposes to do, would not be and never is in the public interest. Generally, a municipality in Minnesota is responsible for negligence in maintaining the safety of its streets and sidewalks. The liability of the city is limited, however, to those cases where it has notice, actual or constructive, of the defective condition. *Cleveland v. City of St. Paul*, 18 Minn. 255 (279) (1872); *see also* Peterson, *Government Responsibility for Torts in Minnesota*, 26 Minn. L. Rev. 480, 487-94 (1942). In his August 14, 2007 email to Project Manager Rietkerk, St. Anthony Parkway resident James Dew provided the Park Board with such actual notice of, *inter alia*, the fact that every study has concluded that sidepaths with intersections are the most dangerous form of bike path and many times more dangerous than riding in the street. Stanbury Aff. Ex. 6. Dew went on to produce a research paper, a copy of which he believes he sent to Project Manager Rietkerk. Dew's research paper cited numerous studies and web sites for defendant's benefit, but, apparently, all of it was ignored just as Huxmann's Intersection DVD was ignored by the Park Board members and staff and, more recently, by the Park Board's attorney and the trial judge. *See generally* Affidavit of Peter Huxmann dated May 18, 2007. *E.g.*, as bicycle facilities expert John S. Allen states on his web page, "The evidence that bicycling on sidewalks and similar facilities is more hazardous than bicycling on streets is overwhelming." A.89. Allen, whom plaintiff will probably retain as at least one of his experts at trial, has much to say about the dangers inherent in the type of bike-and-pedestrian path that the Park Board proposes to construct, as do others such as Fred Oswald (A.106-115) and Jeffrey Hiles (A.116-130). If Rietkerk had googled "bike path safety" as Dew suggested in his August 14, 2007 email, he could have located the web sites and publications of those three experts and others and learned that what Dew wrote in that email was correct and irrefutable. In its *Bikeway Facility*

Design Manual, e.g., **Mn/Dot itself states that designating a sidewalk as a shared facility for bicycle travel is not recommended.** A.143 (emphasis added). The American League of Bicyclists states that it is difficult, if not impossible, to design a safe-sidepath-style separated bicycle facility in most locations, and the League notes, *inter alia*, that “Separated shared use paths may be used to provide access when no suitable road exists; . . .” A.137 and 135. In its *Guide for Development of New Bicycle Facilities*, AASHTO states that the designated use of sidewalks as bikeways is unsatisfactory and two-way bike lane use on one side of a street has led to a number of fatal head-on collisions. A.80 and 94. The *California Highway Design Manual--Bikeway Planning and Design* is quoted as stating that bike paths immediately adjacent to streets and highways are not recommended. A.102. In their study of bicycle-vehicle accidents in Palo Alto, California, titled *Risk Factors for Bicycle-Motor Vehicle Collisions at Intersections*, Wachtell and Lewiston conclude, *inter alia*, that sidewalk bicycling adjacent to busy streets with many intersections present special dangers and should not be encouraged, that the average cyclist in their study incurred a risk on the sidewalk 1.8 times as great as on the roadway, and that, while only 15% of the bicycle paths in Palo Alto were sidepaths, **85%! of the bicycle-vehicle accidents occurred on the sidepaths at intersections.** A.95 (emphasis added). Despite all of that, Parks Engineer Brown has testified as follows with, apparently, a straight face:

In designing this Project, the Park Board looked at alternatives for the bike path, **including placing the bike path either in the street or on the south side of the street rather than on the north side.** These alternatives were rejected because of safety concerns or impact concerns.

The Park Board considered but rejected placing the bike path in the street due to the fact that safety is jeopardized when bike paths are in city streets. The Park Board provides bike paths to be used for family activities and by a wide range of users including the very young, the elderly, entire families, and people with special needs. The safety of these users would be jeopardized if bike paths were in streets. The Park Board only rarely has put any bike path in a street.

The Park Board considered but rejected placing the bike path on the south side of the street rather than on the north side. The Park Board decided that placing the bike path on the north side of the street would have less impact on the school in the area (Northeast Junior High School), the street crossings, and the trees in the area. **In addition, the Park Board considered the safety factor and with its consultants decided the proposed location of the bike path would be safer.**

Brown Aff. ¶¶ 24-26) (emphasis added.).

Clearly, the Park Board does not have a clue as to how hazardous its proposed bike path will be and its attendant liability inasmuch as it is on notice as to the inherent hazards. Nor does it care to be told. Even so, construction of that path must be enjoined for the sake of all concerned.

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

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

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

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

STANBURY: I don't. Your Honor.

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

STANBURY: There's no allegation at this time.

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

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

COURT: For bikes?

STANBURY: Yes. And I think the court can take judicial notice, if you've ever seen a bicyclist traveling down the street, you know that they travel at more than 10 miles an hour. Children maybe not, but bicyclists, yes. Plus in this instance they're going to be hitting seven to nine intersections. I would hope --

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

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

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

STANBURY: No, I know.

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

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

COURT: But how would I know that though? That's not in

the record. It just says 'Attached hereto as Exhibit 17 is a true and correct copy of John Allen's 'May 2002 critique. See Planner Paul Schmidt's report defending MIT's proposal to build an expensive sidewalk which would cross intersections,' et cetera. How do I know that John Allen is just, you know, another John Allen out there who didn't like the bike paths in his deal?

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

COURT: But you have the burden.

STANBURY: Pardon me?

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

STANBURY: Your Honor, if I may?

COURT: Go ahead.

STANBURY: I don't know that at this stage I have to put in expert testimony. My point in putting the web pages in there, which refer to AASHTO, the AASHTO Guide, which is recognized, the California guy which I've quoted. All of this adds up to at least a prima facie case of the unsafe character of the bike path that they propose to construct and they have put in nothing more than an affidavit of Tim Brown with conclusionary statements like we consulted with engineers, unidentified engineers, and we determined that it was safer to put the bike path where we're putting it than in the street, which is contradicted by all evidence out there.

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

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

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

STANBURY: Taken as true, but it's still conclusionary, is it not? And I've put in evidence at this stage which should be considered sufficient to show that it is not safe. What you're looking at is a[] portended bike path that is going to result in injuries that can be avoided if it is not constructed at all, and that goes to the public policy aspect. Nowhere is it in the public interest, regardless of what one's mission statement says, nowhere is it in the public interest for a governmental body to set up or construct something if there is notice or if there is some evidence, and in this case it's ample, that it's going to cause injuries, that it is dangerous, that it is hazardous. Are we suppose to wait until we get the actual proof?

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

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

COURT: Did anybody die or was injured?

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

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

STANBURY: I'm sorry, would you repeat.

COURT: Sure. As I sit here today, it sounds like what you're telling me is, despite John Allen's critique of Paul Schmidt's report, they did build the bike path out in Boston. And my question is, after they built it, do you have any evidence that's in the record that would tell me, and you know, here's what happened, three people were injured and bikes were running into small children and no one was slowing down?

Is there any, do you have any evidence that what you're saying is going to happen in this case actually happened in that case?

STANBURY: Nothing in the record. Your Honor. Just in response to your previous question, which is what I've heard, what I've learned, but it's not in the record at this moment. But also in the record, or something that is in the record is the Wachtel study of Palo Alto, California, which over the period of a few years studied three hundred and some accidents on sidepaths. And I don't know if the court has ever seen a statistic like this, I know I haven't, where 15 percent of the bike paths in Palo Alto are sidepaths, at least at the time of the study. Yet 85 percent of the injuries during the period studied occurred at intersections on these sidepaths.

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

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

COURT: On the bike path?

STANBURY: Yeah. And the —

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

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

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

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

COURT: Okay. So bicycles hitting cars?

STANBURY: Yes.

COURT: Okay.

This *Dahlberg* factor supports granting the temporary injunction.

II.

THIS CASE SHOULD BE ASSIGNED TO ANOTHER JUDGE UPON REMAND BECAUSE THE PRESENTLY ASSIGNED JUDGE HAS STATED, PREDISPOSITIONALLY, THAT “THE DOCTRINE OF DISCRETIONARY IMMUNITY WILL APPLY IN THIS CASE.”

On June 13, 2007, Huxmann’s attorney wrote as follows in a letter requesting leave to move for reconsideration of the denial of his motion for a temporary injunction:

Dear Judge Connolly:

Pursuant to Minn. Gen. R. Prac. 115.11, I write to request leave to move for reconsideration of Your Honor’s denial of plaintiff’s motion for a temporary injunction (copy attached as Exhibit 1). Please make this letter part of the record. Your Honor’s decision is palpably wrong in every respect.

Your Honor has not judged my client’s motion with the diligence and in the unbiased way required by Canon 3B(1) of the Code of Judicial Conduct, and that by itself is reason enough to reconsider the denial of plaintiff’s motion. After Your Honor admitted on May 23d that all of the submissions had not yet been read, the decision was rushed into the mail by Friday, May 25th, so Your Honor and staff could begin a vacation over the Memorial Day week, was it not? I have good reason to believe that it was, which brings to mind the last two lines of Canto III of A. Pope’s *Rape of the Lock* (rev. 1717): ‘The hungry Judges soon the Sentence sign, And Wretches hang that Jury-men may Dine.’

There is nothing in the order memorandum that so much as suggests that Your Honor read my client’s verified complaint, his two memoranda of law, his two affidavits, and my two affidavits. Your Honor’s glancing reference to but one of the *nineteen* exhibits attached to my May 18th affidavit does not stand as a reason to think that my client’s arguments and evidence were given even *de minimis* attention. Extraordinarily shallow and blatantly one-sided reasoning underlies Your Honor’s decision because the order memorandum is a veritable photocopy of the Park Board’s memorandum. The replication is not even subtle.

E.g., nobody who had read my client’s submissions would say, as Your Honor has, that ‘[n]o affidavits from a homeowner (except perhaps Mr. Stanbury) have been presented to the court that express opposition to the bike path.’ On the contrary, opposition

to the bike path was expressed in the *verified* complaint, and, as a result, such opposition did not have to be expressed in an affidavit, *see* Minn. R. Civ. P. 65.01, but even so, opposition was also expressed in plaintiff's two affidavits, the intersection DVD, and exhibits like the *Northeaster* editorial, the *Northeaster* article, and the work and emails of Parkway resident Dew which Your Honor, obviously, neither read nor viewed. And nobody who had read plaintiff's submissions and listened to my arguments at the hearing would have found, as Your Honor has, that the width of the sidewalk is 5' when it was shown to be 6' wide. And, where the Park Board was **not** a party in *Chabot v. City of Sauk Rapids*, 422 N.W. 2d 708 (Minn. 1977), and where *Chabot* did **not** involve the construction of a bike/pedestrian path, nobody who had read *Chabot* would say, as Your Honor has, that 'In [*Chabot*], 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 government.'" (Emphasis added.)

Your Honor's decision as to discretionary immunity is palpably wrong for the same reasons the district court's application of discretionary immunity was reversed in *Conlin v. City of St. Paul*, 625 N.W.2d 396 (Minn. 2000), as set out on pages 9-10 of plaintiff's ignored Memorandum of Law in Support of Temporary Injunction. And Your Honor apparently does not even know that the Park Board had the burden to prove its claim of discretionary immunity, as demonstrated by the fact that Your Honor saw no need at the hearing to ask even one question of the Park Board's attorney on that or any other subject and by Your Honor's wholesale adoption of the unsupported assertions and inadmissible hearsay in the Brown and Rietkerk affidavits while omitting to mention that my client *specifically* challenged those affidavits as well as the Park Board's sham Answer. Nary a word, yet Your Honor, acting *sua sponte* and based only on a cursory look at the aforementioned Exhibit 19, struck **all** of my client's exhibits as 'unsupported assertions and inadmissible hearsay.' Topping that off is Your Honor's prospective holding that the doctrine of discretionary immunity 'will' apply in this case, which explains why the Park Board has already calendared a motion for summary judgment without any intention to conduct discovery.

My client and I have no reason to believe that he can get fair hearings in Your Honor's court. We therefore ask for Your Honor's voluntary disqualification and the reassignment of this case to another judge for a reconsideration of my client's motion for a temporary injunction. Pending that reconsideration, the Park Board should be restrained from commencing the construction of a bike path between Ulysses Street NE and Stinson Boulevard, but that

TRO need not and should not apply to the Camden-to-Ulysses path which the Park Board has allowed to fall into disrepair.

Sincerely,

A.211-212 (footnotes omitted).

On June 15, 2007, defendant's attorney's response in opposition to that request (see A.213-214) required plaintiff's attorney to write the following to Judge Connolly on June 16, 2007:

Dear Judge Connolly:

In her June 15, 2007 letter to Your Honor, the Park Board's lawyer/lobbyist makes some statements that compel a reply. Please make this letter part of the record. Plaintiff *did* distinguish the discretionary immunity cases relied on by the Park Board. See plaintiff's May 18, 2007 memorandum of law at 9-10. Expressly distinguishing the unpublished *Hill v. City of White Bear Lake*, 1999 WL 451763, was unnecessary where the court's statements concerning discretionary immunity were *dicta*. In my June 13, 2007 letter, I did *not* claim that my client will not have enough time to conduct discovery and had no reason to do so where the outcome of the Park Board's summary judgment motion has been predetermined. I pointed out that the Park Board does not intend to conduct any discovery because Your Honor's ruling that discretionary immunity 'will' apply to this case has guaranteed an eventual dismissal of the action. The Park Board's attorney was able to 'explain' the Park Board's side in only about ten minutes because, as I pointed out in my June 13, 2007 letter, Your Honor did not ask even one question of her. It is meaningless as well as untrue to say that plaintiff did not provide the court with any valid reason to reject the Park Board's argument that discretionary immunity would apply since (i) Your Honor did not read, let alone weigh, plaintiff's arguments and evidence and (ii) the Park Board had the burden of proof on that issue but was not required by Your Honor to meet it. My stated grounds for recusal stand un rebutted, and when the impartiality of a judge is sincerely questioned [as herein], he need assert no defense of his judicial integrity other than a ready willingness to leave the trial of the cause to another jurist. *Wiederman v. Wiederman*, 36 N.W.2d 810, 812 (Minn. 1949).

A.215.

On June 22, 2007, the court issued an Order Denying Request to Seek Permission to Bring Motion for Reconsideration and Denying Request to Remove and

Memorandum of Law. A.216-218. On July 15, 2007, Huxmann's attorney wrote as follows in a letter requesting leave to move for reconsideration of the denial of the request to remove:

Dear Judge Connolly:

Pursuant to Minn. Gen. R. Prac. 115.11, I write to request leave to move for reconsideration of Your Honor's denial of plaintiff's request to remove (copy attached as Exhibit 1). Please make this letter part of the record. Your Honor's order bears no relation to the fact that my June 13, 2007 letter set out my and my client's **objective** reasons for believing that he cannot obtain a fair hearing before Your Honor. Because Your Honor's impartiality can be reasonably questioned, removal is warranted. *State v. Laughlin*, 508 N.W.2d 545, 548 (Minn. App. 1993) ('[R]emoval is warranted only where the judge's impartiality might 'reasonably' be questioned; therefore, a judge should not . . . be removed simply because a litigant subjectively believes the judge is biased.'). When the impartiality of a judge is sincerely questioned [as herein], he need assert no defense of his judicial integrity other than a ready willingness to leave the trial of the cause to another jurist. *Wiederman v. Wiederman*, 36 N.W.2d 810, 812 (Minn. 1949).

There is no basis whatsoever for Your Honor to state that 'plaintiff essentially argues that the court is biased against him because the court ruled against him.' What plaintiff actually argued should not have been all that hard to discern from no more than cursory readings of my June 13 and 16, 2007 letters. Merely characterizing the order memorandum as 'detailed' says nothing about its substance and the fact that the order memorandum is a veritable photocopy of the Park Board's memorandum, and merely characterizing the hearing as 'lengthy' says nothing about the fact that not even one question was asked of the Park Board's attorney at the hearing even though the Park Board had the burden to prove its claim of discretionary immunity. And I note in particular that Your Honor chose to say nothing at all about Your Honor's holding that the doctrine of discretionary immunity 'will' apply in this case. *That expressly revealed predisposition is an affirmative showing of cause for Your Honor's removal and a reconsideration of my client's motion for a temporary injunction before any summary judgment motion is briefed and heard.* In other words, Your Honor has granted the Park Board's pending summary judgment motion in advance, and that is not camouflaged by Your Honor's June 27, 2007 order which admonishes the parties to comply with the additional requirements for summary judgment set out in Minn. Gen. R. Prac. 115.03(d). Under the circumstances, the hearing of that motion and the proceedings leading up to it will be a charade of

Your Honor's making.

Your Honor found that '[t]he conduct at issue in this case is the Park Board's decision to locate a ten (10) foot wide, concrete, **bike/pedestrian** path . . . from Ulysses Street to Stinson Boulevard.' (Emphasis added.) And Your Honor found that "[o]n April 23, 2007, the Minnesota Department of Transportation approved the location and **design** of the Project." (Emphasis added.) If Your Honor had examined Brown Affidavit Exhibit D instead of simply copying those statements from the Park Board's memorandum *verbatim*, Your Honor would have learned that MnDot did not approve a 'bike/pedestrian' path and actually was asked to approve and did approve a 10-foot wide 'bicycle only' path. See attached Exhibit 2 (MnDot's April 23, 2007 approval letter and two selected pages from the Park Board proposal approved by MnDot) (yellow highlighting supplied). The Parkway residents were *never* told that the path was to be a 'bicycle only' path, and the intended type of path was misrepresented to the court by the Park Board's attorney and its affiant Brown as a 'bike/pedestrian' path. A bike/pedestrian path and a bicycle-only path are immeasurably different. The Parkway residents *and* Your Honor have been hoodwinked, and that should persuade Your Honor to restrain the commencement of the construction of the Ulysses-to-Stinson path until the court is able to full[y] and correctly understand, *inter alia*, exactly what the Park Board intends to construct, whether safety studies were actually conducted and, if so, by whom, and on what, if anything, MnDot based its purported determination that the project 'would not impact noise levels, air quality, and *other social/economic areas*.'

Additionally, Your Honor found that 'the Park Board will preserve trees in the area and no tree . . . is slated for removal or destruction.' That finding, too, was simply copied from the Park Board's memorandum *verbatim*, and, anyway, no tree 'slated' for removal or destruction only means, of course, that there is no *present* plan at the moment to remove or destroy any particular trees. As to what stands to be done in the future when the Park Board is outside the reach of this court, Your Honor needed only to look at Brown Affidavit Exhibit C to discover that one of the Park Board's recommendations approved by the Met Council was 'the bike path intersections should be clear of trees and landscaping that may impair the visibility of the bicyclist or the motorist to the possibility of oncoming traffic.' When the crews start removing trees *and altering the terrain of residents' land* based on nothing more than an arbitrarily determined need to improve visibility, who is going to stand in the way of the Bobcats and chain saws? Your Honor?

Accordingly, my client and I again ask for Your Honor's voluntary

disqualification and the reassignment of this case to another judge for a reconsideration of my client's motion for a temporary injunction. Pending that reconsideration, the Park Board should be restrained from commencing the construction of any kind of path between Ulysses Street NE and Stinson Boulevard.

Sincerely,

A.219-223.

On July 20, 2007, Judge Connolly responded to that request as follows:

Dear Counsel:

I have received Mr. Stanbury's July 15, 2007 letter in which he seeks permission to move for reconsideration of the Court's Order of June 22, 2007. For the reasons previously articulated and because there are no compelling reasons, the request is denied.

Sincerely yours,

A.224.

Accordingly, where the trial judge's expressly revealed predisposition is objective evidence of Huxmann's inability to obtain a fair hearing upon remand, where the trial judge is indifferent to, *inter alia*, the fact that the Park Board intends to construct a bicycle-only path in place of the pedestrian sidewalk presently running in front of the homes on the northerly side of St. Anthony Parkway between Ulysses Street NE and Stinson Boulevard, and where the trial judge has revealed an unacceptable willingness to completely ignore the arguments of Huxmann's attorney, the interests of justice mandate an assignment of this case to another judge upon remand.

CONCLUSION

For the foregoing reasons, appellant Peter Huxmann respectfully asks the court (1) to reverse the trial court's order of May 25, 2007, and require the issuance upon remand of a temporary injunction enjoining the Park Board from constructing a bike path on St. Anthony Parkway between Ulysses Street NE and Stinson Parkway during the pendency of a trial on the merits and (2) to require the assignment of this case to another judge upon remand.

Respectfully submitted,
STANBURY LAW FIRM P.A.

Dated: October 1, 2007.

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CERTIFICATE PURSUANT TO MINN. R. CIV. APP. P. 132.01, SUBD. 3

The undersigned certifies that this Brief complies with the word count requirements of Minn. R. Civ. App. P. 132.01. This Brief was prepared using AppleWorks Version 6.2.9 and that this word processing program has been applied specifically to include all text, including headings, footnotes, and quotations in the following word count. All text is 13-point Times, and this Brief contains 13,946 words.

Alfred Stanbury

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