January 14, 2014

The Honorable Mel Dickstein

Judge of Hennepin County District Court

C-1531 Hennepin County Government Center

300 South Sixth Street

Minneapolis, Minnesota 55487

Re: Stephanie Woodruff, et. al v. City of Minneapolis and Minneapolis Park and Recreation Board

Hennepin County District Court File No. 27-CV- 13-21254

Dear Judge Dickstein:

Please find enclosed the following:

1. Plaintiffs' Memorandum in Opposition to Motion for Surety Bond;
2. Second Affidavit of Stephanie Woodruff;
3. Plaintiffs' Second Demand for Production of Documents; from Defendant City of Minneapolis;.

We are filing these documents directly with you since the hearing on the Defendant City of Minneapolis' motion is scheduled for January 15, 2014 at 8:45 AM.

Sincerely yours,

Paul T. Ostrow

cc: Peter Ginder, City of Minneapolis

Brian Rice, Minneapolis Park and Recreation Board

STATE OF MINNESOTA

DISTRCT COURT

COUNTY OF HENNEPIN

FOURTH JUDICIAL DISTRICT

Court File No. 27-CV-13-21254

Stephanie Woodruff, Dan Cohen and
Paul Ostrow,

Plaintiffs,

v.

The City of Minneapolis and Minneapolis Park and Recreation Board,

Defendants

MEMORANDUM OF LAW
IN OPPOSITION TO MOTION
FOR SURETY BOND

PROCEDURAL POSTURE

On December 20, 2013, the Court issued its Supplemental Order Denying Plaintiffs' Motion for Temporary Restraining Order. The only issue before the Court was whether to issue a temporary restraining order on Count III. In relevant part, the Court held that "there is not yet a justiceable controversy ripe for adjudication." The Court did not make a determination as to the Plaintiffs' likelihood of success on the merits but did make a specific finding that the Minneapolis Park and Recreation Board has the exclusive authority "to devise, adopt and maintain" parks.

In light of the Court's findings that the Plaintiffs were unlikely to succeed on Counts 1, 2, 4 and 5, the Plaintiffs voluntarily dismissed those counts and filed an Amended and a Second Amended Complaint on December 30 and December 31. * The Plaintiffs abandoned their claim for injunctive relief and now seek merely a declaratory judgment consistent with the Court's previous decision and analysis. Specifically, the Plaintiffs seek "a declaratory judgment finding 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. Such a declaratory action would apply to any and all actions to be taken by the Minneapolis City Council, including any actions anticipated in the Downtown East development.

During the oral arguments, Defendant City of Minneapolis alleged that there would be "grave" consequences if the Court allowed the temporary injunction issued on December 13 to continue beyond December 27. Following the ruling on December 20, City representatives lauded the decision and indicated that the project could now move forward. The Star Tribune, following a press release from city officials, reported that **"Judge's ruling clears way for development near stadium."** The article reported that the City Attorney was pleased with the ruling "which allows the project to move forward without delay." (See Woodruff Affidavit)

*** Dismissal of Count 1 and 2 may have been premature. Media reports now indicate that the stadium development and the Downtown East project are sufficiently intertwined that a delay in the issuance of the bonds for the stadium project will prevent the development from moving forward. Additionally the request for proposal issued by the City for air rights over the proposed parking ramp states that no parking spaces are guaranteed for use by Ryan Companies or Wells Fargo. (Woodruff Affidavit)**

On December 27, the Star Tribune reported that the Star Tribune land deal was "delayed." Neither Ryan Development nor city officials made reference to this lawsuit as a cause of any delay. Rick Collins of Ryan Development issued the following statement: "While we've achieved a great majority of our objectives in the approvals we need, we have not been successful in completing all the documents required for funding to take place to allow us to close." (Woodruff Affidavit)

The City never represented that the mere pendency of this declaratory judgment action would cause grave consequences until the filing of its Motion for a Surety Bond on January 9, 2013. The City represented that negotiations were ongoing and final details were being worked out. The Court's Order denying a temporary restraining order allowed the City, Minneapolis, the Minneapolis Park and Recreation Board and Ryan Companies to move forward in a way consistent with the City Charter. It would appear that the City is unable or unwilling to proceed in a manner that is consistent with the Charter.

FACTS PERTINENT TO MOTION FOR SURETY BOND

The factual record in this matter is incomplete due to the failure of the City of Minneapolis to respond in a timely manner to the Plaintiffs' Demand for Production of Documents. Among the documents sought by the Plaintiffs through discovery are copies of purchase agreements between Ryan Companies and the Star Tribune, spreadsheets showing the City's anticipated annual bond payments and a list of all known city purchases of land with the intention of dedicating the land exclusively for use as a park. The Court should consider the failure of the City to provide these

and other documents in determining whether or not a surety bond should be required.

The Plaintiffs' declaratory judgment action no longer applies to three of the five blocks in the Industrial Development District. The Council action approved the issuance of two separate bonds – a bond issuance of 41.5 million dollars for the costs of the parking ramp and other site costs related to the office and residential development and a separate bond issuance of 20.5 million dollars to finance the costs, primarily land acquisition costs, for the proposed urban park. Nothing in this action precludes the issuance of the bonds required for the parking ramp required both by this development and for the Vikings stadium development.

Neither Ryan Companies nor the Star Tribune have joined this lawsuit and the City of Minneapolis moves for a surety bond to protect the City from financial damages if the project is delayed. The City claims that if the project does not move forward the City could lose a total of 45 million dollars in property tax revenues for the next thirty years. This estimate would require a conclusion that but for the development the land would remain dormant for thirty years. This estimate also ignores the City's financial exposure on the parking ramp and the twenty million dollar costs for the acquisition of "the Yard." The City also claims that temporary or permanent jobs will be lost. There is no indication in the record , however, that any of the permanent jobs are new jobs since they involve the relocation of Wells Fargo employees from other locations.

The City contends that Ryan Companies was unable to negotiate an extension of the purchase agreement with Star Tribune Companies and that the land sale must be completed by January 26 or the Star Tribune will cancel the purchase agreement. The contention that the Star Tribune Companies would cancel the purchase agreement strains credulity. The negotiated land price for the five blocks is $38 million dollars, which is more than double the $17 million assessed value for the property. The negotiated price for the proposed parkland is 13.9 million dollars, far in excess of the 5.9 million dollar assessed value for the land. There is no claim that any other offer or buyer exists for the Star Tribune property.

The City acknowledges that the deadline under the Term Sheet for the issuance of bonds is March 31, 2014. Apparently the Star Tribune is unwilling to wait to be paid for the land until the proceeds of the bond issuance are received, requiring Ryan Companies to obtain a bridge loan to pay the purchase price for the land. The amount of this increased cost to Ryan Companies is not specified. There is no indication that the City is required to reimburse Ryan Companies for these costs.

The Plaintiffs propose an expedited hearing schedule that would allow a trial on the merits in this matter by February 15, 2013. This proposed schedule would allow the City to meet its obligations under the Term Sheet and issue bonds by March 31 so long as its actions are in conformity with the final ruling of this Court.

ARGUMENT

Minnesota Statutes Section 562.02 provides for the requirement of a surety bond for certain legal challenges to the validity of actions taken by a public body in the "issuance or delivery of bonds." In relevant part, the statute provides as follows:

"If the court determines that **loss or damage to the public or taxpayers may result from the pendency of the action, or proceeding,** the court may require such party, or parties, to file a surety bond which shall be approved by the court, in such amount as the court may determine. The court must also consider whether the action presents **substantial constitutional issues or issues of statutory construction**, and the **likelihood of a party prevailing on these issues**, when determining the amount of a bond and whether a bond should be required... "(emphasis added).

I. The City of Minneapolis has failed to establish that loss or damage to the public may result from the pendency of the action

For a number of reasons, the City has completely failed to show that any financial loss or damage will result from the pendency of this action.

First, the Plaintiffs have submitted a proposed expedited schedule for these proceedings. This schedule will allow final determination on the merits to occur prior to March 31, 2014. Issuance of any bonds prior to that date fully meets the approved Term Sheet. The claim that the Star Tribune will walk away from its purchase agreement if there is no closing by January 26 defies logic and common sense. The City should not be allowed to benefit from manufacturing a crisis that does not exist. This Court was previously informed that grave consequences would result if the closing was delayed past December 27.

Second, there is nothing keeping the City from proceeding to closing so long as it is acting in conformity with its charter and respecting the exclusive authority of the Minneapolis Park and Recreation Board to establish and maintain the City's park system. The City has not disclosed a final development agreement with Ryan Companies. The Plaintiffs believe that the proposed final agreement may require the establishment and maintenance of a park regardless of whether or not the Minneapolis Park and Recreation Board ultimately takes title and accept the operational and maintenance costs and responsibilities of the park. It is the City's inability or unwillingness to honor the Charter and not the pendency of this action that may be delaying the closing and bond issuance.

Third, there has been no showing whatsoever of any potential financial damages to the City. The loss of tax revenue is highly speculative. It is very possible that the project will be a net loss financially to the City if the City's obligations for bond payments for the park , diverted parking revenue and losses on the parking ramp exceed the anticipated 1.5 million dollar annual property tax revenue. Further the City has provided no information to support a claim that financing costs will increase. Finally, Ryan Companies is not a party to this litigation and any potential loss to Ryan Companies cannot form the basis for an Order requiring a surety bond.

Fourth, the Plaintiffs' remaining claim does not impact any necessary public improvement. The City can issue the bonds for the parking ramp under any circumstance as the bonds for the parking ramp are in no way affected by this

proceeding. The "urban park" is not scheduled to open until 2016. The City may separately negotiate and bond for the portion of the land intended for use as a park.

The City's claim appears to hinge on Ryan Companies apparent unwillingness to proceed to closing absent a contractual guarantee that "the Yard" will be established as a park. That is a guarantee, however, as the Court has ruled, that the City Council is not authorized to make. Any delay therefore, is the inevitable result of the City's failure to obtain the Minneapolis Park and Recreation Board's approval of the establishment of this new park through its planning and budgeting processes.

Finally, media reports now indicate that the Downtown East development closing and bond issuance may be delayed in any event due to a separate legal challenge to the legality of the bond issuance for the new stadium. The City is unable to show that the proposed transaction can proceed to closing in light of this new development. (See Woodruff Affidavit).

II. **Plaintiffs claims raise substantial issues of the rights of Minneapolis citizens under the City Charter, which should be vindicated.**

The Court has already found that the Plaintiffs' claims raise substantial issues regarding the rights of Minneapolitans under their City Charter. Specifically the Court determined in its December 20 ruling that the City Charter creates substantial rights and that the Charter controls over other general laws and statutes. The specific reference to the importance of "constitutional issues" or "issues of statutory construction" in M.S. 562.02 reflects a legislative intent that favors the vindication of

citizens' rights under laws or statutes. (Case law suggests that rights under a home rule charter have the same force and effect as rights under state statutes). Requiring a surety bond would effectively end this litigation and prevent the vindication of those rights. While not dispositive, the fact that this litigation involves an interpretation of rights under the City Charter weighs against the City's motion for a surety bond.

Article 1, Section 7 of the Minnesota Constitution provides as follows:

"Every person is entitled to a certain remedy in the laws for all injuries or wrongs which he may receive in his person, property, or character, **he ought to obtain justice freely and without purchase**, completely and without denial, promptly and without delay, conformable to the laws." (emphasis added)

The Plaintiffs acknowledge that there are circumstances when the requirement of a surety bond is necessary. In making that determination, however, the Plaintiffs believe Courts should be mindful of the rights of citizens under the state constitution and the 14th Amendment. In this matter, the Court has already found that there is evidence "that the City may act contrary to the Park Board's authority." Requiring a surety bond effectively ends this litigation and denies the Plaintiffs a remedy under the law,

III. **The Plaintiffs are likely to prevail on the merits**

The Plaintiffs anticipate the opportunity to more fully develop the record and argue the merits of our declaratory judgment action. The Plaintiffs believe that this record should be established in a final hearing or trial in order that the Court may fully determine the issues. Since one of the factors for the Court to consider in

considering the requirement of a surety bond is the likelihood of success on the merits, the Plaintiffs will address the merits in a more abbreviated fashion in this memorandum.

In adopting M.S. 562.02, the legislature did not intend its provisions to be a tool that public bodies could use to defeat substantial and legitimate issues regarding governmental authority. M.S. 562.02 was adopted by the legislature "for the apparent purpose of discouraging vexatious lawsuits by irresponsible litigants." **Village of Elbow Lake v. Otter Tail Power Company**, 160 N.W.2d 571 at 574 (Minn.). The Plaintiffs are not "irresponsible litigants" and this litigation is not "vexatious." Rather the Court has already found merit in the lawsuit and has agreed with the Plaintiffs' central claim that the Minneapolis Park and Recreation Board has exclusive authority over the City's park system.

The Court aptly summarizes the issues in this litigation on page 7 of its Order. The Court states as follows:

"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."

The Court expresses its own uncertainty and states that "the answers to these questions are less than clear." The facts that have arisen since the Court's Order creates even more uncertainty. Specifically, the City now claims that it cannot finalize the development agreement so long as this litigation is pending. Since this

position was not taken by the City previously, the Plaintiffs believe it is the specific reference to the limited powers of the City Council in the Court's Order that likely caused the delay in the closing. In other words, the City was unable to move forward in a way consistent with the Court's analysis.

The Plaintiffs have filed a Second Request for Production of Documents and Request for Admissions. The Plaintiffs believe that the intent of the City and Ryan Companies is to enter into a contract committing to the City's expenditure of $20 million dollars for land to be used as a park. The Plaintiffs also believe that the contract will require the City to create and maintain the park even if the Minneapolis Park and Recreation Board determines that it will not own or maintain the park. This contract, once signed, will be enforceable not only by Ryan Companies but also by the Minnesota Vikings who are named as a third party beneficiary in the Term Sheet.

The Plaintiffs believe that if the City now intends to sign a development contract requiring the creation and maintenance of "the Yard" without any formal action by the Park Board accepting the ownership and responsibility for the park, that injunctive relief may now be appropriate. In other words, as the Court states at the end of its Order, there may now be "good reason to seek injunctive relief." Until the City discloses and produces through discovery the actual development contract it proposes to enter into with Ryan Companies, it is not possible to know if an injunction is now necessary.

In any event, even if injunctive relief is not yet in order, a declaratory judgment serves a different purpose. Both declaratory judgments and injunctive relief serve preventative purposes. "Declaratory judgment actions were created ' to allow parties to determine certain rights, and liabilities pertaining to an actual controversy before it lead to repudiation of obligations, invasion of rights and the commission of wrongs." **Miller v. Foley**, 317 N.W.2d 710 at 712 (Minn. 1982). "Temporary injunctions are issued to preserve the status quo until a case is finally adjudicated on the merits." Id. at 712.

The fact that the Court denied the Plaintiffs' motion for a temporary injunction for lack of a "justiceable controversy" is not dispositive as to the claim for declaratory relief." "Declaratory judgment actions can be sustained under the ripeness doctrine if no injury has yet occurred, before a claim is ripe for adjudication. However, Plaintiff must face injury that is certainly impending." **Public Water District No.. 8 of Clay County, Missouri v. City of Kearney**, 401 F.3d 930 (8th Cir. 2005). Here the injury is certainly impending. The extent to which it is impending is unclear only because the City has not been forthcoming as to the contractual obligations it intends to undertake in the upcoming closing.

The most important case in Minnesota on the establishment of jurisdiction in a declaratory judgment action is **McCaughtrey v. Red Wing**, 808 N.W.2d 331 (Minn. 2011). In **McCaughtrey,** the Minnesota Supreme Court reversed the Court of Appeals which had affirmed a trial court's dismissal of a declaratory judgment action on the grounds that the appellants had not alleged an injury that was "actual

or imminent." The Minnesota Supreme Court concluded that the challenge to the constitutionality of the City's rental inspection ordinance did present a justiceable controversy for the purposes of a declaratory judgment action. As in this case, the appellants argued that 'the seeds of this controversy are so ripe they are falling off the vine.' The Court held that the landlords affected by the ordinance did not have to wait until an administrative search warrant was issued to challenge the city's ordinance. The Court stressed that a plaintiff in a declaratory judgment action must show "a direct and imminent injury which results from the alleged unconstitutional provision." Id. at 337 citing **Kennedy v. Carlson**, 544 N.W.2d 1 at 6 (Minn. 1996)

None of the cases cited by the City fit the circumstances of this case. The Defendant has not met any of the standards to be met before a surety bond should be required. This matter **should be expedited** for final trial and hearing and discovery should be completed as soon as possible.

CONCLUSION

Plaintiffs respectfully request that the Court deny Defendant City of Minneapolis' request for a surety bond in all respects.

_____

Stephanie Woodruff

_____

January 13, 2014

Dan Cohen

_____

Paul Ostrow

STATE OF MINNESOTA DISTRCT COURT

COUNTY OF HENNEPIN FOURTH JUDICIAL DISTRICT

Court File No. 27-CV-13-21254

Stephanie Woodruff, Dan Cohen and Paul Ostrow,

Plaintiffs,

v.

The City of Minneapolis and Minneapolis Park and Recreation Board,

Defendants

PLAINTIFFS' SECOND DEMAND FOR PRODUCTION OF DOCUMENTS

Pursuant to Rule 34.02 of the Rules of Civil Procedure, the Plaintiffs hereby demand the following documents as soon as practicable and pursuant to any Order of the Court:

1. A copy of the Development Agreement between Ryan Companies and the City of Minneapolis that the parties intend to sign for the Wells Fargo Officer Towers and Park.

Dated: January 13, 2014

_____

Stephanie Woodruff

_____

Dan Cohen

_____

Paul Ostrow

STATE OF MINNESOTA

COUNTY OF HENNEPIN

DISTRCT COURT

FOURTH JUDICIAL DISTRICT

Court File No. 27-CV-13-21254

Stephanie Woodruff, Dan Cohen and

Paul Ostrow,

SECOND AFFIDAVIT OF
STEPHANIE WOODRUFF

v.

The City of Minneapolis and Minneapolis Park

Recreation Board,

Defendants

STATE OF MINNESOTA

COUNTY OF HENNEPIN

Your Affiant, being first duly sworn on oath, deposes and states as follows:

1. I am on of the Plaintiffs in the above-referenced matter.
2. The attachments to this Affidavit are offered both with respect to the Plaintiffs' Memorandum in Opposition to City of Minneapolis Motion for a Surety Bond and in support of Plaintiffs' claims in this litigation.
3. Attached are true and correct copies of the following articles published in the Star Tribune newspaper.

    a. "Star Tribune Land Deal is Delayed," published on December 27, 2013 attached as Exhibit A;

    b. "Judge's ruling clears way for development near stadium,"

published on December 20, 2013 attached as Exhibit B;

c. "Minneapolis Mayor R.T. Rybak's last act: West Bank Walkway," published on December 30, 2013 attached as Exhibit C;

d. "Former Fuji-Ya will yield its riverfront to even older landmarks" published on January 11, 2014 attached as Exhibit D;

e. "Minnesota Supreme Court asked to dismiss Vikings stadium bond suit," published on January 13, 2014 attached as Exhibit E.

4. Attached is a true and correct copy of the article "Digging into the details of the Downtown East park," published in the Journal on January 7, 2014 attached as Exhibit F.

Further Affiant sayeth not.

Subscriber and sworn to
before me this ___day of
January, 2014

_____

Stephanie Woodruff