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STATE OF MINNESOTA
COUNTY OF HENNEPIN

DISTRICT COURT
FOURTH JUDICIAL DISTRICT
Case Type: Declaratory Judgment/Contract

Stephanie Woodruff, Dan Cohen, and Paul Ostrow,

Plaintiffs,

v.

City of Minneapolis and Minneapolis Park and Recreation Board,

Defendants.

**SUPPLEMENTAL ORDER DENYING PLAINTIFFS' MOTION FOR TEMPORARY RESTRAINING ORDER**

Court File No.: 27-CV-13-21254

The above-entitled matter came on for hearing before the Honorable Mel I. Dickstein, Judge of District Court, on December 18, 2013, pursuant to Plaintiffs' Motion for Temporary Restraining Order. Plaintiffs Paul Ostrow and Stephanie Woodruff appeared personally. Peter Ginder, Esq., and Susan Segal, Esq. appeared on behalf of Defendant, City of Minneapolis. Brian Rice, Esq., appeared on behalf of Defendant, the Minneapolis Park and Recreation Board.

Based upon the files, records, and proceedings herein, including the arguments of counsel, the Court makes the following:

**ORDER**

1. Plaintiff's Motion for Temporary Restraining Order is DENIED.
2. The Court's Order Granting In Part and Denying In Part Plaintiffs' Motion for Temporary Restraining Order, dated December 13, 2013, is hereby VACATED to the extent the Order granted a Temporary Restraining Order.
3. The attached Memorandum is incorporated herein by this reference.

**IT IS SO ORDERED**.

**BY THE COURT:**

Dated: December 20, 2013

Mel I. Dickstein
Judge of District Court

## MEMORANDUM

### A. Procedural Background

Plaintiffs filed the above entitled matter on December 11, 2013. The Court heard extensive oral argument on Plaintiffs' Motion for Temporary Restraining Order on December 12, 2013, and issued its Order Granting In Part and Denying In Part Plaintiffs' Motion for Temporary Restraining Order on December 13, 2013. The Court found that Plaintiffs failed to sustain their burden to demonstrate a likelihood of success on the merits of their claims that (1) the Downtown East Project exceeds the City's statutory contribution limit to the Vikings stadium; (2) the Downtown East Project fails to serve a public purpose; and (3) the development fails to advance the public policy aimed at developing "marginal property" within the meaning of Minn. Stat. § 469.059.

The Court left for further consideration the issue of whether the City has the authority to acquire and maintain parks independent of the Minneapolis Park and Recreation Board ("the Park Board" or "the Board"). The Court determined that the Park Board was a necessary and indispensable party to a resolution of the issue, and ordered that Plaintiffs join the Park Board as a party defendant. *See* Order Joining Minneapolis Park and Recreation Board, dated December 13, 2013. The Court has now received the parties' respective memoranda and corresponding affidavits, and heard the arguments of the parties and counsel on December 18, 2013.

The Court concludes that the issue raised by Plaintiffs regarding the City's authority to acquire, design and operate a park as a part of the Downtown East Development Project does not present a justiciable controversy at the present time, and therefore the Temporary Restraining Order should be vacated. In reaching this decision the Court has considered arguments regarding the asserted concurrent jurisdiction of the City and the Park Board over establishment, maintenance and control of parks; the power of the City Council and Park Board to work

together to purchase, operate and control parkland; and the current status of the Council and Park Board's collaborations on the Downtown East Park. The Court will address each of these issues.

**B. The Concurrent Powers Issue**

**1. The parties' respective positions**

Plaintiffs argue that the City's actions in financing the purchase of land for a park, and in the planned design and operation of the park, all exceed its authority under the Minneapolis City Charter ("the Charter") and should therefore be restrained. Plaintiffs maintain that the Charter specifically reserves to the Park Board those powers associated with adoption and maintenance of parks and parkways in the City. They argue that Charter Chapter 16 § 2 provides that:

> The Park and Recreation Board of the City of Minneapolis and its successors **shall** have the power and it **shall** be its duty to devise, adopt and maintain parks and parkways in and adjacent to the City of Minneapolis, and from time to time to add thereto [and] to designate lands and grounds to be used and appropriated for such purpose…

Charter Chapter 16 § 2 (emphasis supplied).

The City counters that while the Park Board is given the powers enumerated in Chapter 16, those powers are not exclusive, and do not prohibit the City Council from independently acquiring land for parks and engaging in the design and operation of parks within the City. The City cites Chapter 1 § 2 entitled "Powers," which provides in relevant part that the City of Minneapolis may, "take and hold, lease and convey all such real, personal and mixed property as the purposes of the corporation may require…." The City maintains that the establishment of a park and the conveyance of real property constitute two of the general powers enjoyed by municipalities.

In support of its position, the City cites Minn. Stat. § 471.15, entitled "Recreational Facilities by Municipalities," which states, in relevant part, that:

> [A]ny home rule charter or statutory city or…any board thereof…may operate a program of public recreation and playgrounds; acquire, equip and maintain land, buildings, or other recreational facilities…and expend funds for the operation of such program pursuant to the provisions of sections 471.15 to 471.19. The city…may issue bonds pursuant to chapter 475 for the purpose of carrying out the powers granted in this section.

Minn. Stat. § 471.15 (a). The City also relies upon *State ex rel. Town of Lowell v. City of Crookston*, 91 N.W.2d 81, 83 (Minn. 1958), for the proposition that "in matters of municipal concern, home rule cities have all the legislative power possessed by the legislature of the state." *Id.* Finally, the City asserts that the Park Board is a department of the City government and as such the City maintains the same powers as those given to the Park Board under the Charter. *See State ex rel. Merrick v. Dist. Court of Hennepin Cnty.*, 22 N.W. 625 (Minn. 1885).

**2. The Court rejects the City's position that the Council retains concurrent power with the Park Board**

The Court rejects the City's argument that the Council has power, concurrent with the Park Board, to purchase, devise, maintain and operate city parks. Minn. Stat. § 471.15 specifically provides that a board of any home rule charter or statutory city may be constituted to operate any program of public recreation and acquire, equip and maintain other recreation facilities. In addition, the Minnesota Supreme Court held that a city may adopt city charter provisions for the orderly conduct of municipal affairs though they may differ from those existing under general laws, and that the provisions of a charter may prevail over general statutes relating to the same subject matter. *Crookston*, 91 N.W.2d 81, 83.

The City of Minneapolis has adopted Charter provisions that reserve to the Park Board the power to "devise, adopt and maintain" parks, and to designate property to be appropriated for such purpose. Minneapolis City Charter Chapter 16 § 12. While the Charter provides that the Park Board is a department of the City government, it is also an independent entity in critical

respects. Park Board members are elected by citizens of the City of Minneapolis independent of Minneapolis City Council elections. The Park Board also has the independent power to condemn land and issue bonds (*Id.* at §§ 4 and 5), and the power to levy taxes (*Id.* at § 6).

The general powers conveyed to the City of Minneapolis are consistent with the Park Board's specific authority. The City may "take and hold, lease and convey all such real, personal and mixed property as the purposes of the corporation may require." *Id.* at § 2. These are general powers designed to enable City departments (Charter 3 Powers and Duties of Officers), and the City Council (Chapter 4) to perform their responsibilities. But nowhere in the Charter will one find the specific authority to devise, maintain and adopt parks except in those enabling provisions that give the power to the Park Board.

The general powers to take and hold property held by the City Council, and the specific powers to obtain parkland delegated to the Park Board, can be read in concurrence. Minn. Stat. § 645.26 provides that specific powers, here given to the Park Board in Chapter 16, shall prevail and shall be considered as an exception to the general provisions, such as those contained in Chapter 1.

In addition, the provisions in Chapters 1 and 16 are otherwise irreconcilable in an ordered government. If one reads the power delegated to the Park Board as merely a concurrent power also reserved to the City Council, the result is potential confusion and inefficiency in the design, construction and maintenance of the City's park system. Nowhere is it clearly stated that the drafters of the Charter intended for the general provision granting the City broad powers should prevail over the specific provision delegating authority over the City's parks to the Board.[1]

[1] Minn. Stat. § 645.26, subd. 1 provides:

> When a general provision in a law is in conflict with a special provision in the same or another law, the two shall be construed, if possible, so that effect may be

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.

**3. 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. 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

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given to both. If the conflict between the two provisions be irreconcilable, the special provision shall prevail and shall be construed as an exception to the general provision, unless the general provision shall be enacted at a later session and it shall be the manifest intention of the legislature that such general provision shall prevail.

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.

**C. The Ultimate Issue Is Not Ripe For Adjudication**

The ultimate issue in the present case is twofold in nature: (1) whether the City Council is operating independently—committing the City to the expenditure of over $20 million for a park the Council won't relinquish or which the Park Board doesn't want; or (2) whether the City is working with the Park Board toward a joint effort for the common good, so that the City obtains title to property and the Park Board willingly exercises its ownership, management or control. If the former, Plaintiffs' motion for Temporary Restraining Order should be granted, and if the latter, the motion should be denied.[2]

**1. There is evidence that the City is working collaboratively with the Park Board**

The answers to these questions are less than clear. On the one hand, the City asserts that an advisory committee has been created to provide guidance on the design and construction of the park, and that the Park Board's Assistant Superintendent of Planning Services is a member of

[2] In so ruling, the Court rejects the City's argument that under the City Charter it may devise, maintain and operate parkland concurrently with the powers exercised by the Park Board. The Court also rejects Plaintiffs' argument that the Park Board must act independently, and is precluded from participating in a collaborative effort with another City department.

the committee. The City also asserts this management level involvement by the Park Board contradicts the argument that the City Council is acting independently, or that the Park Board may become saddled with property it doesn't want, and won't manage and control. Charles Lutz, the Deputy Director of the City's Department of Community Planning and Economic Services, states that discussions between the City and Park Board are ongoing, and responsibility for the park and its operation may be assumed by the Park Board. Lutz Aff. ¶¶ 2, 3 and 7.

The City's position is bolstered by the City Council Action on Friday, December 13, 2013. The Council minutes reflect adoption of the Downtown East Development Project. Under "Action Taken," the minutes state:

> Staff directed to coordinate with the Park and Recreation Board on all phases of the development and operation of the park connected to the proposed 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 of the park.

Rice Aff., Ex. 9.

The City's position is also bolstered by the Park Board which, while contesting the City's independent power to operate and maintain City parks, states that the Park Board and the City have a history or working together on issues regarding which entity will own, operate and maintain land acquired by the City. Erwin Aff. ¶¶ 3 and 4. Mr. Erwin, the Park Board Commissioner at Large, states that on numerous occasions the City has acquired land and then turned it over to the Park Board for ownership and operation. *Id.* at ¶ 3.[3]

**2. There is also evidence that the City may act contrary to the Park Board's authority**

[3] The Ryan Downtown East Project Term Sheet provides that the City can sell, lease or convey all or any part of the park so long as any subsequent owner or lessee is bound by the term sheet commitments. Complaint, Ex. D, p. 15, ¶ 12(I).

While the City may come to an agreement with the Park Board to take over ownership, management and/or control of the park, the result is hardly a foregone conclusion. The City continues to argue that it has independent, concurrent authority to establish, maintain and control City parks—a position this Court rejects.

The City also argues that the park at issue isn't a park, but a public square within the City's jurisdiction. The City's own documents, however, describe the park as, "a major new **park** amenity in downtown Minneapolis." *See* Complaint, Ex. C: Request for City Council Committee Action from the Department of Community Planning and Economic Development (CPED), July 9, 2013, p. 4 (emphasis added). The CPED Request of December 10, 2013, states under the heading, "**Park:**"

> "The total capital costs for the **park** are estimated to be approximately $20 million…A **Park** Committee is establishing the vision and drafting the principles that will guide the **park's** design. The City will decide on the final design of the **park**. The parties contemplate that the City will engage in the fundraising necessary for any improvements in the **park**, but is not legally obligated to. The City will also be responsible for the operations and maintenance costs of the **park**."

Complaint, Ex. D. (emphasis supplied). Nowhere does the City describe the park as a "square" or "public square," except in arguments to the Court. The Court concludes the City's argument that the park is actually a "public square" is without merit.

Equally without merit is the City's argument that it has authority over the Downtown East Park as a public square under Chapter 4 § 1 or Chapter 8 § 15 of the City Charter. The Charter language relates to the City's authority over highways, streets, and alleys, and the City's power to layout and open new streets and alleys, and extend, widen and straighten any that now exist. There is a huge difference between a square resulting from the confluence of streets laid

out by the City (which would arguably be covered by the referenced provisions) and the four acre, $20 million park at issue in the Downtown East Development Project.

Nor is the City's argument that reference to "public squares" in the Charter gives the Council independent authority over the Downtown East Park supported by the occasion and necessity for the Charter provisions at issue. Minn. Stat. § 645.16 (in determining legislative intent we consider such elements as the occasion and necessity for a law, and the object to be attained by its passage). Chapters 4 § 1 and 8 § 15 give the City Council authority over the design, construction and layout of city streets, highways and alleys. The reference to "public squares" is required because the confluence of city streets may create squares, and in that event the City retains authority over the square as a part of its responsibilities. The Court concludes that reference to "public squares" in the Charter does not give the City Council concurrent jurisdiction with the Park Board over the Downtown East Park—Chapters 4 and 15 may not be expanded beyond their intended purpose to facilitate the City's exercise of its authority over streets, highways and alleys.

**3. The issue before the Court is not ripe for adjudication**

The case before the Court is not ripe for adjudication because the facts that might give rise to injunctive relief have not yet developed. A declaratory judgment proceeding must involve an actual controversy between the parties in order to be ripe for resolution. In *Seiz v. Citizens Pure Ice Co.*, 290 N.W. 802 (1940), the Minnesota Supreme Court found that an action based on a set of hypothetical facts does not present a justiciable controversy. *Id.* at 804. The *Seiz* court stated:

> Proceedings for a declaratory judgment must be based on an actual controversy. The controversy must be justiciable in the sense that it involves definite and concrete assertions of right and the contest thereof touching the legal relations of parties having adverse interests in the matter with respect to which the declaration

> is sought, and must admit of specific relief by a decree or judgment of a specific character as distinguished from an opinion advising what the law would be upon a hypothetical state of facts.

*Seiz v. Citizens Pure Ice Co.*, 207 Minn. 277, 281, 290 N.W. 802, 804 (1940).

*State ex rel. Friends of Riverfront v. City of Minneapolis*, 751 N.W.2d 586 (Minn. Ct. App. 2008), is instructive. In *Friends of Riverfront*, the Minnesota Court of Appeals rejected plaintiff's claim that the City of Minneapolis should be precluded from constructing an athletic field on lands subject to several restrictive covenants because the claim did not present an issue ripe for resolution. At the time of the court's decision, the Minneapolis Park and Recreation Board planned to build an athletic facility next to DeLaSalle High School, and had obtained some, but not all of the approvals necessary to proceed. Plaintiffs claimed the project would violate one of the terms of plaintiffs' lease, and the City should therefore be restrained from proceeding further with the project. The appeals court held that merely planning the athletic facility at issue did not violate restrictive covenants contained in the plaintiff's lease. The relevant conduct, the court found, was the actual construction of the athletic facility, not the course of conduct leading up to its construction. *Id.* at 593. The court held that the City had not made an unconditional repudiation of the contract at issue, and it was still possible for the City to perform. *Id.* The Minnesota Court of Appeals therefore upheld the dismissal of the lawsuit at issue.

In the present case, the City asserts that under the terms of the proposed Downtown East Project the Park will be acquired and developed by third-party Ryan Companies US, Inc. The City maintains that it plans to acquire the parcel on a turnkey basis, but not before 2016. The City also claims that an advisory committee has been created to provide guidance on the design and construction of the park, that the Park Board's Assistant Superintendent of Planning Services

is a member of the committee, and that responsibility for the park and its operation may yet be assumed by the Minneapolis Park and Recreation Board. *See* Lutz Aff. ¶¶ 2, 3 and 7.

The Park Board supports the City's position. So long as the Park Board is eventually given authority and control over the Downtown East Park, the Board sees no reason why the Council can't use its unique resources to work collaboratively with the Park Board for the public good.

The Court agrees there is not yet a justiciable controversy ripe for adjudication. The City has not yet finalized all the contractual details with third party Ryan Companies US, Inc. The acquisition of the park at issue is not scheduled to occur until 2016. And responsibility for the design and operation of the park remains unsettled. Since the request for injunctive relief is an extraordinary legal remedy which should not be lightly granted, the request for a Temporary Restraining Order should be denied. If the City continues to work with the Park Board, and the Park Board eventually takes over operation and control of the Downtown East Park, there is no apparent reason for the Court to intercede—only time will tell whether Plaintiffs or the Park Board have good reason to seek injunctive relief.

M.I.D.