IN THE IOWA DISTRICT COURT IN AND FOR JOHNSON COUNTY

GARY WEINMAN,

Plaintiff, **NO. CVCV077032**

vs.

RULING

CITY OF NORTH LIBERTY,

Defendant.

This is a case in which the Plaintiff, Dr. Gary Weinman ("Dr. Weinman"), seeks a stay and/or temporary injunctive relief preventing the Defendant, the City of North Liberty ("the City"), Iowa, from proceeding with proceedings to condemn an easement over Dr. Weinman's property. Plaintiff filed his petition on January 20, 2015. On January 26, 2015, the court set a hearing on the request for temporary injunctive relief for February 5, 2015.

This case is one of two filed by Dr. Weinman against the City. The other case, Johnson County Case No. LACV076900, was filed on November 26, 2014. Dr. Weinman seeks permanent injunctive relief in case 076900 as well as declaratory relief, an order directing the City to use an alternate route for the easement, and attorney fees. Both cases seek to challenge the same sanitary sewer easement.

On February 5, 2015, Plaintiff's application for a temporary injunction was presented to the court. What was scheduled to be a three hour hearing blossomed into a hearing that was almost a full day in length. The court allowed the hearing to run long out of a desire to let each side be fully heard before any decision was made.

Dr. Weinman appeared personally and was represented by Attorneys Wallace Taylor and Richard Pundt. The City appeared via the City Administrator, Ryan Heiar, and was represented by Attorneys Matthew Novak and Scott Peterson. Having considered the evidence and arguments presented by the parties, having reviewed the file and the briefs submitted by the parties, and being otherwise advised in the premises, the court enters the following ruling.

FINDINGS OF FACT

This case arises from the pending condemnation of a temporary and permanent easement for sanitary sewer. The Iowa City Community School District is planning to

build a new school in North Liberty. The plan is to alleviate overcrowding in West High School and City High School with this new school. However, the site selected by the district does not have access to sanitary sewer. As a result, North Liberty plans to install a new sanitary sewer line from its sewer treatment plant running to the east and north to the school. North Liberty plans to extend this sewer somewhat beyond the school. It will ultimately service not just the new school, but also anticipated new, and possibly, some existing development.

North Liberty needs both temporary and permanent easements to construct this new sewer line. The permanent easement will be for the buried line, for access to any manholes, and for access to repair and maintain the line if needed. The temporary easement will be for the area needed to trench, store soil, and operate equipment in the construction of the sewer line.

In determining the route for this new sewer line, North Liberty considered at least two options: the route at issue in this case and another route referred to as the "deep cut" route. Although the evidence as to the relative cost of these routes was disputed, the more convincing evidence showed that the projected cost of the deep cut route would be approximately $1.5 million more than the route through the Weinman property. Additionally, the deep cut route would involve very deep trenching, as much as 50 feet at some locations. As a result, the risks involved in service and repair and the cost of maintaining the sewer if this route were used would substantially exceed those involved in the route over the Weinman property.

At the hearing, Dr. Weinman introduced expert testimony regarding a route he proposes. This route was not considered by the City of North Liberty and could not have been considered by the City because it did not have the proposal until the day of the hearing. There was, however, some evidence from the City's engineering consultant that Foxx Engineering had looked at this approximate route and had not developed a formal proposal based on it because it also would be a "deep cut" route and the cost of the route would be substantially higher than the route over the Weinman property.

Dr. Weinman's engineer testified the route would be less expensive than other routes, but the court notes the engineer did not provide information as to whether his proposal would allow service of the entire basin or just the school, the diameter of sewer line used for his cost estimate, and other variables relevant to a comparison of his proposal to the other proposals considered by North Liberty.

In the process of preparing for the condemnation process and negotiating with the landowners, North Liberty utilized the services of a surveyor. This surveyor marked the planned route over the Weinman property and neighboring properties with survey

stakes. In performing this work, the surveyor entered Dr. Weinman's property without providing written notice as required by Iowa Code section 354.4A(3) (2014). However, the route for the sanitary sewer had already been determined with the possible exception of small deviations determined in the course of the survey. Thus, the survey was not necessary for North Liberty to proceed with its condemnation action. Rather, it was part of the City's efforts to show the physical location of the easement to the landowners over whose property the easement would run. After discovering the survey stakes, Dr. Weinman removed some or all of them.

As of the time of hearing, North Liberty had negotiated easements with 12 of the 13 property owners over whose property the sewer line will run. Dr. Weinman is the sole holdout.

Dr. Weinman, in anticipation of a condemnation, filed a suit against the City: Johnson County Case No. LACV076900. The City subsequently initiated condemnation proceedings against Dr. Weinman. The condemnation commission is set to meet on February 13, 2015 to assess damages.

The temporary construction easement over Dr. Weinman's property will be .75 acres. It will require the removal of some trees on Dr. Weinman's property, but the route will primarily impact prairie on his property. Dr. Weinman partnered with the Iowa Department of Natural Resources to restore about 5 acres of his property to native prairie 30 years ago. He presented evidence that if this prairie is disturbed, it will take about 30 years to restore it to its present condition. The court also finds that if mature trees are removed, they cannot be effectively "restored" because it is not possible to plant new mature trees. However, restoration efforts can be made and relatively large replacement trees can be planted after work is completed.

There was evidence that some trees that are potential habitat for Indiana bats would be impacted by the construction of the planned sewer. Indiana bats are an endangered species. Not all trees are potential habitat for Indiana bats. The project as a whole would require the removal of approximately 107 trees that would be suitable habitat for Indiana bats. There was no evidence as to how many of these trees would be located on Dr. Weinman's property.

It was undisputed that work on the sewer will necessitate removal of some number of trees from Dr. Weinman's property. However, Dr. Weinman indicated only a few trees had been marked when the route was marked. Thus, it is unlikely that the work on Dr. Weinman's property would involve removal of more than a small number of trees that might provide habitat to Indiana bats.

What was clear is that the removal must be completed by March 31. It appears the Iowa Department of Natural Resources will not allow removal of the trees after the end

of March. The bats migrate south each winter. By the end of March, they may be returning. If trees are removed before the bats return, the bats will not roost in those trees and will, instead, look for other suitable trees. Removal of trees prior to March 31 will not kill or injure any bats. Dr. Weinman's property contains about 50 acres of forest. This means there should still be adequate roosting locations if only a few trees are removed prior to March 31, 2015.

The construction of the sewer line will require that .75 acres of Dr. Weinman's property be excavated and used for other construction purposes. The existing prairie on this part of the property, some of which has developed root systems as much as 12 feet deep over the past 30 years, will be destroyed. It can be replanted, but replanting the prairie will not truly restore it to its original condition. The restoration process would take roughly 30 years, just as it took 30 years for the prairie to reach its current condition.

The bulk of the prairie on Dr. Weinman's property would appear to be suitable habitat for Ornate box turtles, a threatened species. Photographs were introduced of an Ornate box turtle found on the neighboring property which borders Dr. Weinman's prairie to the north. No evidence was introduced to establish that Ornate box turtles are present on Dr. Weinman's property. At best, the evidence established there is a strong possibility they are present. The evidence also established that the portion of Dr. Weinman's property most likely to be populated by Ornate box turtles is the hilly portion to the north of the proposed easement. The easement is closer to Muddy Creek and the soil there was indicated to be less favored by Ornate box turtles. At this point in time, it is impossible to assess whether Ornate box turtles are actually present because they hibernate for the winter.

Shortly prior to the hearing, the Iowa Department of Natural Resources ("IDNR") apparently became aware of the possibility that there could be Ornate box turtles living in the easement. Dr. Weinman's Exhibit 32, a document much discussed by both sides at the hearing, indicates that the IDNR would likely approve of any one of several different options in light of the circumstances. This letter was sent by the IDNR to the City's engineer for the project on February 4, 2015. If there are turtles on the easement, the IDNR would suggest an alternate route that does not impact the turtles and an alternate method of construction that does not impact the turtles (described at the hearing as directional boring).

The IDNR would suggest in the alternative that a survey be done to determine if there are Ornate box turtles in the area where work will be performed. If they are, the area can be fenced off and the turtles can be moved outside the fence. However, this can only be done during a fairly narrow window of time. The search or survey can only be done after the turtles come out of hibernation, likely mid-April according to the evidence. It cannot be done after mid to late May, when the turtles begin mating and making

nests. The City's consulting engineer indicated that their construction activities could be staged so that they could check for and move any turtles during this window.

It was clear from the evidence that the time line for continuing with the condemnation process and starting construction is tight. If the condemnation case is stayed, it is highly unlikely that tree removal can be done prior to March 31. Tree removal on Dr. Weinman's property cannot be performed until after the condemnation commission meets and the property is condemned. If the condemnation case is stayed, that means construction of the sewer is delayed at least 6 months. Additionally, if the case is stayed and the condemnation does not proceed by late May 2015, it will not be a viable solution to fence the construction area and temporarily remove any Ornate box turtles that might be found within the area because they will be in their nesting season and the construction work could harm nests located within the construction area.

The plan is for the school to be completed and in use by the fall 2017 school year. That is feasible if the project starts very soon. That plan is not feasible if the project is delayed for six months or more. In other words, grant of a temporary injunction will not only delay the sewer project, it will delay the construction and occupancy of the new school. Evidence was also offered that delay is likely to result in greater expense for construction of the sewer because the bids for the work are likely to be higher later in time.

LEGAL CONCLUSIONS AND RULING

A. STANDARDS GOVERNING GRANT OF INJUNCTIVE RELIEF

Dr. Weinman is asking the court to grant a temporary injuction.

> "A temporary injunction is a preventive remedy to maintain the status quo of the parties prior to final judgment and to protect the subject of the litigation." *Kleman v. Charles City Police Dep't,* 373 N.W.2d 90, 95 (Iowa 1985). "The issuance or refusal of a temporary injunction rests largely in the sound discretion of the trial court, dependent upon the circumstances of the particular case." *Kent Prods. v. Hoegh,* 245 Iowa 205, 211, 61 N.W.2d 711, 714 (1953).

Lewis Investments, Inc. v. City of Iowa City, 703 N.W.2d 180, 184 (Iowa 2005).

Iowa Rule of Civil Procedure 1.321 governs the grant of temporary injunctions. That rule states in pertinent part:

> A temporary injunction may be allowed under any of the following circumstances:

> **1.1502(1)** When the petition, supported by affidavit, shows the plaintiff is entitled to relief which includes restraining the commission or continuance of some act which would greatly or irreparably injure the plaintiff.
> **1.1502(2)** Where, during the litigation, it appears that a party is doing, procuring or suffering to be done, or threatens or is about to do, an act violating the other party's right respecting the subject of the action and tending to make the judgment ineffectual . . .

Iowa R. Civ. P. 1.321 (2015).

The Iowa Supreme Court has held that:

> "An injunction is an extraordinary remedy which should be granted with caution and only when clearly required to avoid irreparable damage." *Planned Parenthood of Mid–Iowa v. Maki,* 478 N.W.2d 637, 639 (Iowa 1991). The party seeking the injunction must establish: (1) an invasion or threatened invasion of a right; (2) that substantial injury or damages will result unless the request for an injunction is granted; and (3) that there is no adequate legal remedy available. *See Matlock,* 531 N.W.2d at 122. When considering the appropriateness of an injunction "the court should carefully weigh the relative hardship which would be suffered by the enjoined party upon awarding injunctive relief." *Id.*

Sear v. Clayton County Zoning Board of Adjustment, 590 N.W.2d 512, 515 (Iowa 1999) (discussing permanent injunctive relief).

The Iowa Supreme Court has also explained that:

> Permanent injunctive relief is an extraordinary remedy that is granted only when there is no other way to avoid irreparable harm to the plaintiff. *See Planned Parenthood of Mid–Iowa v. Maki,* 478 N.W.2d 637, 639 (Iowa 1991); *Myers v. Caple,* 258 N.W.2d 301, 304–05 (Iowa 1977). Accordingly, if a plaintiff has an adequate remedy at law, injunctive relief as an independent remedy is not available. *See Opat v. Ludeking,* 666 N.W.2d 597, 603 (Iowa 2003); *Sergeant Bluff–Luton Sch. Dist. v. City of Sioux City,* 562 N.W.2d 154, 156 (Iowa 1997).

Lewis Investments, 703 N.W.2d at 185.

Temporary injunctive relief is evaluated by the same standards as permanent relief except the party seeking a temporary injunction must also show a likelihood or probability of success on the merits of the underlying claim. Max v. Iowa Realty Co., 621 N.W.2D 178, 181 (Iowa 2001).

B. HAS DR. WEINMAN SHOWN A PROBABILITY OF SUCCESS ON THE MERITS?

In order to obtain the requested temporary injunction, Dr. Weinman must show it is likely he will succeed on the merits of at least one of his underlying claims.[1] That is, he must have a legal basis for his position and he must have produced enough evidence in support of his claim that the court anticipates he will probably succeed on that claim.

In support of his request for injunctive relief, Dr. Weinman raises multiple alleged legal bases for his claims. Although the doctor's counsel attempts to assert otherwise, he has clearly "shotgunned" this case. He has vaguely asserted multiple alleged legal bases for his underlying claims, but has only addressed some of those bases in detail.

Among other things, Dr. Weinman argues that the survey without notice taints the process and requires the court to stay the condemnation. He argues that there are viable or more appropriate alternative routes and that because such routes exist, the City cannot condemn the route at issue. He argues that the route at issue lies outside the city limits and as a result, the City cannot condemn the route at issue. He argues that the habitat of an endangered species, the Indiana bat, and a threatened species, the Ornate box turtle, will be destroyed or negatively impacted by the construction and that an alternate route must be used or the condemnation must be stayed until any environmental impact can be more fully investigated.

Many of the arguments made by Dr. Weinman rely on Iowa statutes as their legal basis. The rules of statutory construction in Iowa are well settled.

> When a statute is plain and its meaning is clear, [the courts] need not search for its meaning beyond its expressed language. American Asbestos Training Ctr., Ltd. v. Eastern Iowa Community College, 463 N.W.2d 56, 58 (Iowa 1990) (citation omitted). [The courts] resort to rules of statutory construction only when the terms of the statute are ambiguous. Le Mars Mut. Ins. Co. of Iowa v. Bonnecroy, 304 N.W.2d 422, 424 (Iowa 1981) (citation omitted), superseded by statute on other grounds, Steinkuehler v. Brotherson, 443 N.W.2d 698 (Iowa 1989); Iowa Code

[1] The City cites Mann v. City of Marshalltown, 365 N.W.2d 307 (Iowa 1978) as holding that "an independent suit to enjoin condemnation proceedings may be had where there are allegations of fraud, oppression, illegality or abuse of power or discretion by the condemnor." Id. at 313. The court does not view Mann as limiting independent suits to enjoin condemnation proceedings to the extent claimed, particularly because the Iowa Legislature's subsequent enactment of section 6A.24 authorizes independent suits to challenge the public purpose of condemnation proceedings. The court need not determine the extent to which Dr. Weiman's rights are otherwise limited by Mann because, even if the court applies a lower standard and evaluates whether Dr. Weinman has established a likelihood of success on the merits, the City prevails.

§ 4.6.

> [Iowa Courts] give precise and unambiguous language its plain and rational meaning as used in conjunction with the subject considered, absent legislative definition or particular and appropriate meaning in law. American Asbestos, 463 N.W.2d at 58 (citation omitted); Iowa Code § 4.1(38). Thus, it is not for [the courts] to speculate as to the probable legislative intent apart from the wording used in the statute or to use legislative history to defeat the plain words of the statute. Le Mars, 304 N.W.2d at 424 (citation omitted). [The courts] must look to what the legislature said rather than what it should or might have said. Iowa R.App.P. 14(f)(13)

Stroup v. Reno, 530 N.W.2d 441, 443-444 (Iowa 1995).

1. *Alleged Violation of Iowa Code Section 6A.24*

Dr. Weinman argues that the City's initiation of condemnation proceedings is inconsistent with the requirements of Iowa Code chapter 6A, particularly section 6A.24. He aptly points out that this code section has not previously been interpreted in any reported Iowa appellate decision.

Section 6A.24 allows an owner of property described in an application for condemnation to "bring an action challenging the exercise of eminent domain authority or the condemnation proceedings." Iowa Code § 6A.24(1) (2015). In any such action, the acquiring agency bears the burden of proving "by a preponderance of the evidence that the finding of public use, public purpose or public improvement meets the definition of those terms."[2] Iowa Code § 6A.24(3) (2015). Those terms are defined in Iowa Code section 6A.22. A "public use," "public purpose," or "public improvement" includes "[t]he acquisition of any interest in property necessary to the function of a public or private utility, common carrier, or airport or airport system." Iowa Code § 6A.22(2)(a)(2) (2015).

In the context of its application to the present case, section 6A.24 is not ambiguous. As a result, the court may not apply rules of statutory instruction. It must give the words of the statute their ordinary meanings and may not speculate as to the probable legislative intent.

At hearing the "public purpose" issue was not really disputed. The condemnation is for an easement that will be used to run sanitary sewer for the City. The City's sanitary

[2] In the present action, Dr. Weinman bears the burden of showing that, with the burden of proof on the City on this part of the underlying claim, he would prevail.

sewer is a public utility. Iowa Code § 362.2(6) (2015). As a result, Plaintiff has not shown a likelihood of success under section 6A.24(1) (2015).

2. *Alleged Violations of Iowa Code Chapter 314*

Dr. Weinman argues that the proposed condemnation violates Iowa Code section 314.23. That code section provides in pertinent part:

> It is declared to be in the general public welfare of Iowa and a highway purpose that **highway** maintenance, construction, reconstruction, and repair shall protect and preserve by not causing unnecessary destruction, the natural and historic heritage of the state. In order to provide for the protection and preservation, the following shall be accomplished in the design, construction, reconstruction, relocation, repair or maintenance **of roads, streets, and highways** . . . .

Iowa Code § 314.23 (2015) (emphasis added). The court notes that section 314.23 is part of Iowa Code chapter 314 which sets forth "Administrative Procedures for Highways."

Iowa Code section 314.24 provides that:

> Cities, counties, and the department shall to the extent practicable preserve and protect the natural and historic heritage of the state in the design, construction, reconstruction, relocation, repair, or maintenance of **roads, streets, or highways**. Destruction or damage to natural areas, including but not limited to prime agricultural land, parks, preserves, woodlands, wetlands, recreation areas, greenbelts, historical sites or archaeological sites shall be avoided, if reasonable alternatives are available for the location **roads, streets, or highways** at no significantly greater cost. In implementing this section, cities, counties, and the department shall make a diligent effort to identify and examine the comparative cost of utilizing alternative locations **for roads, streets, or highways**.

Iowa Code § 314.24 (2015) (emphasis added).

Although sections 314.23 and 314.24 set forth the Legislature's position regarding construction of streets and highways, they do not include public improvements such as the sewer line at issue in this case within the scope of their provisions. Iowa Code § 314.13(6) (2015) (defining "highway" or "street"). Furthermore, section 314.23 applies to woodlands, wetlands, public parks, and prime agricultural lands. The portion of Dr. Weinman's property at issue was not shown to be prime agricultural land. Although a few trees may be removed, the impacted area is not woodland. Nor is the impacted

property a publicly owned park, preserve, or recreation area. At most it is a privately owned preserve.

As was the case with section 6A.24, sections 314.23 and 314.24 are not ambiguous. The court is bound to apply those code provisions as written. Although sections 314.23 and 314.24 can be read as reflecting public policy in favor of protecting certain natural areas, the Legislature has not yet opted to extend that protection to takings for utility easements. It is not the role of this court to extend the scope of sections 314.23 and 314.24. That is a legislative function. As a result, sections 314.23 and 314.24 would not apply to the improvement and/or the property at issue in the present case. Because the code sections would not apply, Plaintiff has not shown a likelihood of success on the merits with regard to this aspect of his claim.

3. Survey Without Notice

Iowa Code section 354.4A requires surveyors to give written notice by mail seven days before entering onto property to conduct a survey. Iowa Code § 354.4A (2015). It is conceded in the present case that when a survey was performed to place stakes by either Foxx Engineering or its contractor, the notice provisions were not followed. Surveyors entered Dr. Weinman's property without notice to him and without his express permission. These surveyors then placed stakes on the property to mark the location of the easement at issue in this case.

Dr. Weinman argues that because this survey was done in violation of section 354.4A, the whole process is somehow tainted and the court must enjoin the City's condemnation. The court disagrees.

If the procedures set forth under section 354.4A are followed, the surveyor is not subject to criminal or civil liability for trespass. Iowa Code § 354.4A(1)(a) (2015). It follows that if those procedures are not followed, the surveyor is subject to criminal and civil liability for trespass. Thus, Dr. Weinman may pursue a civil claim against the surveyor for trespass if he so chooses and if he has damages.

Furthermore, it was established at the hearing that this survey was not a necessary precursor to the condemnation action. The legal description of the route had already been determined and was being used to set the stakes. Thus, the condemnation could have proceeded without this survey. In addition, Dr. Weinman removed the stakes the surveyor put in place. This has deprived the City of the ability to use the survey in any construction work. It will presumably have to conduct a new survey and place new stakes so that any construction activities can be conducted on the condemned easement.

As a result, Dr. Weinman has not shown a likelihood of success on the merits on his claims under section 354.4A. He may have a meritorious claim for trespass, but that does not allow him to obtain a stay of the pending condemnation action.

4. Condemnation Outside the City Limits

The condemnation at issue seeks to obtain an easement for a sanitary sewer line. Sanitary sewer is a city utility. Iowa Code §362.2(6) (2015). Iowa Code section 364.4 provides:

> A city may:
> 1. a. Acquire, hold, and dispose of property outside the city in the same manner as within. However, the power of a city to acquire property outside the city does not include the power to acquire property outside the city by eminent domain, **except for the following**, subject to the provisions of chapters 6A and 6B:
> (1) The **operation of a city utility** as defined in section 362.2 . . . .

Iowa Code § 364.4 (2015). Pursuant to section 364.4, a city may use eminent domain to obtain property outside the city limits for use in or by a city utility. Banks v. City of Ames, Iowa, 369 N.W.2d 351, 354 (Iowa 1985).

Consequently, Dr. Weinman's argument on this issue is without merit. He has not shown the requisite likelihood of success on the merits.

5. Alleged Violations of the Endangered Species Act

Plaintiff argues that allowing the condemnation will violate the Endangered Species Act and should therefore be enjoined. In support of this argument, he has provided the court with two United States Supreme Court cases. Instead of addressing these cases in his brief, he offered copies of them as exhibits. Neither case is factually consistent with the present case. Tennessee Valley Authority v. Hill, 437 U.S. 153 (1978), involved the construction of a dam that would have wiped out the endangered darter snail. The primary issue in the case was whether Congress intended the Endangered Species Act to apply to the dam project which was ongoing at the time the act was passed. Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or., involved a challenge to a department of interior regulation that defined harm. The definition was upheld and the court applies it in this opinion.

> The Endangered Species Act of 1973 ("ESA"), 16 U.S.C. § 1531, contains a variety of protections designed to save from extinction species that the Secretary of the Interior designates as endangered or threatened. *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon,* 515 U.S. 687, 690, 115 S.Ct. 2407, 132 L.Ed.2d 597 (1995). Section 9 of the Act makes it unlawful for any person to "take" any endangered or threatened species. 16 U.S.C. § 1538(a)(1)(B). "Take" is defined to mean "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to engage in such conduct." 16 U.S.C. § 1532(19). The U.S. Fish and Wildlife Service's ("FWS") regulations further define "harm" to include any "significant habitat modification or degradation where it actually kills or injures fish or wildlife by significantly impairing essential behavioral

> patterns, including breeding, feeding or sheltering."  50 C.F.R. § 17.3; see also *Sweet Home,* 515 U.S. 687, 115 S.Ct. 2407, 132 L.Ed.2d 597 (upholding FWS' definition of "harm"). The prohibition on take extends to both endangered and threatened species, and includes any "egg or offspring" thereof. 16 U.S.C. § 1532(8); *see also* 50 C.F.R. § 17.31(a).

Wild Equity Inst. v. City and County of San Francisco, 2011 WL 5975029.

In deciding whether a temporary injunction under the ESA is appropriate, the question is whether the challenged activity "will reduce appreciably [the species'] likelihood of survival or recovery or appreciably diminish the value of their critical habitat." Pacific Coast Federation of Fisherman's Assoc. v. Gutierrez, 606 F. Supp. 1195, 1207 (E.D. Ca. 2008).

As with his other claims, Plaintiff fails to show a probability that this one will succeed. To the extent the project will require removal of trees, the IDNR is requiring that work be done when there will be no Indiana bats roosting in the trees. Only a few trees will be removed on Dr. Weinman's property and not all of these would be potential roosting sites for Indiana bats. Further, there is zero evidence thus far in this case that any Indiana bats actually roost in these trees. Rather, the area is described as suitable for potential habitat. This falls far short of the requisite "significant habitat modification or degradation where it actually kills or injures fish or wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering."

There is also no evidence that Ornate box turtles are present in the area that will be condemned. They are present on the neighbor's property, but that area is not directly contiguous to the easement. It is separated from the easement by the bulk of Dr. Weinman's prairie restoration. The area where the easement will be located is not as suitable for turtle habitation as the area left untouched. Further, the IDNR has already outlined a plan pursuant to which a search or survey for the turtles can be conducted and, if any are present, they can be moved out of harm's way until after construction is completed. This will have to be done in a very narrow window of time between when the turtles become active and when their breeding season begins, but if the condemnation proceeds on schedule, it can be done within this window of time.

6. *Failure to Conduct an Environmental Survey*

Dr. Weinman argues that the condemnation should be stayed because there has not been an environmental survey. Dr. Weinman had the burden of proof in this case. The court reviewed all of the code provisions and constitutional provisions he cited as a potential legal basis for his claims. None of them required an environmental survey prior to work being performed on a project of this nature. Further, the IDNR is responsible for issuing any permits required for the work at issue. The IDNR is aware of the possibility that this easement may include Indiana bat habitat and Ornate box turtle

habitat. If the IDNR requires a survey and none has been performed, the IDNR will not issue the requisite permits.

Because Dr. Weinman has not provided citation to any applicable law allowing the court to stay the condemnation in the absence of an environmental survey, Dr. Weinman has failed to show a likelihood of success on the merits on this issue.

C. CONCLUSION

To the extent Dr. Weinman has mentioned other potential legal bases for his claims, he has fallen far short of the required showing of a probability of success on the merits. Dr. Weinman has not identified a single underlying claim on which there is a probability of success. Consequently, the court need not reach any other issue relevant to grant of a temporary injunction. The request for temporary injunctive relief is DENIED.

Clerk to notify.

State of Iowa Courts

Type: OTHER ORDER

Case Number	**Case Title**
CVCV077032	GARY WEINMAN VS NORTH LIBERTY

So Ordered

Christopher L. Bruns

Christopher L. Bruns, District Court Judge
Sixth Judicial District of Iowa