

Leal G. Segura and Patrick Adamson,

Court File No.: 55-CV-21-1546

Relators,

vs.

International Properties LLC,
Steven L. Connelly, and
Aderonke Mordi,

Defendants.

**FINDINGS OF FACT,
CONCLUSIONS OF LAW,
AND ORDER**

On April 28, 30, and May 3, 2021, the above-captioned matter came on for a hearing before the Honorable Pamela A.W. King in Olmsted County District Court. **Travis M. Ohly, Attorney at Law**, appeared on behalf of Relator Leal G. Segura. **John T. Giesen, Attorney at Law**, appeared on behalf of Relator Patrick Adamson. **Daniel J. Heuel and Cheyenne M. Wendt, Attorneys at Law**, appeared on behalf of Defendants International Properties, LLC and Dr. Aderonke O. Mordi. **Paul H. Grinde, Attorney at Law**, appeared on behalf of Defendant Steven L. Connelly.

The Court, based on all of the files, records, proceedings, and arguments of counsel, hereby makes the following Findings of Fact, Conclusions of Law, and Order.

FINDINGS OF FACT

Parties and Procedural History

1. Relator, Leal G. Segura, (hereinafter “Segura”) is the owner of a parcel of property located at 810 60th Avenue SW, Rochester, MN (hereinafter “Segura Property”).
2. Relator, Patrick Adamson, (hereinafter “Adamson”) is the owner of a parcel of real property located at 1010 60th Avenue SW, Rochester, MN (hereinafter “Adamson Property”).
3. Defendant, Steven L. Connelly, (hereinafter “Connelly”) is the owner of real property located in Olmsted County, Minnesota described as follows:

E30 of W60A E ½ of SW ¼
30 Acres more or less
Section 6 T106N-R14W
(hereinafter “Connelly Property”).

4. The Segura, Adamson, and Connelly properties share boundary lines. The Segura Property lies generally west of the Connelly Property’s western boundary. The Adamson Property lies west of the Connelly Property and generally south of the Segura Property’s southern boundary line. A stand of trees used by Great Blue Herons for nesting is situated on the three properties and collectively are referred to as the “Rookery.”
5. International Properties, LLC is a Minnesota limited liability corporation (hereinafter “International”). Dr. Aderonke O. Mordi (hereinafter “Mordi”) is President and CEO of International Properties, LLC.
6. Defendants International and Mordi seek to purchase the Connelly property and develop the land into a subdivision called Pavilion Estates.
7. On March 20, 2021, Relators served Defendant Steven Connelly with a Summons and Complaint seeking declaratory and injunctive relief, an Ex Parte Motion for a Temporary Restraining Order, as well as supporting documents. Service was not perfected upon Defendants International or Mordi on that date. The Ex Parte Motion sought to temporarily restrain Defendants and any person or entity acting on behalf of Defendants from, in any manner whatsoever, disturbing the Rookery or to remove any trees within one thousand (1,000) feet of any nest situated in the Rookery. This motion was reviewed by Judge Pamela A.W. King on March 20, 2021, and was granted.
8. On March 22, 2021, Relators filed their Complaint seeking declaratory and injunctive relief under Minnesota’s Environmental Rights Act (MERA), Minnesota Statute § 116B.031.
9. The Ex Parte Temporary Restraining Order was filed on March 29, 2021.
10. The Ex Parte Temporary Restraining Order was provided to Defendant Connelly on April 2, 2021, and to Defendants International and Mordi on April 6, 2021.
11. On April 5, 2021, Defendants filed a Notice of Motion and Motion to Dissolve the Temporary Restraining Order.
12. At the motion hearing on April 7, 2021, the parties agreed that instead of addressing whether the previous order should be vacated, the hearing would be used to determine whether there was a basis for a Temporary Restraining Order to be issued prior to a hearing on the temporary injunctive relief sought by Relators.

13. On April 12, 2021, Judge Pamela A.W. King granted Defendants' motion to dissolve the March 20, 2021 order and granted Relators renewed motion for a Temporary Restraining Order restraining all the parties and any person or entity acting on behalf of any party to this action from removing any trees within one thousand (1,000) feet of any nest situated on their respective properties. The same order required Relators to post cash or bond in the amount of \$20,000 no later than 5:00 p.m. on April 9, 2021.
14. On April 14, 2021, Relators filed a Motion for a Temporary Injunction enjoining and restraining all parties to this action and any person or entity acting on behalf of any party from, in any manner whatsoever disturbing the Rookery or to remove any trees within one thousand (1,000) feet of any nest situated in the Rookery, until the matter of the underlying lawsuit is tried on the merits.

Relationship of the Parties

15. Segura, Adamson, and Connelly are neighbors. As noted above, the Rookery which is the subject of this litigation encompasses portions of all three properties.
16. Segura's parents built a house on the Segura Property in 1976 where she grew up as a child. In 2011, Segura bought the property and has lived there since. Segura recalls seeing the birds in the Rookery as a young girl.
17. The Adamson Property consists of 44.5 acres with a house Adamson lives in with his family and a guest cottage. He enjoys the return of the birds every year and often invites friends to his property to see them from his home.
18. Connelly does not live on his property and uses it primarily for hunting. There is no house located on the Connelly Property.
19. Adamson and Connelly have known each other for years. Adamson has discussed with Connelly purchasing the Connelly Property numerous times in the past five years.
20. Connelly informed Adamson sometime in the spring of 2020 that he was entering into a purchase agreement and that the price was \$1,400,000. Adamson asked Connelly if he would sell the property to him on a three-year contract for deed. This was not acceptable to Connelly.
21. On June 18, 2020, International entered into a purchase agreement with Connelly for the sale of the Connelly Property. The purchase agreement between Connelly and International is for \$1,400,000. A down payment of \$145,000 has been paid into an account held for the benefit of Connelly for use by Connelly in an IRC Sec. 1031 like-kind exchange. The purchase agreement is contingent upon the Olmsted County Board approving a zoning change for this property. The purchase agreement was the beginning of the development process.

Development Process for Pavilion Estates & the Parties Relationship to this Development

22. In 2020 and continuing through the time of the hearing, the Connelly Property was designated “urban service” under the Olmsted County Land Use Plan, which allows for future development with lot sizes of one-half acre or less.
23. The plans for Pavilion Estates is to build ten single-family homes on large lots. This requires approval by a number of government agencies including a zoning modification.
24. In the latter part of 2020, International made application with Olmsted County and Rochester Township seeking the approval of a General Development Plan and an Amendment to the County Land Use Plan to allow for the development of the Connelly Property into Pavilion Estates.
25. Rochester Township has applied to Olmsted County to change the designation to “potential suburban” which allows for future development with lot sizes of a minimum of two acres.
26. Segura and Adamson have participated in the County and Township processes regarding this development by attending meetings as well as voicing concerns they each had about it. Segura noted boundary line concerns, concerns about recent flooding, and her desire to continue enjoying the privacy she currently enjoys as impactful on her land value. Adamson requested that a condition be placed on the development allowing him an easement off the proposed private road.
27. In the development plan, a new road identified as Pavilion Lane SW provides access to Pavilion Estates from Boulder Creek Lane. The proposed road would require removal of trees containing Great Blue Heron nests on the Connelly Property.
28. Adamson testified that on March 19, 2021, Rick Cordie from Hathaway Tree Service called Adamson and told him that the proposed road was staked on the Connelly Property and that he would be coming to remove trees on March 22, 2021. That same day, Adamson walked out to the property and saw the stakes directly under trees with nests.
29. On March 19, Adamson told Segura that he believed that some of the trees with bird nests were going to be cut down by Hathaway Tree Service.
30. It was not until March 2021 that concerns regarding the impact of the proposed development on the Rookery were raised.
31. Changes to the roadway path could be contemplated, but that would require additional survey work that is presently enjoined.

32. International will not be able to move forward on this development without Township and County approval, neither of which approvals had been obtained through the date of this hearing.

Great Blue Herons and the Rookery

33. Great Blue Herons are colonial nesting birds. Colonial nesting birds tend to gather in large assemblages, called colonies, during nesting season and obtain all or most of their food from the water. The birds will return to the same nests year after year. The trees in which a colony of herons nest in is referred to as a rookery.
34. Herons are classified as common birds in Minnesota and are not a protected species. In Minnesota they fall within the purview of nongame wildlife.
35. Mr. Carrol Henderson is retired from the Minnesota Department of Natural Resources. While working for the DNR he supervised the Nongame Wildlife Division in 1977. Mr. Henderson has a lot of experience with Great Blue Herons and testified that Great Blue Herons are a declining migratory bird, and that scientific literature suggests that the number of rookeries observed in the State of Minnesota has declined since Mr. Henderson's first inventory in 1977.
36. Mr. Henderson testified that in 1985, a total of 126 active Great Blue Heron colonies were known in the state, most of which were located in northern Minnesota. Mr. Henderson further testified that number declined to 90 confirmed nesting reports in the more recent Minnesota Breeding Bird Atlas Survey.
37. Mr. Henderson testified that Great Blue Heron rookeries are commonly found adjacent to rivers, lakes, and other bodies of water, with nesting trees typically located in lowland areas.
38. Relators called Dr. Bonnie Ploger as an expert witness. Dr. Ploger is a professor from the Department of Biology at Hamline University. Dr. Ploger is a Ph.D. Zoologist and has personally studied many rookeries during the course of her career. Dr. Ploger testified that throughout her life she has likely spent 18 to 20 months observing rookeries, often spending 12 to 14 hours a day in the rookery she was observing.
39. Dr. Ploger testified that most rookeries are located on islands or in wetlands.
40. According to the United States Department of the Interior, Fish & Wildlife Service, an active nest is a nest that contains viable eggs, chicks, or young birds that still depend on the nest for survival. If they do not have eggs or fledglings in the nest, the nest is inactive.
41. Dr. Ploger testified that Great Blue Herons are very sensitive to disturbances during their nesting season. She testified that the removal of nesting trees or other disturbances during such time would almost certainly result in colony abandonment. Dr. Ploger testified that Great Blue Heron rookeries typically benefit from a buffer zone from human activity.

42. The Rookery on the Segura Property, Adamson Property, and Connelly Property consists of approximately fifty (50) nests used by Great Blue Herons. The Rookery has been in the same location for at least a decade. The Rookery is located in an upland habitat, on land in a patch of forest with some agricultural land to the west of it. The Rookery also has a small stream running through it.
43. The topography of this land allows for runoff of bird waste, which in many cases kills the trees the birds build nests in. All of the nests within the Rookery are in live hardwood trees.
44. Mr. Henderson testified that he has visited the Rookery and described it as “unique in all of science.” Mr. Henderson testified that the Rookery is an upland hardwood rookery, and the only rookery of its kind that Mr. Henderson has ever visited. Mr. Henderson stated that it is unusual to find a rookery so far away from a major body of water.
45. Dr. Ploger stated the Rookery is unlike any of the other rookeries she has previously studied and that she has not seen another one like it.
46. If a rookery is abandoned, for whatever reason, it does not mean that the herons will die or will not be able to procreate in the future. It may, however, mean they would not do so in this hardwood forest.
47. On or about March 22, 2021, an examination of the nests in the rookery was performed by Mr. Broberg or agents hired by Mr. Broberg. Mr. Broberg was hired by International through his company Blueline Environmental Advisors, PLLC. That examination included viewing the nests by the use of a drone. This inspection revealed there were no eggs, chicks, or fledglings in any of the nests. The Restraining Order was in place on this date restraining the removal of any trees in the Rookery.
48. A total number of eight inactive nests were located by Mr. Broberg on the Connelly Property. The remaining nests, estimated in number by Relators’ witnesses as totaling 40-50, are all located on the Adamson and Segura Properties.
49. The nests were not active on March 20, 2021.
50. All parties agree that the nests may be active now.

Potential Harm to be Suffered by Relators if the Temporary Restraint is Denied as Compared to that Inflicted on Defendant if the Injunction Issues Pending Trial.

51. The trees with nests will not be impacted while the nests are active as disturbing them violates federal law.
52. If Defendants are able to secure the appropriate permits and other administrative relief, and begin to develop the road or subdivision prior to the court hearing regarding

the Relator's Complaint under the MERA act, and after the nest are no longer active, destruction of the trees and construction of the road could result in abandonment of the Rookery when the birds return.

53. Connelly planned on planting crops starting in the 2021 growing season on the replacement property using like-kind exchange proceeds which would generate income for Connelly. A temporary injunction pending trial could lead to further delay of the closing date and impact Connelly's ability to generate income.
54. The closing date on the purchase agreement between International and Connelly has been extended to June 30, 2021. Defendants claim further delay may result in cancellation of the purchase, resulting in a loss to Connelly and International, as well as loss of the residence Mordi had personally reserved for her family in the development.
55. The purchase agreement is contingent only on securing a zoning change.
56. Dr. Ploger testified that the proposed development of the Connelly Property would materially impair the Rookery and likely would lead to permanent Colony abandonment during the next mating season because the birds would be more vulnerable to predators and disturbances while nesting.

CONCLUSIONS OF LAW

1. "A temporary injunction is an extraordinary equitable remedy." *Metropolitan Sports Facilities Com'n v. Minnesota Twins Partnership*, 638 N.W.2d 214, 220 (Minn. Ct. App. 2002)(citing *Miller v. Foley*, 317 N.W.2d 710, 712 (Minn. 1982)). "It is meant to preserve the status quo pending an adjudication on the merits." *Id.* "The grant of a temporary injunction neither establishes the law of the case nor constitutes an adjudication of the issues on the merits." *Id.* (citing *Indep. Sch. Dist. No. 35 v. Engelstad*, 144 N.W.2d 245, 248 (Minn. 1966)).
2. "Because a temporary injunction is granted prior to a complete 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." *Miller*, 317 N.W.2d at 712 (citing *Pickerign v. Pasco Marketing, Inc.*, 228 N.W.2d 562, 564 (Minn. 1975)). "Injunctions should be awarded only in clear cases, reasonably free from doubt, and when necessary to prevent great and irreparable injury." *AMF Pinspotters, Inc. v. Harkins Bowling, Inc.*, 110 N.W.2d 348, 349 (Minn. 1961). "The burden of proof rests upon complainant to establish material allegations entitling him to relief." *Id.*
3. In *Dahlberg Bros., Inc. v. Ford Motor Co.*, the Minnesota Supreme Court set out the five factors the Court must evaluate to determine whether a party is entitled to temporary injunctive relief:
 - a. The nature and background of the relationship between the parties preexisting tie dispute giving rise to the request for relief. 137 N.W.2d 314, 321 (Minn. 1965). This factor is designed to ascertain the current status of the parties in relation to one

another, and then determine whether entering a temporary injunction will maintain that relationship “until adjudication of the case on the merits.” *Pac. Equip. & Irr., Inc. v. Toro Co.*, 519 N.W.2d 911, 915 (Minn. Ct. App. 1994). The parties in this case are private property owners who share boundary lines and are engaged in a land use dispute. This dispute encompasses the Pavilion Estates property development that International and Mordi are hoping to build on the Connelly property. The parties are currently involved in the development process at the county and township levels. At this time, the sale of the property has not been finalized, there is no plan to begin building a road or other construction on this site at least until the end of July while the nests in the Rookery are active and subject to the protection of federal law. The parties will maintain this relationship even without a temporary injunction. With a temporary injunction in place, the Relators could use the injunction as a source of leverage during the county and township development process which would disrupt the status quo. This factor weighs in favor of Defendants.

- b. The harm to be suffered by plaintiff if the temporary restraint is denied as compared to that inflicted on defendant if the injunction issues pending trial. *Dahlberg Bros.*, 137 N.W.2d at 321. Generally, the moving party must show “irreparable harm” to prevail on this factor, and the non-moving party need only show “substantial harm” to bar an injunction altogether. *Toro Co.*, 519 N.W.2d at 915. Both parties have demonstrated some harm. However, the irreparable harm to the Relators is premised on a series of future events which have not yet come to fruition. This factor weighs in favor of Defendants.
- c. 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. *Dahlberg Bros.*, 137 N.W.2d at 321. Even when the moving party makes a “doubtful showing as to the likelihood of success on the merits,” the court can nonetheless issue a temporary injunction if the other factors weigh in favor of doing so. See *Minnesota Twins P’ship*, 638 N.W.2d at 226. Relators bring their claim for equitable relief under MERA.
 1. To establish a prima facie showing, a plaintiff must prove: (1) a protectable natural resource, and (2) pollution, impairment, or destruction of that resource. *Freeborn County by Tuveson v. Bryson*, 210 N.W.2d 290, 297 (Minn. 1973); Minn. Stat. § 116B.04 (b).
 2. “Natural resources’ shall include, but not be limited to, all mineral, animal, botanical, air, water, land, timber, soil, quietude, recreational and historical resources.” Minn. Stat. § 116B.02, subd. 4.
 3. Minnesota Courts have interpreted MERA as requiring something more than “some destruction and impairment” of a natural resource. *State by Schaller v. County of Blue Earth*, 563 N.W.2d 260, 264 (Minn. 1997). The plaintiff must show that defendant’s conduct will, or is likely to, have a materially adverse effect” on the environment. Minn. Stat. § 116B.02, subd. 5.

affect the environment, or is likely to do so, the district court must consider the following five *Schaller* factors: (1) the quality and severity of any adverse effects of the proposed action on the natural resources affected; (2) whether the natural resources affected are rare, unique, endangered, or have historical significance; (3) whether the proposed action will have long-term adverse effects on natural resources, including whether the affected resources are easily replaceable (for example, by replanting trees or restocking fish); (4) whether the proposed action will have significant consequential effects on other natural resources (for example, whether wildlife will be lost if its habitat is impaired or destroyed); and (5) whether the affected natural resources are significantly increasing or decreasing in number, considering the direct and consequential impact of the proposed action. 563 N.W.2d at 267. Relators have made a prima facie showing based on these factors that the Rookery may be protected by MERA.

- d. The aspects of the fact situation, if any, which permit or require consideration of public policy expressed in the statutes, State and Federal. *Dahlberg Bros.*, 137 N.W.2d at 321-22. The fourth *Dahlberg* factor requires the court to consider whether there are circumstances “which permit or require consideration of public policy expressed in the statutes.” *Dahlberg*, 137 N.W.2d at 321-22. In the very first section of MERA, the legislature “declares its policy to create and maintain within the state conditions under which human beings and nature can exist in productive harmony in order that present and future generations may enjoy clean air and water, productive land, and other natural resources with which this state has been endowed.” Minn. Stat. § 116B.01. Public policy under MERA should be balanced against Connelly’s right to use his property as he sees fit and should take into consideration the economic burdens that Relators are asking Connelly to bear for the benefit of the general public.
 - e. The administrative burdens involved in judicial supervision and enforcement of the temporary decree. *Dahlberg Bros.*, 137 N.W.2d at 322. The existence of a burden might be a significant factor counseling against the injunction, but the absence of one “is not a very strong argument in favor of extraordinary relief.” *Queen City Constr., Inc. v. City of Rochester*, 604 N.W.2d 368, 379 (Minn. Ct. App. 1999). If the temporary injunction were to issue, the burden to the Court would be to hold a hearing on a motion for contempt for any party failing to abide by the Court’s Order. This factor is neutral.
4. “The failure to show irreparable harm is, by itself, a sufficient ground upon which to deny a preliminary injunction.” *Morse v. City of Waterville*, 458 N.W.2d 728, 730 (Minn. Ct. App. 1990)(citing *Gelco Corp. v. Coniston Partners*, 811 F.2d 414, 418 (8th Cir. 1987)). The herons and their nests are currently protected by federal law. Given the current status of the development project, Relators have not shown irreparable harm.

ORDER

1. Relators' motion for a Temporary Injunction is **DENIED**.

BY THE COURT:



Pamela A.W. King
Judge of District Court

MINNESOTA
JUDICIAL
BRANCH