

STATE OF MICHIGAN
IN THE SUPREME COURT
Appeal from the Court of Appeals
[Whitbeck, C.J. and Bandstra and Markey, JJ]

MICHIGAN DEPARTMENT OF
TRANSPORTATION,

Plaintiff-Appellant,

v

RODNEY TOMKINS and DARCY
TOMKINS,

Defendants-Appellees.

Supreme Court No. 132983

Court of Appeals No. 256038

Kent County Circuit Court
No. 01-07548-CC

**APPELLEES RODNEY TOMKINS' AND DARCY TOMKINS'
BRIEF ON APPEAL**

ORAL ARGUMENT REQUESTED

**THE APPEAL INVOLVES A RULING THAT A
PROVISION OF THE CONSTITUTION, A STATUTE,
RULE OR REGULATION, OR OTHER STATE
GOVERNMENTAL ACTION IS INVALID.**

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STATEMENT OF THE BASIS OF APPELLATE JURISDICTION

The Appellees concur that appellate jurisdiction is proper under MCR 7.301(A) and MCR 7.302(G)(3) as stated by the Appellant in its brief.

COUNTER-STATEMENT OF QUESTIONS INVOLVED

- I. Did the ratifiers of Constitution 1963, Article 10, § 2, have a common understanding of the phrase “just compensation” based on the principle that all factors relevant to market value must be considered when it ratified the constitution and was that same principle applied with respect to all cases in which a taking occurs, either by a direct condemnation proceeding or after a judicial determination that an inverse taking has occurred?**

Appellee answers: “Yes.”

Appellant answers: “No.”

The Court of Appeals answered: “Yes.”

The Trial Court answered: “No.”

- II. Does § 20(2) of the Uniform Condemnation Procedures Act impermissibly conflict with the established meaning of “just compensation” by attempting to remove consideration of the effects of highway proximity from the factors relevant to market value which are used when determining the proper amount of compensation due for a partial taking?**

Appellee answers: “Yes.”

Appellant answers: “No.”

The Court of Appeals answered: “Yes.”

The Trial Court answered: “No.”

COUNTER-STATEMENT OF MATERIAL FACTS AND PROCEEDINGS

This is a condemnation case filed by the Appellant Michigan Department of Transportation (“MDOT”) for the taking of certain property owned by Rodney and Darcy Tomkins (“Tomkins”). MDOT had determined it necessary to take part of the Tomkins property for use in its M-6 (South Beltline) project. Paragraph 9 of MDOT’s Complaint states: “The property described in the Declaration of Taking is being acquired for a necessary public improvement, namely the relocating, establishing, opening and/or improvement of highway M-6 in Kent County, Michigan.”¹ The Statement of Necessity and the Declaration of Taking executed by MDOT refer to acquisition of part of the Tomkins property for “construction of the highway M-6 Wilson Avenue interchange through the Township of Byron.”² M-6 was designed and constructed to be a limited access freeway traversing the area south of metropolitan Grand Rapids. As part of the M-6 project, MDOT had to construct several overpasses to allow existing roads to continue over the new M-6 freeway. The Tomkins property is located on Kenowa Avenue near one of the overpass locations. In order to accommodate the construction of the overpass on Kenowa Avenue, MDOT took a 49 foot wide portion of the property owned by Tomkins and upon which their home is located. In addition to widening the road, the construction of the overpass also required that the portions of Kenowa Avenue approaching the overpass be elevated. The elevation change in front of the Tomkins property is approximately one foot higher than before the taking. However, the elevation at the overpass, approximately 320 feet from the Tomkins property, is six feet higher than the prior existing Kenowa Avenue grade and as such the overpass would be obviously visible from the front yard of the Tomkins

¹ MDOT’s Complaint and Demand for Jury Trial, p 3; Tomkins Appendix at p 3b.

² Statement of Necessity and the Declaration of Taking executed by MDOT; Tomkins Appendix at p 5b and 7b.

property.³ MDOT's expert witness, Don Kishman, stated it was appropriate to consider both the M-6 right-of-way and the improvements on Kenowa Avenue in terms of possible damages to the Tomkins parcel.⁴ During their depositions, both Mr. and Mrs. Tomkins were asked about how the project would affect their property. Mrs. Tomkins stated her understanding that "people don't want to buy houses next to expressways" and also referred to the traffic movement and traffic noise. Mr. Tomkins focused on the impact the proximity to the expressway would have on the value of the property including the effect of widening Kenowa and constructing the bridge overpass nearby.⁵

MDOT offered Tomkins \$4,200 for the taking of their property. After this offer was rejected by Tomkins, MDOT filed its Complaint for Condemnation pursuant to the UCPA in Kent County Circuit Court on July 23, 2001. MDOT and Tomkins subsequently exchanged the appraisals of their respective expert witnesses. Both appraisers, Don Kishman for MDOT and John Henry for Tomkins, agreed that the market value of the land that was physically taken (i.e., the 49-foot wide frontage piece) was \$3,800. However, Mr. Henry determined that there were additional "proximity damages" based on the effect of the project on the value of the remainder of the Tomkins property which was not physically taken. Mr. Henry's report and deposition testimony explained his approach to the determination of "just compensation" for the effects of both the Kenowa Avenue improvements and the actual M-6 right-of-way on the market value of the Tomkins property after the taking. Specifically, Mr. Henry conducted an analysis of local property sales to determine a market-supported percentage of reduction for properties located

³ Brief in Support of Defendants' Response to Michigan Department of Transportation's Motion in Limine at p 3, citing Kishman deposition transcript, pp 18-19; Tomkins Appendix at p 12b.

⁴ Brief in Support of Defendants' Response to Michigan Department of Transportation's Motion in Limine at p 2, citing Kishman deposition transcript, p 30; Tomkins Appendix at p 11b.

⁵ Brief in Support of Defendants' Response to Michigan Department of Transportation's Motion in Limine at p 4, citing Darcy Tomkins deposition, p 30 and Rodney Tomkins deposition, p 13; Tomkins Appendix at p 13b.

near a state highway such as the Tomkins property.⁶ Using this approach, Mr. Henry determined that there was an additional \$48,200 in damages to the remainder of the Tomkins property after the taking.

MDOT's appraiser, Mr. Kishman, agreed that proximity to such a highway is one of the aspects which could affect the market value of a property.⁷ Kishman further stated that he himself has performed appraisals taking into consideration the fact of proximity to a highway, including other appraisals for MDOT on the same M-6 project.⁸ However, Mr. Kishman was specifically instructed by MDOT's counsel "not to consider any diminution in market value resulting from the proximity of the highway to the property involving matters such as increased traffic, traffic noise, visibility, changes to the surrounding area, matters involving fumes, light and other general effects ... even though those effects may somewhat diminish the market value of the property".⁹

MDOT filed a Motion in Limine to Prohibit the Raising of the General Effects of the Project or in the Alternative Motion for Summary Disposition Pursuant to MCR 2.116(C)(8) on January 23, 2004. In this motion, MDOT asserted that Tomkins' claims, and Mr. Henry's expert testimony, were based on "the general effects" of the project which are not compensable under Section 20(2) of the UCPA because some of the project's effects might be the same as those experienced by others nearby who did not suffer an actual taking of property. After briefing by the parties, a hearing was held on February 19, 2004. MDOT asserted that Mr. Henry's opinion

⁶ Brief in Support of Defendants' Response to Michigan Department of Transportation's Motion in Limine at p 4, citing Henry deposition transcript, pp 25, 46; Tomkins Appendix at p 13b.

⁷ Brief in Support of Defendants' Response to Michigan Department of Transportation's Motion in Limine at p 3, citing Kishman deposition transcript, p 22; Tomkins Appendix at p 12b.

⁸ Brief in Support of Defendants' Response to Michigan Department of Transportation's Motion in Limine at p 3, citing Kishman deposition transcript, pp 23-24; Tomkins Appendix at p 12b.

⁹ Brief in Support of Defendants' Response to Michigan Department of Transportation's Motion in Limine at p 3, citing Kishman deposition transcript, p 8; Tomkins Appendix at p 12b.

as to “just compensation” for the taking was precluded by Section 20(2). As such, MDOT requested the Court to order that Tomkins’ claims for additional compensation and Mr. Henry’s testimony as to such compensation could not be considered in determining “just compensation” at trial. MDOT alternatively requested that the Court order that Tomkins’ attempts to recover damages attributable to the “general effects” of the project failed to state a claim upon which relief could be granted under the holding in *Spiek v Department of Transportation*.¹⁰ During the hearing, Tomkins asserted that Section 20(2) of the UCPA is unconstitutional in that it attempted to abrogate the constitutional right to “just compensation” for the taking of property. In addition, Tomkins introduced copies of other appraisals conducted by MDOT that in fact included consideration of proximity damages to remainder property, as asserted in this case.¹¹

The Circuit Court granted MDOT’s motion stating: “The court is of the opinion that there’s nothing – no constitutional violation here” and “the general effects of the project are not compensable here”.¹² The Circuit Court further stated Tomkins could not be “compensated for M-6 when all that’s taken is a narrow strip along Kenowa, and Kenowa is not, other than the fact that the grade is going up slightly, is not affected by this project and there’s no interchange there, and I would not imagine there’s any increase in traffic on Kenowa, either. In fact, maybe there would even be less traffic.”¹³ As a result of these rulings, the only remaining issue for trial was the value of the land actually taken by MDOT. Since both appraisers had agreed that the value of that land was \$3,800, the parties stipulated to a final judgment leaving the disputed issues as to additional compensation for appeal.

¹⁰ 456 Mich 331 (1998).

¹¹ Motion for Summary Disposition hearing transcript p 15; Tomkins Appendix at p 15b.

¹² Motion for Summary Disposition hearing transcript, p 28; MDOT’s Appendix at p 24a.

¹³ Motion for Summary Disposition hearing transcript, pp 28-29; MDOT’s Appendix at pp 24a-25a.

Tomkins appealed the Circuit Court's decision to the Michigan Court of Appeals. After briefing and oral argument, the Court of Appeals issued its Opinion on March 2, 2006. It reversed the Circuit Court's ruling on the constitutionality of Section 20(2) of the UCPA. It held that "the Section 20(2) limitation on general damages as applied to partial takings cases impermissibly conflicts with the established constitutional meaning of Just Compensation which requires that any and all factors relevant to market value be taken into consideration when determining the difference in the remaining property's value before and after the taking".¹⁴ The Court then sought to address the issue of whether the taking of Tomkins' property was an "integral and inseparable" part of the M-6 construction project. Tomkins had argued that the use of their property taken along Kenowa for construction of the overpass was an integral and inseparable part of the M-6 construction project, and as a result, the general effects of the M-6 highway should also be considered in estimating the depreciation in value of their remaining property. MDOT contested this claim and argued that the Kenowa overpass was "merely incidental" to the M-6 project. The Court of Appeals remanded the case to the Circuit Court to determine whether there is a question of fact as to whether the Kenowa overpass was an integral and inseparable part of the M-6 improvement.¹⁵ After briefing and oral argument, the Circuit Court ruled such a question of fact exists and entered an order to that effect on August 31, 2006.¹⁶ Subsequently, the Court of Appeals entered an Order dated October 20, 2006 stating that this matter shall proceed to trial.¹⁷

¹⁴ *Department of Transportation v Tomkins*, 270 Mich App 153, 166; Slip Op. p 8; MDOT's Appendix at p 39a.

¹⁵ *Tomkins*, 270 Mich App at 170-171; Slip Op. p 11; MDOT's Appendix at p 42a; Court of Appeals Order Remanding Case to Trial Court, MDOT's Appendix at p 43a.

¹⁶ Final Trial Court Order on Remand dated August 31, 2006; MDOT's Appendix at p 44a.

¹⁷ Court of Appeals Second Order of Remand; MDOT's Appendix at p 46a.

MDOT filed a Motion for Reconsideration with regard to the Court of Appeals' Opinion and Orders. The Court of Appeals issued an Order dated December 7, 2006, denying that Motion.¹⁸

MDOT filed an Application for Leave to Appeal the Court of Appeals decision. On June 15, 2007, this Court granted MDOT's application and directed that the parties include among the issues to be briefed:

- (1) what was the ratifiers' common understanding of the phrase "just compensation" when they ratified Constitution 1963, Article 10, § 2, and was it commonly understood that "just compensation" in inverse condemnation cases was different than "just compensation" in direct, partial taking cases; and
- (2) whether § 20(2) of the Uniform Condemnation Procedures Act, MCL 213.70(2), impermissibly conflicts with this established meaning of "just compensation."

¹⁸ Court of Appeals Order Denying MDOT's Motion for Reconsideration; MDOT's Appendix at 47a.

SUMMARY OF ARGUMENT

When Article 10, § 2, of the Constitution of 1963 was ratified, the common understanding by the ratifiers as to the phrase “just compensation” was based on the principle that all factors relevant to market value must be considered. This principle was applied in all cases in which a taking occurs, either by a direct condemnation proceeding to acquire property or after a judicial determination that an inverse taking has occurred. However, the ratifiers also clearly understood that a claimant whose property was not directly taken through condemnation was required to establish that government action had resulted in a de facto taking of his property by destroying its value to some extent. Any requirement for demonstrating a “recognized property right” or “special injury” was relevant only for purposes of the claimant establishing a taking had occurred.

Section 20(2) of the UCPA impermissibly conflicts with the established meaning of “just compensation” by removing from consideration factors relevant to market value in determining the proper amount of just compensation for a partial taking. The requirement in *Spiek* with regard to a showing of special effects from highway proximity is limited to application in inverse condemnation cases as it establishes a threshold for proving a taking of property has occurred. Such a requirement is not relevant in a direct taking case since the physical occupation has already occurred and placing such a limitation on the factors relevant to market value abrogates the meaning of just compensation.

ARGUMENT

I. THE RATIFIERS' COMMON UNDERSTANDING OF THE PHRASE "JUST COMPENSATION" WHEN THEY RATIFIED CONSTITUTION 1963, ARTICLE 10, § 2, WAS BASED ON THE PRINCIPLE THAT ALL FACTORS RELEVANT TO MARKET VALUE MUST BE CONSIDERED. THIS PRINCIPLE WAS APPLIED TO ALL CASES IN WHICH A TAKING OCCURS, EITHER BY A DIRECT GOVERNMENT PROCEEDING TO ACQUIRE ALL OR PART OF ONE'S PROPERTY OR AFTER A JUDICIAL DETERMINATION THAT AN INVERSE TAKING HAS OCCURRED.

In this Court's Order granting MDOT's application for leave to appeal, the parties were first directed to address the following questions: "What was the ratifiers common understanding of the phrase "just compensation" when they ratified Constitution 1963, Article 10, § 2, and was it commonly understood that "just compensation" in inverse condemnation cases was different than "just compensation" in direct, partial taking cases?"

This appeal presents the issue of whether § 20(2) of the Uniform Condemnation Procedures Act ("UCPA"),¹⁹ is unconstitutional in that it impermissibly conflicts with the established meaning of "just compensation" under the Michigan Constitution. This Court reviews constitutional issues de novo.²⁰

A. THE RATIFIERS UNDERSTOOD THE PHRASE "JUST COMPENSATION" WAS BASED ON THE PRINCIPLE THAT ALL FACTORS RELEVANT TO MARKET VALUE MUST BE CONSIDERED WHEN THERE IS A TAKING OF PRIVATE PROPERTY.

The Fifth Amendment to the United States Constitution guarantees property owners the right to "just compensation" when a government entity takes property for a public use.²¹ Similarly, under Article 10, Section 2 of the Michigan Constitution of 1963, "private property

¹⁹ MCL 213.70(2).

²⁰ *County Road Association v Governor*, 474 Mich 11, 14, 705 NW2d 680, 682 (2005).

²¹ *Phelps v United States*, 274 US 341 (1927); 47 S.Ct. 611; 71 L.Ed. 1083.

shall not be taken for public use without “just compensation” therefor being first made or secured in a manner prescribed by law.”

In *Wayne County v Hathcock*, this Court stated that the primary objective in interpreting a constitutional provision is to determine the text’s original meaning to the ratifiers, the people at the time of ratification.²² The Court explained: “This Court typically discerns the common understanding of constitutional text by applying each term’s plain meaning at the time of ratification. If the constitution employs technical or legal terms of art, ‘we are to construe those words under technical, legal sense.’ This Court further stated: “We have held that the whole of Article 10, § 2, has a technical meaning that must be discerned by examining the ‘purpose and history’ of the power of eminent domain” *Hathcock*²³. “Where there is a technical meaning related to the common understanding of the constitutional provision, the courts must delve into the body of case law” *Hathcock*²⁴.

This Court provided this type of thorough analysis of the meaning of the term “just compensation” under the Michigan constitution in *Silver Creek Drain District v Extrusions Division, Inc.*²⁵ In doing so, the Court focused on the historical establishment of the meaning of that term while paying special deference to the legislative intent of the framers of the 1963 Michigan Constitution. The Court stated:

The meaning of “Just Compensation” cannot be discerned merely by a careful reading of the phrase. The words themselves, as the Court of Appeals found, just do not inform a court about the potential complexity and variety of factors to be considered in determining value.

²² 471 Mich 445 (2004); 684 NW2d 765 (2004).

²³ 471 Mich at 470.

²⁴ 471 Mich at 471.

²⁵ 468 Mich 367; 663 NW2d 436 (2003).

.... They are words that fall under that category we have described as technical legal terms or phrases of art in the law, and thus they are to be given the meaning that those sophisticated in the law gave them at the time of enactment. This means that, in this case, it is appropriate to review the consensus understanding in 1963, by those skilled in this area of law, of the meaning of “Just Compensation”.

The Court was referring to the members of the Constitutional Convention of 1963 as “those skilled in this area of law” and whose understanding of “just compensation” is to be given full force and effect. The Court also reviewed both state and federal judicial principles of “just compensation” as they existed in 1963. In its analysis of this case law, this Court identified the “universal rule” which, it noted, continues to be the universal rule to this day: “Just compensation is equivalent to the full value of the property. All elements of value inherent in the property merit consideration in the valuation process.” The Court focused on the well established and oft-cited statement from *Re Widening of Gratiot Avenue*: “the determination of value is not a matter of formulas or artificial rules, but of sound judgment and discretion based upon a consideration of all the relevant facts in a particular case.”²⁶ The Court emphasized that it had reiterated this general rule recently in *Department of Transportation v Van Elslander*,²⁷ where it described what is relevant to “just compensation” as “any evidence that would tend to affect the market value of the property as of the date of the condemnation.”²⁸ In summary, the Court stated:

Thus, in our law, “Just Compensation” was a legal phrase of art in 1963 that meant, and still means, that the proper amount of compensation for property takes into account all factors relevant to market value. It was this meaning that the constitutional drafters

²⁶ 294 Mich 569, 575; 293 NW 755 (1940).

²⁷ 460 Mich 127, 130, 594 NW2d 841, 843 (1999).

²⁸ *Silver Creek*, 468 Mich at 379.

and ratifiers are held to have understood when they were adopting the Michigan Constitution of 1963” (emphasis added).²⁹

“Just compensation” requires that landowners be compensated for the entire loss caused by the taking of their land and thereby be placed in as good a position as they would have been if the condemnation had not occurred. The only way to fulfill that objective in a partial taking case such as this is to compensate the owner not only for the land actually taken but also for the diminution in value of the part of his property not taken which results from the condemnation or the project. In *City of Grand Rapids v Barth*,³⁰ and subsequent cases, this Court addressed partial taking cases as those in which “the owner is entitled to recover the difference between the fair market value of the entire tract before the taking and the market value of what is left after the taking.” As emphasized by the Court of Appeals in the present case, this principle has been incorporated into the Michigan Standard Jury Instructions for partial takings as SJI 90.12. It is also consistent with the principle adopted by the United States Supreme Court in *Bauman v Ross*,³¹: “when only part of a parcel is taken for a highway, the value of that part is not the sole measure of the compensation or damages to be paid to the owner; but the incidental injury or benefit to the part not taken is also to be considered.”

In the present case, the Court of Appeals applied these very same principles of “just compensation”, stating:

A condemnee’s damages are, in general, measured by the fair market value of the property taken. *Dep’t of Transportation v. Sherburn*, 196 Mich.App. 301, 304, 492 N.W.2d 517 (1992). But where only a portion of the whole parcel is taken, it is possible for the remaining property to also suffer damages attributable to the taking. *Johnstone v. Detroit, G.H. & M.R. Co.*, 245 Mich. 65, 81, 222 N.W. 325 (1928); *Sherburn, supra* at 305, 492 N.W.2d 517. In such a case, the value of the property taken is allowed as direct

²⁹ *Silver Creek*, 468 Mich at 379.

³⁰ 248 Mich 13; 226 NW 690 (1929).

³¹ 167 U.S. 548 17 S. Ct. 966; 42 L.Ed. 270 (1896).

compensation, but the remaining portion's decrease in value, by virtue of the use made of the property taken, is also allowable as compensation even though this is strictly consequential damage in nature. *In re Widening of Fulton Street*, 248 Mich. 13, 20-21, 226 N.W. 690 (1929); *Johnstone*, *supra* at 81, 222 N.W. 325; see also *Bauman v. Ross*, 167 U.S. 548, 574-575, 580, 17 S.Ct. 966, 42 L.Ed. 270 (1897). This diminution in value, or "severance damages," is measured by calculating the difference between the fair market value of the remaining property before and after the taking. *Sherburn*, *supra* at 305, 492 N.W.2d 517; *State Hwy. Comm. v. Minckler*, 62 Mich.App. 273, 277, 233 N.W.2d 527 (1975); see also M. Civ. J.I. 90.12. Thus, "[t]he proper measure of damages in a condemnation case involving a partial taking consists of the fair market value of the property taken plus severance damages to the remaining property[.]" *Sherburn*, *supra* at 306, 492 N.W.2d 517. Indeed, the Michigan Standard Jury Instructions provide that, in valuing the property left after the taking, a jury should take into account various factors, including: (1) its reduced size, (2) its altered shape, (3) reduced access, (4) any change in utility or desirability of what is left after the taking, (5) the effect of the applicable zoning ordinances on the remaining property, and (6) the use which the [name of condemning authority] intends to make of the property it is acquiring and the effect of that use upon the owner's remaining property. M. Civ. J.I. 90.12. And according to the Michigan Supreme Court, "any evidence that would tend to affect the market value of the property as of the date of condemnation is relevant [,] . . . to the extent that 'the [evidence] would have affected the price which a willing buyer would have offered for 'the' property just prior to the taking.'" However, the rule is not without limitations. An owner should not to be enriched because of the condemnation; thus, "the total damages awarded may not exceed the fair market value of the whole parcel before the taking."³²

B. THE SAME PRINCIPLE OF "JUST COMPENSATION" HAS BEEN APPLIED TO DIRECT PARTIAL TAKING AND INVERSE TAKING CASES.

The principle that all factors relevant to market value must be considered in determining "just compensation" was understood by the ratifiers to apply to all cases in which a taking of private property has occurred. In addition to the direct partial taking cases addressed previously,

³² *Tomkins*, 270 Mich App at 158-159; Slip Op. at p 4; MDOT's Appendix at p 35a.

these principles were also applied to inverse taking cases. Thus, in *Olsen v City of Dearborn*,³³ property owners brought an action to recover damages for the diminution in value to their properties caused by the City's constructing sewers and water mains across those properties without rights by grant or condemnation. The Court determined that the City had unlawfully imposed servitude upon the properties and awarded the owners damages based on the depreciation in value of their parcels. Also in *Johnstone v Detroit, Grand Haven and Milwaukee Railway Company*³⁴, the owners of lots in a subdivision asserted that the State had effectively taken an interest in their parcels by taking other lots for a use which would result in a violation of building restrictions applicable to all lots in the subdivision. The Court determined that the violation of the restrictive covenants amounted to a taking of property and entitled the owners to "just compensation" based on the diminution in value of their properties as a result of the destruction of the restrictions.

C. THE DISTINCTION BETWEEN DIRECT PARTIAL TAKINGS AND INVERSE TAKINGS IS BASED ON THE OWNER'S BURDEN OF PROVING HIS PROPERTY HAS BEEN TAKEN.

There is no distinction made in common law before or after 1963 with regard to the universal application of the "just compensation" principles enunciated by this Court in *Silver Creek*. These principles have been applied in all cases involving the taking of property whether they are direct takings, direct partial takings or inverse takings. However, the Court of Appeals did emphasize the one important distinction between direct taking and inverse taking cases:

Under the broad scope of §20(2), certain "general" damages that are shared in common by the public should not be considered in determination of Just Compensation awards. However, this statutory mandate fails to recognize that there is a distinction between liability in inverse condemnation cases and damages in

³³ 290 Mich 651, 288 NW 295 (1939).

³⁴ 245 Mich 65; 222 NW 325 (1928).

direct, partial condemnation cases. “An inverse or reverse condemnation suit is one instituted by a landowner whose property has been taken for public use ‘without the commencement of condemnation proceedings.’” To be liable for a “taking” for purposes of inverse condemnation, the property owner must demonstrate that the government, by its actions, has effectively and permanently deprived the owner of any possession or use of the property. Conversely, by virtue of filing a direct condemnation action, the government is admitting liability, and the only issue is a determination of Just Compensation.³⁵

MDOT finds fault with the Court of Appeals ruling that it was error to exclude the damages sought by Tomkins for the so-called “general effects” of the M-6 project for reason that this is a partial taking case.³⁶ It states:

The Court of Appeals below recognized this Court’s ruling in *Spiek*, that, “noise, dust, vibration, and fumes experienced by owners of property along an interstate freeway [do not] constitute a taking of a recognized property interest where the effects alleged are not unique or peculiar in character.” Nonetheless, the Court ruled that it was error to exclude the damages sought by the property owner below for those very same effects, because this is a partial taking case.³⁷

MDOT misconstrues the concept of “recognized property interest” with regard to the relationship between direct partial takings and inverse takings. As the Court of Appeals stated, once an actual partial taking has occurred by virtue of a condemnation action, there is no further inquiry as to the nature or extent of the condemnee’s property interests. The only issue remaining is “just compensation.” The condemnee may or may not be able to convince the finder of fact that a certain factor related to the project has diminished the value of his remainder property but the constitution requires that he be given the opportunity to present all factors he believes are relevant. On the other hand, the property owner who asserts his property value has been diminished without an actual condemnation action has no right to “just compensation”

³⁵ *Tomkins*, 270 Mich App at 161-162; Slip Op. pp 5-6; MDOT’s Appendix at p 36a-37a.

³⁶ Appellant’s Brief on Appeal at p 10.

³⁷ Appellant’s Brief on Appeal at p 10.

unless and until he demonstrates he has a “recognized property interest” that has been to some extent destroyed by government action.

MDOT goes further astray with this argument in its analysis of the precedent the Court of Appeals relied upon to articulate the “just compensation” principle that any factor affecting market value should be considered. The Court cited the *VanElslander* case for this principle, as did this Court in *Silver Creek*. MDOT asserts that *VanElslander* is inapposite because it did not address “whether interests that do not constitute property rights are compensable” and “did not address whether a distinction is to be drawn between inverse and partial taking cases for purposes of just compensation”.³⁸ First, *VanElslander* is cited because of its statement of the broad overriding “just compensation” principle it enunciates and not because of any underlying factual similarity to the present case.

Second, since *VanElslander* was a direct partial taking case, the Court had no reason to discuss any so-called “compensable property rights”. Since the owner’s property had been taken, this concept was not relevant as it might be in an inverse taking case where the owner had to prove his property was taken. It should also be noted that MDOT cites no case law to support the statement that “pre-1963 eminent domain law informed ratifiers of non-compensable damages” in direct partial taking cases. Other than citing portions of Justice Cooley’s constitutional treatises, MDOT offers no support for this assertion. By the same token, MDOT offers no case law in support of the assertion that the terms “property rights” or “non-property rights” were used with regard to direct partial taking cases.³⁹ These terms were only used in inverse taking cases where no physical occupation of property had occurred in the context of the

³⁸ Appellant’s Brief on Appeal at p 11.

³⁹ Appellant’s Brief on Appeal at p 14.

owners efforts to establish a taking which would then entitle him to “just compensation” such as the *Olsen* and *Johnstone* cases discussed previously.

The Court of Appeals statement regarding a “different rule” applying in direct partial taking cases as opposed to inverse taking cases must be considered in the proper context. The basis for this conclusion is the distinction between existing liability in direct taking cases and yet-to-be proved liability in inverse taking cases. The Court stated:

[T]he landowner seeking severance damages need only prove the value of his or her property has been impaired, not that other members of the public are not similarly affected.” Thus, it is reasonable for us also to reach the conclusion that a different rule for Just Compensation does indeed apply in direct, partial condemnation cases as opposed to inverse condemnation cases, and we do so conclude today. Accordingly, we hold that the §20(2) limitation on general damages, as applied to partial takings cases, impermissibly conflicts with the established constitutional meaning of “Just Compensation,” which requires that *any* and *all* factors relevant to market value be taken into consideration when determining the difference in the remaining property’s value before and after the taking.⁴⁰

The Court of Appeals is correct in stating that the owner in the direct taking case need only prove the value of its property has been impaired because once the physical taking of the property has occurred, the only issue remaining is the determination of “just compensation” according to the principles under the Michigan Constitution. To the contrary, the property owner facing an inverse taking case now is required under *Spiek* to demonstrate that it faces “special effects” that are different from the “general effects” suffered by other members of the public. As such, it has to prove that “other members of the public are not similarly affected” as stated by the Court of Appeals. Effectively, the “special effect” requirement under *Spiek* acts as a quantum of

⁴⁰ *Tomkins*, 270 Mich App at 165-166; Slip Op. p 8; MDOT’s Appendix at p 39a.

proof to demonstrate a taking of property has occurred. In many inverse taking cases, a property owner needs to prove that his property has been taken applying the following standard:

An inverse or reverse condemnation suit is one instituted by a landowner whose property has been taken for public use “without the commencement of condemnation proceedings.” ... Under Michigan law, a “taking” for purposes of inverse condemnation means that governmental action has permanently deprived the property owner of any possession or use of the property. *Electro-Tech, Inc v H.F. Campbell Co*, 433 Mich 57, 88-89, 445 NW2d 61 (1989).

However, more recently we stated:

“Any injury to the property of an individual which deprives the owner of the ordinary use of it is equivalent to a taking, and entitles him to compensation. So a partial destruction or diminution of value of property by an act of government, which directly and not merely incidentally affects it, is to that extent an appropriation.” *Peterman v Dep’t of Natural Resources*, 466 Mich 177, 190, 521 NW2d 499 (1994).⁴¹

However, with the *Spiek* case, the threshold for property owners asserting an inverse taking claim based on the general effects of being located near a highway is the “special effect” standard. Based on prior case law in *Richards v. Washington Terminal Co*,⁴² the *Spiek* case established a rule which would guide courts in the determination of whether the impact of a public project on property amounts to an inverse taking or not. In the context of proximity to a highway project when property is not physically taken, the court will require the showing of a “special effect” to meet the high threshold of proof to effectively establish what amounts to a taking which would entitle the owner to “just compensation”.

⁴¹ *Spiek*, 456 Mich at 334.

⁴² 233 US 546; 34 S Ct 654; 58 L.Ed. 1088 (1914).

D. THE COURT OF APPEALS' "INTEGRAL AND INSEPARABLE" EXCEPTION IS CONSISTENT WITH MICHIGAN LAW.

MDOT asserts that the Court of Appeals' adoption of the so-called "integral and inseparable" exception should be rejected. The articulation of this "exception" was stated by the Court of Appeals as follows:

to the extent that ... a part of an owner's land is taken for a public improvement ... and the part taken 'constitutes an integral and inseparable part of a single use to which the land taken and other adjoining land is put,' the owner is entitled to recover the full damage to his remaining property due to such public improvement, even though portions of the public improvement are located on land taken from surrounding owners.⁴³

MDOT characterizes this statement as the exception to a so-called "rule" which MDOT asserts is derived from the holding in *Campbell v United States*⁴⁴. MDOT relies on the *Campbell* court's statement that "the damages resulting to the remainder from the taking of a part were separable from those caused by the use to be made of the lands acquired from others."⁴⁵ However, as the Court of Appeals stated, MDOT's reliance on *Campbell* "misinterprets the integral and inseparable exception".⁴⁶ In fact, the *Campbell* court based its decision upon the very same analysis used by the Court of Appeals. As the Court of Appeals pointed out, the *Campbell* court held "the land taken from the Plaintiff was not shown to be indispensable to the construction of the nitrate plant or to the proposed use of the other lands acquired by the United States." On that basis, the *Campbell* court held that the damages resulting to the remainder of the owner's property were separable to those caused by the use to be made of the property acquired

⁴³ *Tomkins*, 270 Mich App at 168; Slip Op. at p 10; MDOT's Appendix at p 41a.

⁴⁴ 266 US 368, 45 S. Ct. 115, 69 L.Ed. 328 (1924).

⁴⁵ Appellants Brief on Appeal at p 18.

⁴⁶ *Tomkins*, 270 Mich App at 168; Slip Op. at p 10; MDOT's Appendix at p 41a.

from other owners. The Court of Appeals explicitly states that this language from *Campbell* is the basis for the adoption of the “integral and inseparable” exception.⁴⁷

MDOT also asserts that the Court of Appeals’ decision was contrary to the holding in *In re: Ziegler*⁴⁸. MDOT further asserts that the Michigan Supreme Court in that case adopted the *Campbell* rule. However, as previously stated, MDOT has misinterpreted the so-called *Campbell* rule. Therefore, any reliance on that case is flawed. The Court of Appeals correctly considered and distinguished the *Ziegler* case from the present case:⁴⁹

MDOT also relies on *In re: Ziegler*, in which the Michigan Supreme Court held that property owners were not entitled to damages for the diminution in value of their own property resulting from the taking of their neighbor’s property, not their own. The Court explained:

It was only for the taking of a part of their own land that [the defendants] would be entitled to receive Just Compensation for the damages to the remainder, and the extent of recovery may not be thereby enlarged so as to include items otherwise not compensable [, such as] ... diminution in the value of the remainder caused by the acquisition of the adjoining lands of others for the same undertaking.

However, *Ziegler* is distinguishable from the present case. In *Ziegler*, the landowners claimed, in part, that their Just Compensation award “should include the damage to them resulting from the taking of the adjoining land or their neighbor to the south [.] But the Tomkins, unlike the landowners in *Ziegler*, are not directly claiming damages from the taking of their neighbors’ land; rather, they are claiming diminution in the value of their own remaining land from the M-6 highway construction project for which, arguably, part of their land was taken.

Slip Op. pp. 6-7

⁴⁷ *Tomkins*, 270 Mich App at 167-168; Slip Op. at p 9; MDOT’s Appendix at p 40a.

⁴⁸ 326 Mich 183; 40 NW2d 111 (1949).

⁴⁹ This case is referred to as the *Ziegler* case in the Court of Appeals’ Opinion and as *Busch* in the Appellant’s Brief. It is referred to as *Ziegler* in this Brief.

Further examination of the facts of the two cases shows the propriety of this analysis. In *Ziegler*, the property owner claimed damage from the taking of an adjacent parcel combined with the Highway Department's grading of its previously owned right-of-way in front of the owner's property which he had improved and used for his own purposes. This taking resulted in the owner's farmhouse being located on a part of his land surrounded by the highway on three sides. The owner in *Ziegler* did not make a claim for damages related to the so-called "highway effects." Presumably, this was due to the fact that before the taking his property already fronted on state highway property and the owner had actually made his own improvements on the state's right-of-way.

In its analysis, the Court of Appeals comprehended and articulated the important distinction involved. That is, Tomkins did not claim damages from the taking of a neighbor's land. Their claim is based on the diminution in value of their remainder property from the entire M-6 highway construction project. Tomkins never asserted that their claim was based solely on the taking of any property adjacent to their own. To the extent that MDOT characterizes the Tomkins claim as only for damages resulting from the "highway effects" that will occur on "property MDOT acquired from others", this assertion is factually false. Tomkins asserted that part of the highway effects which are of concern are related to the taking of their own property fronting on Kenowa Avenue.⁵⁰ Furthermore, Mr. Henry's analysis of highway proximity damages was not limited to the effects of the actual M-6 right-of-way.

The "integral and inseparable exception" is only an issue in this case because MDOT took the rather disingenuous position in the circuit court proceeding that the land taken from Tomkins for the Kenowa overpass was "merely incidental to the M-6 project." MDOT made this

⁵⁰ Brief in Support of Defendants' Response to Michigan Department of Transportation's Motion in Limine at p 4; Tomkins Appendix at p 13b.

argument notwithstanding the fact that its pleadings and the underlying legislative declarations for the necessity of the taking actually stated that the Tomkins property was being acquired “for a necessary public improvement, namely the relocating, establishing opening and/or improvement of highway M-6”.⁵¹ Under the circumstances, there is really no legitimate argument the Tomkins property was not integral and inseparable with regard to the M-6 project. The property would not have been taken but for the M-6 project and the M-6 project could not have been completed without the property. As the Court of Appeals held based on *Campbell*, the critical inquiry is whether the part of the property taken is “integral and inseparable” with regard to the public project such that “just compensation” is required to make the property owner whole for any diminution in value caused by the project.

MDOT also argues that the Court of Appeals erred by relying on “foreign” case law to create this exception. Although cases from other states were used in the Court’s analysis to illustrate other applications of the same principles, there is nothing inconsistent with the exception as it relates to the so-called *Campbell* rule. The damage claims of the property owners in both *Campbell* and *Ziegler* were denied for the express reason that such damages to their property were *separable* from the use made of someone else’s land. It is only logical that the opposite is true: if such damages are *inseparable*, they should be compensable.

II. § 20(2) OF THE UCPA IMPERMISSIBLY CONFLICTS WITH THE ESTABLISHED MEANING OF “JUST COMPENSATION” WHICH REQUIRES CONSIDERATION OF ALL FACTORS RELEVANT TO MARKET VALUE IN DETERMINING THE PROPER AMOUNT OF “JUST COMPENSATION” FOR A PARTIAL TAKING.

The second question which this Court directed the parties to address in its briefing was: “Whether § 20(2) of the Uniform Condemnation Procedures Act, MCL 213.70(2), impermissibly

⁵¹ *Tomkins*, 270 Mich App at 169; Slip Op. p 10; MDOT’s Appendix at p 41a.

conflicts with this established meaning of “just compensation.” As previously stated, this Court reviews constitutional issues de novo.⁵²

With regard to “just compensation” principles as affected by Section 20(2) of the UCPA, the Court of Appeals held:

“Just Compensation . . . must put the party injured in as good position as he would have been if the injury had not occurred.” In keeping with this principle, the Michigan Supreme Court has held that determination of “Just Compensation” requires “that the proper amount of compensation for the property takes into account all factors relevant to market value.” The Court further clarified that there was no indication in the UCPA that the Legislature intended to abrogate this established meaning of “Just Compensation.” Indeed, to attribute such intent, i.e., the intent to diminish a constitutional standard by statute is to place the legislators in the posture of acting unconstitutionally,” which is a construction that the Court will seek to avoid “unless no other construction is possible.” Here, however, we conclude that, under the circumstances of this case, no other construction is possible. Our review of Michigan precedent and other persuasive authority necessitates our conclusion that the limitation on general damages set forth in §20(2) of the UCPA, as applied to partial taking cases, impermissibly conflicts with the established constitutional meaning of “Just Compensation.”⁵³

MDOT asserts that § 20(2) conforms to the holding in *Spiek* that “noise, dust, vibration, and fumes experienced by owners of property along an interstate freeway [do not] constitute a taking of a recognized property interest where the effects alleged are not unique or peculiar in character.”⁵⁴ It further asserts this provision applies even to cases where a direct partial taking for the highway project has already occurred. This statement leads us to a closer look at *Spiek*.

Spiek was an inverse condemnation case brought by property owners alleging that MDOT’s highway project had been located adjacent to their property so as to interfere with its use and enjoyment and render it worthless, thus constituting a taking. The Court of Appeals held

⁵² *County Road Association*, 474 Mich at 14.

⁵³ *Tomkins*, 270 Mich App at 158; Slip Op. p 3-4; MDOT’s Appendix at p 34a-35a.

⁵⁴ Appellant’s Brief on Appeal at p 34.

that the trial court erred in dismissing the *Spieks*' claim "without affording them an opportunity to establish that their use and enjoyment of their property has been detrimentally affected to a degree greater than that of the citizenry at large in connection with the normal use of the highway." Thus, the only issue before the Supreme Court on appeal was whether the *Spieks* had met the threshold for establishing that a taking had occurred so as to sustain their inverse condemnation claim.

This Court reviewed historical cases involving inverse condemnation claims for damages related to the effects of a highway project. After such analysis, the Court found that there was a distinction in that body of law between property owners who could show the harm they suffered was different in kind from that experienced by the general public or those otherwise similarly situated and property owners whose claim was merely based on a difference in degree of inconvenience experienced by the public at large. The Court applied this principle as the basis for reversing the Court of Appeals' decision and holding the *Spieks* had not asserted a claim upon which relief could be granted.

Furthermore, the Court specifically stated "any diminution of the value of property not directly invaded nor peculiarly affected, but sharing the common burden of incidental damages arising from the legalized nuisance is held *not to be a taking* within the constitutional provision." Thus, the *Spiek* court was careful to limit the principles enunciated to inverse condemnation cases in which there has been no direct invasion of the landowner's property by a government agency.

The *Spiek* case did not in any manner address a situation in which an actual taking of property occurred. The only issue was whether the property owners, of whom no part of their property was physically taken, could meet the threshold for establishing an inverse

condemnation claim. The Court held that, short of a physical taking, the only way that threshold could be met is if the property owner could establish that the harm to his property “differs in kind” from the harm suffered by all others in the proximity of the highway. It also referred to this “different in kind” damage as a “special injury” and related to “effects which are unique or peculiar in character.”

This Court applied the standard for reviewing inverse condemnation cases. It then affirmed the trial court’s determination that the property owners had failed to state a claim upon which relief may be granted. The only basis for this determination was the owners’ failure to allege that the damage to their property was of a unique or peculiar character different from that experienced by other similarly situated property owners. The rule fashioned by this Court was primarily based upon the U.S. Supreme Court case of *Richards v Washington Terminal Company*⁵⁵. In *Richards*, the property owner sued for diminution in value to his property caused by vibrations from a train moving through a tunnel adjacent to his house and smoke and gases emitted from the train onto his property. The plaintiff was not allowed to seek recovery for the allegation of vibration causing damages, but was allowed to seek recovery for the damage from the smoke because it was different in kind from the type of damage which may be suffered by other similarly property owners in the area. This Court stated that the Court of appeals had incorrectly applied the *Richards* case by emphasizing the different in degree and inconvenience experienced by the public at large as opposed to the difference in kind of harm suffered.⁵⁶

Spiet applies only to inverse taking claims. The scope and contextual basis of its holding makes this clear. The “special effect” requirement resulting from the case establishes a threshold

⁵⁵ 233 US 546, 34 S. Ct. 654, 58 L.Ed. 1088 (1914).

⁵⁶ *Spiet* 456 at 342.

which must be met to effectively prove a taking has occurred which would entitle a property to “just compensation”.

More importantly, any broader interpretation of the holding in *Spiek* would violate Article 10 , § 2 of the Michigan Constitution. By the same token, Section 20 (2) of the UCPA can not have the effect MDOT asserts it has and still comply with the principles of “just compensation”.

The constitutional basis for this distinction is based on the inherent difference between direct partial takings and yet-to-be proved inverse taking claims. The fact that this was commonly understood by the ratifiers of Constitution 1963, Article 10, § 2, is demonstrated by review of a portion of the official record of the Constitutional Convention which resulted in the adoption of Constitution 1963, Article 10, § 2. The ratifiers fully understood and intended that claims of damages by persons based on so-called general highway effects without an actual taking of their property should be excluded.⁵⁷ During the Constitutional Convention of 1961, a proposal to amend the Constitution was presented as follows, with the amendment language in bold type:

Sec. a. IN THE EXERCISE OF THE POWER OF EMINENT DOMAIN, private property shall not be taken OR DAMAGED by the public nor by any corporation for public use OR PURPOSE, without the necessity [therefor] being first determined and just AND EQUITABLE compensation [therefor being first made or secured in such manner as shall be prescribed by law] FOR THE LOSSES AND DAMAGES SUFFERED THEREBY BEING FIRST PAID.

Delegate Erickson stated that the phrase “ ‘or damaged’ ” has been added to point out the need for parties being compensated for their property being damaged in cases where there is no

⁵⁷ A more thorough analysis of the deliberations regarding this proposed amendment is found in “Just Compensation and the Framer’s Intent: a Constitutional Approach to Road Construction Damages in Partial Taking Cases”, Alan T. Ackerman and Noah Yanick, 77 U. Det. Mercy L. Rev. 241.

actual taking of the property or physical contact with the property”.⁵⁸ Delegate Mahinske, a proponent of the proposed new “or damage” language, clarified the intent of the amendment: while “people whose property was not being taken” could not intervene in necessity hearings, there would be “absolutely no doubt about their having the right to intervene in the hearings to determine damages and compensation.”⁵⁹ Delegate Stafseth proposed to amend the committee proposal by deleting the words “or damaged” because he thought that the original committee proposal would allow “people who have property that is not taken for the project to come in for claims of damages, you are opening up what you might say is Pandora’s box to a siege of litigation” “If we open up the possibility of claims outside of the property owners or any interest in that property which we are taking for the purpose, and we have a deluge of claims coming in, . . . it is going to hit the taxpayer right in the pocket.”⁶⁰

Other delegates stated the proposal would “open up the floodgates of compensation” and “open [t]he door . . . to the type of nuisance suit where you will have a right of any individual to intervene purely with the idea of getting a settlement out of the condemning authority.”⁶¹

Stafseth further stated that his amendment was intended to prevent “a whole series of additional cases” from “coming into a condemnation procedure.”⁶² Delegate Brake added that he was “nervous about this matter of damages by people whose property is not taken.”⁶³

Thus, the record indicates there was significant concern about enabling those when property was not actually taken or physically invaded to commence inverse taking cases related to the effects of highway projects.

⁵⁸ 2 Official Record, Constitutional Convention 1961, p 2581.

⁵⁹ 2 Official Record, Constitutional Convention 1961, p 2582.

⁶⁰ 2 Official Record, Constitutional Convention 1961, pp 2582-2583.

⁶¹ 2 Official Record, Constitutional Convention 1961, p 2585.

⁶² 2 Official Record, Constitutional Convention 1961, p 2593.

⁶³ 2 Official Record, Constitutional Convention 1961, p 2600.

At the same time, the record demonstrates the intent to continue to apply the commonly understood principles of “just compensation” based on consideration of all factors affecting value to partial taking cases involving claims of diminution in value because of highway effects. Delegate Allen supported Stafseth’s amendment stating: “The amendment keeps the damages determined-that is, the amount of damages, on the standards which we have had before. That is, we treat damages in terms of damages to the property that is being taken, but the committee proposal-and I wonder how many of us appreciate this-introduces a new concept into the Michigan law. It not only will pay damages as fair damages, just damages to the property being taken, but it introduces in the constitution-and I underline the words "in the constitution"-the new concept of paying damages to other people's property, to property that is not being taken.”⁶⁴

A last but significant consideration pertains to another way in which MDOT’s position would lead to an absurdly unfair and unconstitutional result. Using MDOT’s rationale, Tomkins would not be entitled to compensation for so-called “general effects” even if part of their property was actually taken and used for the actual M-6 right-of-way. This would be the necessary result even though after the taking the remainder of their property actually abutted the M-6 right-of-way. Even with one of the busiest freeways in West Michigan right in their backyard, they would not be entitled to claim any compensation for the diminution in value to their property because that diminution would be caused by the same *type* of concerns (i.e., general effects) experienced by other property owners in the vicinity albeit to a much greater degree. Since the diminution in value is caused by the “general effects” of the project, it would become their own cost to bear for “living in a modern, developed society” under MDOT’s rationale. This certainly is not a result which comports with “just compensation.” As the Court

⁶⁴ 2 Official Record, Constitutional Convention 1961, p 2594.

of Appeals further noted a number of other state courts “have made clear that the ‘different in kind’ limitation does not apply to cases involving direct appropriations of partial parcels”.⁶⁵ If it did, the constitutional protection afforded property owners in condemnation cases would be subverted to a point far removed from what the ratifiers of the 1963 Constitution understood to be “just compensation.”

⁶⁵ *Tomkins*, 270 Mich App at 164; Slip Op. at p 8; MDOT’s Appendix at p 39a.

CONCLUSION

When Article 10, § 2, of the Constitution of 1963 was ratified, the common understanding by the ratifiers as to the phrase “just compensation” was based on the principle that all factors relevant to market value must be considered. This principle was applied in all cases in which a taking occurs, either by a direct condemnation proceeding to acquire property or after a judicial determination that an inverse taking has occurred. However, the ratifiers also clearly understood that a claimant whose property was not directly taken through condemnation was required that government action had resulted in a de facto taking of his property by destroying its value to some extent. Any requirement for demonstrating a “recognized property right” or “special injury” was relevant only for purposes of the claimant establishing a taking had occurred.

Section 20(2) of the UCPA impermissibly conflicts with the established meaning of “just compensation” by removing from consideration factors relevant to market value in determining the proper amount of just compensation for a partial taking. The requirement in *Spiek* with regard to a showing of special effects from highway proximity is limited to application in inverse condemnation cases as it establishes a threshold for proving a taking of property has occurred. Such a requirement is not relevant in a direct taking case since the physical occupation has already occurred and placing such a limitation on the factors relevant to market value abrogates the meaning of just compensation.

RELIEF SOUGHT

Appellees Rodney Tomkins and Darcy Tomkins respectfully request that this Honorable Court affirm the decision of the Court of Appeals declaring that § 20(2) of the UCPA, as applied to partial taking cases, impermissibly conflicts with Article 10, Section 2 of the Michigan Constitution of 1963.

Respectfully submitted,

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