

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

ONE THOUSAND FRIENDS OF IOWA,)
et al.,)

Plaintiffs,)

vs.)

NORMAN Y. MINETA, *et al.*,)

Defendants.)

CIVIL NO. 4-02-CV-10168

ORDER

The Court has before it the combined plaintiffs' motion for temporary restraining order, filed May 28, 2002. The federal defendants filed a resistance on May 31, 2002, with the state defendants and the City of West Des Moines filing their respective resistances on June 3, 2002.¹ Plaintiffs filed a reply on June 5, 2002. The motion is fully submitted.²

I. BACKGROUND AND GOVERNING LAW

This is the second of two actions filed by plaintiffs to halt federal, state and local efforts to improve the roadways and infrastructure supporting the Jordan Creek Town Center, a super-regional shopping center proposed to be developed in West Des Moines. Among the roadway improvements

¹ West Des Moines filed a 58-page memorandum in support of its combined resistance to plaintiff's motion for preliminary injunction--a copy of which counsel has had since May 16, 2002-- and plaintiff's motion for temporary restraining order. The City's memorandum not only violated the Local Rules, due to the lack of a corresponding motion to exceed the page limitation, but also placed a substantial burden on the Court's time. Because the Court has committed to issuing a ruling this week, the Court will not strike the memorandum, but cautions counsel that the Local Rules will be strictly enforced with regard to all future pleadings.

² Although the motion is styled as a temporary restraining order, all defendants were served with copies of the motion and corresponding documents, and have filed resistances thereto. During a telephonic hearing held with the Court on May 31, 2002, the parties agreed the matter could be fully submitted on the record, and that an evidentiary hearing was not needed prior to certification of the administrative record during the week of June 17, 2002.

include the construction or modification of two major interchanges on Interstate 80 ("I-80") and Interstate 35 ("I-35") in West Des Moines, Iowa. Plaintiffs contend that such improvements are being conducted in violation of the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321 *et seq.*, and the Fourteenth Amendment to the United States Constitution.

A. NEPA

In order to fully understand the basis for plaintiff's lawsuit, it is important at this juncture to briefly outline the relevant portions of NEPA and its supporting regulations. NEPA provides that "all agencies of the Federal Government shall . . . include in . . . [all] major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on:

- (i) the environmental impact of the proposed action,
- (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
- (iii) alternatives to the proposed action,
- (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and
- (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented."

42 U.S.C. § 4332(C). Generally, the first step in determining whether a proposed action is likely to significantly affect the human environment is to prepare a document known as an environmental assessment ("EA"). 40 C.F.R. § 1501.4.³ "Environmental Assessment" is defined in the regulations as follows:

- (A) Means a *concise* public document for which a Federal agency is responsible that serves to:
 - (1) Briefly provide sufficient evidence and analysis for determining whether to prepare an environmental impact statement or a finding of no significant impact.
 - (2) Aid an agency's compliance with the Act when no environmental impact statement is necessary.
 - (3) Facilitate preparation of a statement when one is necessary.
- (b) Shall include brief discussions of the need for the proposal, of alternatives as required by sec. 102(2)(E), of the environmental impacts of the proposed action and alternatives, and a listing of agencies and persons consulted.

³ If the proposed action is one that either normally requires an environmental impact statement ("EIS") or one that clearly does *not* require such a statement, no EA need be prepared. 40 C.F.R. § 1501.4. It is safe to assume most roadway projects involve a myriad of improvements, however, and therefore require completion of an EA.

40 C.F.R. § 1508.9.

Under the regulations, the agency may designate the applicant for public action, which in this case is West Des Moines, to prepare the EA. *Id.* § 1506.5(b). In such cases, however, the agency "must independently evaluate the information submitted and shall be responsible for its accuracy." *Id.* § 1506.5(a)-(b). The agency must also make its own evaluation of the environmental issues "and take responsibility for the scope and content of the environmental assessment." *Id.* § 1506.5(b).

Once the EA is complete, the agency determines whether an EIS is required. *Id.* § 1501.4. If the agency reviews the EA and determines that an EIS is *not* required, however, it may issue a finding of no significant impact ("FONSI"). *Id.* Under the Federal Highway Administration's ("FHWA") own NEPA regulations, the agency must do more than simply agree with the applicant's FONSI, but must make a separate, written FONSI explaining its reasoning and incorporating applicable documents. *See* 23 C.F.R. § 771.121(a).

The regulations also require the agency to make "diligent efforts" to involve the public in the preparation and implementation of NEPA procedures. *See generally* 40 C.F.R. § 1506.6. For example, the regulations provide that the agency *shall* "provide public notice of NEPA-related hearings, public-meetings, and the availability of environmental documents." 40 C.F.R. § 1506.6. Agencies must also "hold or sponsor public hearings or public meetings whenever appropriate or in accordance with statutory requirements applicable to the agency," and "solicit appropriate information from the public." *Id.*

B. Relevant Facts

Although defendants claim the proposed improvements were planned irrespective of the Jordan Creek Town Center, no one disputes the proposed improvements were *hastened* by the shopping mall development. It is also undisputed that the development of the shopping center is contingent upon the proposed interchange and related roadway improvements. What is disputed, however, is whether, as plaintiffs contend, defendants colluded to thwart a meaningful environmental review process.

The following facts appear relevant with regard to plaintiffs' claims. On March 6, 2000, the West Des Moines City Council approved a Development Agreement with General Growth, the developer of the Jordan Creek Town Center, which made the construction of the Town Center contingent on the proposed enhancements. Subsequently, during a meeting held January 11, 2001, defendants and their consultants agreed on the dates an EA would be drafted and released, the date on which it would be approved, the date for a hearing, and the date on which a FONSI would be issued.

The FHWA then directed West Des Moines, as applicant for the proposed improvements, to prepare a distinct EA for each interchange, rather than a more in-depth EIS covering the impact of the combined improvements. The FHWA, with input from West Des Moines and the Iowa Department of Transportation ("IDOT"), decided not to require a distinct EA covering a proposed interchange at 105th Street and I-80, or to reference the interchange in the other two preliminary EAs. On October 5, 2001, FHWA and IDOT released a single, final EA for the 74th Street and Civic Parkway interchanges.

On November 17, 2001, West Des Moines hosted an open house-style public meeting, with key participants from FHWA and IDOT on hand to answer design and environmental questions. Employees of the firm that sub-contracted with West Des Moines to complete the EA also were present at the meeting. Meeting attendees were given the opportunity to discuss their concerns in one-on-one conversations with program participants, or to submit written or tape recorded questions or comments. On March 1, 2002, the FHWA issued its FONSI, adopting, in substantial part, the EA prepared by West Des Moines.

Plaintiffs now contend that the final EA fails to comply with NEPA, in that it "contains no analysis of the cumulative and secondary impacts of the proposed action, no analysis of reasonable alternatives to the proposed action, and no analysis of the impact of the proposed action on minority and low-income communities in this region."⁴ Complaint at 5. In particular, plaintiffs contend the EA

⁴ Plaintiff King Irving Park Neighborhood Association represents minority and low-income individuals who allege they will be adversely affected by the proposed improvements.

unlawfully "segmented" the proposed action by including an analysis of the environmental effects of improvements to only two of the three interchanges involved. *Id.* at 5-6.

II. DISCUSSION

A. Preliminary Matters

1. Plaintiffs' Allegations of Delay and Premature Ruling by Court

Prior to evaluating the substantive issues involved, the Court feels compelled to address several issues raised by plaintiffs in their June 5, 2002 responsive memorandum. First, plaintiffs accuse the Court of issuing a premature ruling on their request for TRO prior to receiving evidence and/or briefings on the pertinent issues. Plaintiffs' Response to Defendants' Briefs at 4-5. Plaintiffs have misinterpreted the Court's statements. Although the Court admittedly told plaintiffs' counsel during two separate telephone conference calls held shortly after plaintiffs filed their motion for TRO that it would not immediately halt construction or scheduled bridge closures, this statement was not an "oral denial" of plaintiffs' motion. Rather, the Court simply emphasized it would not issue such an extraordinary injunction based strictly on plaintiffs' motion papers, without further evidentiary support from plaintiffs and/or responses from defendants. The Court then offered to schedule an evidentiary hearing on the motion for TRO itself, which plaintiffs declined.⁵

Secondly, plaintiffs indirectly accuse the Court of contributing to the delays in this case, repeatedly stating that plaintiffs' first Complaint was filed more than five months ago, and included within it a request for injunctive relief. The Court will not accept responsibility for any perceived delays in either case. The Court is not obliged to remain abreast of relevant agency conduct and construction schedules. If plaintiffs had filed a request for TRO in conjunction with their initial Complaint, or even requested an immediate hearing at the time of filing their motion for preliminary injunction on May 15,

⁵ An evidentiary hearing on plaintiffs' motion for preliminary injunction currently is scheduled for June 24, 2002. This hearing date was selected by Chief Magistrate Judge Ross Walters during a status conference with counsel for all parties on May 24, 2002. Defense counsel has assured the Court and plaintiffs' counsel that the administrative record will be complete by that date.

2002, the urgency with which the present proceedings have been conducted may have been avoided.

Likewise, plaintiffs' suggestion that Chief Magistrate Judge Ross Walters should have sua sponte directed defendants to expedite the completion of the administrative record also is unfounded. Plaintiffs knew the nature of their causes of action, as well as the evidentiary material needed for judicial review, even before they filed their initial complaint in December 2001. If they were concerned the record would not be completed on a timely basis, they should have taken steps to expedite its completion at an earlier date.

2. Plaintiffs' Request for Judicial Recusal

Lastly, plaintiffs request that the Court consider whether it should recuse itself from consideration of this matter based on its residency in West Des Moines, and its frequent use of facilities which abut 74th Street. Plaintiffs contend these facts may render the Court a member of plaintiffs' proposed class of persons "who live on or proximate to 74th Street and Civic Parkway between I-80 and 335th Street and regularly use the interchange at I-80 and 74th Street and the roadways impacted by that interchange." Complaint at ¶ 31.

Pursuant to 28 U.S.C. § 455, a federal judge must disqualify himself or herself from hearing a case when a "reasonable neutral observer with knowledge of all the facts of record would question the judge's impartiality." *See also Little Rock School Dist. v. Arkansas State Bd. of Educ.*, 902 F.2d 1289, 1290 (8th Cir. 1990). The Court admittedly is a West Des Moines resident, and as such, may indirectly benefit from the increased tax revenues generated by the shopping center. The Court assures the parties, however, that such benefits are speculative at best, and that it remains entirely neutral with regard to the overall worthiness of the development.

As to the Court's use of the I-80/74th Street interchange, the Court notes that any disruption in the Court's use of nearby facilities is both minimal and temporary. Although plaintiffs may be correct that a possible alternative to the planned configuration of the intersection may have taken land belonging to the country club of which the Court is a member, the Court again assures the parties it has no preconceived opinions regarding the propriety of any of the various alternatives. Applying the standard

set forth in 28 U.S.C. § 455 and *Little Rock School District* to the facts of this case, the Court finds no basis for recusal at this juncture.

B. Law Governing Preliminary Injunctive Relief

That having been said, the Court will now consider the substantive issues underlying plaintiffs' motion. In determining whether to grant preliminary injunctive relief, this Court must consider the following factors: 1) plaintiffs' probability of success on the merits; 2) the threat of irreparable harm to plaintiffs; 3) the balance between this harm and potential harm to others if relief is granted; and 4) whether an injunction serves the public interest. *Sanborn Mfg. Co., Inc. v. Campbell Hausfeld/Scott Fetzer Co.*, 997 F.2d 484, 485 (8th Cir. 1993) (citing *Dataphase Sys., Inc. v. C L Sys., Inc.*, 640 F.2d 109, 114 (8th Cir. 1981)). The same factors are used to evaluate a request for a temporary restraining order. *See S.B. McLaughlin & Co. v. Tudor Oaks Condominium Project*, 877 F.2d 707, 708 (8th Cir. 1989); *Sports Design & Development, Inc. v. Schoneboom*, 871 F. Supp. 1158, 1162-65 (N.D. Iowa 1995).

C. Probability of Success on the Merits

1. Count I: Alleged Violation of NEPA and the APA

Count I alleges, among other things, that the EA prepared by West Des Moines at the direction of the FHWA fails to satisfy NEPA statutory and regulatory requirements. Complaint at ¶ 76. Accordingly, plaintiffs contend the FHWA's reliance on the EA to issue its FONSI was arbitrary, capricious and not in accordance with law, in violation of the Administrative Procedures Act ("APA"), 5 U.S.C. § 701 *et seq.* *See id.* at ¶ 79. Because the FHWA's issuance of the FONSI constitutes a final agency action, the Court finds it has subject matter jurisdiction over Count I of plaintiffs' Complaint pursuant to 5 U.S.C. § 702.

The APA provides in relevant part that a reviewing court shall "hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2). Pursuant to this standard, an agency action will not be found arbitrary and capricious unless "the agency relied on factors which Congress

has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Central S.D. Coop. Grazing Dist. v. Secretary of U.S.D.A.*, 266 F.3d 889, 894 (8th Cir. 2001).

"APA review of agency action is normally confined to the agency's administrative record." *Newton Cty. Wildlife Ass'n v. Rogers*, 141 F.3d 803, 807 (8th Cir. 1998). Although the administrative record in the present case has not yet been completed, both plaintiffs and defendants have prepared a voluminous record with which the Court may preliminarily review the agency's action. In fairness to plaintiffs, however, the Court will deny defendants' motion to strike various affidavits submitted by plaintiffs as outside the scope of the administrative record. Plaintiffs can hardly be expected to confine their argument at this juncture to the record when the record is unavailable.

a. Involvement by City of West Des Moines

The majority of plaintiffs' arguments in support of Count I appear to turn on West Des Moines' role in preparing the EA and submitting a proposed FONSI for FHWA approval. The Court has reviewed the various allegations made by plaintiffs, as well as relevant evidentiary material, and concludes the City's role in the overall NEPA process does not support a finding that the FHWA's conduct was in any way arbitrary and capricious.

As set forth previously, the general NEPA regulations expressly authorize the agency to designate preparation of an EA to the applicant for public action. *See* 40 C.F.R. § 1506.5(b). The FHWA's own NEPA regulations also *require* that the FHWA work closely with all interested parties and the public from the early stages of a project to ensure all necessary information is gathered. 23 C.F.R. § 771.111 ("Early coordination with appropriate agencies and the public aids in determining the type of environmental document an action requires, the scope of the document, the level of analysis, and related environmental requirements. This involves the exchange of information *from the inception of a proposal for action* to preparation of the environmental document.") (emphasis added).

The fact the City was an admitted advocate of the project does not establish that it failed to

complete a thorough investigation in conjunction with the EA. Most importantly, there is no evidence in the record the FHWA, which is obligated under the regulations to conduct an independent assessment prior to adopting and/or issuing a FONSI, had any preconceived opinion regarding the project. *See* 40 C.F.R. § 1506.5(a)-(b) (agency "must independently evaluate the information submitted and shall be responsible for its accuracy").

Similarly, the Court is not troubled by the allegation that, during a January 11, 2001 meeting, defendants and their consultants may have agreed on the dates an EA would be drafted and released, the date on which it would be approved, the date for a hearing, and the date on which a finding of no significant impact ("FONSI") would be issued. The fact defendants attempted to prepare a preliminary schedule based on the assumption no EIS would be needed does not foreclose their ability to revise the schedule in the event that the NEPA investigation uncovered the potential for significant environmental impact.⁶

b. Division of Roadway Improvements

Plaintiffs also allege defendants erroneously segmented the project into two EAs, and artificially limited the study area.

Relevant FHWA regulations provide that:

In order to ensure meaningful evaluation of alternatives and to avoid commitments to transportation improvements before they are fully evaluated, the action evaluated in each EIS or finding of no significant impact (FONSI) shall:

- (1) Connect logical termini and be of sufficient length to address environmental matters on a broad scope;
- (2) Have independent utility or independent significance, *i.e.*, be usable and be a reasonable expenditure even if no additional transportation improvements in the area are made; and
- (3) Not restrict consideration of alternatives for other reasonably foreseeable transportation improvements.

⁶ Plaintiffs also allege that an unidentified representative of the City or the mall developer complained that preparation of an EIS would "kill the Town Center project." Complaint at ¶ 47. Again, however, absent evidence the FHWA or its agents acted in an arbitrary or capricious manner with regard to the NEPA process, a stated concern regarding the time needed to complete an EIS does not evidence a likelihood plaintiffs will succeed on the merits.

23 C.F.R. § 771.111(f).

In the present case, the FHWA explained its decision to eliminate the 105th Street interchange in the FONSI as follows: "The 105th Street Interchange was not included in the 74th St./George Mills EA because the timing of the interchange is beyond the implementation period of the 74th St./George Mills projects. This fact, combined with the rationale that 105th Street has independent utility, explains its absence from the 74th St./George Mills EA." *See* FONSI, Section 2, Part A; Interest Group Comments p. 2-3, Exh. B. to Plaintiffs' App. The Court finds this explanation is both consistent with the regulations and reasonable under the circumstances. Absent specific evidence the FHWA's conduct in this regard was somehow arbitrary and capricious, the Court finds plaintiffs' argument does little to advance their claims under Count 1.

c. FHWA's Alleged Failure to Consider Environmental Justice

Plaintiffs also contend the EA, and presumably, the FHWA in considering the EA, failed to "examine the real world consequences of the project on those least able to protect their interests." Memorandum Brief in Support of Plaintiffs' Motion for Preliminary Injunction and Stay Pending Judicial Review at 18. Specifically, plaintiffs contend the FHWA has failed to adequately consider whether protected individuals, *i.e.*, "poor, minority, elderly, disadvantaged (or those in no car households)" somehow have been discriminated against through the resulting denial of transportation projects proposed throughout the relevant planning area. *Id.*

Plaintiffs' argument is based on language found in an Executive Order issued in February 1994 by then President Clinton. *See* 59 Fed. Reg. 7629 (Feb. 11, 1994). This Order stated that the FHWA should attempt to achieve "environmental justice" whenever possible when carrying out its various transportation projects. *Id.* at 7629.

As noted by the federal defendants in their resistance memorandum, however, the Order also expressly states that it "shall not be construed to create any right to judicial review involving compliance or noncompliance of the United States, its agencies, its officers, or any other person with this order." *Id.* at 7633. Accordingly, although ensuring protected individuals are not deprived of needed

transportation projects at the expense of others in more affluent areas is both a recognized and worthy goal for all FHWA projects, the failure to consider "environmental justice" in and of itself cannot support a finding the FHWA acted in an arbitrary and capricious manner. *See, e.g., Sur Contra La Contaminacion v. E.P.A.*, 202 F.3d 443, 449 (1st Cir. 2000) (agency's alleged noncompliance with Executive Order on Environmental Justice not appropriate for judicial review).

d. November 20, 2001 Hearing

Plaintiffs also contend the November 20, 2001 hearing conducted on the proposed Jordan Creek Town Center and related roadway projects was a "sham." In particular, plaintiff Wilbur Butch Devine complained about the format and configuration of the meeting, and what he perceived to be a lack of organization. *See* Affidavit of Wilbur Butch Devine, Jr., at 2, Exh. A-2 to Plaintiffs' App. of Documents in Support of Motion for Injunction and Stay Pending Judicial Review. He also argued that the written responses to three questions he submitted during the meeting were not received until more than five months following the meeting, after completion of the EA. *Id.* at 3.

Although the regulations require the agency to "hold or sponsor public hearings or public meetings whenever appropriate," *see* 40 C.F.R. § 1506.6, the regulations do not dictate a format for conducting such meetings. It appears from the record that the hearing was conducted upon adequate notice to the public, with all necessary agency and project personnel in attendance. A particular individual's dissatisfaction with the organization of the public meeting does not support a finding that the FHWA acted in an arbitrary or capricious manner.

e. Alleged Failure to Consider Alternatives

Lastly, plaintiffs contend the EA is inadequate because it failed to consider certain alternatives, such as a flyover or light rail. It is plaintiffs' burden, however, to show that their preferred alternatives are "within the range of alternatives that reasonably needed to be considered." *Missouri Min., Inc. v. I.C.C.*, 33 F.3d 980, 984 (8th Cir. 1994). Furthermore, the fact the EA found the proposed construction would not significantly impact the environment lessened the range of alternatives the FHWA needed to consider. *Id.* Plaintiffs' argument regarding the alleged failure to consider specific

alternatives is, therefore, without merit.

2. Count II

Count II of plaintiffs' complaint alleges defendants' conduct violated their property rights and due process rights under the Fourteenth Amendment. Complaint at ¶ 85. Plaintiffs do not develop their due process argument in their memorandum, other than to suggest the November 21, 2001 public hearing was inadequate under the statute. As discussed above, neither the statute nor the regulations dictate a particular format through which the public hearing should be conducted. *See* 40 C.F.R. § 1506.6. Plaintiffs have not argued that notice of the hearing was inadequate, nor that they were denied access to key agency officials. It also appears meeting sponsors devised a mechanism through which interested parties could voice concerns and ask questions. *See generally* Affidavit of Wilbur Butch Devine, Jr., Exh. A-2 to Plaintiffs' App. In short, plaintiffs have failed to point to a deficiency or deficiencies in the November 21, 2001 hearing that would render the hearing constitutionally inadequate.

As for plaintiffs' argument their property values will suffer as a result of environmental degradation,⁷ the Court notes such a decrease is speculative at best, and not yet ripe for review. *See American Canoe Ass'n Inc. v. E.P.A.*, 289 F.3d 589, No. 01-2905, 2002 WL 850819 at * __ (8th Cir. May 6, 2002). Although plaintiffs *may* see decreased property values due to their proximity to the mall itself, the fact the EA concluded there was no significant environmental impact suggests the possibility of a reduction in value caused by *environmental concerns* is relatively low.

3. Conclusion Regarding Probability of Success on the Merits

In summary, no one disputes West Des Moines and the Jordan Creek Town Center developers believed time was of the essence in completing the NEPA process and worked to expedite its completion. The ultimate issues facing this Court, however, do not turn on the possible motivation of the City or project developers to short-cut the investigatory process. Rather, this Court ultimately must

⁷ Plaintiffs' argument that their property values will suffer from increased traffic in the area is not directly relevant to whether the EA adequately addressed *environmental concerns*.

determine whether the FHWA's oversight of the City's work was equally biased to the extent its issuance of the FONSI was arbitrary and capricious and/or plaintiffs were denied due process. There is no evidence to support such either finding at this juncture. Accordingly, the Court finds plaintiffs are not likely to succeed on the merits of their Complaint.

D. Threat of Irreparable Harm to Plaintiffs

Although the Court's finding that plaintiffs are unlikely to succeed on the merits carries considerable weight, *S & M Constructors, Inc. v. Foley Co.*, 959 F.2d 97, 98 (8th Cir. 1992), this finding does not eliminate the need to at least consider the remaining three *Dataphase* factors. *Calvin Klein Cosmetics Corp. v. Lenox Lab., Inc.*, 815 F.2d 500, 503 (8th Cir. 1987). The first of the three remaining factors is whether a denial of preliminary injunctive relief will cause irreparable harm to any of the individual or organizational plaintiffs.

In their memorandum in support of their motion for preliminary injunction, plaintiffs concede that the irreparable harm contemplated by this *Dataphase* factor cannot be speculative, but must be certain and imminent. *See. e.g., Local Union No. 884, United Rubber, Cork, Linoleum & Plastic Workers v. Bridgestone/Firestone, Inc.*, 61 F.3d 1347, 1355 (8th Cir. 1995) ("The possible harm identified is wholly speculative and because it is, cannot be called irreparable harm."); *Woida v. United States*, 446 F. Supp. 1377, 1389 (D. Minn. 1978) (irreparable harm cannot be speculative). Plaintiffs contend, however, that the "degradation of the environment and open space," traffic congestion, public safety threat and air pollution caused by the proposed projects is *not* speculative.

This Court disagrees. On the current state of the record, plaintiffs have failed to show that improvements to the interchanges themselves will cause them more than diminimus harm. Any increase in traffic congestion or significant decrease in grassland areas is more closely related to the development of the Jordan Creek Town Center than to the roadway enhancements. The Court therefore finds this factor goes against granting preliminary relief.

E. Balance of Harms

The Court must also consider the balance between this harm and potential harm to others if

relief is granted. *Sanborn Mfg. Co.*, 997 F.2d at 485. As argued in the City's memorandum, the roadway improvements at issue were contemplated long before the proposed shopping center, and are needed to help resolve *current* traffic congestion in the area. See EA at 1-3 to 1-4, Exh. D to Plaintiffs' App. The rapid population growth in West Des Moines "has resulted in widespread congestion, particularly on the local roadway network, and at the existing 74th Street interchange. This existing congestion problem will worsen if no major improvements are forthcoming." *Id.* at 1-4.

Furthermore, congestion on I-235 and local roadways attributed to inadequate access to I-35 in the southwest region of West Des Moines also will decrease by the creation of a new interchange at Civic Parkway. *Id.* at 1-8. Not only West Des Moines residents, but also other users of I-235 who join West Des Moines residents during peak travel times will suffer if the Court chooses to grant plaintiffs' restraining order.

In contrast, the potential harms facing plaintiffs are speculative at best, and may result regardless of whether the roadway improvements and/or shopping center are completed. Although plaintiffs assert that alternatives to the chosen improvements are available, they fail to offer any evidence that the alternatives are in fact less intrusive. The Court therefore concludes this factor supports the issuance of temporary relief.

F. Whether Injunction Serves the Public Interest

Finally, the Court must consider whether the issuance of a temporary restraining order serves the public interest. *Sanborn Mfg. Co.*, 997 F.2d at 485. As set forth above, West Des Moines' existing and projected traffic problems at the interchanges at issue are well-documented. According to estimates prepared by the Director of Public Works for the City of West Des Moines, granting plaintiffs' proposed injunction could cost the City approximately \$100,000 in direct costs per day that the injunction is in force. See Affidavit of Larry A. Read ("Read Aff.") at 4-5, Exh. C to West Des Moines' Exhibits in Support of Resistance to Plaintiffs' Motion for a Temporary Restraining Order and/or a Preliminary Injunction. The City and its residents may also be responsible for the contractors' lost opportunity costs, as well as increased costs of commuting along alternate routes pending delayed

reconstruction of the bridges.

The Iowa Department of Transportation ("IDOT"), and Iowa taxpayers, also will suffer increased costs due to delays in its portion of the project, as well as indirect costs caused by delays in other roadway projects that are on hold pending completion of the Civic Parkway and 74th Street interchanges. *See generally* Aff. of Scott Dockstader ("Dockstader Aff."), submitted in conjunction with State Defendants' Resistance to Plaintiffs' Motion for Preliminary Injunction and Temporary Restraining Order. In fact, even assuming the Court had considered plaintiffs' motion before the City entered into construction contracts and/or actual construction commenced, the existing traffic congestion near the interchanges placed an immeasurable strain not only on area residents, but on emergency service personnel as well. *See* Dockstader Aff. at 3-4; Read Aff. at 7, and accompanying video exhibit. Lacking actual proof that significant environmental concerns will result from the roadway improvements, the Court finds a halt in construction at this juncture does not serve the public interest.

III. CONCLUSION

For the reasons outlined above, all four *Dataphase* factors weigh against the granting of temporary, preliminary relief. Plaintiffs' motion for a temporary restraining order and stay pending review is denied. Defendant City of West Des Moines' motion to strike affidavits is also denied, with the understanding it may be renewed prior to this Court's consideration of the motion for preliminary injunction. The parties are directed to continue with preparations for the June 24, 2002 evidentiary hearing as outlined in Judge Walters' May 24, 2002 Order.

IT IS ORDERED.

Dated this __ day of June, 2002.

RONALD E. LONGSTAFF, CHIEF JUDGE
UNITED STATES DISTRICT COURT