IN THE IOWA DISTRICT COURT IN AND FOR CLAY COUNTY

NAVIGATOR HEARTLAND GREENWAY, LLC Plaintiff, vs. MARTIN PAUL KOENIG, Defendant.	NO. EQCV034863 TRIAL RULING ON DEFENDANT'S COUNTERCLAIM RE: CONSTITUTIONALITY OF IOWA CODE §479B.15

"*Freedom and property rights are inseparable, you cannot have one without the other*."[1]

- George Washington

BACKGROUND

This action commenced upon the filing of a Petition by Plaintiff, Navigator Heartland Greenway, LLC, ("Navigator") who is seeking injunctive relief to enter onto certain land in Clay County owned by Defendant, Martin Koenig ("Koenig") for the purpose of performing land surveys. Navigator contends that entry onto Defendant's land is necessary to conduct land survey operations related to the development of a proposed underground carbon dioxide pipeline. Further, Navigator, a pipeline company for purposes of Iowa Code Chapter 479B, contends that Iowa Code section 479B.15 gives it the authority to enter onto Koenig's land for the purpose of conducting certain land survey operations without his consent or permission. In response to the Petition,

[1] George Washington, as quoted in Page C. Dringman, Comment, Regulatory Takings: The Search for a Definitive Standard, 55 MONT.L.REV. at 245 (1994).

Koenig initiated a counterclaim, asserting that Iowa Code section 479B.15 violates the Iowa Constitution. The Court previously granted Navigator's motion for summary judgment as it relates to Navigator's compliance with Iowa Code Chapter 479B, but did not at that time enter an order granting Navigator's requested injunction so as to address the constitutionality of § 479B.15 given some very recent U.S. Supreme Court precedent.

On April 19, 2023, Defendant's counterclaim, asserting that Iowa Code section 479B.15 is unconstitutional, came before the Court for contested trial. Attorney Brian Rickert appeared on behalf of Plaintiff, Navigator Heartland Greenway, LLC. Defendant Martin Koenig appeared personally and through Attorney Brian Jorde. Additionally present was Sarah Dempsey, appearing as a representative of Navigator Heartland. Trial consisted of the presentation of evidence and witness testimony. Based on the pleadings, evidence, and argument presented to the Court it now finds as follows.

FINDINGS OF FACT

During trial, the Court heard testimony from Ann Marie Welshans, who is the Director of Right of Way for Navigator. She testified as to her familiarity with Navigator's standard practice and the scope of intrusion for the surveys which Navigator seeks to perform. Ms. Welshans identified the four types of surveys typically performed on each affected property; these include a civil survey, a biological/environmental survey, a cultural survey, and a geotechnical survey. Each of the four surveys are completed at separate times, thus at a minimum, surveyors would expect to enter onto the private land on at least four separate occasions. She additionally testified that Navigator typically hires third parties to perform each of the surveys. She conceded that her lay understanding of the Iowa Code §479B.15 does not limit the duration or number of times surveys may occur so long as they are confined to surveying purpose for the proposed pipeline path.

Ms. Welshans' testimony indicated that the civil survey is generally short in length, averaging approximately 30 minutes. The civil survey involves a team of two surveyors who walk around the property and note the property boundaries, the location of the proposed pipeline, and any visible impediments, such as buildings and utility lines, which may impact the route of the proposed pipeline. The Court heard testimony from Ms. Welshans about the environmental/biological survey. Like the civil survey, the biological survey is done on foot by a two-person contracted crew whereby they look in the areas in which an easement is to be sought. The crew looks at water crossings, habitat, and notes the presence of any endangered species. Ms. Welshans testified that the biological survey can involve a shovel-test or soil probe; but otherwise, involves only visual surveying. For a property the size Koenig's, Ms. Welshans testified that the biological survey is expected to take approximately one (1) hour to complete.

Ms. Welshans then testified concerning a cultural survey. The cultural survey is estimated to take between two and three hours, and involves a crew digging a 2x2x2 size hole in the land, whereby the crew will look for historic and prehistoric artifacts. Ms. Welshans testified however that the length of time needed to complete the survey could take longer if such artifacts are found. If an artifact is found, a more expansive survey could be necessitated. Lastly, Ms. Welshans testified about the geotechnical survey. This survey is the most intrusive survey of the four. This survey takes approximately eight (8) hours to complete and involves a team of between three and six people. During a geotechnical survey, surveyors use a truck containing a mounted drill to probe holes between two (2) and four (4) inches wide and 20 to 200 feet in depth. Ms. Welshans further indicated that after drilling, the holes are then filled-in with soil and bentonite.

The Court heard testimony from Martin Koenig, who testified as to his ownership of certain land in Clay County and his concerns about his right to exclude under Iowa Code section 479B.15.

At the conclusion of evidence, both parties raised motions for directed verdicts. The Court reserved ruling on the motions and took the matter under advisement. After reviewing the pleadings contained in the Court file, considering the parties' evidence, arguments, written summations, and reviewing the applicable law, the Court DENIES the parties' respective Motions for Directed Verdicts and enters the following ruling on Defendant's counterclaim.

STANDARD OF REVIEW

A constitutional challenge can be either facial or as-applied. *Bonilla v. Iowa Board of Parole*, 930 N.W.2d 751, 764 (Iowa 2019). "By its nature, a facial challenge asserts that the statute is void for every purpose and cannot be constitutionally applied to any set of facts." *F.K. v. Iowa Dist. Ct. For Polk Cnty.*, 630 N.W.2d 801, 805 (Iowa 2001). A facial challenge to a statute is difficult to mount successfully as the challenger is required to demonstrate that the statute is unconstitutional in "all its applications." *Bonilla*, 930 N.W.2d at 766 (quoting *Honomichi v. Valley View Swine, LLC*, 914 N.W.2d 223, 231 (Iowa 2018).

Statutes are presumed to be constitutional, and challengers face "the heavy burden of rebutting that presumption." *Santi v. Santi*, 633 N.W.2d 312,316 (Iowa 2001). A party challenging a statute as facially unconstitutional may prevail '"only upon proof that the act clearly infringes constitutional rights and then only if every reasonable basis for support is negated."' *F.K.*, 630 N.W.2d at 805-806 (quoting *Seeman v. Iowa Dep't of Human Servs.*, 604 N.W.2d 53,60 (Iowa 1999). To be successful on a facial attack on a statute, the challenger must show that the statute is '"totally invalid and therefore, 'incapable of any valid application'" *Santi*, 633 N.W.2d at 316 (quoting *State v. Brumage*, 435 N.W.2d 337, 342 (Iowa 1989)). Challengers must prove the unconstitutionality beyond a reasonable doubt, and must "refute every reasonable basis upon

which the statute could be found to be constitutional." *State v. Hess*, 983 N.W.2d 279, 284 (Iowa 2022) (quoting *State v. Aschbrenner*, 926 N.W.2d 240, 246 (Iowa 2019). "[I]f a statute is susceptible to more than one construction, one of which is constitutional and the other not, we are obliged to adopt the construction which will uphold it." *Santi*, 633 N.W.2d at 316, (citing *Iowa City v. Nolan*, 239 N.W.2d 102, 103 (Iowa 1976)).

STATUTORY PROVISION AT ISSUE

Iowa Code Chapter §479B governs hazardous liquid pipelines and storage facilities. This code chapter delineates the procedural process which a pipeline company must follow to "construct maintain or operate a pipeline or underground storage facility under, along, over, or across any public or private highways, grounds, waters, or streams of any kind in this state". Iowa Code §479B.3. To construct a pipeline in accordance with Chapter 479B, a pipeline company must file a "verified petition with the [Iowa utilities] board asking for a permit". Iowa Code §479B.4(1-2). In addition, at least thirty (30) days before filing the verified petition with the board, the pipeline company must "hold informational meetings in each county in which real property or property rights will be affected."[2] Iowa Code §479B.4(3).

Chapter 479B also provides for entry by a pipeline company onto private land for the purpose of surveying and examining the land. Iowa Code section 479B.15 provides,

> After the informational meeting or after the filing of a petition if no informational meeting is required, a pipeline company may enter upon private land for the purpose of surveying and examining the land to determine direction or depth of pipelines by giving ten days' written notice by restricted certified mail to the landowner as defined in section 479B.4 and to any person residing on or in possession of the land. The entry for land surveys shall not be deemed a trespass and may be aided by injunction. The pipeline company shall pay the actual damages caused by the entry, survey, and examination.

[2] Iowa Code section 479B.4(3-5) contains additional information regarding notice requirements of such informational meetings.

Iowa Code §479B.15.

Presently, the Court is tasked with determining the constitutionality of Iowa Code §479B.15. The Court has previously made a determination that Navigator has complied with all necessary statutory requirements under Iowa Code Chapter 479B to be allowed entry onto Koenig's land in accordance with Iowa Code section 479B.15. (*See Ruling on Plaintiff's Motion for Summary Judgment*, April 6, 2023).

CONCLUSIONS OF LAW

The United States Supreme Court has consistently emphasized that "[t]he right to exclude is 'one of the most treasured' rights of property ownership." *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2072, 210 L. Ed. 2d 369 (2021) (quoting *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435, 102 S.Ct. 3164, 73 L.Ed.2d 868 (1982)). The right to exclude is '"universally held to be a fundamental element of the property right,' and is 'one of the most essential sticks in the bundle of rights that are commonly characterized as property."' *Cedar Point*, 141 S. Ct. at 2072 (quoting *Kaiser Aetna v. United States*, 444 U.S. 164, 176, 179-180, 100 S.Ct. 383, 62 L.Ed.2d 332 (1979)). Because of the "central importance to property ownership" of the right to exclude, Courts have long treated "government-authorized physical invasions as takings requiring just compensation". *Cedar Point*, 141 S. Ct. at 2073.

In the present case, Koenig maintains that Iowa Code §479B.15 is facially unconstitutional because the statute allows for a per se taking without just compensation. Koenig asserts that Iowa Code §479B.15 strips landowners of their right to exclude by statutorily allowing pipeline companies to come onto private land to perform certain surveying operations, which amounts to a

per se taking. Additionally, Koenig argues that the statute does not provide for just compensation in accordance with Article I section 18 of the Iowa Constitution.

To determine the Constitutionality of Iowa Code §479B.15, the Court must first determine whether the statute effects a taking requiring just compensation. If the statute does effect a taking, the Court must then determine whether the statutory provision provides for just compensation.

I. IOWA CODE §479B.15 EFFECTS A TAKING.

The Takings Clause of the Fifth Amendment to the United States Constitution provides that private property shall not be taken for public use, without just compensation. *Cedar Point*, 141 S. Ct. at 2071; U.S. Const. Amend. 5. The Takings Clause is applicable to the States through the Fourteenth Amendment and was designed to protect private property rights as "[t]he Founders recognized that the protection of private property is indispensable to the promotion of individual freedom." *Cedar Point*, 141 S. Ct. at 2071. The Iowa Constitution contains a similar provision designed to protect individual property rights in Article 1 section 18. The Iowa Constitution provides "[p]rivate property shall not be taken for public use without just compensation first being made, or secured to be made to the owner thereof, as soon as the damages shall be assessed by a jury." Iowa Const. art. 1, §18.

When the government physically occupies private property, such physical appropriations are the "clearest sort of taking". *Cedar Point*, 141 S. Ct. at 2071 (quoting *Palazzolo v. Rhode Island*, 533 U.S. 606, 617, 121 S. Ct. 2448, 150 L.Ed.2d 592 (2001)). In such circumstances, a *per se* rule applies: "The government must pay for what it takes." *Cedar Point*, 141 S. Ct. at 2071. However, a different standard may apply when the government imposes regulations which restrict a private land owner's ability to use his own property. *Id.*; *See also Pennsylvania Coal Co v. Mahon*, 260 U.S. 393, 43 S.Ct. 158, 67 L.Ed 322 (1922) ("[W]hile property may be regulated to a

certain extent, if regulation goes too far it will be recognized as a taking."). In 1978, the United States Supreme Court decided *Penn Central Transp. Co. v. New York City*, wherein the Court developed a test for determining whether a land use regulation effects a taking. The "Takings Test" developed in *Penn Central* created a balancing test which required the consideration of the economic impact of the regulation, the extent to which the regulation interferes with distinct investment-backed expectations, and "the character of the governmental action." *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124, 98 S.Ct. 2646, 2659, 57 L.Ed.2d 631 (1978).[3]

The *Penn Central* "Takings Test" *had been* the leading approach to determine whether a regulatory use restriction amounts to a taking. However, the United States Supreme Court recently noted that "when the government physically appropriates property, *Penn Central* has no place – regardless whether the government action takes the form of a regulation, statute, ordinance, or decree." *Cedar Point*, 141 S. Ct. at 2063. In *Cedar Point*, the United States Supreme Court distinguished between physical appropriations and use restrictions noting "[t]he essential question…is whether the government has physically taken property for itself or someone else – by whatever means – or has instead restricted a property owner's ability to use his own property." *Id*. at 2072.

In *Cedar Point*, the United States Supreme Court determined that a California regulation allowing labor organizations to enter upon an agricultural employer's property, for the purposes of soliciting employee support, effected a *per se* taking. The California regulation allowed labor organizations, after providing written notice, to physically enter upon an agricultural employer's

[3] The Iowa Supreme Court has in the past followed the "consequential damages rule". *See Harms v. City of Sibley*, 702 N.W.2d 91, 101 (Iowa 2005). This rule provides that '"in the proper exercise of governmental powers, and not directly encroaching upon private property, though their consequences may impair its use, are universally held not to be a taking within the meaning of the constitutional provision."' *Id*. at 100 (quoting *N. Transp. Co. of Ohio v. City of Chicago,* 99 U.S. 635, 642, 25 L.Ed. 336, 338 (1878)).

property for up to 3 hours per day, 120 days per year. *Id*. at 2072. The Court in *Cedar Point* determined that the California access regulation "appropriates a right to physically invade the growers' property" and therefore effected a *per se* physical taking." *Id*. at 2074. In its analysis, the United States Supreme Court cited to a recent line of precedent explaining that "government-authorized invasions of property – whether by plane, boat, cable, or beachcomber – are physical takings requiring just compensation." *Id*. The Court went on to say that government authorized physical invasions can be considered *per se* takings even when such invasions are intermittent and temporary. *Id*. at 2075.

A central theme throughout the analysis in *Cedar Point*, was the importance of the right to exclude, with the Supreme Court noting that "the right to exclude 'falls within [the] category of interests that the government cannot take without compensation."' *Id*. at 273 (quoting *Kaiser Aetna*, 444 U.S. at 180, 100 S.Ct. 383). The Supreme Court emphasized that the California regulation appropriated the property owner's right to exclude, noting that "without the access regulation, the [property owners] would have had the right under California law to exclude union organizers from their property." *Cedar Point*, 141 S. Ct. at 2076.

It is important to note however that *Cedar Point* did not open the door for all government-authorized physical invasions to amount to takings.[4] In *Cedar Point*, the Supreme Court stated that "many government-authorized physical invasions will not amount to takings because they are consistent with longstanding background restrictions on property rights." *Id*. at 2079. Thus, the heart of the analysis rests upon whether or not this Court should consider survey activity of a

[4] The U.S. Supreme Court in *Cedar Point* recognized three narrow exceptions by which a government could avoid takings liability for an invasion: 1) isolated physical invasions treated as torts (i.e. think of U.S. Postal service worker entering onto one's property to deliver mail); 2) background restrictions (of which 3 examples are provided which is discussed at length below); and 3) permit conditions. Of little dispute is that this case involves the second of the three exceptions: "background limitations".

private hazardous liquid pipeline consistent with the type of "longstanding background restriction on property rights" referenced in *Cedar Point*. In short, does Navigator's survey activity outlined in Iowa Code §479B.15 fall into the *Cedar Point* "background restriction" exception? And, if not, why?

These background restrictions encompass "traditional common law privileges to access private property". *Id*. As guidance the Supreme Court lists explicit, yet non exhaustive, examples of such certain background restrictions such as: 1) the event of public and private necessity; 2) the abatement of nuisances; and 3) enforcement of criminal law in certain circumstances. *Id*.

The Court observes important similarities between the facts of this case and those in *Cedar Point*. Like the private labor organizations in *Cedar Point*, Navigator presently seeks to repeatedly enter onto privately owned land despite a lack of consent from the landowner. While true the California statute in *Cedar Point* allowed labor organizations to enter on the property for up to 120 days per year three hours per day whereas Navigator is seeking to enter for no more than four days (ranging from thirty minutes to eight hours at a time); the Court is leery to enter into too much detailed comparison of the intrusive nature of the invasion because, as *Cedar Point* makes clear, the frequency and duration of the invasion is no longer relevant. *Id*. at 2074 ("the fact that a right to take access is exercised only from time to time does not make it any less a physical taking" and "the duration of an appropriation—just like the size of an appropriation—bears only on the amount of compensation.")

Rather, this Court must undertake the enterprise to contrast *Cedar Point's* explicitly enumerated "background restriction" examples as a *vade mecum*. In so doing, this Court, like the U.S. Supreme Court in *Cedar Point*, finds that the fear and argument from Navigator that treating

this survey activity as a *per se* physical taking endangers a host of historically accepted activities involving entry onto private property is unfounded.

First, while this Court acknowledges that survey access may be a traditional privilege that allows access to private property, it is no less so than union organization in the migrant agriculture industry of California or that of the coal mines in mid-1800 Pennsylvania. Notably absent from the explicit examples provided by *Cedar Point* were survey access, utility and or railroad easements, etc. The lack of inclusion leads to conclusion.

Second, nuisance abatement, necessity, and criminal law enforcement/reasonable searches have two things in common: exigency and risk to the public. Nuisance abatement presents a real and immediate disruption/hazard to others. Moreover, one does not have a right to engage in nuisance in the first place. *Id*. at 2079. The type of private or public necessity contemplated by *Cedar Point* entailed entry to avoid: "imminent public disaster"…"serious harm to a person, land, or chattels." *Id*. (Quoting Restatement (Second) of Torts §196 and §197 (1964)). In essence, acts of God and natural disasters. Hot pursuit of a fleeing criminal onto the property of another is even recognized as an exception to the warrant requirement. Additionally, government searches pursuant to a warrant and the Fourth Amendment cannot be said to take any property right from landowners. *Id*.

Because *Cedar Point* was only recently decided, Iowa courts (and legislature) have not yet had to grapple with the new constitutional "takings" precedent. No guidance from Iowa case law exists on the issue of "takings" jurisprudence since the issuance of *Cedar Point*.[5] However, for all

[5] In arguing that such background principle exists, Plaintiff relies on a federal case in the western district of Virginia, *Klemic v. Dominion Transmission, Inc*., 138 F. Supp. 3d 673, 690-91 (W.D. Virginia 2015). Not only is that case outside of this state's jurisdiction, it predates *Cedar Point*. In *Cedar Point*, the Supreme Court found that "[u]nlike a law enforcement search, no traditional background principle of property law requires the growers to admit union organizers onto their premises." *Id*. at 280 Similarly, the Court here is not convinced that there exists a traditional background principle of property law requiring private landowners to allow private hazardous liquid pipeline

of the reasons stated above, the Court finds that the survey activity of a hazardous liquid pipeline company contemplated in Iowa Code §479B.15 is not consistent with the type of "longstanding background restrictions on property rights" referenced in *Cedar Point*. It is more dissimilar to the examples provided by *Cedar Point* than similar.

In looking to the language in Iowa Code §479B.15, the Court concludes that the standards established in *Cedar Point* are applicable. The statute is not a use restriction which can be analyzed under the *Penn Central* "Takings Test". Rather, because the statute grants pipeline companies a right to physically enter and occupy privately owned land, the statute appropriates a right to invade the landowner's property. When such appropriation occurs, the Court follows the traditional rule: "Because the government appropriated a right to invade, compensation is due." *Cedar Point*, 141 S. Ct. at 2076.

The Court finds that Iowa Code section 479B.15 appropriates Koenig's right to exclude others from his privately owned land. Without Iowa Code §479B.15, Koenig would have had the right under Iowa law to exclude the pipeline company and any third-party surveyors from his property. Because the statute amounts to a government authorized physical invasion, and additionally appropriates Koenig's right to exclude, the Court is convinced Iowa Code §479B.15 effects a *per se* taking for which just compensation is required.

II. IOWA CODE §479B.15 DOES NOT PROVIDE JUST COMPENSATION.

Because Iowa Code §479B.15 effectuates a taking under *Cedar Point*, the Court must next determine whether the statute provides for just compensation. Presently, Defendant contends that

companies (and their hired third-party surveyors) to enter onto private lands for survey purposes that align with the type of "background restriction" exceptions contemplated by Cedar Point.

while Iowa Code §479B.15 provides for compensation of damages caused *by* the entry, the statute does not provide for compensation *for* the entry. In other words, Defendant asserts that the compensation for damages provided for in the statute does not account for the damages caused by the physical invasion itself, but rather is limited to actual damages caused on the property by the land surveys. Defendant further asserts that the statute is unconstitutional because the mechanism for determination of damages and possible compensation is wholly in the hands of the "taker". In response, Plaintiff maintains that the statute does provide for damages. Plaintiff argues that if a landowner claims there are damages, then, under the statute the pipeline would be required to pay them.

"In determining what constitutes 'just compensation,' courts must look to the individual facts of each case." *Aladdin, Inc. v. Black Hawk County*, 562 N.W.2d 608, 611 (Iowa 1997). "The term 'just compensation' as found in [the] Constitution . . . . has no technical or purely legal significance. The words express in a general way the meaning intended." *Des Moines Wet Wash Laundry v. City of Des Moines*, 197 Iowa 1082, 1086, 198 N.W. 486, 488 (1924).

The issue of whether Iowa Code §479B.15 allows for just compensation is one of statutory interpretation. The goal of statutory construction is to determine legislative intent. *Auen v. Alcoholic Beverages Div.,* 679 N.W.2d 586, 590 (Iowa 2004). Legislative intent is derived from the words chosen by the legislature, not what it should or might have said. *Id*. Absent a statutory definition or an established meaning in the law, words in the statute are given their ordinary and common meaning by considering the context within which they are used. Under the guise of construction, an interpreting body may not extend, enlarge or otherwise change the meaning of a statute. *Id*.

The interpretation of a statute requires an assessment of the statute in its entirety, not just isolated words or phrases. *State v. Young,* 686 N.W.2d 182, 184–85 (Iowa 2004). Indeed, "we avoid interpreting a statute in such a way that portions of it become redundant or irrelevant." *T & K Roofing Co. v. Iowa Dep't of Educ.,* 593 N.W.2d 159, 162 (Iowa 1999). We look for a reasonable interpretation that best achieves the statute's purpose and avoids absurd results. *Harden v. State,* 434 N.W.2d 881, 884 (Iowa 1989). To interpret the legislature's intent behind a statute, the first step is to look at the language of the statute. *Mulhern v. Catholic Health Initiatives*, 799 N.W.2d 104, 113 (Iowa 2011); *Estate of Ryan v. Heritage Trails Assocs., Inc.*, 745 N.W.2d 724, 729 (Iowa 2008). If the language is plain and unambiguous, no deeper analysis is needed. However, if the terms of a statute are ambiguous, the court must then look to the rules of statutory construction. *Estate of Ryan*, 745 N.W.2d at 729, (citing *State v. Wiederien,* 709 N.W.2d 538, 541 (Iowa 2006)). Ambiguity exists if "reasonable minds can disagree on the meaning of particular words or the statute as a whole." *State v. McIver*, 858 N.W.2d 699, 703 (Iowa 2015).

As it relates to the issue of compensation for damages, Iowa Code §479B.15 provides that "the pipeline company shall pay the *actual damages* caused by the entry, survey, and examination." Iowa Code §479B.15 (emphasis added). In looking to the Iowa Code, the phrase "actual damages" is defined in §714H.2(1). Under that section, "actual damages" is defined as follows:

> Actual damages means all compensatory damages proximately caused by the prohibited practice or act that are reasonably ascertainable in amount. Actual damages does not include damages for bodily injury, pain and suffering, mental distress, or loss of consortium, loss of life, or loss of enjoyment of life.

Iowa Code §714H.2(1).

Based on a plain reading of the aforementioned statutory definition, the phrase "actual damages" should be construed to mean damages caused by the prohibited practice or act which are

reasonably ascertainable in amount. The invasion onto one's property (i.e. survey) is the act. Axiomatically, actual damages does not include damages which are subjective, such as bodily injury, pain and suffering, mental distress, or loss of consortium, loss of life, or loss of enjoyment of life.[6] Thus, harmonizing Iowa Code §479B.15 with the statutory definition of "actual damages" in §714H.2(1), "actual damages" is unambiguous. Because it is plain and unambiguous, no deeper analysis is needed and rules of statutory interpretation superfluous. The pipeline company shall pay the reasonably ascertainable damages caused by the entry, survey, and examination.

The question then for the Court to determine is whether, under the plain meaning of the statute, Iowa Code §479B.15 provides just compensation for the appropriation of Defendant's right to exclude. Presently, the Court finds that, while Iowa Code §479B.15 provides compensation for certain damages, it does not provide for compensation as it relates to the government's *per se* taking. That is, the concept of exclusion in and of itself.

The definition of "actual damages" in §714H.2(1) provides that the damages must be reasonably ascertainable in amount. Damages for destruction of physical property are reasonably ascertainable. For example, if, upon entering private property to perform a land survey, a pipeline company vehicle causes damage to a driveway, the amount of compensation for such damages would be objective and could be ascertained with reasonable certainty. The landowner in that example could provide objective documentation by way of receipts or invoices showing the amount needed to fix the damage.

However, if no physical damage is done to the private property, does Iowa Code §479B.15 still require compensation to the landowner for the government-authorized taking? §479B.15 says

[6] *See Jasper v. H. Nizam, Inc*. 764 N.W.2d 751, 772 (Iowa 2009)([I]t is generally recognized that damages for pain and suffering are by their nature "highly subjective" and are not "easily calculated in economic terms.")

no and any other interpretation of such is unreasonable. At the end of trial Navigator argued that the distinction between "actual damages" and *per se* damage is a distinction without a difference. Navigator's counsel argued that Koenig's "actual damage" is any damage that he may claim.[7] The Court does not find such interpretation to be reasonable because the damage has to be "actual" and cannot be subjective. It has to be reasonably ascertainable. The statute requires such.

Consequently, when the damage claimed is the landowner's loss of the right to exclusive use of his property caused by a government authorized taking, the landowner cannot easily ascertain, in economic terms, the amount of damages. The damages resulting from a landowner's loss of his right to exclusive use of his property are subjective in the same way that pain and suffering damages are as it relates to a victim of a tortious injury. Neither set of damages are easily calculated in economic terms, nor are they ascertainable with reasonable certainty. Similar to damages for loss of enjoyment of life —the loss of the ability to exclude is highly subjective. A landowner is unlikely to be able to produce an invoice, estimate, or receipt which could be used to reasonably calculate the resulting damage in economic terms and §479B.15 expressly does not allow for such subjectivity when it uses the qualifier "actual".

Therefore, a clear and common sense reading of Iowa Code §479B.15 is that, if by going onto private property to survey, a pipeline company causes actual damage to the property, compensation is required to cover the damages. However, because non actual damages resulting from the government authorized taking are subjective and not readily ascertainable, the Court cannot interpret the meaning of "actual damages" within the statute to cover a *per se* taking in and of itself. To find otherwise would deprive "actual damages" of all its ordinary meaning.

[7] i.e. "So if they claim simply by looking in their direction that they're damaged, then that's a claim they could make, and under the statute they would have a right to pursue those claims." and "If his claim is that simply walking on there creates damages, then we have to pay for those."

A. Presumption of Constitutionality.

As recited above, statutes are presumed to be constitutional, and challengers face "the heavy burden of rebutting that presumption." *Santi v. Santi*, 633 N.W.2d 312,316 (Iowa 2001). A party challenging a statute as facially unconstitutional may prevail '"only upon proof that the act clearly infringes constitutional rights and then only if every reasonable basis for support is negated."' *F.K.*, 630 N.W.2d at 805-806 (quoting *Seeman v. Iowa Dep't of Human Servs.*, 604 N.W.2d 53,60 (Iowa 1999).

The Court, as reasoned above, has earnestly attempted to adopt an alternative reasonable interpretation of "actual damages" in §479B.15 that avoids a finding of unconstitutionality: it cannot. No other construction of the statute, as it currently exists, would render any compensation for damages that are not "actual". It is in this way that the statute is unconstitutional and incapable, beyond a reasonable doubt, of "any valid application". *Santi*, 633 N.W.2d at 316. There could never be a set of circumstances whereby the statute would authorize payment for a *per se* taking without "actual damages" first occurring. Compensation is conditioned on actual damage. Thus, Iowa Code §479B.15 provides for compensation of damages caused *by* the entry but not *for* the entry in and of itself. Such is true in every instance.

As such, Iowa Code §479B.15 violates Article I section 18 of the Iowa Constitution, and the Fifth Amendment of the United States Constitution. Consequently, Plaintiff's Petition for Injunctive Relief pursuant to Iowa Code §479B.15 must be denied.

CONCLUSION

Though the statute is "cloaked with a presumption of constitutionality"[8], the Court finds that Iowa Code §479B.15 results in a *per se* government taking without providing just compensation, in violation of Article I section 18 of the Iowa Constitution and the Fifth Amendment of the United States Constitution. The Court can find no other reasonable interpretation in which Iowa Code §479B.15 passes "constitutional muster".[9] Consequently, the Court finds that Iowa code §479B.15 should be declared unconstitutional, and Plaintiff's request for an injunction should be denied.

ORDER

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED AS FOLLOWS:

1. All of the above;
2. Iowa Code §479B.15 is unconstitutional under Article I section 18 of the Iowa Constitution and the Fifth Amendment of the United States Constitution; and
3. Plaintiff's Petition for Injunctive Relief pursuant to Iowa Code §479B.15 is DENIED.

[8] *See State v. Gonzalez*, 718 N.W.2d 304, 307 (Iowa 2006) (reiterating that statutes are "cloaked with a presumption of constitutionality.")

[9] *See McGill v. Fish*, 790 N.W.2d113, 121 (Iowa 2010) ("Moreover, we do not interpret statutes in a manner that would render the stature unconstitutional if a reasonable alternate interpretation exists that passes constitutional muster.")

State of Iowa Courts

Case Number	**Case Title**
EQCV034863	NAVIGATOR HEARTLAND GREENWAY, LLC V. MARTIN KOENIG
Type:	OTHER ORDER

So Ordered

John M. Sandy, District Court Judge
Third Judicial District of Iowa

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