

STATE OF MINNESOTA
COUNTY OF HENNEPIN

DISTRICT COURT
FOURTH JUDICIAL DISTRICT

Friends of the Terrace LLC,

Judge Michael K. Browne
Case Type: Civil Other/ Misc.

Plaintiff,

ORDER

v.

BRE Non-Core 2 Owner B LLC,

Defendant.

Court File No.: 27-CV-16-12544

APPEARANCES

The above-entitled matter came before the Honorable Michael K. Browne, Judge of District Court, Hennepin County Government Center, 300 South Sixth Street, Minneapolis, Minnesota. Erik Hansen, Esq. appeared on behalf of Plaintiff. Marc Simpson, Esq. appeared on behalf of Defendant. Andrew Biggerstaff, Esq. appeared on behalf of interested government entity, Robbinsdale Economic Development Authority (“REDA”).

BRIEF BACKGROUND

On September 24, 2016, Defendant began to raze the Terrace Theater. That same day, the Court issued an Order for Injunction Pending an Appeal, which was scheduled to expire at 4:30 pm on Monday, September 26, 2016. The September 24, 2016 Order also stated that bond would be determined before its expiration. On September 26, 2016, the Court heard a motion by Plaintiff to extent the Court’s Saturday, September 24, 2016 Order for Injunction Pending the Appeal of the Court’s September 19, 2016 Order Denying a Temporary Restraining Order (“TRO”) against Defendant. At the conclusion of the hearing, the Court verbally ordered that Defendant discontinue demolition efforts until the Court could issue this written order.

CONCLUSIONS OF LAW

I. A STAY OF THE COURT’S ORDER IS APPROPRIATE FOR THE PURPOSES OF APPEAL.

Although interlocutory orders are generally not appealable, Plaintiff may appeal an order denying a temporary restraining order. Minn. R. Civ. App. P. 103.03 (2016), *see also*, citing *Eakman v. Brutger*, 285 N.W.2d 95 (Minn. 1979). A trial court may not grant or deny a TRO without first completely analyzing the facts according to *Dahlberg Brothers, Inc. v. Ford Motor Co.*, 137 N.W.2d 314 (Minn. 1965). *M.G.M. Liquor Warehouse Intern., Inc. v. Forsland*, 371 N.W.2d 75, 77 (Minn. App. 1985). Such an order may be found by an appellate court to be a reversible error and abuse of discretion. *Id.*, citing *Miller v. Foley*, 317 N.W.2d 691, 693 (Minn. App. 1984).

Minnesota Rules of Civil Appellate Procedure Rule 108.01 states, “[e]xcept as otherwise provided by rule or statute, an appeal from a judgment or order does not stay enforcement of the judgment or order in the trial court unless that court orders relief in accordance with Rule 108.02.” (2016). Therefore, Rule 108.02 states, a party seeking “an order suspending, modifying, restoring, or granting an injunction while an appeal is pending” must move first in trial court, under Minnesota Rule of Civil Procedure 62.02. In turn, Rule 62.02 states:

When an appeal is taken from an interlocutory or final judgment granting, dissolving, or denying an injunction, the court in its discretion may suspend, modify, restore, or grant an injunction during the pendency of the appeal upon such terms as to bond or otherwise as it considers proper for the security of the rights of the adverse party.

(2016).

The Court has discretion to grant or deny Plaintiff's motion to extend the Saturday, September 24, 2016 Order granting an injunction pending an appeal of the Court's September 19, 2016 Order to the Minnesota Court of Appeals. In its motion to the Court, Plaintiff relied on the arguments it previously made in its motion for a TRO, and added, "[i]n denying a temporary injunction, the Court erred [in] [*sic*] its interpretation of [the Minnesota Environmental Rights Act ("MERA")]" and application of the *Dahlberg* factors." Plaintiff's Memorandum of Law in Support of Motion for Stay of Order Denying Temporary Injunction, Pending Appeal, p. 2. Defendant oppose the stay, and focused it argues on its request for a bond of \$3.2 million, and REDA requested a bond in the amount of \$3.5 million.

While the Court naturally disagrees with Plaintiff that it erred in its interpretation of the law, it agrees that unless the Terrace Theater is maintained, Plaintiff's appeal would be moot. This, in essence, necessitates that the Court grant the injunction pending appeal, despite the fact that the TRO in question fails the *Dahlberg* Test. *See* Order of the Court Denying Temporary Restraining Order dated September 19, 2016.

II. A BOND OF \$2.875 MILLION IS NECESSARY TO SECURE DEFENDANT’S INTEREST IN THE PROPERTY.

Given that the injunction will be granted for the duration of the pending appeal, the Court turns to the issue of attaching a surety bond to the injunction for the purposes of indemnifying Defendant from damages incurred as a result of the injunction. MERA, under which Plaintiff brings its motion, states that “[w]hen the court grants temporary equitable relief, it may require the plaintiff to post a bond sufficient to indemnify the defendant for damages suffered because of the temporary relief, if permanent relief is not granted.” Minn. Stat. § 116B.07 (2016). However, Minnesota’s appellate court asserted that while MERA “terms a temporary injunction bond as optional, temporary injunctions shall not be granted except upon the giving of security in an amount the court deems proper for payment of costs and damages as may be incurred or suffered by the party who was wrongfully enjoined.” *State by Drabik v. Martz*, 451 N.W.2d 893, 897 (Minn. Ct. App. 1990), citing Minn. R. Civ. P. 65.03(a) (Supp. 1989). The bond amount is entirely within the trial court’s discretion. *Id.*, citing *In re Petition of Giblin*, 232 N.W.2d 214 (Minn. 1975).

Minn. R. Civ. App. P. 108.02, subd. 4 governs the amount of security required for a stay or suspension of an order denying an injunction while the matter is pending appeal. (2015). It states that the amount of the security “must be fixed at such an amount as the trial court determines will preserve the value of the judgment or order to the respondent during the pendency of appeal.” Minn. R. Civ. App. P. 108.02, subd. 4(a)(2015).

In this case, Plaintiff argues that no project is being delayed by the litigation and, therefore, there is no real damage to Defendant. However, Defendant's actions prove otherwise. Defendant is moving forward with its plans to tear down the Terrace Theater, in preparation for closing on its \$5.2 million sale to Inland Development Partners ("IDP"). Should that sale fold, the \$5.2 million deal will be lost to Defendant and the property will only be worth an estimated \$2.5 million without the proposed development. Defendant Memorandum in Opposition to Motion for TRO, p. 9. Plaintiff did not provide any evidence or argument to the contrary.

Plaintiff further argues that Hy-Vee, the grocer that plans to establish a store on the Terrace Mall lot as part of the Redevelopment Project, has backed out of the deal due to the "outcry" from the community. Plaintiff's characterization of Hy-Vee's position is not completely accurate. REDA asserted that Hy-Vee has not backed out of the sale, it merely has indicated that it will wait to commit to the project until the outcome of this law suit.¹ Though Plaintiff argues that there is no Redevelopment Project due to this decision by Hy-Vee, in reality, the deal that is being hindered by this suit is the one between Defendant and IDP. So, tangibly, the cost of the loss of this transaction will be \$2.875 million (that is, the difference between the sale price to IDP of \$5.2 million less the market value of the property without the redevelopment project, or \$2.5 million, plus \$175,000 in property tax). Again, Plaintiff provided no argument or evidence to the contrary.

¹ It is clear that Hy-Vee does not want to enter a community on the wrong foot, investing large sums into its new store and seeing little return as a result of community ill-will. REDA has been established that 85% of Robbinsdale residents surveyed supported the Redevelopment Project and welcome Hy-Vee. Plaintiff argues that Hy-Vee will not necessarily be part of redevelopment if the Terrace Theater is removed and takes no position on its demolition. But, the plans for the building of a 91,000 square foot Hy-Vee include the demolition of the Theater, and its involvement is contingent on the Theater's demolition, as the soil conditions on the land necessitate the removal of the Theater in order to erect any other large structure. There can be no other reasonable interpretation of the plans to build this campus without the Terrace other than Hy-Vee's involvement being predicated on the demolition of the Terrace Theater itself.

III. A BOND OF \$3.5 MILLION IS NECESSARY TO SECURE REDA'S INTEREST IN THE PROPERTY.

Originally when the Court determined that a TRO would not issue, it determined that the matter of REDA's bond was moot. However, now that an injunction has been granted pending appeal, REDA's bond has become relevant once again.

REDA contends that it has standing to request a surety bond in this matter. Plaintiff attempts to distinguish the case at bar from precedent that allows for surety bonds for the benefit of public corporations under statutes Minn. Stat. §§ 469.044-045, citing that REDA does not directly own the land allocated for redevelopment. It also questions REDA's standing, as it argues that REDA has not entered into any redevelopment contracts and therefore will suffer no losses. Yet, first, owning the property is not a requirement of the statute. *Anderly v. City of Minneapolis*, 552 N.W.2d 236, 241 (Minn. 1996). Second, "even if a redevelopment contract [has] not yet been entered into between [the parties], this suit would still trigger section 469.044." *Id.* Further, REDA requires any developer to enter into a redevelopment agreement, which outlines the terms of the redevelopment plan, in order to qualify for Tax Increment Financing ("TIF") assistance. Glick Supp. Aff., ¶8. Therefore, Plaintiff's arguments against REDA's standing are without merit.

A. REDA's standing to request a surety bond

Minn. Stat. § 469.044 states,

When any action or proceeding at law or in equity is commenced, drawing in question the right, power, or authority of a public corporation created and operating under sections 469.001 to 469.047 *to do any act or to make or perform any contract or agreement or to undertake or enter upon the discharge of any obligations or commitments under those statutes*, the corporation may, if it deems that the pendency of the litigation might directly or indirectly impair its borrowing power, increase the cost of its projects, or be otherwise injurious to the public interest, move the court in which the litigation is pending to require the party who instituted the suit to give a surety bond as provided in sections 469.045 to 469.047.

(2015) (Emphasis added).

The statute requires REDA to show that (1) the law suit draws into question its right, power or authority to act or make an agreement, and that (2) the pendency of the litigation might directly or indirectly impair its borrowing power, increase the cost of its projects, or be otherwise injurious to the public interest. *See id.*

Plaintiff incorrectly argues that REDA has not identified any actual challenge to its rights or authority. In fact, it argues that REDA's right, power and authority are not drawn into question by this suit. However, barring REDA from redeveloping the property according to its approved plans strips it of its authority to enter into a valid contract to redevelop the parcels. REDA already made a decision approving the Redevelopment Project and has identified the interests of the taxpayers of Robbinsdale in the development of this property, and this suit infringes on REDA's decision making process and its ability to execute its plans.

This pending suit is injurious to the public interest because it precludes the commencement of a major redevelopment project, which, as REDA pointed out, will lead to loss of future tax revenue, 700 new jobs, and the opportunity to clear blight from the area. *See Anderly*, 552 N.W.2d at 241 (Minn. 1996) (the loss of tax revenue is sufficient to meet the harm requirement for a surety bond.) The law suit is hindering the redevelopment of the parcel because the prospective grocery store tenant of the redeveloped land, Hy Vee,– or any other developer – may be deterred by a litigation-laden property. Any rational investor would not seek to purchase a property in contention.

While Plaintiff claims that REDA cannot establish a challenge to its authority or a prospective loss to the public, the record clearly establishes that this law suit removes the plans for development of the Terrace Mall lot from REDA’s hands and that the public will be harmed if the Redevelopment Project in question does not go forward. As a result of the above analysis, REDA is entitled to seek a bond from Plaintiff in this matter. Minn. Stat. § 469.045 (2015) (Appearance of Public Corporation; Bond).

B. The Bond Amount

Minn. Stat. § 469.045 establishes the factors through which bonds should be instated. It states,

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 the party who instituted it to give a surety bond, approved by the court or judge, in a penal sum to be determined by the court to protect against loss or damage, whether or not a temporary injunction or restraining order has been demanded or ordered.

(2015). The statute goes on to say, “[d]uring the pendency of the litigation, the court, on motion, may require additional security if found necessary, and upon failure to furnish it shall dismiss the action or proceeding with prejudice.” *Id.*

In its submissions, Plaintiff argued that MERA establishes a \$500 cap on all surety bonds; however, during the in-person hearing on Monday, September 26, 2016, it ceded that that cap only applies to costs and disbursements, not to surety bonds. *See* Minn. Stat. § 116B.06. Nevertheless, Plaintiff continues to argue that the public policy that established MERA also dictates that small bond amounts are appropriate, as small bond amounts give all Minnesotans access to the courts.

Courts have previously instated bonds ranging from \$1,000 to \$3.2 million in MERA cases. *See, e.g. State by Drabik, supra*, 451 N.W.2d 893 (Minn. App. 1990); *Anderly, supra*, 552 N.W.2d 336 (Minn. 1996); *Webb Golden Valley, LLC v. State*, 865 N.W.2d 689 (Minn. 2015). REDA moves the Court to instate a surety bond in the amount of \$3.5 million. It calculated this amount based on the fact that property taxes are meant to increase by \$350,000 per year after the Terrace Mall lots are developed. REDA asserted that history suggests that the Terrace will remain vacant 10, 15, or 20 more years if the Redevelopment Project does not go forward as planned. Therefore, it requests a bond of \$3.5 million (accounting for ten years of lost tax revenue).

Plaintiff argues that REDA cannot ask for a bond based on future tax earnings, relying on the *Anderly v. City of Minneapolis* case to support its argument. *Supra*, 552 N.W.2d 236. Plaintiff's interpretation of the holding in *Anderly*, however, does not comport with the plain language of the opinion. Plaintiff stated that the Minnesota Supreme Court has determined that future tax revenues are speculative damages, and therefore are a "bridge too far" for the Court to consider in this case. But, the Minnesota Supreme Court actually stated that damages in such cases will "necessarily" be speculative and upheld a trial court's order to instate a surety bond based on future tax revenue. *Id.*, at 242. Section 469.045 requires that the surety bond be in an amount commensurate with the loss or damage that *may* result from the pendency of the action. *Id.* (Emphasis original). Damages are naturally speculative in a case such as this. *Id.* Therefore, due to the "undeterminable nature of the damages" which may occur in this case, the Court may set a bond amount proportionate with the damages that REDA may incur as a result of the pendency of the case. *Id.*

Further, the Court agrees that the length of time the lot would be undeveloped should the Redevelopment Plan fall through is unascertainable. After the Terrace Theater closed in 1999, it remained empty for 17 years and the adjacent strip mall struggled to remain open, now lying largely vacant. The Theater may realistically remain vacant for the next 17 years, or it may be renovated and occupied shortly after this suit is adjudicated – there is no way for the Court to determine that amount of time. Therefore, the Court relies on the estimations of the economic development authority in question and the seriousness of the risk to the public to determine the bond amount.

This Court concludes that REDA has reasonably articulated a loss to the public due to the continued pendency of this suit. *See Anderly*, 552 N.W.2d at 242. For almost two decades, the Terrace has been on a long trajectory towards complete dereliction. If the project falls through, the building will continue to deteriorate, now with a gaping hole on the western side of the building. *See id.* “It is fundamental that such a result would be harmful to the public.” *Id.* Further, REDA contends that the Redevelopment Project is expected to generate approximately \$350,000 in additional real estate taxes per year upon its completion. *See id.* “Losing this tax revenue would cause harm to the public.” *Id.* Additionally, losing this Project will result in the loss of 700 jobs (which approximate in \$2.5 million per year in wages), a grocery store for the Robbinsdale community, and the continued presence of a blighted property in the center of town. Finally, REDA has shown that HyVee is reticent to commit to this project unless the property is prepared for its development, which includes the demolition of the Terrace. Thus, there is ample evidence to show that a delay in the project will seriously thwart it, which usurps the authority of REDA and could result in significant injury to the public. *See id.*

CONCLUSION

The Court extends this injunction as it is important to allow meaningful appellate review of district court decisions, however, it is necessary to recognize the tangible and real losses to Defendants and REDA as a result of this review and indemnify them against it.

ORDER

Based on the submissions of the parties, applicable law in the State of Minnesota, and the arguments of counsel during the September 26, 2016 hearing, the Court **HEREBY ORDERS** the following:

1. Plaintiff's motion for an extension of the injunction issued on Saturday, September 24, 2016 is **GRANTED**, pending the decision of the Minnesota Court of Appeals regarding this Court's denial of the Plaintiff's request of the Temporary Restraining Order dated September 19, 2016.
 - a. Defendant is prohibited from destroying, demolishing, or impairing the aesthetic of the Terrace Theater, located at 3508 France Avenue North, Robbinsdale, Minnesota.
2. Defendant's motion for a bond is **GRANTED**. A bound for \$2.875 million is necessary to secure the Defendant's interest in its own property.
3. REDA's motion for reconsideration of its motion for a surety bond for \$3.5 Million is **GRANTED**, because this amount is necessary to secure the public's interest in the health, safety and welfare of the community.
4. Plaintiff's request to have time to post the two bonds is **GRANTED**. The time shall commence on Tuesday, September 27, 2016, at 8:00 a.m. and shall expire on Friday, September 30, 2016 at 4:30 p.m. The bond shall comply with Minn. R. Civ. App. P. 108.02, subd. 3 (2015).
5. Pursuant to Minn. Stat. § 469.045 and *Anderly v. City of Minneapolis*, 552 N.W.2d 236 (Minn. 1996), if Plaintiff should fail to post the bonds by Friday at 4:30 p.m., this action **shall be dismissed with prejudice** and Defendant shall continue razing the Terrace Theater.
6. The hearing date of October 10, 2016 is hereby **STRICKEN** from the Court's calendar.

IT IS SO ORDERED.

BY THE COURT