IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

JPMORGAN CHASE BANK, N.A.,

Plaintiff,

v.

CITY OF MONONA,

Defendant.

OPINION AND ORDER

17-cv-752-wmc

Plaintiff JPMorgan Chase Bank, N.A. ("Chase" or "the Bank") sought a preliminary injunction against defendant City of Monona, alleging constitutional claims for takings, due process, and equal protection, as well as claims for common law breach of contract and violation of state condemnation procedures. (*See* Pl.'s Br. (dkt. #13).) After a brief stipulation requiring the City and its contractors to ensure reasonable access to the Bank "in accordance with the Chase lease" (*see* Stipulation (dkt. #24) 1)), the court held a hearing on Chase's request for a preliminary injunction. Because Chase has shown some likelihood of success on the merits of its breach of contract claim and possible loss of goodwill due to a seemingly unnecessary business upheaval, the court will enter a preliminary injunction as specified below.

BACKGROUND[1]

In 1992, Bank One entered a lease agreement with American Family Mutual Life Insurance Company to operate a branch in a 4,100 square foot suite on the first floor of

[1] Except as noted, the following facts are undisputed as taken from the parties' preliminary injunction submissions, as well as from live testimony and argument heard by the court on October 11, 2017.

the building located at 802 Broadway (the "Property"). Eventually, through a series of bank mergers, Chase assumed Bank One's position of lessee on that lease, and it has continued to operate the branch under its name at that same location since at least late 2012. The Property was purchased on December 13, 2013, by Monona Drive Properties, LLC ("Monona LLC"), which plaintiff characterizes as a "shell" corporation but does not dispute became its lessor under the terms of the Lease. Monona LLC's sole member is the Community Development Authority of the City of Monona ("Monona CDA"), which was formed to pursue urban renewal and housing projects for the City.

On July 12, 2017, Monona CDA unanimously voted to authorize a condemnation offer to its wholly-owned subsidiary, Monona LLC. (July 12, 2017 Minutes, Monona CDA (dkt. #17-4) 2.) Unsurprisingly, the parties agreed on a price just six days later and Monona LLC formally transferred the Property to Monona CDA. Later in July, Chase received a letter with the subject "Notice of Relocation Eligibility and 90 Day Notice," which detailed available relocation benefits as lessee of part of the now condemned property and provided notice that Chase's "expected vacation date is October 19, 2017." (July 21, 2017 Letter (dkt. #18-4) 1-2.) Consistent with Wis. Admin. Code § 92.40(16), requiring an agency provide displaced persons (including businesses) with data on the cost of comparable property, the notice also included three identified "comparable properties" (*id.* at 4), none of which Chase considered comparable.

Instead, Chase had identified the old Radio Shack building (2251 W. Broadway, Monona, WI), as its only viable replacement option for a branch bank. In August, Chase began seeking approvals for construction to prepare the building, and signed a lease. In

September, Chase received the last necessary approvals and took possession of the property, so that construction could begin. Importantly, Chase asserts that this construction work is necessary and cannot be completed before the noticed-vacation date of October 19, 2017, but rather has an expected, expedited completion date (weather permitting) of January 2018.

On October 2, 2017, after sending a cease and desist letter to the City Attorney seeking to prevent closure of an entrance to the building (*see* Letter (dkt. #19-4)), Chase filed this lawsuit and sought a temporary restraining order or preliminary injunction. Following a telephonic hearing resulting in the denial of a TRO on October 3, the court scheduled an in-person hearing for Friday, October 6, which was rescheduled for October 11, 2017, at the urging of both parties. In the interim, the parties also entered into a stipulation that "the City . . . and its contractors [would] take reasonable efforts to ensure safe and clear access to both entrances to the [Bank] premises, the Chase drive up banking facilities, and the building entrance; and to provide reasonably sufficient parking for Chase customers, all in accordance with the Chase lease." (Stipulation (dkt. #24) 1.) At the conclusion of the preliminary injunction hearing on October 11, the court indicated that it was inclined to enter a preliminary injunction similar to the parties' stipulation, until either (a) January 31, 2018, or (b) when the City obtained a writ of assistance. The court also extended the stipulation until October 16, so that the parties could meet and confer on the actual terms of such an injunction. The parties were also directed to reach agreement on those terms and file them by that date, or failing that, to file their counter proposals for the court's consideration.

OPINION

As an initial matter, and contrary to the assertion of the City, (Def.'s Opp'n Br. (dkt. #30) 1), this court has federal question jurisdiction over the constitutional claims presented here, as well as diversity jurisdiction over Chase's contract and other state law claims. *See* 28 U.S.C. §§ 1331, 1332. Even though not a jurisdictional problem, however, Chase's constitutional takings claim presents a ripeness issue. *See Kolton v. Frerichs*, 473 F.3d 532, 534 (7th Cir. 2017) (explaining that the Supreme Court has clarified that "*Williamson County* 'is not, strictly speaking, jurisdictional'" and that *Williamson County* "does not diminish federal courts' adjudicatory competence" (internal citation omitted)).

As for Chase's contract claim, the court has diversity jurisdiction. Specifically, Chase, a national bank, is a citizen of Ohio, where its articles of association designate its main office. *See Wachovia Bank v. Schmidt*, 546 U.S. 303, 307 (2006). The City of Monona is a Wisconsin municipal corporation and headquartered in Monona, Wisconsin. Not only are the parties diverse, the face of the complaint contains allegations sufficient to establish that at least $75,000 is in controversy in displacement costs and loss of goodwill alone.

Thus, the court has subject matter jurisdiction.

As for the requirements to establish entitlement to a preliminary injunction, a party must demonstrate that: (1) it has a likelihood of success on the merits; (2) that it will suffer irreparable harm without an injunction; and (3) there is no adequate remedy at law. *See American Civil Liberties Union of Ill. v. Alvarez*, 679 F.3d 583, 589 (7th Cir. 2012) (quoting *Ezell v. City of Chicago,* 651 F.3d 684, 694 (7th Cir. 2011)). Once the movant makes this showing, "the court weighs the factors against one another, assessing whether

the balance of harms favors the moving party or whether the harm to the nonmoving party is sufficiently weighty that the injunction should be denied." *Id.* (quoting *Ezell*, 651 F.3d at 694 (internal quotations omitted).

Consistent with the Seventh Circuit's direction, this court applies a sliding scale in determining whether preliminary relief is warranted, meaning that the "more likely it is that [the moving party] will win its case on the merits, the less the balance of harms need weigh in its favor." *Girl Scouts of Manitou Council, Inc. v. Girl Scouts of USA, Inc.*, 549 F.3d 1079, 1100 (7th Cir. 2008); *see also Hoosier Energy Rural Elec. Coop., Inc. v. John Hancock Life Ins. Co.*, 582 F.3d 721, 725 (7th Cir. 2009) ("[T]he more net harm an injunction can prevent, the weaker the plaintiff's claim on the merits can be while still supporting some preliminary relief."). The court will further consider any relevant public interests at stake, including "the ramifications of granting or denying the preliminary injunction on nonparties to the litigation." *Girl Scouts*, 549 F.3d at 1100. During this analysis, the court's goal is to "choose the course of action that minimizes the costs of being mistaken," yet the analysis is "subjective and intuitive, one which permits district courts to weigh the competing considerations and mold appropriate relief." *Id.* (internal citations and quotation marks omitted). Because the court concludes that Chase has shown some likelihood of success on the merits of its breach of contract claim and may suffer an irreparable loss of goodwill as the result of a needlessly abrupt move to a new branch location, the court will grant a preliminary injunction on this basis to maintain the status quo for approximately 100 days.

I. Reasonable Likelihood of Success

A. Constitutional Claims

Because Chase's constitutional claims are not yet ripe for adjudication, they cannot be the basis for a preliminary injunction. "[R]egardless of how a plaintiff labels an objectionable land-use decision (i.e., as a taking or as a deprivation without substantive or procedural due process), recourse must be made to state rather than federal court." *CEnergy-Glenmore Wind Farm #1 v. Town of Glenmore*, 769 F.3d 485, 489 (7th Cir. 2014). While conceding this general proposition, as it must, plaintiff Chase argues that it need not exhaust avenues for relief in state court before raising constitutional claims here under recognized exceptions for finality and futility.[2] However, neither exception applies to plaintiff's constitutional claims here.

As an initial matter, the City acknowledged both before and after Chase filed this lawsuit that it was obligated to follow the procedures set forth under Chapter 92 before undertaking to end the lease. Moreover, during the preliminary injunction hearing, the City agreed not to attempt any self-help to evict Chase from its branch suite. Rather, the City has committed to proceed on or after October 19, 2017, to seek a writ of assistance from the Dane County Circuit Court under Wis. Stat. § 32.05(8)(b) and not to force Chase to move until after receiving that writ.[3] (Def.'s Opp'n Br. (dkt. #30) 4.) In that state

[2] At the hearing, Chase also argued a "facial attack" under Chapters 32 and 92 of the Wisconsin Statutes, but those claims that the City failed to follow the statutory procedures are caught up in its constitutional claims and thus belong in the state court.

[3] Wis. Stat. § 32.05(8)(b) provides, in relevant part that:

> If the condemnor is denied the right of possession, the condemnor

court proceeding, presumably Chase may assert its claims (constitutional, statutory or contractual) as a defense to the request for a writ.

Even if these claims were not available to Chase in responding to a writ of assistance, it has thus far failed to avail itself of the state court to assert its rights. *See Kolton v. Frerichs*, 473 F.3d 532, 535 (7th Cir. 2017) (plaintiff should exhaust state court remedies before turning to federal court to assert a takings claim); *Clifton v. Schafer*, 969 F.2d 278 (7th Cir. 1992) ("A person who claims to have been deprived of property by the state without due process must use the judicial remedies the state has provided."). Indeed, until the state proceedings are completed, it remains unclear that *any* unconstitutional takings or denial of due process has or will occur here. *Porter v. DiBlasio*, 93 F.3d 301, 305 (7th Cir. 1996) (in assessing a procedural due process claim, the court first determines if the plaintiff was deprived of a protected interest; and if so, then it determines what process was due.). This claim is also not ripe because Chase did not utilize the state court procedure.

Thus, Chase's constitutional claims are not ripe and cannot provide the basis for a

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> may, upon 48 hours' notice to the occupant, apply to the circuit court where the property is located for a writ of assistance to be put in possession. The circuit court shall grant the writ of assistance if all jurisdictional requirements have been complied with, if the award has been paid or tendered as required and if the condemnor has made a comparable replacement property available to the occupants, except as provided under par. (c).

In addition, Wis. Stat § 32.05(8)(c) prevents a condemnor from forcing an occupier to vacate "until a comparable replacement property is made available," unless the occupier waived relocation benefits or is not a displaced person.

preliminary injunction.[4]

B. Breach of Contract Claim

The only remaining question then is whether Chase is entitled to a preliminary injunction on the basis of its breach of contract claim. Under Wisconsin law, a breach of contract claim requires the plaintiff to prove three elements: (1) a contract; (2) a breach; and (3) damages caused by the breach. *Northwestern Motor Car, Inc. v. Pope*, 51 Wis. 2d 292, 296 187 N.W.2d 200, 203 (1971). For the reasons that follow, the court finds that Chase has at least established some likelihood of success on this claim.

Section 12.14 of the subject lease provides that it will bind its "parties, their legal representatives, successors, heirs, devisees, executors, administrators, successors in interest, and assigns." (Lease (dkt. #14-1) 20.) There is no dispute that Chase became the lessee through bank mergers, and that Monona LLC became the lessor through its acquisition of 802 Broadway. Rather than Monona CDA stepping into the shoes of Monona LLC upon the property's transfer, however, the City argues that the lease was terminated by

[4] Although Chase's substantive due process claim appears facially meritless under the applicable standard, *see CEnergy-Glenmore Wind Farm*, 769 F.3d at 488 (for a land-use decision to be a constitutional violation, it must "shock the conscience," the decision must be "arbitrary and capricious," "random and irrational," or "egregious" to implicate substantive due process), the plaintiff must avail himself of state law remedies in the first instance as well. *Id*. at 488-89; *see also Johnson v. Thompson-Smith*, 203 F. Supp. 3d 895, 907 (N.D. Ill. 2016) ("When a substantive due-process challenge involves only the deprivation of a property interest, a plaintiff must show either the inadequacy of state law remedies or an independent constitutional violation before the court will even engage in this deferential rational-basis review."), *appeal docketed*. Chase also purports to raise a "class of one" equal protection claim, but it is a nonstarter. In the Seventh Circuit, a "class of one" plaintiff must demonstrate "(1) that [it] has been intentionally treated differently from others similarly situated and (2) that there is no rational basis for the difference in treatment." *Fares Pawn, LLC v. Ind. Dep't of Fin. Insts.*, 755 F.3d 839, 845 (7th Cir. 2014). Chase has not, and indeed would appear wholly unable, to make such a showing. The court thus devotes no further attention to this argument.

condemnation under section 6.3. In relevant part, section 6.3 provides:

> If the Premises are acquired or condemned by any governmental authority, in whole or in part, *such that the Premises are unsuitable for the business of Tenant*, then the term of this lease shall terminate as of the date of title vesting . . . .

(*Id.* at 13 (emphasis added).)

Even assuming that an acquisition or condemnation by Monona CDA of its LLC's property triggers this provision,[5] however, it is not clear that the premises were rendered "unsuitable" for Chase's business on that date. To the contrary, just as Monona LLC's acquisition in 2013 clearly did not make the Property "unsuitable" for Chase's purposes, as evidenced by Chase's continued, branch banking business at the Property, Chase's continued operations to the present would appear to support a finding that the lease remains in effect. (*See id.* at 49 (specifying that the lease was extended until December 31, 2019).) Indeed, the City and its CDA are effectively conceding as much by accommodating the branch's operations at least until obtaining a writ of assistance in state court.

The third paragraph of section 1.2 of the lease provides:

> No alteration of or improvement to the Building, the common areas, or the surrounding areas (including sidewalks, streets, and highways) by Landlord or others which may inconvenience Tenant's employees, agents, or patrons shall subject Landlord to any liability to Tenant, not shall Tenant be entitled to any abatement, reduction or diminution of rent, nor shall such alteration or improvement be deemed to constitute constructive or actual eviction. However, *Landlord shall make*

[5] In disputing Chase's proposed fact that it has a lease, the City responds that "Chase has no current leasehold estate. Any such estate was extinguished by either condemnation of the Property or acquisition of the Property by [Monona LLC] based on Chase's claim that [Monona LLC] is a governmental authority." (Def.'s Resp. Pl.'s Amend. Proposed Statement of Facts (dkt. #26) 5.)

> *every reasonable effort to protect the Tenant's right to peaceful possession and use of the leased premises.*

(*Id.* at 7 (emphasis added).) Given credible complaints that customers have been denied access to the branch because of Monona CDA's recent activities on the Property, it appears that plaintiff can prove Monona CDA, as its landlord, has not made "every reasonable effort" to ensure Chase's "peaceful possession and use" of the Property, although in fairness, the City represents that it is making efforts to do so.

This is not to hold that plaintiff *will* ultimately prevail on its breach of contract claim, but rather to find that it has some likelihood of doing so, particularly in light of the duty of good faith and fair dealing inherent in every Wisconsin contract. *Tilstra v. Bou-Matic, LLC*, 1 F. Supp. 3d 900, 910 (W.D. Wis. 2014) ("Wisconsin law recognizes that every contract imposes an obligation of good faith in its performance.").

II. Irreparable Harm & Inadequacy of Monetary Relief

Having determined that Chase has at least some likelihood of success on the merits of its breach of contract claim, the court must now consider whether there is a sufficient risk of irreparable harm to warrant a preliminary injunction. Chase alleges that its goodwill will suffer and that the harm to its business will be difficult to monetize. (Pl.'s Br. (dkt. #13) 20-21.) "Goodwill is an intangible asset that represents the ability of a company to generate earnings over and above the operating value of the company's other tangible and intangible assets. It often includes the company's name recognition, consumer brand loyalty, or special relationships with suppliers or customers." *In re Prince*, 85 F.3d 314, 322 (7th Cir. 1996). Injury to a business's goodwill "can constitute irreparable harm for which

a plaintiff has no adequate remedy at law." *Meridian Mut. Ins. Co. v. Meridian Ins. Grp., Inc.*, 128 F.3d 1111, 1120 (7th Cir. 1997) (citing *Gateway E. Ry. Co. v. Terminal R.R. Ass'n of St. Louis*, 35 F.3d 1134, 1140 (7th Cir. 1994)).

Each month, 600 existing customers visit the Chase branch bank at issue regarding their accounts, and the branch opens an average of 65 new accounts each month. (Def.'s Resp. Pl.'s Amend. Proposed Statement of Facts (dkt. #26) 39-40.) Chase handles 4,000 ATM transactions and 5,000 teller transactions each month. (*Id.* at 39.) In addition to banking, Chase customers visit the branch to access their Safe Deposit Boxes. (*See id.* at 39-40.) At minimum, interfering with Chase's ability to conduct its business and provide service to these customers would disrupt Chase's operations and would likely impact the branch's and, therefore, Chase's bottom line, although the court is convinced that with proper comparables, most of that loss is both quantifiable and compensable, especially with the more lenient standard for proving monetary damages once liability has been established. Still, the court also finds credible on the record before it that the abrupt closing of Chase's Monona branch location, with no warning or advance notice (at least from a customer's perspective) may negatively impact goodwill in ways that are more difficult to measure, much less monetize, including loss of customer long term loyalty. This is an injury that could be irreparable. In contrast, requiring the City to institute reasonable accommodations of Chase's business for the relatively brief period necessary to open a new branch would protect Chase's goodwill, and allow it a realistic opportunity to continue its local business.

III. Balance of Harms

The court next considers whether the likely irreparable harm to Chase is outweighed by harm to the City, if any. While the court is certainly willing to assume some harm to the City in delays and work-arounds of its construction plan, the City has offered no evidence of *any* real impact on the City, except the need to seek a writ of assistance from the state circuit court before it is entitled to full possession of the Property. This does not, however, entail anything more than what it has represented it was preparing to do without an injunction. Indeed, plaintiff is now asking for nothing more than a continuation of the status quo for a few more months while it completes the buildout of a new, comparable branch in the City of Monona.[6] In fact, the City will not be prevented from continuing its construction work, provided it takes reasonable steps to accommodate Chase's business in the interim. This should not unduly burden the City's construction.

In short, a limited injunction as specified below simply maintains the status quo -- preserving Chase's business operations and allowing the City's construction -- until either the City receives assistance from the state circuit court or the end of January 2018, by which time Chase should have relocated. When weighed against the likelihood that Chase may be irreparably harmed by the City's precipitous eviction in breach of contract, the balance of harms strongly supports the entry of a preliminary, 100-day injunction.

IV. Public Interest

Finally, the court considers the impact of a preliminary injunction on nonparties.

[6] To the extent that there are costs associated with a preliminary injunction wrongfully delaying Chase's eviction, the City can seek a bond to cover that impact.

Contrary to the City's assertion, the public interest does not weigh against the issuance of a preliminary injunction. While Monona residents are invested in the advancement of the Monona Riverfront Development Project, they are not harmed because the preliminary injunction does not cease work on the project. Even if they were, the City has failed to offer any evidence of the harm. Rather, as noted above, the preliminary injunction simply requires the construction to accommodate Chase's business in a reasonable fashion. Further, for those Monona residents and visitors who still bank at the Property, they are provided "reasonable signage," access ways that "are and remain safe for vehicular traffic," and parking. Additionally, Chase and the City will create "a channel of communication" to "address[] issues relating to the construction work," and they have agreed not to seek enforcement unless good faith efforts to resolve disagreements have failed, something that serves the larger public interests in dispute resolution and conserving judicial resources. Finally, the vindication of contractual rights is itself a public good.

Because Chase has established some likelihood of success on the merits of its contract claim, irreparable harm and the inadequacy of monetary relief, and because the public interest and balance of harms weigh in Chase's favor, the court will enter the preliminary injunction set forth below.[7]

ORDER

IT IS ORDERED that the court will GRANT IN PART AND DENY IN PART

[7] At the October 11 hearing, the court asked the parties to submit a proposed stipulation as to the form of a preliminary injunction. Since the parties have now stipulated to its form, the court adopts it, other than a few slight modifications of syntax for clarity, relying on its own reasoning as set forth above.

plaintiff's request for a preliminary injunction (dkt. #12) as set forth below:

1) During the period that this preliminary injunction is in place, the City, its agencies and their contractors will undertake all reasonable efforts to ensure safe and clear access via both entrances at the same time, as depicted on the attached map, to enable the plaintiff's customers to reach the premises and the plaintiff's drive-up banking facilities and the building entrance. If altering the routes from Bridge Road to the leased premises which were used before this action was filed, the defendant shall:

   a. Provide reasonable signage at the entrances on Bridge Road and through the altered access routes to enable customers of the plaintiff to readily access the leased premises.

   b. Monitor the altered access ways to verify that they are and remain safe for vehicular traffic.

2) The defendant shall maintain not less than twenty (20) parking spaces reasonably proximate to the leased premises for plaintiff's customers and at least five (5) additional spaces for plaintiff's employees and visitors; and shall provide clear signage designating such areas as parking available for customers of the plaintiff. The parking area so provided shall be kept clear of any unsafe conditions associated with defendant's construction activities. In selecting the parking spaces, the defendant shall not select spaces which, if occupied by parked cars, would block access to the drive-up banking facilities.

3) The plaintiff shall advise the defendant of its specific opening and closing procedures and other security procedures, including inspecting the exterior of the building, to prevent robbery and other access to the leased premises by persons who are a threat to people or their property. In managing the construction in the Common Areas, the defendant shall take into account the safety and security needs of the plaintiff and its customers, and the recommendations of law enforcement as regards the response to suspected criminal activity in the Common Areas or on the leased premises.

4) The defendant shall arrange for a channel of communication to drivers delivering equipment and materials to the construction site and shall direct that they are not to park in the access ways but are to deliver such equipment and materials directly to the construction staging areas. This channel of communication shall include a method whereby the defendant can effectuate a communication to all contractors, subcontractors and materialmen working on the construction project and be able to direct their conduct in a manner that will not violate Section 1.2 of the Lease Agreement.

5) Consistent with the covenant of good faith and fair dealing that is implied in the Lease Agreement, the court expects the parties to engage in the following conduct:

a. Establish a channel of communication between the parties addressing issues relating to the construction work in the Common Areas and the manner in which the terms of this Injunction are to be implemented.

b. The plaintiff shall provide the defendant with practical notice of problems to the parties designated by the defendant to receive such information. There may be more than one notice receiver identified by the defendant to receive notices dependent upon the nature of the information expected to be included in different types of notices.

c. Following notice to the defendant, the plaintiff shall provide the defendant a reasonable period of time to correct the problem described in the plaintiff's notice, so long as the required access and parking are being provided pursuant to the terms of this preliminary injunction.

The plaintiff shall not seek enforcement of this injunction until the plaintiff and the defendant, and their respective counsel, have made good faith efforts to resolve any alleged violations of this injunction.

d. Unless extended by court order, this preliminary injunction shall expire on January 31, 2018, unless:

    i. A state court issues a writ of assistance ordering an earlier eviction of the plaintiff from the leased premises, in which case defendant may petition for relief from the injunction.

ii. Defendant materially hinders plaintiff's move to its new branch location, in which case plaintiff may seek an extension of the injunction.

iii. Other just cause is shown.

Entered this 19th day of October, 2017.

BY THE COURT:

/s/

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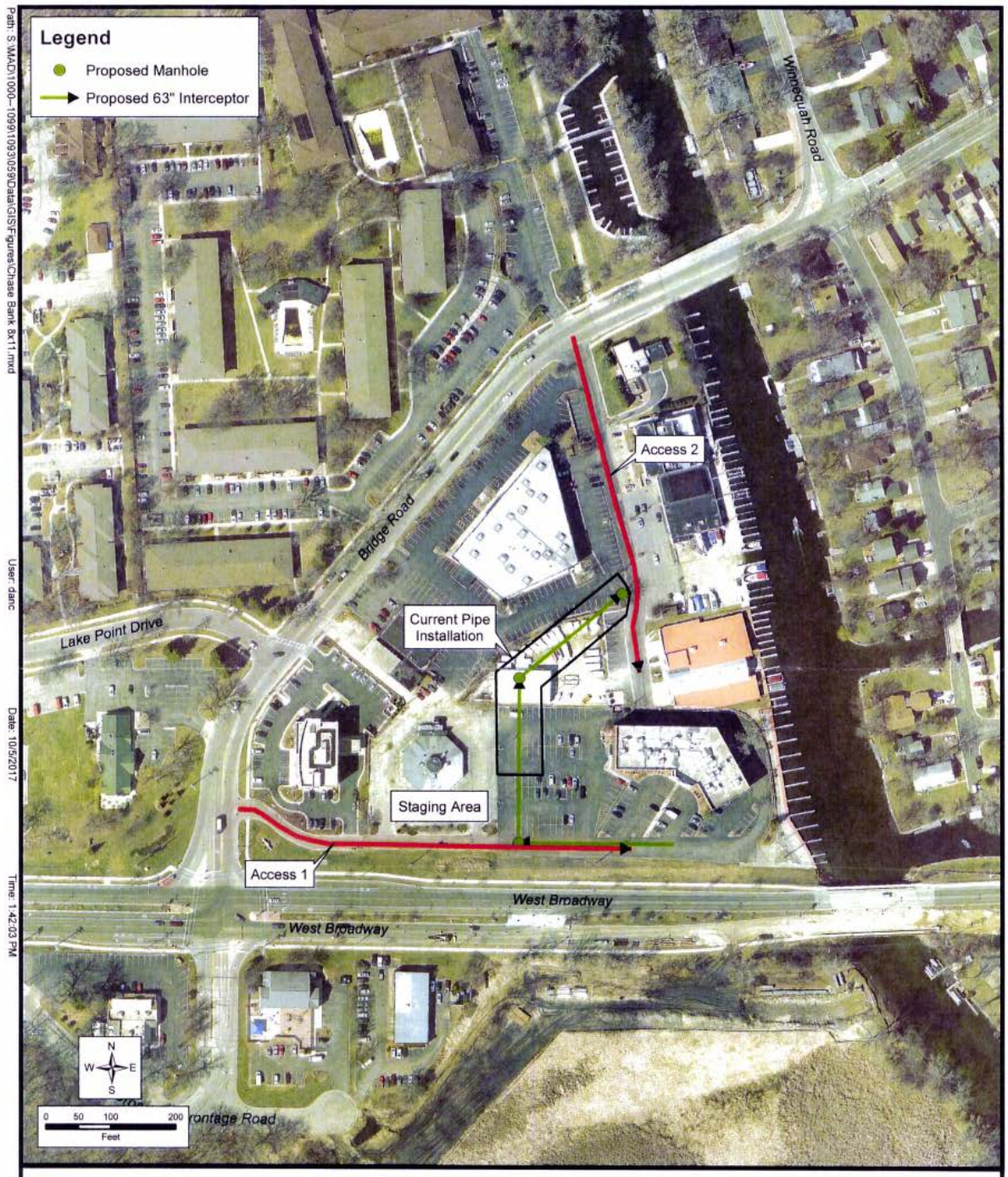
WILLIAM M. CONLEY
District Judge



CHASE BANK ACCESS
SANITARY SEWER RELOCATION

CITY OF MONONA
DANE COUNTY, WISCONSIN