

STATE OF MINNESOTA
COUNTY OF HENNEPIN

DISTRICT COURT
FOURTH JUDICIAL DISTRICT

Stephanie Woodruff; Dan Cohen; and
Paul Ostrow,

Court File No. 27-CV-13-21254

Plaintiffs,

**ORDER GRANTING
DEFENDANT'S MOTION FOR
SURETY BOND**

v.

The City of Minneapolis and Minneapolis
Park and Recreation Board,

Defendants.

The above-entitled matter came on before the Honorable Mel I. Dickstein, Judge of District Court, on January 15, 2014, at the Hennepin County Government Center, Minneapolis, Minnesota pursuant to Defendant City of Minneapolis' Minn. Stat. § 562.02 Motion For A Surety Bond.

Susan L. Segal, Esq., appeared on behalf of Defendant City of Minneapolis. Brian Rice, Esq., appeared on behalf of Defendant Minneapolis Park and Recreation Board. Plaintiffs Paul Ostrow and Stephanie Woodruff appeared personally.

Based upon all of the files, records, submissions and arguments of counsel herein, the Court issues the following:

ORDER

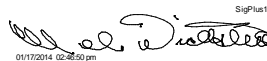
1. Defendant City of Minneapolis' motion for the posting of a surety bond is GRANTED.

2. Plaintiffs shall post a \$10,000,000.00 surety bond no later than **Thursday, January 23, 2014**. The bond shall be conditioned for payment of any loss or damage caused to

the City of Minneapolis by any delay or inability in entering into a development agreement or any other material document regarding the financing of the Downtown East project or acquisition of parkland for the project or for any delay in issuing general obligation bonds or inability to issue any general obligation bonds arising out of the pendency of this lawsuit if Plaintiffs' lawsuit is ultimately unsuccessful.

3. If Plaintiffs fail to post the surety bond on or before **January 23, 2014** this matter will be dismissed with prejudice.

4. The attached Memorandum is incorporated herein by this reference.



The image shows a handwritten signature in black ink, which appears to read "Mel I. Dickstein". To the right of the signature is a small digital signature stamp that says "SigPlus1". Below the signature, there is a timestamp that reads "01/17/2014 02:25:50 pm".

Dated: January 17, 2014

Mel I. Dickstein
Judge of District Court

MEMORANDUM

I. Procedural and Factual Background

This matter arises from a complaint filed and served on December 11, 2013. The Complaint alleges that the City of Minneapolis (“the City”) should be precluded from acting upon a resolution authorizing the execution of contract documents and the issuance of \$57 million in general obligation revenue bonds to finance the Downtown East Development Project (hereinafter referred to as “Downtown East”). Downtown East is a proposed 5 block project, in the immediate area of the new Vikings Stadium, consisting of office space, a parking ramp, a public park (or “the Yard” or “the Downtown East Park”), skyways, office space and residential development.

On December 13, 2013, the Court denied in-part and granted in-part Plaintiffs’ motion for a temporary restraining order, finding Plaintiffs were not likely to succeed of the merits of Plaintiffs’ claims. The Court rejected Plaintiffs’ request for a temporary restraining order on the assertion that: (1) the City’s expenditure exceeded statutory limits; (2) Downtown East does not serve a public purpose; and (3) the property sought to be redeveloped was not “marginal” within the meaning of Minn. Stat. § 469.048, subd. 5. The Court reserved ruling on Plaintiffs’ claim that the Minneapolis City Council (“the Council”) does not have concurrent power with the Minneapolis Park and Recreation Board (“the Park Board”) to purchase, devise, maintain and operate parks. *See* Order Granting In Part and Denying In Part Plaintiffs’ Motion For Temporary Restraining Order, dated December 13, 2013. The Court ordered that Plaintiffs join the Park Board.

Following a hearing on December 18, 2013, the Court issued an order denying Plaintiffs’ motion for temporary restraining order in its entirety. The Court stated:

While the City Council lacks the power to unilaterally obtain land for a park, or to design, build and maintain a park, there is nothing in the Charter that prevents the City Council and the Park Board from working together to advance the City's interests. To the contrary, the Charter specifically identifies the Park Board as a department of the City government. Chapter 16 § 1. And as a City department, the Park Board may take title to parkland by gift or devise, purchase or lease. *Id.* at § 2. The Charter does not limit the individuals or entities from whom the Park Board may take title. The Park Board is "authorized to receive and accept in the name of the City, any gift or devise of land or buildings to be used for a public park..." Chapter 7. The Park Board may also accept gifts and bequests of money and personal property in furtherance of any of the powers and responsibilities it is bequeathed under the terms of the City Charter.

In sum, there is no reason to preclude the Park Board and the City Council from working in concert. The Council may, consistent with its statutory authority, obtain land as a part of an industrial development district to address blight caused by marginal property. *See* Minn. Stat. §§ 469.048-469.068. There is no reason to preclude the City from working with the Park Board to turn a portion of the marginal property into parkland, so long as the objectives of the industrial development district are met.

See Supplemental Order Denying Plaintiffs' Motion For Temporary Restraining Order, dated December 20, 2013, pp. 6-7.

Plaintiffs subsequently amended their complaint, claiming that because the Park Board has the sole power to "devise, adopt and maintain parks," the Council is "without authority to approve any contract or to make any binding financial commitments for the acquisition, ownership, operation and maintenance of" parkland. *See* Amended Complaint, dated December 30, 2013. Plaintiffs request the following declaratory relief:

1. A declaratory judgment findings that the Minneapolis Park and Recreation Board has the sole and exclusive authority to acquire, own, operate and maintain parkland in the City of Minneapolis.
2. A declaratory judgment finding that the City Council of the City of Minneapolis is without authority to approve any contracts or to make any binding financial commitments for the acquisition, ownership, operation and maintenance of any potential parkland within Ryan Development.

*Id.*¹

Presently before the Court is Defendant City of Minneapolis' Motion for Surety Bond under Minn. Stat. § 562.02, which was filed on January 9, 2014.

II. Analysis

A. Introduction—When Minnesota Law Provides for the Payment of a Surety Bond

Minnesota law provides for the issuance of a security bond, in appropriate circumstances, when an action in law or equity questions the authority of a public body to issue bonds or to enter into a contract for public improvements. Under Minn. Stat. § 562.02, if a court concludes that a loss may result from the mere pendency of an action, the Court may require a party to file a surety bond. Before requiring a surety bond, however, the Court must consider the likelihood that the complaining party will succeed on the merits. *See* Minn. Stat. § 562.02.

While a district court has broad discretion in determining when the requirement of a surety bond is appropriate, the Court's authority requires certain express findings. For example, the Court must find that the City would suffer damages, such as additional fees and costs from a

¹ A Second Amended Complaint was filed by Plaintiffs on December 31, 2013 to add the following request for relief:

3. A declaratory judgment that the City Council of the City of Minneapolis is without authority to acquire, own operate and/or maintain the proposed "Yard" in the Ryan Development or to approve any contracts or financial commitments representing such an authority.

After the January 15, 2014 hearing, Plaintiffs submitted a motion to amend the complaint a third time. The proposed amendment requests the following relief:

1. A declaratory judgment finding that the Minneapolis Park and Recreation Board has the sole and exclusive authority to establish, own, operate and maintain parkland in the City of Minneapolis.
2. A declaratory judgment finding that the City Council of the City of Minneapolis is without authority to approve the execution of any contracts, development agreements or other documents resulting in the legal responsibility or obligation to establish, own, operate and/or maintain any potential parkland in the City of Minneapolis.

In deciding this motion for surety bond, the Court considers the relief sought in all of Plaintiffs' complaints.

project delay. *See Responsible Governance for Roseville v. City of Roseville*, A11-2216, 2012 WL 1380409 (Minn. Ct. App. Apr. 23, 2012), review denied (July 17, 2012). The Court must also consider the potential merits of the legal challenge in order to determine whether the challenge has a likelihood of success on the merits. *Id.* at *1.

B. Discussion

Under the facts of this case, a surety bond should be required. The Court concludes (1) the present lawsuit challenges the City's authority to contractually bind the City to design, construct and maintain a park as part of its commitment to the Downtown East developer; (2) the City may suffer a loss from the mere pendency of this action; and (3) Plaintiffs are not likely to succeed on the merits.

1. The Action Questions the Council's Authority

First, it is undisputed that Plaintiffs' action questions the authority of the Council to enter into a contract with the Downtown East developer. In Plaintiffs' Second Amended Complaint and in oral argument, Plaintiffs assert that the Council should be precluded from entering into an agreement binding the City to obtain property for a park, develop a park, and maintain a park. Plaintiffs assert only the Park Board has that authority, and the Council should not be permitted to expose the City to potential liability as a result of a commitment the Council doesn't have the authority to make.

2. The City Will Suffer Loss from the Pendency of this Action

Second, it is equally clear that the City will suffer losses by the mere pendency of this action. The City may not be able to finalize the development agreement, or issue the bonds that are integral to financing the project. Alternatively, the City may incur increased costs to issue the bonds so long as the suit is pending or threatened. Finally, the City may lose the development

opportunity provided by the Downtown East project, along with the concomitant benefits from sizeable property tax revenue, jobs associated with the development, and other benefits resulting from the development of marginal properties that have been underutilized for decades. *See generally* Collins Second Aff., Segal Aff. and Carpenter Aff.

3. Plaintiffs Have Not Demonstrated a Likelihood of Success on the Merits

The issue regarding Plaintiffs' likelihood of success on the merits, however, is more problematic. Plaintiffs' legal position that the Council does not have the authority to unilaterally bind the City to develop and operate a park has merit. The Court has previously addressed this issue in its Order dated December 20, 2013 at pp. 4-6:

The Court concludes that the Minneapolis City Charter has adopted provisions for the orderly conduct of municipal affairs by giving authority over its parks to a duly elected board. This result is permitted by Minn. Stat. § 471.15 and approved by the Minnesota Supreme Court in *Crookston*, 91 N.W.2d 81. To hold otherwise would be unreasonable—a result the legislature discourages. *See* Minn. Stat. § 645.17 (“the legislature does not intend a result that is absurd, impossible of execution, or unreasonable”). It would mean that two separate bodies, potentially acting at cross purposes, could each develop the Minneapolis park system—all to the detriment of the City's citizens. The rules of statutory construction, logic, common sense, and the advancement of effective government all militate in favor of a reasonable division of responsibility between the Park Board and the City Council—that is what was accomplished in the City Charter, and the Court rejects the City's assertion to the contrary.

See Supplemental Order Denying Plaintiffs' Motion For Temporary Restraining Order, p. 6.

But the Court also concluded that nothing in the City Charter prevents the Council and the Park Board from working together:

While the City Council lacks the power to unilaterally obtain land for a park, or to design, build and maintain a park, there is nothing in the Charter that prevents the City Council and the Park Board from working together to advance the City's interests. To the contrary, the Charter specifically identifies the Park Board as a department of the City government. Chapter 16 § 1.

...

In sum, there is no reason to preclude the Park Board and the City Council from working in concert.

Id. at p. 6-7.

The City states that it is now actively cooperating with the Park Board to reach an agreement regarding authority over the design, construction and operation of the planned Downtown East Park. Minutes from a December 13, 2013 City Council meeting supports the City's assertion. The minutes reflect that the Council passed a resolution directing staff

to coordinate with the Park and Recreation Board all phases of the development and operation of the park connected to the prospered Downtown East. This is intended to be in addition to the membership of a representative from the Park and Recreation Board on the Public Realm Committee formed for planning the park.

See Minneapolis Park and Recreation Board's Memorandum of Law in Opposition to Plaintiffs' Motion for Temporary Restraining Order, Rice Aff. Ex. 9.

Equally importantly, the Park Board actively supports the park planned for the Downtown East development. In its letter brief dated January 14, 2014, the Park Board states: "The [Park Board] supports the Downtown East (Ryan) project and believes that it will be a benefit to the City and the [Park Board]." (emphasis added). The Park Board also represents that "the City has indicated its intention to work with the Park Board on all phases of the development and operation of the Downtown East Park..." *See* Minneapolis Park and Recreation Board's Memorandum of Law in Opposition to Plaintiffs' Motion for Temporary Restraining Order, p. 7.

The Court, therefore, concludes the Plaintiffs are not likely to succeed on the merits of their litigation. The Minneapolis City Charter is not as one dimensional as Plaintiffs interpret it. The Charter clearly permits different departments of the City government to work together in the City's best interest, a process currently underway in connection with the Downtown East

development. The Council has the encouragement and support of the Park Board, and as a consequence, the danger Plaintiffs seek to avoid is illusory. This is not a case in which the Council threatens a rogue action; rather, it involves a cooperative effort by two units of city government in agreement that the Downtown East Park will benefit the City, and that plans for it should proceed.

C. The City’s Motion for a Surety Bond Should be Granted

The Court concludes that Plaintiffs should file a surety bond as security against the loss and damages likely to occur while this lawsuit is pending. Under similar circumstances, the Minnesota Supreme Court affirmed a \$30 million surety bond in *Pike v. Gunyou*, 491 N.W.2d 288 (Minn. 1992). In *Pike*, taxpayers brought suit challenging legislation authorizing bonds to finance construction of aircraft maintenance and repair facilities. The taxpayers’ lawsuit was dismissed in district court after plaintiffs failed to post a \$30 million surety bond. On review, the Minnesota Supreme Court affirmed the district court, observing:

Here, the trial court, upon review of the various negotiated agreements and the considerable financial documentation offered by the state, concluded that the ‘mere pendency of this lawsuit has the effect of a preliminary injunction’ against the sale of certain bonds and constituted a threat to the continued viability of the entire project.

Pike at 291-92.

Similar to *Pike*, the mere pendency of this lawsuit has the effect of a preliminary injunction and threatens the delay of Downtown East. The Downtown East Term Sheet requires the City to represent that no pending litigation is threatened. Segal Aff. ¶¶ 3-4 and Carpenter Aff. ¶ 10. Because Minn. Stat. § 562.02 was “designed to protect taxpayer from delays in the implementation of public projects,” the Court finds that a surety bond pursuant § 562.02 is appropriate in this case. *Pike* at 291.

The amount of the surety bond should be substantial. If the project fails because of the pendency of this suit, the City and Park Board will lose between \$40-\$45 million in tax base over time. According to the City Finance Officer:

The proposed Downtown East Project...increases the tax base, with total projected additional property taxes of approximately 3.9 million dollars in the first year including approximately 1.1 million dollars for the City. Assuming two percent escalation, over the time the City's bonds are outstanding incremental property taxes to the City are estimated to be approximately 40 to 45 million dollars.

Carpenter Aff. ¶ 9. In addition, each day of delay on the City bond closing adds costs to the project. *Id.* at ¶ 12.

III. Conclusion

The Court concludes that a \$10 million surety bond is reasonable under the circumstances of this case. A \$10 million surety bond is justified by the City's potential loss of \$40-\$45 million in property tax revenue over time, as well as the increased costs associated with potential delay.

M.I.D.