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9TH JUDICIAL CIRCUIT
COUNTY OF KALAMAZOO
KALAMAZOO, MICHIGAN

STATE OF MICHIGAN

IN THE 9th CIRCUIT COURT FOR THE COUNTY OF KALAMAZOO

COUNTY OF KALAMAZOO,
a Michigan municipal corporation,

Plaintiff,

v.

JAMES BERRY, JENNIFER BERRY, JILLYNE BLAKESLEE, RICHARD BLAKESLEE, JAMES ENGELS, JAYNE ENGELS, CAMILLE FATH, JAMES HEETER, JUDITH HEETER, CHERYL JOHNSON, JAMES JOHNSON, NANCY JOHNSON, JOYCE MCCLISH, LARRY MCCLISH, EDMUND TALANDA, as individuals,

Defendants.
_____/

Case No. : 2022-0530-CB

Hon. Curtis J. Bell

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OPINION AND ORDER

At a session of said Court held in the City and County of Kalamazoo, State of Michigan, on the 4th day of August 2023.

PRESENT: HON. CURTIS J. BELL
Circuit Court Judge

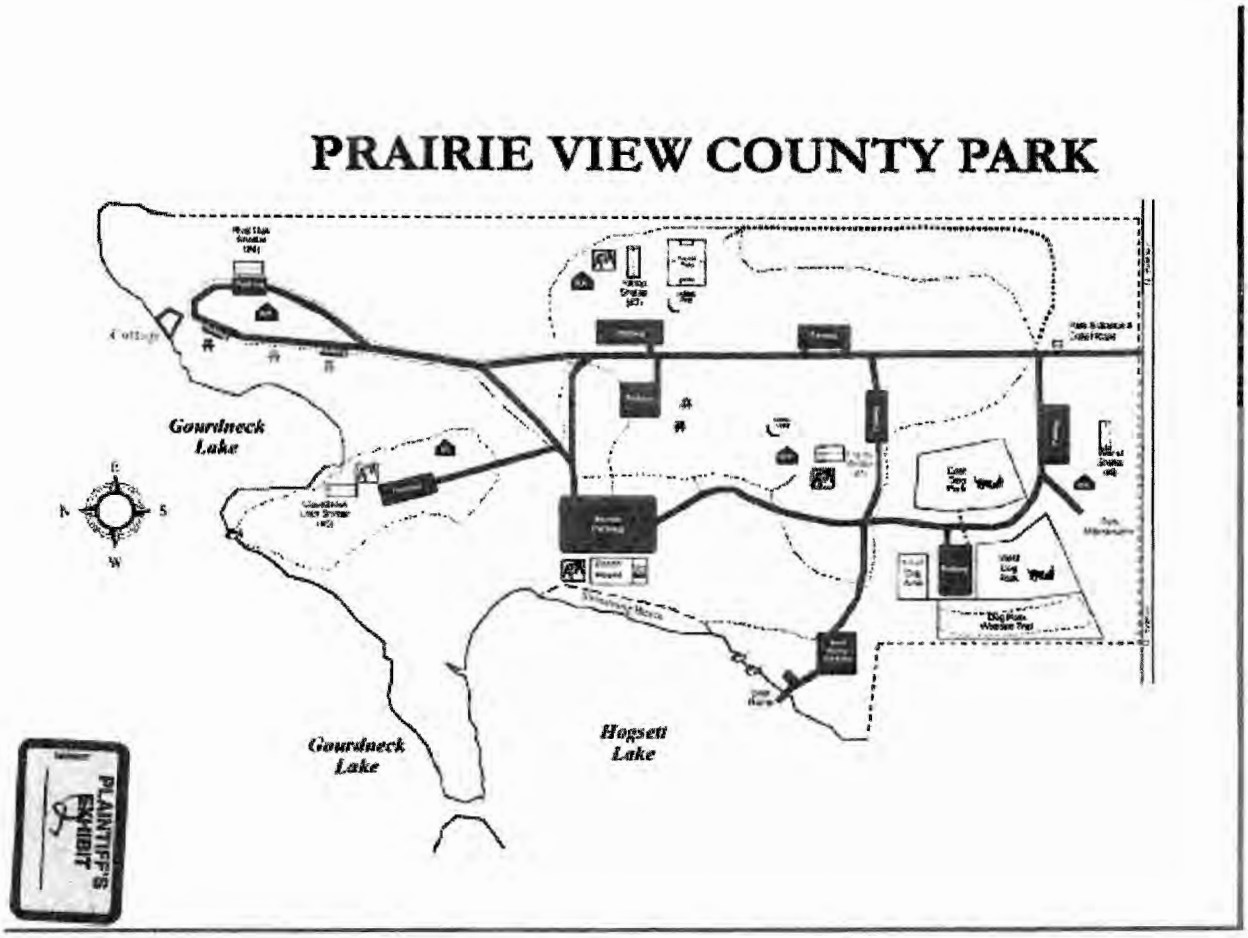
STATEMENT OF FACTS

Plaintiff Kalamazoo County, hereinafter referred to as the County, seeks to condemn Defendants' private property. The subject property is located within the bounds of Prairie View Park in Schoolcraft Township, Kalamazoo County. Prairie View Park is a 210-acre public park that has been owned by the County since 1960. The County is a municipal corporation. At the time the park land was acquired by the County, the property in dispute was owned by Helen and Harry Johnson and Edmund and Dorothy Talanda. Each married couple owned an undivided one-half interest in the property. Both couples passed away by 2019.

The Defendants in the instant case are the heirs of either the Talandas or the Johnsons. Defendants Camille Fath and Edmund Talanda, Jr., hereinafter referred to as the Talanda family, own an undivided one-half fee simple interest in the property. The Johnson family owns the other one-half fee simple interest. This Johnson family is comprised of Judith and James Heeter, Jillyne and Richard Blakeslee, Jennifer and James Berry, Nancy and James Johnson, Joyce and Larry McClish, Jerome and Cheryl Johnson, and Jayne and James Engles.

The approximately one-third acre property is located at 1739 East U. Avenue, Vicksburg, Michigan 49097. The property contains a one-story seasonal residential structure and is approximately 1,276 square feet. The families primarily use the property as a weekend and holiday cottage.

The property shares its southern, eastern, and western borders with Prairie View Park and its northern border with Gourdneck Lake. Because it is landlocked, Defendants must access the property through the park gate with key access. A map of the property provides a visual representation of its condition, as seen here on the previously admitted Exhibit 2:



There is no recorded easement allowing for the ingress and egress to the property. Rather, in 1963, Kalamazoo County and the Stender family entered into a Settlement Agreement, which among other things, governs the owners' right of ingress and egress through the County's land to the property. The Agreement was entered into on January 28, 1963, subsequent to the County's initiation of a condemnation suit against the Stender family in the Kalamazoo County Circuit Court. Additionally, the parties agreed that the County would have the first option to purchase the property from the owners and that the owners would not rent or assign the property to any person who is not a signatory-landowner to the agreement; this is displayed in Paragraph 8 of the agreement, which provides:

> It is hereby agreed by and between the party in the first part and the parties of the second part, that the said party of the first part shall have first option to purchase the said property above described, owned and occupied by the parties of the second part; the parties of the second part agree that they will not rent or assign their said premises to any person or persons who are not parties of the second part.

In 2002, Helen Johnson conveyed her interest to her children. On March 24, 2019, Edmund Talanda, Sr., the last living signatory to the 1963 Agreement, passed away. His heirs and their spouses now own the Talanda family interest. The County now seeks to condemn the property and pay compensation for its taking.

PROCEDURAL HISTORY

In 2017, a lawsuit was filed by the Johnson family against the Talanda family. This lawsuit concerned the Talanda family preventing access by refusing to provide gate keys, See Case No. 2017-0300-CZ. The County changed the locks and it only gave the Talanda family keys. The Talanda family refused to provide keys to the Johnson family.

The parties stipulated to go into alternative dispute resolution pursuant to an order dated October 12, 2017. In that order, the County, though not a litigant, was encouraged to participate. On February 26, 2020, the case was dismissed with prejudice as a resolution had been reached. During the time in which this matter was being litigated, the Johnson family and the Talanda Trust filed a lawsuit against the County.

Defendants in the 2019 case brought suit against the County alleging that it had restricted ingress and egress to the property and thus effectuated an unconstitutional taking of their property, See Case No. 2019-0328-CZ. They sought mandamus to enforce their property rights. Prior to the lawsuit being filed, the County also solicited the Johnson family and Talanda family to negotiate the sale of the property. The 2019 case was dismissed via stipulation on April 20, 2020.

The County's governing board had, on April 19, 2022, voted on and adopted a Resolution of Necessity to proceed under the Michigan Uniform Condemnation Procedures Act to obtain

Defendants' property, declaring its acquisition as necessary for enhancing public interest. On May 6, 2022, the County filed a lawsuit seeking condemnation of the property. Approximately two months later on July 14, 2022, the County sought to dismiss the case because there was a failure "... for Plaintiff to comply with all the necessary prerequisites for bringing a condemnation action under the MCL 213.51 *et seq.*, and thereafter to refile its Complaint for Condemnation," See Case No. 2022-0233-CB July 14, 2022, filing. The case was eventually dismissed via stipulation with costs and attorney fees against Plaintiff on August 1, 2022.

On August 23, 2022, the County sent a Good Faith Offer to Defendants. The estimated total compensation was $320,000. The following month, the County issued a Declaration of Taking, arguing that the property's condemnation was for public purposes.

On October 12, 2022, Plaintiff filed a Complaint for Condemnation and an Ex Parte Motion for an Order to Show Cause. The Order requested the Court to fix a hearing date at least 28 days after accomplishing service. On October 17, 2022, the Court granted the Order for Defendants to appear on December 5, 2022.

Defendants James and Judith Heeter timely filed an Answer to the Complaint and Jury Demand. On November 23, 2022, Defendants James and Judith Heeter filed a motion for Pretrial Ruling on Entitlement to Jury Trial on the Issue of Necessity for Public Use or, in the Alternative, for an Evidentiary Hearing Regarding Fraud, Mistake of Law, or Abuse of Discretion. Defendants sought a ruling on whether they are entitled to a jury trial where the County is required to prove the necessity. In the alternative, Defendants sought an evidentiary hearing to establish that the Kalamazoo County Board of Commissioners based the April 19, 2022 Resolution of Necessity on fraud and/or mistake of law and/or abuse of discretion.

On December 1, 2022, Defendants Camille Fath, Edmund Talanda, Judith Heeter, James Heeter, Nancy Johnson, Cheryl Johnson, Joyce McClish, Larry McClish, Jayne Engel and James Engels filed their Answer to the Complaint. They also filed a Motion to Dismiss for Lack of Subject Matter Jurisdiction and/or Necessity on December 12th. On December 29, 2022, Plaintiff filed a Motion for Summary Disposition regarding the surrender of possession and just compensation.

On October 17, 2022, the Honorable Judge Lipsey issued an Order to Show Cause and a hearing on the complaint. No parties appeared for the December 5th, 2022, hearing. On December 29, 2022, the Court issued a Notice of Scheduled Proceeding for an Early Scheduling Conference for January 20, 2023. All parties stipulated and agreed to adjourn the Early Scheduling Conference, scheduled for January 20, 2023, to February 9, 2023. Plaintiff's Motion for Summary Disposition was also scheduled for February 9, 2023.

The Court entertained Plaintiff's Motion for Summary Disposition to surrender possession and just compensation. After oral argument, the Court denied said motion. The Court found procedural error associated with Plaintiff's notice to Defendants. A written order has yet to be submitted by Defendants. The Court adjourned Defendants' Motion to Dismiss for Lack of Subject Matter Jurisdiction.

On May 25, 2023, the Court heard Defendants' Motion for Lack of Subject Matter Jurisdiction and/or Necessity. On June 2, 2023, this Court entered an Order Denying Defendants' Motion to Dismiss for Lack of Subject Matter Jurisdiction and/or Necessity.

On June 16, 2023, Plaintiff filed an Ex Parte Motion to Quash Subpoenas and for Protective Order. The Motion requested the Court to disregard subpoenas issued by Defendants for the testimony of current and former Kalamazoo County employees and issue a Protective Order

preventing these testimonies. The Court granted Plaintiff's Motion concerning the quashing of certain subpoenas and granted a protective order. Plaintiff's counsel has not yet submitted this order. At the conclusion of proofs on Defendants' motion to dismiss based on necessity, the Court took the matter under advisement for 45 days in order to issue this written opinion. This is in compliance with MCL 213.56(4), which states, "[t]he court shall render a decision within 60 days after the date on which the hearing is first scheduled."

DISCUSSION

This case calls into question the interplay between this State's constitutional provisions and its statutory language concerning the condemnation of private property by a state agency through its eminent domain authority. In Michigan, "[a]ny public corporation or state agency is authorized to take private property necessary for a public improvement or . . . for public use and to institute and prosecute proceedings for that purpose." MCL 213.23(1). However, "[p]rivate property shall not be taken for public use without just compensation therefore being first made or secured." Mich. Const. art. X, § 2. As stated in *Hathcock*, "public use" seeks to promote the "public health, safety, morals, general welfare, security, prosperity, and contentment of all the inhabitants or residents within the municipal corporation." *County of Wayne v. Hathcock*, 471 Mich. 445, 462 (2004) (quoting *Gaylord v. Gaylord City Clerk*, 378 Mich. 273, 300 (1966)). "'Public use' does not include the taking of private property for transfer to a private entity for the purpose of economic development or enhancement of tax revenues." *Id.* The condemning authority must prove by a preponderance of the evidence that the taking of private property is for a public use. Mich. Const. art. X, § 2.

Not only is the County authorized under the general eminent domain and condemnation processes discussed above, Michigan statute specifically envisions situations in which municipalities will need to secure private property for the purposes of county and regional parks.

County commissions are specifically authorized to acquire suitable real estate within their counties for the purpose of park creation. See MCL 46.358. MCL 46.359, contained within county and regional parks Art 261 of 1965 provides Sec. 9:

> A county operating under this act or a regional commission may take private property necessary for any purposed within the scope of its power under this act, for the use or benefit of the public, and institute and prosecute proceedings for that purpose under and in accordance with Act No. 149 of the Public Acts of 1911, as amended, being sections 213.21 to 213.41 of the Compiled Laws of 1948.

When a public corporation or State agency seeks to condemn property under MCL 213.23, the proposed taking must not only be for a public improvement or public use, "but it must also be 'necessary' to that end." *County of Wayne*, 471 Mich. at 463. Public corporations and state agencies are vested with the authority to determine the necessity required under MCL 213.23. *Id.* Additionally, MCL 213.56(2) provides:

> With respect to an acquisition by a public agency, the determination of public necessity by that agency is binding on the court in the absence of a showing of fraud, error of law, or abuse of discretion.

The challenging landowner bears the burden of proving that the condemning agency based its determination of necessity on fraud, error of law, or abuse of discretion in determining the owners' property is necessary for public use. *County of Wayne*, 471 Mich. at 463.

The question of necessity was thoroughly discussed by the Michigan Court of Appeals in *Michigan State Highway Commission v. Vanderkloot,* 43 Mich. App. 56 (1972). The *Vanderkloot* Court addressed the question of whether an administrative agency abused its discretion in determining the necessity of taking real property for the construction of a roadway, *Id.* At 59. The administrative agency was acting in accordance with MCL 213.361. *Id.* The court provided the following insight concerning the nature of necessity:

> It is fundamental to an understanding of this case to recognize that the right of eminent domain is founded on the law of necessity. *26 Am.Jur.2d, Eminent*

> *Domain, s 2, p. 639.* If the object can be affected practically as well in some manner other than by appropriating private property, then a taking cannot occur under the guise of eminent domain. The taking, however, need not be an absolute necessity; it is sufficient that it is reasonably necessary for public convenience or advantage.

Id. at 62. The court goes on to state:

> A requirement that an act shall be 'in the public interest' is a sufficient criterion and standard where the subject matter of the statute renders this an intelligible and not a limitless criterion. Similarly, 'public interest, convenience, or necessity' and public convenience and advantage' have been held sufficient standards. *Am.Jur.2d.*Adminstrative Law, s 120, p. 929.

Id. at 65.

In terms of any set factors to consider in determining necessity, the Court provides the following insight:

> There appears to be no fixed or inflexible rule of law by which the issue of necessity of the taking may be measured. *State Department of Transportation v. Myers, 237 So.2d 257, 262 (Fla.App.1970).* The determination must depend upon and vary with the facts in each particular case. A factor of extreme importance in one case may not even be a consideration in another situation.

Id. at 66.

In 2020, Michigan's High Court discussed necessity in *Rafaeli, LLC v. Oakland County,* 505 Mich. 429 (2020). Defendants rely extensively on the *Rafaeli* case in their argument that the County's determination of necessity is improper. However, *Rafaeli* is of little relevance to the issues presented in the present case. The *Rafaeli* decision concerned property tax foreclosure and surplus funds derived therefrom. Though the Court necessarily had to discuss eminent domain to provide its underlying rational, the decision does not modify either existing precedent concerning eminent domain and necessity, nor determine the statutes in question in the instant matter unconstitutional. As *Rafaeli* states:

> As *Lingle* suggests, each constitutional provision protects property owners against specific government action, offering different remedies for distinct constitutional

> violations. The remedy for taking of private property is just compensation., while the remedy for being deprived of property without due process of law is the return of the property. Notably, plaintiffs do not dispute the legitimacy of defendant's authority to foreclose on their properties, nor do plaintiffs contest the adequacy of defendants' efforts to notify plaintiffs of the tax delinquency, forfeiture, and foreclosure. Instead, plaintiffs challenge defendants' retention of the surplus proceeds as an unconstitutional taking. Plaintiffs ask this Court to reverse the decision of the Court of Appeals and remand to the circuit court for a determination of just compensation. Plaintiffs' request for a determination of just compensation demonstrates that the nature of their claim is a taking without just compensation, not a deprivation of property without due process of law.

Id. at 448-49.

In the present case, Defendants argue each of the three exceptions under MCL 213.56(2). First, Defendants argue that the County's determination of necessity was based upon fraud because Kalamazoo County Board of Commissioners were informed that condemnation of Defendants' property could be based upon the breach of the 1963 Agreement between the County and the families. The elements of a fraud claim are: (1) the defendant made a material representation, (2) the material representation was false, (3) the defendant made the representation knowing that it was false, or made it recklessly without knowledge of its truth, (4) the defendant made the representation intending that the plaintiff would act on it, (5) the plaintiff acted in reliance on the representation, and (6) the plaintiff suffered injury because of the reliance. *Lucas v. Awaad*, 299 Mich.App. 345, 363 (2013) (citing *Cooper v. Auto Club Ins. Ass'n*, 481 Mich. 399, 408 (2008)).

The Kalamazoo County Board of Commissioners is composed of individual members. However, their decisions are made as a body and on behalf of the County. Even for argument's sake, accepting as true that there were commissioners who believed there was a breach of the 1963 Agreement and that the parties intended to have further settlement discussions has no impact on the Board's decision. The Board spoke and its decision to take Defendants' property was a matter of necessity.

In looking at the elements noted above, it is unclear as to whom Defendants are claiming provided intentional material misrepresentations and to whom they assert made false or reckless representations. The Court can surmise that Defendants would argue it was county administration that provided information to the individual commissioners. However, there is nothing about this specific fact pattern that lends itself to a claim of fraud. The fraud in this case would have had to have been perpetrated against Defendants specifically. There is no such claim.

Additionally, Defendants argue that the County intended to discuss with them a meaningful settlement plan yet did not do so. This argument is also a claim of fraud made by Defendants against the County. However, the facts are insufficient to support this assertion. Failed intentions to negotiate a dispute resolution does not in and of itself create fraud. Considering all of the factors, Defendants' claim is without merit.

Next, Defendants argue that the County's determination of necessity was based upon error of law because county commissioners "were under the mistaken impression that eminent domain is an appropriate remedy for breach of contract." As stated above, the Kalamazoo County Board of Commissioners acts on behalf of the County. Defendants have not provided proof consistent with their assertion that this is how the Kalamazoo County Board of Commissioners reached its determination of necessity. Accepting that one, two or even three commissioners held this belief does not create a majority that would have affected the outcome of the Board's decision.

Lastly, Defendants argue that the County abused its discretion in reaching its determination of necessity because the Board of Commissioners did not show that there was a proposed plan in place for use of the property. Much of Defendants' argument focuses on this issue. Defendants claim that because there is no specific designated use for the property, the County abused its discretion. Defendants rely on *Board of Education of City of Grand Rapids v. Baczewski,* 340

Mich. 265 (1954).

In *Baczewski*, the plaintiff, through its eminent domain authority, sought to condemn the defendants' undeveloped property and construct a high school on it. *Id.* at 268. There was no current need to build a high school on the defendants' property. *Id.* Rather, the plaintiff estimated that it would need the property for a high school 30 years in the future and planned to use it for playground purposes until then. *Id.* The court held that the plaintiff's plan did "not meet the test of necessity in condemnation proceedings." *Id.* at 269. "The words 'necessity for using such property' . . . does not mean an indefinite, remote or speculative future necessity, but means a necessity now existing or to exist in the future." *Id.* To allow necessity to extend to a future time "would not only be beyond what was contemplated in the constitutional grant of condemnation power, but would result in confusion and chaos in future condemnation proceedings." *Id.* Additionally, "[i]f necessity was established, it would have to be necessity of acquisition for a high school site," and not a playground *Id.* at 268.

This one-third acre of property is fully contained within an existing park. The absorption of this park will make the property whole. The County need not say or determine that the property will be used for green space, a beach, a dock, or anything more specific than that will be part of Prairie View Park. This use is not speculative, nor remote in time. The issues discussed in *Baczewski,* relate to concerns over remoteness of time for the principle use for the condemned property. Here the condemnation of land for the purpose of a county park is specifically provided for in Michigan statute as discussed herein.

Although Illinois law is not binding on Michigan courts, the two jurisdictions maintain similar eminent domain laws, and because there is such limited binding authority available, this Court looks to the persuasive authority offered by Illinois.

Similar to the controlling statute in Michigan, Illinois Courts may not second guess a condemning agency's authority regarding the necessity of taking private property for public use. *Alsip Park Dist. v. D & M Partnership*, 625 N.E.2d 40, 45 (Ill. App. Ct. 1993). In *Alsip Park Dist.*, the defendants owned undeveloped property which they intended to construct a group home for developmentally disabled persons on. *Id.* at 41. The plaintiff sought to acquire a portion of the property for park land. *Id.* at 42. The district where the property was located passed an ordinance authorizing the acquisition of the site by the plaintiff. *Id.* The court held that the plaintiff's determination of necessity for taking the defendants' property was appropriate and that Illinois courts shall not second guess a condemning agency's authority. *Id.* at 45. Additionally, the court held that the "introduction of a valid ordinance approving the taking of private property for a public purpose into a trial record, establishes a *prima facie* case . . . , making it the duty of the party challenging said condemnation to offer evidence that the condemner abused its discretion with respect to its decision concerning the necessity of the taking." *Id.*

CONCLUSION

This Court is a court of record endowed by the Michigan Constitution with "original jurisdiction in all matters not prohibited by law," in addition to having "power to issue, hear and determine prerogative and remedial writs, supervisory and general control over all inferior courts and tribunals," and "jurisdiction of other cases and matters as provided by riles of the supreme court." Mich. Const. art. VI, § 13. Thus, this Court is assumed to have jurisdiction unless the matter in question is specifically excluded by law. *Lester v. Spreen,* 84 Mich. App. 689; (1978). MCR 8.117 and the Supreme Court Administrator's Office recognize that, among circuit court case type codes is "CC" for "all condemnation proceedings."

Moreover, unless divested of its presumptive jurisdiction by a specific statute, this Court,

or any court, must exercise the jurisdiction conferred upon it. As summarized in *Union Pac RR Co. v. Brotherhood of Locomotive Eng'rs,* 558 U.S. 67, 71 (2009). Michigan courts, like their federal counterparts, "are not permitted either to enlarge or diminish the jurisdiction conferred by statute or the constitution." *In re Hatcher,* 443 Mich 426, 433 (1993).

Plaintiff's determination of necessity regarding the taking of Defendants' property is not based upon fraud, error of law, or abuse of discretion and is, therefore, valid and binding on this Court. Unlike *Baczewski*, where the plaintiff attempted to take the defendants' property for a public use 30 years in the future, the County's determination is that Defendants' property is necessary to eliminate private interest from a public venue. The importance of Prairie View Park to endure as a public entity exists now, not tomorrow. As the County's Parks Director testified, he knows of no private interests that are found in, and completely surrounded by, a public park. This makes this property unique and non-conforming to the use of the parks by the general public.

Moreover, the County must prove by a preponderance of the evidence that Defendants' property will be *used* for a public purpose. Pursuant to MCL 213.56(2), this Court may not reconsider the County's determination of necessity because Defendants have failed to demonstrate that the proposed taking was based upon fraud, error of law, or abuse of discretion. Prairie View Park is owned by the County and is open to the public, and the purpose of the proposed taking is to complete Prairie View Park, and thus far the proposed taking is unquestionably for a public use. Because the County has met its burden of proving that the proposed taking of Defendants' property will be used for a public purpose, the Court holds that the taking is appropriate and within the County's eminent domain authority.

As the Court previously ruled, Defendants have no right to a jury trial on the issue of necessity. This Court's opinion now resolves the question of necessity. As provided in MCL

213.56(5), "[t]he court's determination of a motion to review necessity is a final judgement." See also *Consumers Energy v. Storm,* 509 Mich. 195 (2022).

The pendency of a dispute as to just compensation has no bearing on the County's right to possession. MCL 213.59(5)(c). Moreover, MCL 213.57 states that "(1) If a motion to review necessity is not filed under section 6, the title to the property described in the petition shall vest in the agency as of the date on which the complaint was filed." As the issue of necessity has now been resolved, the County is now vested with the ownership of the property.

The remaining issue in this case concerns just compensation. The statue is clear as to the rights of Defendants concerning how just compensation shall be determined. MCL 213.62 provides:

> A plaintiff or defendant may demand a trial by jury as to the issue of just compensation pursuant to applicable law and court rules. Accordingly, a jury trial shall be set on the question of just compensation.

Accordingly, the Defendants are entitled to a jury trial on the question of just compensation. Proofs concerning the value of this unique parcel of lake-front land will be left for the jury to determine.

IT IS SO ORDERED.

Dated: August 4, 2023

CIRCUIT COURT JUDGE
Honorable Curtis J. Bell