RECEIVED by MSC 12/20/2021 10:30:09 AM

STATE OF MICHIGAN

IN THE MICHIGAN SUPREME COURT

CONSUMERS ENERGY COMPANY,

Plaintiff-Appellant/
Cross-Appellee,

v.

BRIAN STORM and ERIN STORM,

Defendants-Appellees/
Cross-Appellants

Supreme Court Docket No. 162416

Court of Appeals Docket No. 350617

Lower Court Case No.: 2019-0160-CC
Kalamazoo County Circuit Court

Aaron L. Vorce (P68797)
CONSUMERS ENERGY COMPANY
Attorney for Plaintiff-Appellant/Cross-Appellee
One Energy Plaza
Jackson, MI 49201
(517) 416-4741

Craig H. Lubben (P33154)
MILLER JOHNSON
Attorneys for Defendants-Appellees/Cross-Appellants
Radisson Plaza Hotel & Suites
100 West Michigan Avenue, Suite 200
Kalamazoo, Michigan 49007-3960
(269) 226-2958

Stephen J. van Stempvoort (P79828)
MILLER JOHNSON
Attorneys for Defendants-Appellees/Cross-Appellants
45 Ottawa Avenue, SW – Suite 1100
Grand Rapids, MI 49503
(616) 831-1765

Appendix of Cross-Appellants Brian and Erin Storm

Volume I of II

RECEIVED by MSC 12/20/2021 10:30:09 AM

Table of Contents
Volume I of II

Appendix Page

Complaint for Condemnation of Interests in Land
Filed April 8, 2019 ..... 001b

Affidavit of Brian Storm
Dated May 28, 2019 ..... 140b

Transcript of Hearing on Defendant's Motion Challenging Necessity
Held June 28, 2019 ..... 149b

RECEIVED by MSC 12/20/2021 10:30:09 AM

STATE OF MICHIGAN

IN THE 9th JUDICIAL CIRCUIT COURT FOR THE COUNTY OF KALAMAZOO

CONSUMERS ENERGY COMPANY,

Plaintiff,

Case No. 19-0100-CC

v

Hon. Alexander C. Lipsey

BRIAN STORM, ERIN STORM, and LAKE MICHIGAN CREDIT UNION,

Defendants.

Nikole L. Canute (P68713)
Richard M. Wilson, Jr. (P29717)
Attorneys for Plaintiff
Mika Meyers, PLC
900 Monroe NW
Grand Rapids, MI 49503
(616) 632-8000

COMPLAINT FOR CONDEMNATION OF INTERESTS IN LAND

There is no other pending or resolved civil action arising out of the transaction or occurrence alleged in this complaint.

Plaintiff Consumers Energy Company ("Consumers Energy"), through its attorneys, hereby states as follows for its complaint for condemnation of interest in land ("Complaint"):

PARTIES, JURISDICTION AND VENUE

1. Consumers Energy is a Michigan corporation and public utility organized and existing under Public Act 238 of 1923, MCL §§ 486.251, *et seq.*, as amended, for the purposes of generating, manufacturing, producing, gathering, storing, transmitting, distributing, transforming, selling and supplying electric energy and gas to the public generally, with a principal address of One Energy Plaza, Jackson, Michigan 49201.

RECEIVED by MSC 12/20/2021 10:30:09 AM

2. Defendants Brian Storm and Erin Storm, husband and wife, have an address of 2035 Broadway, Kalamazoo, MI 49008 and own the underlying real property located in Kalamazoo County, Michigan that is at issue in this Complaint, and is further identified as follows ("Property"):

> Lot 33 of Hurni's University Hills, according to the plat thereof, recorded in Liber 28 of Plats, Page 3, Kalamazoo County Records. Being part of the Northeast 1/4 of Section 29, T2S, R11W.
>
> Parcel ID: 06-29-220-033
>
> Commonly known as: 2035 Broadway, Kalamazoo, MI 49008

3. Defendant Lake Michigan Credit Union has, or claims to have, an interest in the Property as a mortgagee that falls within the definition of an "owner" under the Michigan Uniform Condemnation Procedures Act, Public Act 87 of 1980, MCL §§ 213.51, *et seq.* ("UCPA"), and has an address of 5540 Glenwood Hills Parkway SE, Grand Rapids, MI 49512.

4. The Defendants named above are the only persons appearing in the records of the Kalamazoo County Register of Deeds that meet the definition of an "owner" of the Property under the UCPA.

5. Upon information and belief, none of the Defendants, nor anyone else who may have an interest in the Property as an "owner" as defined under the UCPA, is under the age of 18 or is otherwise incapable of defending themselves.

6. Consumers Energy is authorized to use the power of eminent domain to condemn interests in real property pursuant to Michigan law, including, but not limited to, MCL § 486.252 and the UCPA.

7. Consumers Energy is not required by law to obtain a certificate of public necessity before acquiring the interests in the Property described in this Complaint.

RECEIVED by MSC 12/20/2021 10:30:09 AM

8. Upon information and belief, the Property does not lie within a known mineral zone of iron ore, copper, or coal.

9. On February 22, 2019, Consumers Energy submitted the attached, unitary good faith offer, pursuant to MCL § 213.55(1), to all Defendants listed above offering to purchase an easement over the Property and establishing estimated just compensation of $7,500.00 for such easement based upon appraisals dated as of February 18, 2019 and June 25, 2018. (**Exhibit A**: Good Faith Offer). No Defendant accepted the good faith offer.

10. The Property is located in Kalamazoo County, Michigan, so venue is proper in this Court, pursuant to MCL § 213.55(1).

11. In conjunction with filing this Complaint, Consumers Energy deposited the amount of $7,500.00 with the Kalamazoo County Treasurer as estimated just compensation to be disbursed amongst Defendants as provided by further order of this Court, pursuant to MCL §213.58. A copy of the Treasurer's receipt is attached hereto, marked **Exhibit B**, and incorporated herein by reference.

GENERAL ALLEGATIONS

12. Consumers Energy incorporates the allegations of all preceding paragraphs as though fully restated here.

13. Consumers Energy is a public utility providing electricity and natural gas to nearly 6.8 million of Michigan's 10 million residents, in all 68 Lower Peninsula counties.

14. Specifically, Consumers Energy provides electric service to customers in the City of Kalamazoo, in Kalamazoo County, which are currently served by Consumers Energy's 46,000-volt ("46-kV") Lindbergh to Phillips 46 kV Line.

RECEIVED by MSC 12/20/2021 10:30:09 AM

15. The Lindbergh to Phillips 46 kV Line serves a total of approximately 8,220 electric customers in Kalamazoo County, through the Kendall and Oakwood Substations.

16. The Lindbergh to Phillips 46 kV Line, insofar as relevant to the Property, is located entirely within the public rights of way in the City of Kalamazoo and in most places is less than ten feet inside the right of way line of the highway.

17. Consumers Energy has no easement across the Property described in this Complaint for the Lindbergh-Phillips 46 kV Line and therefore has no easement rights to trim trees or remove other obstructions along its route that pose a danger to the integrity of the Lindbergh to Phillips 46 kV Line and threaten the reliability of the service provided by the Lindbergh to Phillips 46 kV Line to its many customers served by that line. Likewise, Consumers Energy has no easement rights in the Property described in this Complaint which permit its construction and maintenance crews to service the Lindbergh to Phillips 46 kV Line as located just west of the western boundary of the Property.

18. Consumers Energy has, therefore, determined that it is necessary in order to properly maintain the Lindbergh to Phillips 46 kV Line and improve the reliability of that line to acquire rights in the form of an easement interest in the Property described in this Complaint to manage vegetation that grows on the Property in proximity to the Lindbergh to Phillips 46 kV Line but which threatens the reliability and integrity of the Lindbergh to Phillips 46 kV Line. Likewise, Consumers Energy has determined that it is necessary in order to properly maintain the Lindbergh to Phillips 46 kV Line to acquire rights in the form of an easement interest in the Property described in this Complaint to permit its construction and maintenance crews to work on the Lindbergh to Phillips 46 kV Line from a location outside of the property on which it is located.

RECEIVED by MSC 12/20/2021 10:30:09 AM

19. Without this improvement to its electric system, Consumers Energy will be unable to meet its obligation to provide reliable electric service to customers served by the Lindbergh to Phillips 46 kV Line.

20. The form of easement Consumers Energy seeks to obtain in this matter is attached hereto, marked **Exhibit C** and incorporated herein by reference.

THE PROPERTY AND INTERESTS TO BE ACQUIRED

21. Consumers Energy incorporates the allegations of all preceding paragraphs as though fully restated here.

22. The specific location in connection with the Property is shown on **Exhibit D** and the overall route of the Lindbergh to Phillips 46 kV Line is shown on **Exhibit E**, attached hereto and incorporated herein by reference. Together with the other documents attached to this Complaint, these materials constitute Consumers Energy's plan showing the property rights to be acquired through this action.

23. As part of operating the Lindbergh to Phillips 46 kV Line, Consumers Energy has determined that it is necessary to acquire permanent easements and right of entry across the Property for vegetation management and the performance of construction and maintenance activities, as stated in the recorded declaration of taking, attached hereto, marked **Exhibit F** and incorporated herein by reference.

24. The easement rights to be acquired generally include a perpetual easement and right of entry for purposes of cutting, trimming, removing, destroying, or otherwise controlling any or all trees and brush now or hereafter standing or growing within forty (40) feet of the Lindbergh to Phillips 46 kV Line (and within eighty (80) feet of the line for danger trees in excess of 35 feet in height) and that are within the Easement Area (as defined more fully in Exhibit C); for the purpose

RECEIVED by MSC 12/20/2021 10:30:09 AM

of controlling and prohibiting the construction of buildings and structures within twenty (20) feet of the Lindbergh to Phillips 46 kV Line; and for purposes of constructing, operating, maintaining, inspecting (including aerial patrol), surveying, replacing, reconstructing, improving, removing, relocating, changing the size of, enlarging, and protecting Consumers Energy's facilities located on lands adjoining and adjacent to the Property described in this Complaint, all as more fully described on Exhibit C.

25. In accordance with section 5 of the UCPA, being MCL 213.55, Consumers Energy states that within 21 days after a given Defendant is served (or within 28 days after service by mail or outside of Michigan, or within such other date set by the Court), if such Defendant wishes to challenge the necessity of acquisition of all or part of the rights that Consumers Energy seeks to acquire in the Property for the purposes described in this Complaint, the Defendant may file a motion asking that necessity be reviewed, pursuant to MCL § 213.56(1).

26. As noted in the good faith offer, Exhibit A, Consumers Energy waives the right to bring federal or state cost-recovery actions against the current owners of the Property.

COUNT I—CONDEMNATION

27. Consumers Energy incorporates the allegations of all preceding paragraphs as though fully restated here.

28. Pursuant to MCL 486.252, the UCPA and other applicable Michigan law, Consumers Energy is authorized to use the power of eminent domain to acquire property necessary for conducting its duly authorized business as a public utility.

29. Consumers Energy has made a unitary, good faith offer to Defendants for payment of estimated just compensation of $7,500.00 in exchange for the necessary rights to be acquired in the Property, which good faith offer was not accepted.

RECEIVED by MSC 12/20/2021 10:30:09 AM

30. Consumers Energy has deposited the total estimated just compensation of $7,500.00 with the Kalamazoo County Treasurer, to be disbursed in accordance with the further order of this Court, pursuant to MCL § 213.58.

31. Consumers Energy has met all requirements of Michigan law necessary to exercise the power of eminent domain and acquire the stated interests in the Property.

32. If a timely motion to challenge necessity is not filed pursuant to MCL § 213.56(1), necessity for the easement and right of entry for the vegetation management and construction and maintenance rights sought in this case will be conclusively presumed to exist, the right to have necessity reviewed or further considered will be waived, and the rights to be acquired in the Property will vest in Consumers Energy as of the date this Complaint was filed with the Court.

33. Upon confirmation of necessity by the Court, the estimated just compensation deposited with the Kalamazoo County Treasurer and the right of just compensation will vest in any Defendants who are entitled to same according to their respective interests in the Property, and will be paid in accordance with further orders of the Court, pursuant to MCL § 213.58

WHEREFORE, Consumers Energy respectfully requests that the Court enter an order granting the following relief:

A. Setting a hearing to (1) enter the default of any Defendant that has been properly served but has not filed a timely response to the Complaint, and if a default is entered, enter judgment and direct payment to such Defendant of the sum of money stated in the declaration of taking to be just compensation for the taking according to the Defendant's interest in the Property; (2) address any motion challenging necessity that any Defendant may file in response to the Complaint; (3) determine

RECEIVED by MSC 12/20/2021 10:30:09 AM

the disposition of any Defendant that could not be located or served; and (4) take any other action permitted under the UCPA or applicable Michigan law;

B. Confirming the necessity of the easement and right of entry for vegetation management and construction and maintenance rights along the Lindbergh to Phillips 46 kV Line, that Consumers Energy's easement rights vested as of the date it filed the Complaint, and that Consumers Energy may take immediate possession of its easement rights that were acquired upon entry of the order;

C. Establishing dates for any necessary pretrial proceedings and trial to ascertain and determine the amount of just compensation that is owed to any Defendant who has contested the amount of just compensation offered by Consumers Energy for acquisition of rights to the Property;

D. Ordering the Kalamazoo County Treasurer to disburse the estimated just compensation of $7,500.00 in accordance with order of the Court;

E. Taking any further action necessary to effectuate Consumers Energy's acquisition of the necessary rights in the Property; and

F. Awarding any further relief provided under Michigan law.

Respectfully submitted,

Nikole L. Canute

Nikole L. Canute (P68713)
Richard M. Wilson, Jr. (P29717)
Attorneys for Plaintiff
Mika Meyers, PLC
900 Monroe NW
Grand Rapids, Michigan 49503
(616) 632-8000

Dated: April 8, 2019

RECEIVED by MSC 12/20/2021 10:30:09 AM

EXHIBIT A

RECEIVED by MSC 12/20/2021 10:30:09 AM

Consumers Energy
One Energy Plaza, Jackson, MI 49201

February 22, 2019

Brian Storm and Erin Storm
2035 Broadway
Kalamazoo, MI 49008

Lake Michigan Credit Union
Sandra Jeliniski, CEO
5540 Glenwood Hills Parkway SE
Grand Rapids, MI 49512

Lake Michigan Credit Union
Sandra Jelinski, CEO
P.O. Box 2848
Grand Rapids, MI 49501-2848

Re: Easement for the Protection of Electric Facilities, parcel # 06-29-220-033
Lands in Section 29, T2S, R11W, City of Kalamazoo
Kalamazoo County, Michigan

Dear Property Owners:

Consumers Energy Company ("Consumers Energy") is in the process of securing certain rights on the property referenced above (the "Property"). Consumers Energy's acquisition of these rights is necessary to maintain the safety and reliability of the existing electric facilities that are located adjacent to the Property. These electric facilities are necessary to provide adequate service to Consumer's Energy's electric customers. We are writing you because you are an "owner" under the Uniform Condemnation Procedures Act.

The purpose of this letter is to extend Consumers Energy's written offer to purchase a permanent easement for the above rights (the "Easement"). A copy of the Easement that contains the terms and conditions of the rights being sought is enclosed with this letter.

Consumers Energy has secured the enclosed Appraisal Report for the property affected by the Easement. Based on the enclosed Appraisal Report, Consumers Energy hereby tenders a unitary good faith written offer jointly to all owners known to Consumers Energy, as listed above, in the amount of Seven Thousand Five Hundred Dollars ($7,500.00) ("Good Faith Offer") for the Easement.

If your review of the appraisal leads you to conclude that Consumers Energy has not included items of compensable property or damage for which you intend to claim a right to just compensation, you must file a written claim with Consumers Energy within 90 days from the date of this Good Faith Offer or within 180 days from the date a

RECEIVED by MSC 12/20/2021 10:30:09 AM

condemnation complaint is served, whichever is later. The taking of this Easement will not require relocation, so no federal or state relocation assistance is included in the Good Faith Offer. If you believe this is incorrect, please contact me as soon as possible.

Consumers Energy waives the right to bring Federal and State cost recovery actions against the present owner(s) of the property arising out of a release of hazardous substances on the property.

Please call me at (517) 788-2225 if you have any questions. In any event, a representative of Consumers Energy will be contacting you soon to discuss this offer.

Acceptance of this offer may only be made by a written response to the undersigned. If this Good Faith Written Offer is not accepted by March 25, 2019, a condemnation lawsuit may be instituted.

Sincerely,

Beth Eby
Project Manager Real Estate Acquisition
Business Services-Real Estate

Attachments: Easement for the Protection of Electric Facilities
Appraisal Report, Genzink Appraisal Company

RECEIVED by MSC 12/20/2021 10:30:09 AM

EASEMENT FOR THE PROTECTION OF ELECTRIC FACILITIES

Lindbergh to Phillips

SAP# 22787258
Master Tract# TRN000916034041
Agreement # MI00000022266

BRIAN STORM and ERIN STORM, husband and wife, 2035 Broadway, Kalamazoo, MI 49008. (hereinafter "Owner")

for $1.00 and other good and valuable consideration [*exempt from real estate transfer tax pursuant to MCLA 207.505(f) and from State real estate transfer tax pursuant to MCLA 207.526(f)*] grants and warrants to

CONSUMERS ENERGY COMPANY, a Michigan corporation, One Energy Plaza, Jackson, Michigan 49201 (hereinafter "Consumers")

a permanent easement to enter the Easement Area described in the attached Exhibit B (hereinafter "Easement Area") located in the City of Kalamazoo, County of Kalamazoo, and State of Michigan as more particularly described in the attached Exhibit B and 1) to trim, cut down, and otherwise remove and control, without compensation to Owner, any trees, brush, roots, and other vegetation standing or growing within the Easement Area, which right is more fully defined below in the "Trees and Other Vegetation" provision, for the purpose of protecting, maintaining, and providing access to Consumers' facilities, which are currently located on land contiguous to the Easement Area and Owner's land described in the attached Exhibit A (hereinafter "Owner's Land"), which land is currently a public road right-of-way (hereinafter "Adjoining Land"); and 2) to utilize the portion of the Easement Area described as the 40' Clear Cut area below to, from within the Easement Area, construct, operate, maintain, inspect (including aerial patrol), survey, replace, reconstruct, improve, remove, relocate, change the size of, enlarge, and protect a line or lines of electric facilities together with any wires, cables, conduits, crossarms, braces, guys, transformers, electric control circuits and devices, communication systems, utility lines, protective apparatus and all other equipment, appurtenances, associated fixtures, and facilities that are useful or incidental to or for the operation or protection thereof and located on the Adjoining Land, and to conduct such other activities as may be convenient in connection therewith as determined by Consumers for the purpose of transmitting and distributing electricity, but without the right to locate any of the aforementioned facilities on Owner's Land or within the Easement Area pursuant to this Easement.

Access: Consumers shall have the right of unimpaired access to the Easement Area for any and all purposes necessary, convenient, or incidental to the exercise by Consumers of the rights granted hereunder and Owner shall not interfere with said access by any means.

Trees and Other Vegetation: Owner shall not plant any trees within that portion of the Easement Area identified as "40' Clear Cut" on the Easement Sketches (hereinafter "Easement Sketches") in the attached Exhibit C. Consumers shall have the right from time to time hereafter to enter that portion of the Easement Area identified as "40' Clear Cut" on the Easement Sketches in the attached Exhibit C to, without compensation to Owner, trim, cut down, and otherwise remove and control any trees, brush, roots, and other vegetation within the "40' Clear Cut" portion of the Easement Area. Consumers shall have the right from time to time hereafter to enter that portion of the Easement Area identified as "40' Danger Trees" on the Easement Sketches in the attached Exhibit C to, without compensation to Owner, trim, cut down, and otherwise remove and control any trees, brush, roots, and other vegetation within the Easement Area that are in excess of 35 feet in height.

RECEIVED by MSC 12/20/2021 10:30:09 AM

Buildings/Structures: Owner agrees not to build, create, construct, or permit to be built, created, or constructed, any obstruction, building, septic system, drain field, fuel tank, pond, swimming pool, lake, pit, well, foundation, engineering works, installation or any other type of structure over, under, on, or within that portion of the Easement Area identified as "20' No Build" on the Easement Sketches in the attached Exhibit C, whether temporary or permanent, without the express authorization of Consumers, which may be withheld in Consumers' sole discretion, and which authorization shall be recorded in the register of deeds for the county in which Owner's Land is situated expressly allowing the aforementioned.

Ground Elevation: Owner shall not materially alter the ground elevation (as shown on the Easement Sketches in the attached Exhibit C) within that portion of the Easement Area identified as "40' Clear Cut" on the Easement Sketches in the attached Exhibit C, without the express authorization of Consumers, which may be withheld in Consumers' sole discretion, and which authorization shall be recorded in the register of deeds for the county in which Owner's Land is situated expressly allowing the aforementioned.

Exercise of Easement: Consumers' nonuse or limited use of this Easement shall not preclude Consumers' later use of this Easement to its full extent.

Ownership: Owners covenant with Consumers that they are the lawful fee simple owner of Owner's Land, subject to existing easements, restrictions and reservations of record, if any, and that they have the right and authority to make this grant, and that they will forever warrant and defend the title thereto against all claims whatsoever.

Successors: This easement shall bind and benefit Owner's and Consumers' respective heirs, successors, lessees, licensees, and assigns.

Counterparts: This easement may be executed simultaneously in two or more counterparts, each of which shall be deemed an original and all of which together shall constitute one and the same instrument. It is not necessary that all parties execute any single counterpart if each party executes at least one counterpart.

RECEIVED by MSC 12/20/2021 10:30:09 AM

Date: _____

_____
BRIAN STORM

_____
ERIN STORM

Acknowledgment

The foregoing instrument was acknowledged before me in _____ County, Illinois,

on _____ by BRIAN STORM and ERIN STORM, husband and wife.

_____
Notary Public
_____ County, Illinois
Acting in _____ County
My Commission expires: _____

Prepared By:
Ady Simmons, 10-08-2018
Consumers Energy Company
One Energy Plaza
Jackson, MI 49201

After recording, return to:
Carrie Main, EP7-471
Consumers Energy Company
One Energy Plaza
Jackson, MI 49201

RECEIVED by MSC 12/20/2021 10:30:09 AM

EXHIBIT A

Owner's Land

A parcel of land situated and being in the City of Kalamazoo, County of Kalamazoo, State of Michigan described as:

Lot 33 of Hurni's University Hills, according to the plat thereof, recorded in Liber 28 of Plats, Page 3, Kalamazoo County Records. Being part of the Northeast 1/4 of Section 29, T2S, R11W.

Parcel ID: 06-29-220-033

RECEIVED by MSC 12/20/2021 10:30:09 AM

EXHIBIT B

Easement Area

An area of land in Lot 33 of Hurni's University Hills Subdivision, as recorded in Liber 28 of Plats, Page 3, in Section 29, Township 2 South, Range 11 West, City of Kalamazoo, Kalamazoo County, Michigan described as follows: Beginning at the Southwest corner of said Lot 33; thence N.01°07'16"E., on the West line of said Lot, 100.00 feet to the Northwest corner of said Lot; thence S.88°52'44"E., on the North line of said Lot, 70.08 feet; thence S.00°53'02"W., parallel with the centerline of the existing 46kV overhead electric line, 100.00 feet to the South line of said Lot; thence N.88°52'44"W., on said South Lot line, 70.49 feet to the point of beginning.

RECEIVED by MSC 12/20/2021 10:30:09 AM

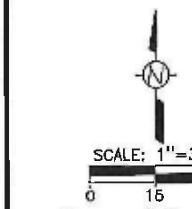
EXHIBIT C

Easement Sketches

RECEIVED by MSC 12/20/2021 10:30:09 AM

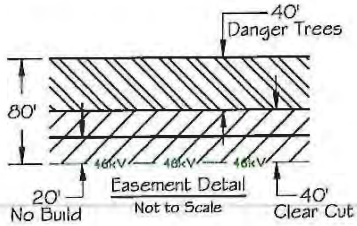
EASEMENT SKETCH

Lindbergh-Phillips 46 kV Line
Tax ID #06-29-220-033



Basis of Bearing

Michigan State Plane Coordinate System
South Zone (NAD83 2011)
Referenced to Kalamazoo CORS



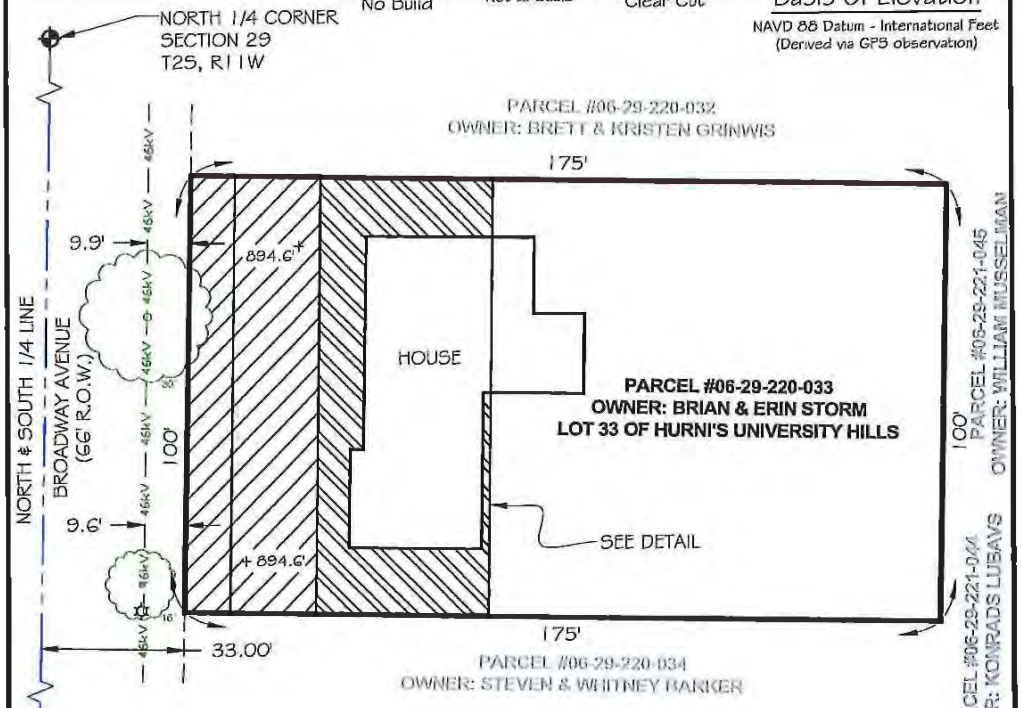


Location Map

Not to Scale

Basis of Elevation

NAVD 88 Datum - International Feet
(Derived via GPS observation)



Surveyor's Notes

1) Property boundary shown is approximate. The lot dimensions shown hereon are record dimensions provided for reference.
2) The existing 46kV centerline was located in the field and dimensions shown from said existing centerline are depicted accurately.
3) Not all improvements and utilities are shown.
4) Parcel is described per title report provided by Consumers Energy.
5) No Build Area - 1029 Sq. Ft., Clear Cut Area - 3029 Sq. Ft. (Including 1029 Sq. Ft. of No-Build), Danger Tree Area - 4000 Sq. Ft.

STATE OF MICHIGAN
MATTHEW M. SCHUELKE
PROFESSIONAL SURVEYOR
No. 63594
LICENSED PROFESSIONAL SURVEYOR

Matt Schuelke

Legend

-- Section Corner	-- Property Line
-- Coniferous Tree	46kV -- Overhead Electric 46kV Line
-- Deciduous Tree	-- Road R.O.W.
-- Power Pole	+901.5 -- Spot Elevation
-- Guy Anchor	-- No Build Area
-- Lot Lines	-- Clear Cut Area
-- Section Line	-- Danger Tree Area

Revision A (4/27/18): Added No Build, Clear Cut, & Danger Tree easement areas. Added ground shots within easement areas.

Consumers Energy

surveying solutions, inc.

Storm Parcel
NE 1/4 Section 29
T2S, R11W
City of Kalamazoo
Kalamazoo Co., Michigan

Drawing No. SB-23519_06-29-220-033

Filename: 23519base.DWG
Field Crew: BAT/CSD
Field Book No. SSI #18273
Drawn By: MMS
Date: 4/27/2018
Scale: 1" = 30'
Sheet 1 of 3

RECEIVED by MSC 12/20/2021 10:30:09 AM

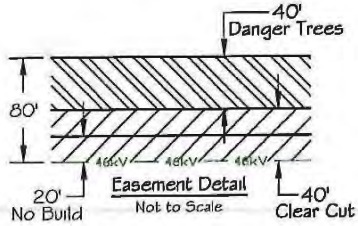
EASEMENT SKETCH

Lindbergh-Phillips 46 kV Line
Tax ID #06-29-220-033

SCALE: 1"=30'
0 15 30

Basis of Bearing

Michigan State Plane Coordinate System
South Zone (NAD83 2011)
Referenced to Kalamazoo COR5

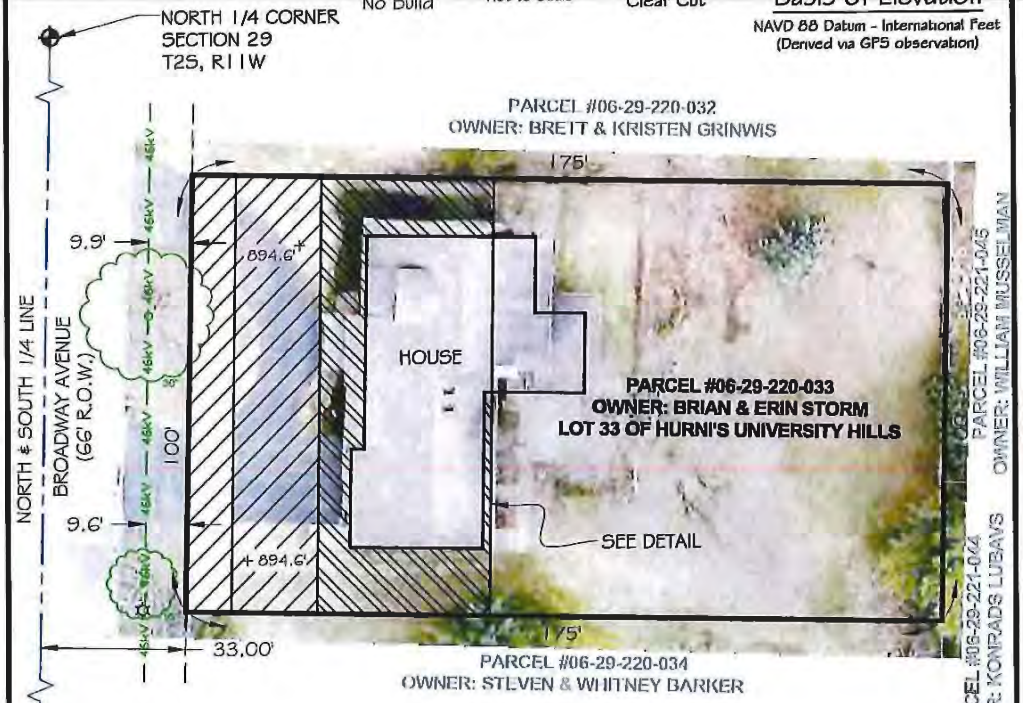




Location Map
Not to Scale

Basis of Elevation

NAVD 88 Datum - International Feet
(Derived via GPS observation)



Surveyor's Notes

1) Property boundary shown is approximate. The lot dimensions shown hereon are record dimensions provided for reference.
2) The existing 46kV centerline was located in the field and dimensions shown from said existing centerline are depicted accurately.
3) Not all improvements and utilities are shown.
4) Parcel is described per title report provided by Consumers Energy.
5) No Build Area - 1029 Sq. Ft., Clear Cut Area - 3029 Sq. Ft. (Including 1029 Sq. Ft. of No-Build), Danger Tree Area - 4000 Sq. Ft.

STATE OF MICHIGAN
MATTHEW M. SCHUELKE
PROFESSIONAL SURVEYOR
No. 63594
LICENSED PROFESSIONAL SURVEYOR

Matt Schuelke

Legend

-- Section Corner		-- Property Line	
-- Coniferous Tree	46kV	-- Overhead Electric 46kV Line	
-- Deciduous Tree		-- Road R.O.W.	
-- Power Pole	+901.5	-- Spot Elevation	
-- Guy Anchor		-- No Build Area	
-- Lot Lines		-- Clear Cut Area	
-- Section Line		-- Danger Tree Area	

Revision A (4/27/18): Added No Build, Clear Cut, & Danger Tree easement areas. Added ground shots within easement areas.

Consumers Energy

SSI surveying solutions, inc.

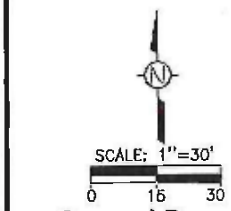
Storm Parcel
NE 1/4 Section 29
T2S, R11W
City of Kalamazoo
Kalamazoo Co., Michigan

Drawing No. SB-23519_06-29-220-033
Filename: 23519base.DWG
Field Crew: BAT/CSD
Field Book No. SSI #18273
Drawn By: MMS
Date: 4/27/2018
Scale: 1" = 30'
Sheet 2 of 3

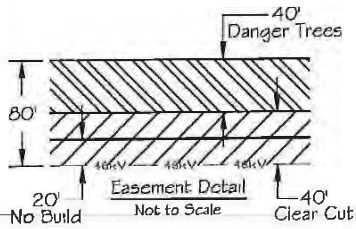
RECEIVED by MSC 12/20/2021 10:30:09 AM

EASEMENT SKETCH

Lindbergh-Phillips 46 kV Line
Tax ID #06-29-220-033



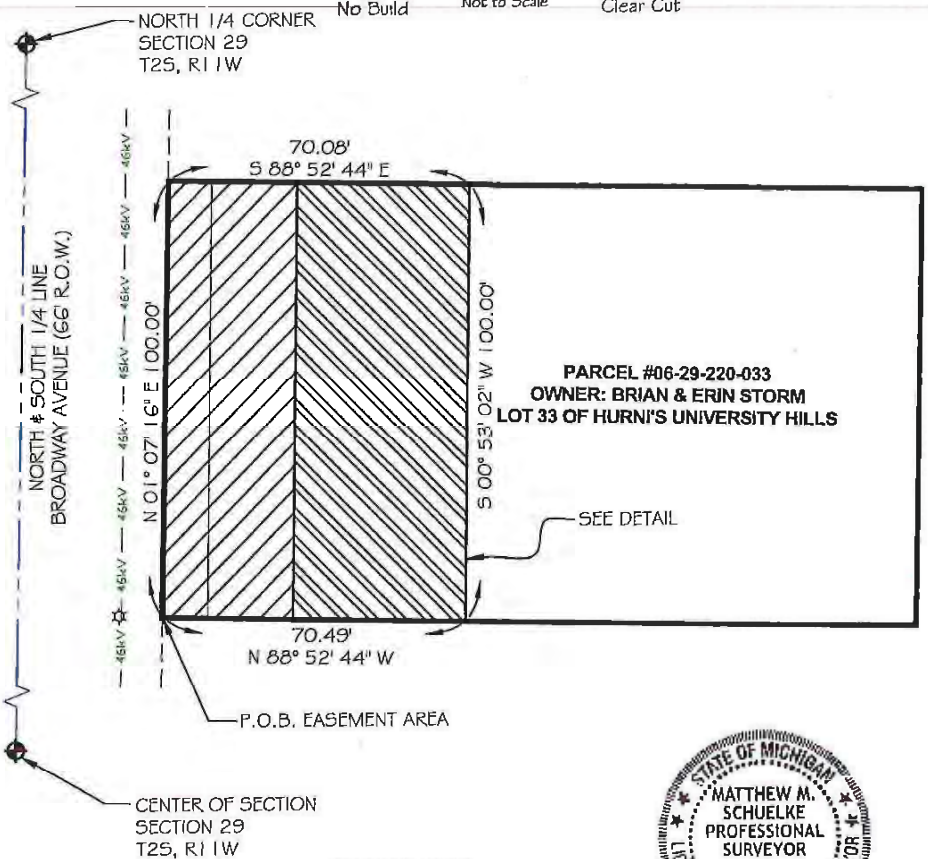
Basis of Bearing
Michigan State Plane Coordinate System
South Zone (NAD83 2011)
Referenced to Kalamazoo CORS



Easement Detail
Not to Scale



Location Map
Not to Scale



STATE OF MICHIGAN
MATTHEW M. SCHUELKE
PROFESSIONAL SURVEYOR
No. 63594
LICENSED PROFESSIONAL SURVEYOR

Matt Schuelke

Easement Areas
No Build Area - 1029 Sq. Ft.
Clear Cut Area - 3029 Sq. Ft.
(Including 1029 Sq. Ft. of No-Build)
Danger Tree Area - 4000 Sq. Ft.
Total Easement Area - 7029 Sq. Ft.

Legal Description: Easement Area

An area of land in Lot 33 of Hurni's University Hills Subdivision, as recorded in Liber 28 of Plats, Page 3, in Section 29, Township 2 South, Range 11 West, City of Kalamazoo, Kalamazoo County, Michigan described as follows: Beginning at the Southwest corner of said Lot 33; thence N.01°07'16"E., on the West line of said Lot, 100.00 feet to the Northwest corner of said Lot; thence S.88°52'44"E., on the North line of said Lot, 70.08 feet; thence S.00°53'02"W., parallel with the centerline of the existing 46kV overhead electric line, 100.00 feet to the South line of said Lot; thence N.88°52'44"W., on said South Lot line, 70.49 feet to the point of beginning.

Revision A (4/27/18): Added No Build, Clear Cut, & Danger Tree easement areas. Added ground shots within easement areas.

Consumers Energy

SSI surveying solutions, inc.

Storm Parcel
NE 1/4 Section 29
T2S, R11W
City of Kalamazoo
Kalamazoo Co., Michigan

Drawing No. SB-23519_06-29-220-033

Filename: 23519base.DWG
Field Crew: BAT/CSD
Field Book No. SSI #18273
Drawn By: MMS
Date: 4/27/2018
Scale: 1" = 30'
Sheet 3 of 3

RECEIVED by MSC 12/20/2021 10:30:09 AM

APPRAISAL REPORT:

Brian and Erin Storm
2035 Broadway Avenue
City of Kalamazoo
Kalamazoo County, Michigan

Lindbergh to Phillips Project

RECEIVED by MSC 12/20/2021 10:30:09 AM

GENZINK APPRAISAL COMPANY

Market Analysis · Real Estate Appraisal · Consulting

February 18, 2019

Ms. Beth Eby
Consumers Energy Company
One Energy Plaza
Jackson, MI 49201

RE: Appraisal Report: Brian and Erin Storm, 2035 Broadway Avenue, City of Kalamazoo, Kalamazoo County, Michigan, Lindbergh to Phillips Project

Dear Ms. Eby:

The purpose of this Appraisal Report is to determine the market value of the fee simple estate before the taking, and the market value of the fee simple estate (subject to an easement for the protection of electric facilities) after the taking, as of October 25, 2018. The taking consists of an easement for the protection of electric facilities.

The primary intended user of the appraisal is Consumers Energy Company. The *sole* intended use of the appraisal is to assist the client in determining just compensation to be paid to the property owner as a result of the taking. The appraisal is not intended for any other use or to be relied upon by any other party.

Based upon the location of the easement and the property rights granted, we determined there is no diminution in value to the remaining property and building improvements, after the taking. Therefore, the subject property will be appraised "as vacant land" in the valuation analysis before and after the taking.

This is an Appraisal Report, which is intended to comply with the reporting requirements set forth under Standards Rule 2-2(a) of the Uniform Standards of Professional Appraisal Practice. The appraiser is not responsible for unauthorized use of this report.

Data, information and calculations leading to the value conclusion are incorporated in the report following this letter. The report, in its entirety, including all assumptions and limiting conditions, is an integral part of, and inseparable from, this letter.

The following appraisal sets forth the most pertinent data gathered, the techniques employed and the reasoning leading to the opinion of value. The analyses, opinions and conclusions were developed based on, and this report has been prepared in conformance with, our interpretation of the guidelines and recommendations set forth in the Uniform Standards of Professional Appraisal Practice (USPAP), the requirements of the Code of Professional Ethics and Standards of

1009 44th Street, SW, Suite 107 · Grand Rapids · MI · 49509 · Phone (616) 261-5000 · Fax (616) 261-5045

RECEIVED by MSC 12/20/2021 10:30:09 AM

Professional Appraisal Practice of the Appraisal Institute, and the Uniform Condemnation Procedures Act (UCPA).

The market values of the fee simple estate, both before and after the taking, as of October 25, 2018, are as follows:

Before and After Values	
Vacant Land Market Value Before Taking	$52,000
Vacant Land Market Value After Taking (1)	- $44,500
Difference	$7,500
Loss of Trees and Landscaping (2)	+ $0
Total	$7,500

(1) Subject to an easement for the protection of electric facilities.
(2) Value of landscaping was provided by Aurora Design and Appraisal, LLC.

The market value, after taking, is based upon the hypothetical condition that the easement for the protection of electric facilities is in place as of the effective date of value. If this condition is not in place, the value conclusion could be impacted.

Loss of trees and other damages, if any, caused by Consumers Energy Company's use of the easement for the protection of electric facilities, if any, will be handled separately from this appraisal by Consumers Energy Company.

In Michigan, appraisers are required to be licensed and are regulated by the Michigan Department of Licensing and Regulatory Affairs, P.O. Box 30018, Lansing, Michigan 48909.

Sincerely,

GENZINK APPRAISAL COMPANY

Jeffrey G. Genzink, MAI
Certified General Real Estate Appraiser

Michael A. Tyska, MAI
Certified General Real Estate Appraiser

jgg/ads

RECEIVED by MSC 12/20/2021 10:30:09 AM

TABLE OF CONTENTS

SEC. I. SUMMARY OF SALIENT FACTS 1

SEC. II. SCOPE OF WORK 4

SEC. III. GENERAL DATA 9
Property Identification 9
Legal Description 9
Ownership 9
Present Use and Occupancy of the Property 9
Sales History of Property 9
Zoning 9
Neighborhood Data 10
Neighborhood Map 11

SEC. IV. DESCRIPTION OF PROPERTY - BEFORE TAKING 13
Aerial View – Before Taking 13
Site Description – Before Taking 14
Building Description 15
Highest and Best Use - Before Taking 16

SEC. V. DESCRIPTION OF TAKING 18

SEC. VI. DESCRIPTION OF PROPERTY - AFTER TAKING 20
Easement Sketch 20
Highest and Best Use – After Taking 22

SEC. VII. VALUATION OF PROPERTY – BEFORE TAKING 23
Cost Approach – Before Taking 23
Sales Comparison Approach – Before Taking 23
Income Capitalization Approach – Before Taking 26
Correlation and Conclusion of Value - Before Taking 27

SEC. VIII. VALUATION OF PROPERTY – AFTER TAKING 28
Cost Approach – After Taking 28
Sales Comparison Approach – After Taking 28
Income Capitalization Approach – After Taking 30
Correlation and Conclusion of Value - After Taking 31

SEC. IX. RECAPITULATION OF BEFORE & AFTER VALUES 32
Exposure and Marketing Time 32

SEC. X. CERTIFICATION 33

SEC. XI. ASSUMPTIONS AND LIMITING CONDITIONS 34

SEC. XII. ADDENDUM 36
Aerial View 37
Subject Photographs 39
Regional Area Data 41
Legal Description 47
Flood Plain Map 49
Vacant Land Sale Comparables 51
Easement for the Protection of Electric Facilities 63
Easement Sketch 70
Landscape Appraisal (Aurora Landscape Design and Appraisal, LLC) 74
Appraiser Qualifications and Licenses 80

RECEIVED by MSC 12/20/2021 10:30:09 AM

SECTION I. SUMMARY OF SALIENT FACTS

Aerial View – Before Taking



Source: City of Kalamazoo GIS (2013 Imagery)

Location:	2035 Broadway Avenue, City of Kalamazoo, Kalamazoo County, Michigan
Owner:	Brian and Erin Storm
Type of Property:	Residential
Zoning:	RS-5, Residential Single-Dwelling
Permanent Parcel No.:	06-29-220-033
Property Rights Appraised	
Before Taking:	Fee simple estate
After Taking:	Fee simple estate (subject to an easement for the protection of electric facilities)
Description - Before Taking:	The mostly level site is rectangular in shape and contains 17,500 SF (0.402 acres) of net land area, excluding road right-of-way. The site has 100 feet of frontage along Broadway Avenue. The property is improved with a single-family residence.

RECEIVED by MSC 12/20/2021 10:30:09 AM

Description of Taking: The taking consists of an easement for the protection of electric facilities. The easement is being acquired by Consumers Energy Company to properly and safely maintain and operate its 46 kV high voltage distribution line. The easement grants the rights to clear cut all trees and brush within 40 feet of the Lindbergh to Phillips Line, and to trim or remove all trees in excess of 35 feet in height and located between 40 and 80 feet from the distribution line. In addition, the easement restricts the construction of buildings and structures within 20 feet of the distribution line.

Description - After Taking: Because the taking is an easement, the net land area of the subject property does not change from before the taking. The total easement area contains 7,029 SF, excluding easement area located in the road right-of-way. The easement area includes 1,029 SF of no build and clear cut area, 2,000 SF of clear cut only area and 4,000 SF of danger tree area. The building improvements are located outside of the no build easement area.

Highest and Best Use

"Before Taking"	
As Vacant:	For residential use
As Improved:	For continued residential use
"After Taking"	
As Vacant:	For residential use
As Improved:	For continued residential use

Effective Date of Value: October 25, 2018

Inspection Dates: March 20 and October 25, 2018

Market Values:

Vacant Land Market Value Before Taking		$52,000
Vacant Land Market Value After Taking [1]	-	$44,500
Difference		$7,500
Loss of Trees and Landscaping [2]		+ 0
Total		$7,500

(1) Subject to an easement for the protection of electric facilities.
(2) Value of landscaping was provided by Aurora Design and Appraisal, LLC.

Loss of trees and other damages, if any, caused by Consumers Energy Company's use of the easement for the protection of electric facilities, if any, will be handled separately from this appraisal by Consumers Energy Company.

RECEIVED by MSC 12/20/2021 10:30:09 AM

Extraordinary Assumption:	None
Hypothetical Condition:	The market value, after taking, is based upon the hypothetical condition that the easement for the protection of electric facilities is in place as of the effective date of value. If this condition is not in place, the value conclusion could be impacted.
Intended User:	Consumers Energy Company
Intended Use:	To assist the client in determining just compensation to be paid to the property owner as a result of the taking.
Appraisal File No.:	4117-18

RECEIVED by MSC 12/20/2021 10:30:09 AM

SECTION II. SCOPE OF WORK

Purpose: The purpose of this Appraisal Report is to determine the market value of the fee simple estate before the taking, and the market value of the fee simple estate (subject to an easement for the protection of electric facilities) after the taking, as of October 25, 2018. The taking consists of an easement for the protection of electric facilities.

Larger Parcel: The tests for the "larger parcel" include unity of use, unity of ownership and contiguity. The subject property consists of parcel no. 06-29-220-033 owned by Brian and Erin Storm. The property is used for residential purposes and is improved with a single-family residence.

Property Identification: The subject property is located along the east side of Broadway Avenue, north of Winchell Avenue, City of Kalamazoo, Kalamazoo County, Michigan. The common street address is 2035 Broadway Avenue, Kalamazoo, Michigan.

Extent of Inspection: A drive-by inspection from the public road right-of-way was completed on March 20 and October 25, 2018 by Mr. Jeffrey Genzink and Mr. Michael Tyska. The property owner was offered the opportunity to complete an interview with us regarding this appraisal and we also requested permission for an on-site inspection. The offer was made in the form of a letter mailed via the United States Postal Service and we received confirmation that the letter was delivered on October 16, 2018. The owner did not respond to our request for an interview and on-site inspection.

Effective Date: October 25, 2018

Client: Consumers Energy Company

Intended User: The primary intended user is Consumers Energy Company.

Intended Use: The *sole* intended use of the appraisal is to assist the client in determining just compensation to be paid to the property owner as a result of the taking. The appraisal is not intended for any other use or to be relied upon by any other party.

Type of Opinion: The type of opinion is market value. The definition used in this report is as follows:

RECEIVED by MSC 12/20/2021 10:30:09 AM

a. The highest price estimated in terms of money that the property will bring if exposed for sale in the open market with a reasonable time allowed to find a purchaser buying with knowledge of all of the uses and purposes to which it is adapted and for which it is capable of being used.

b. The amount which the property would bring if it were offered for sale by one who desired, but was not obliged, to sell, and was bought by one who was willing, but not obliged, to buy.

c. What the property would bring in the hands of a prudent seller, at liberty to fix the time and conditions of sale.

d. What the property would sell for on negotiations resulting in sale between an owner willing, but not obliged, to sell and a willing buyer not obliged to buy.

e. What the property would be reasonably worth on the market for a cash price, allowing a reasonable time within which to effect a sale.

(Source: *Michigan Model Civil Jury Instructions 90.06)*

Just Compensation: The definition of just compensation used in this report is as follows:

Just compensation is the amount of money which will put the person whose property has been taken in as good a position as the person would have been in had the taking not occurred. The owner must not be forced to sacrifice or suffer by receiving less than full and fair value for the property. Just compensation should enrich neither the individual at the expense of the public nor the public at the expense of the individual.

The determination of value and just compensation in a condemnation case is not a matter of formula or artificial rules, but of sound judgment and discretion based upon a consideration of all of the evidence you have heard and seen in this case.

In determining just compensation, you should not consider what Consumers Energy Company has gained. The value of the property taken to Consumers Energy Company and to its customers is not to be considered in any way.

(Source: *Michigan Model Civil Jury Instructions 90.05)*

Loss of trees and other damages, if any, caused by Consumers Energy Company's use of the easement for the protection of electric facilities, if any, will be handled separately from this appraisal by Consumers Energy Company.

Partial Taking: The appraisal involves what is known as a "partial taking"; that is to say, the property being acquired by Consumers Energy Company is part of a larger parcel under the control of the owner. The definition of partial taking used in this report is as follows:

RECEIVED by MSC 12/20/2021 10:30:09 AM

When only part of a larger parcel is taken, as is the case here, the owner is entitled to recover not only for the property taken, but also for any loss in the value to his or her remaining property.

The measure of compensation is the difference between (1) the market value of the entire parcel before the taking and (2) the market value of what is left of the parcel after the taking.

In valuing the property that is left after the taking, you should take into account various factors, which may include: (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 Consumers Energy Company intends to make of the property it is acquiring and the effect of that use upon the owner's remaining property.

Further, in valuing what is left after the taking, you must assume that Consumers Energy Company will use its newly acquired property rights to the full extent allowed by the law.

(Source: *Michigan Model Civil Jury Instructions 90.12)*

Effect of Proposed Public Improvement: The definition of effect of the proposed public improvement is as follows:

The process of determining the value on the date of taking may be complicated by the condemnor's actions leading up to the taking, if those actions have had an effect on the market value of the property.

In such case, you must disregard any change in value resulting from such actions and grant compensation on the basis of what the market value of the property would be if such actions had not occurred. In other words, in arriving at market value you should disregard any conditions which may exist in this area resulting from the prospect of condemnation for this project and the other proceedings leading up to this condemnation case.

You should determine the value of the property as though this project had not been contemplated.

This does not mean that the announcement of the project acts to insulate the properties concerned from normal economic forces. The market may go up or down, the property may deteriorate or be improved, and you should recognize those factors. However, a change in value directly traceable to the prospect of this condemnation should not penalize either owners or the public. By the same token, you should disregard any increases in value which may have occurred by reason of the prospect of the completion of the project.

(Source: *Michigan Model Civil Jury Instructions 90.15)*

RECEIVED by MSC 12/20/2021 10:30:09 AM

General Effects: The definition of general effects used in this report is as follows:

> The general effects of a project for which property is taken, whether actual or anticipated, that in varying degrees are experienced by the general public or by property owners from whom no property is taken, shall not be considered in determining just compensation. A special effect of the project on the owner's property that, standing alone, would constitute a taking of private property under section 2 of article X of the state constitution of 1963 shall be considered in determining just compensation. To the extent that the detrimental effects of a project are considered to determine just compensation, they may be offset by consideration of the beneficial effects of the project.
>
> (Source: *The Uniform Condemnation Procedures Act, Act 87 of 1980, 213.70(2))*

Property Rights Appraised: The ownership interest appraised, before taking, is fee simple estate, which is defined as follows:

> Absolute ownership unencumbered by any other interest or estate, subject only to the limitations imposed by the governmental powers of taxation, eminent domain, police power, and escheat.
>
> (Source: *The Dictionary of Real Estate Appraisal, 6th Edition,* 2015, Appraisal Institute, Chicago, Ill, p. 90)

The ownership interest appraised, after taking, is fee simple estate (subject to an easement for the protection of electric facilities). An easement is defined as follows:

> The right to use another's land for a stated purpose.
>
> (Source: *The Dictionary of Real Estate Appraisal, 6th Edition,* 2015, Appraisal Institute, Chicago, Ill, p. 71)

Extraordinary Assumption: None

Hypothetical Condition: The market value, after taking, is based upon the hypothetical condition that the easement for the protection of electric facilities is in place as of the effective date of value. If this condition is not in place, the value conclusion could be impacted.

Type and Extent of Valuation Analysis Applied: To determine the market values of the fee simple estate, both before and after the taking, we relied upon the sales comparison approach. We considered, but did not develop the income capitalization approach or the cost approach because they were not considered applicable to arrive at credible results.

RECEIVED by MSC 12/20/2021 10:30:09 AM

Type and Extent of Market Data Considered: Based upon the location of the easement and the property rights granted, we determined there is no diminution in value to the remaining property and building improvements, after the taking. Therefore, the subject property will be appraised "as vacant land" in the valuation analysis before and after the taking.

The extent of collecting, confirming and analyzing the market data for use in the sales comparison approach was based properties located in the City of Kalamazoo in the Kalamazoo School District. Research sources included the Genzink Appraisal Company internal database, public records, MLS data and market participants. The data was confirmed with public records, MLS and/or a third party such as a real estate broker or property owner where available.

Noncompensable Items: The indicated value in this report does not include damages that, even if existent, are considered to be noncompensable items in eminent domain proceedings within the State of Michigan, and specifically does not include loss of profits, goodwill, loss of sentimental value, cost of moving personal property, circuity of travel after construction completed, loss of use of public streets for private business, expenses and inconvenience during construction, value to owner, speculative future use, intended future use of property, failure to provide access where none previously existed, diversion of traffic, adding together components of land and divider strip.

(Source: *Noncompensable Items of Damage in Eminent Domain Proceedings and Michigan Law Regarding Benefits,* Michigan Department of Transportation 0633A, 09/05)

Type of Report: This is an Appraisal Report, which is intended to comply with the reporting requirements set forth under Standards Rule 2-2(a) of the Uniform Standards of Professional Appraisal Practice. The appraiser is not responsible for any unauthorized use of this report.

The following appraisal sets forth the most pertinent data gathered, the techniques employed and the reasoning leading to the opinion of value. The analyses, opinions and conclusions were developed based on, and this report has been prepared in conformance with, our interpretation of the guidelines and recommendations set forth in the Uniform Standards of Professional Appraisal Practice (USPAP), the requirements of the Code of Professional Ethics and Standards of Professional Appraisal Practice of the Appraisal Institute, and the Uniform Condemnation Procedures Act (UCPA). *The appraisal includes the real property only, excluding personal property, trade fixtures, machinery, equipment or intangible items.*

RECEIVED by MSC 12/20/2021 10:30:09 AM

SECTION III. GENERAL DATA

PROPERTY IDENTIFICATION

The subject property is located along the east side of Broadway Avenue, north of Winchell Avenue, City of Kalamazoo, Kalamazoo County, Michigan. The common street address is 2035 Broadway Avenue, Kalamazoo, Michigan.

LEGAL DESCRIPTION

The legal description for the subject property (before the taking) was obtained from the Easement for the Protection of Electric Facilities (Exhibit A) and is located in the Addendum section of this report.

OWNERSHIP

The current owners are Brian and Erin Storm.

PRESENT USE AND OCCUPANCY OF THE PROPERTY

The property is improved with a single-family residence. According to public records, the residence is owner occupied.

SALES HISTORY OF THE PROPERTY

According to public records, the current owners purchased the subject property on December 2, 2015. The sale price was $271,500 and public records indicate this was an arm's length transaction. The property was listed for sale on the MLS.

There have been no other known sales of the subject property in the last five years, and there are no known pending offers.

ZONING

The subject property is zoned RS-5, Residential Single-Dwelling. Permitted uses include detached dwelling; cluster housing development; adult foster care family home (6 or fewer residents); foster family group home (5 or 6 children); foster family home (4 or fewer children); open space/nature preserve; parks/recreation facility; government office; public safety substation; family day-care home (6 or fewer residents); building-mounted wind energy units and small freestanding (not primary use) wind energy units. Special uses include community service center; drop-in center; cultural exhibits, libraries and museums; postal service; religious assembly; school; utilities and

RECEIVED by MSC 12/20/2021 10:30:09 AM

public service; group day-care home (7 to 12 residents); cemeteries and mausoleums. The zoning requirements applicable to the subject property are as follows:

Zoning Requirements		
	Zoning	Subject Property
Minimum Lot Width/Frontage	60 feet	Conforms
Minimum Lot Area	7,500 SF	Conforms
Maximum Lot Coverage	45% impervious cover	Conforms
Minimum Front Yard	25 feet	Conforms
Minimum Side Yard	8 feet	Conforms
Minimum Rear Yard	25 feet	Conforms
Maximum Building Height	35 feet	Conforms

The subject property is in conformance with the above zoning requirements. *The appraisal assumes that the property is legal and conforming to zoning and, as may be applicable, is in conformance with all applicable governmental regulations including building, fire and health code restrictions and requirements.*

The City of Kalamazoo master plan designates the future land use of the subject property as R1, Residential.

NEIGHBORHOOD DATA

The objective of a neighborhood analysis is to determine perceivable patterns of growth, structure and change that may detract from or enhance property values. The following analysis describes neighborhood boundaries, transportation, public services, land uses and neighborhood life cycles. A neighborhood map locating the subject property is provided on the following page.

Neighborhood Boundaries: The neighborhood is located in the City of Kalamazoo, Kalamazoo County, Michigan. The neighborhood boundaries are Stadium Drive/Howard Street (north), Portage Street (east), S. Drake Road (west) and Parkview Avenue/Cork Street (south). The neighborhood is located approximately two miles south of the central business district of the City of Kalamazoo and approximately three miles northwest of the Kalamazoo/Battle Creek International Airport.

Transportation: There is a good network of primary and secondary roads serving the neighborhood. Stadium Drive is a primary east/west travel route and S. Westnedge Avenue is a primary north/south travel route. Access to I-94 is available south of the neighborhood with

RECEIVED by MSC 12/20/2021 10:30:09 AM

Neighborhood Map



RECEIVED by MSC 12/20/2021 10:30:09 AM

interchanges at Oakland Drive, S. Westnedge Avenue and Portage Street. Access to US-131 is available west of the neighborhood with an interchange at Stadium Drive.

Public Services: Public services for the area include fire protection by the City of Kalamazoo and street maintenance by city and county municipalities. The neighborhood is serviced by public utilities such as municipal water, sewer, electric, natural gas and telephone.

Neighborhood Land Uses: Within the neighborhood boundaries, the land use consists of a mixture of commercial, office, industrial, single-family residential, multi-family residential and institutional. Commercial and office use is primarily located along the primary thoroughfares including Stadium Drive, Howard Street, S. Drake Road, Parkview Avenue, Whites Road, Cork Street, S. Westnedge Avenue and Portage Street. Industrial use is primarily located at the east portion of the neighborhood between Burdick Street and Portage Street. The majority of residential use includes single-family properties with areas of multi-family development. The neighborhood is located in the Kalamazoo public school district and other institutional uses include religious facilities.

Neighborhood Life Cycle: Neighborhoods and their land uses typically evolve through a four-stage life cycle that consists of 1) Growth – a period during which the market area gains public favor and acceptance; 2) Stability – a period of equilibrium without marked gains or losses; 3) Decline – a period of diminishing demand; and 4) Revitalization – a period of renewal, redevelopment, modernization, and increasing demand. The subject's immediate neighborhood is considered to be in a stage of stability.

RECEIVED by MSC 12/20/2021 10:30:09 AM

SECTION IV. DESCRIPTION OF PROPERTY - BEFORE TAKING

The subject property can best be visualized by the following aerial view and subject photos located in the Addendum section of this report.

Aerial View – Before Taking



Source: City of Kalamazoo GIS (2013 Imagery)

RECEIVED by MSC 12/20/2021 10:30:09 AM

SITE DESCRIPTION – BEFORE TAKING

The site description is based upon public records, limited title certificate completed by Percheron (dated March 29, 2018) and a drive-by inspection of the site.

Location: The subject property is located along the east side of Broadway Avenue, north of Winchell Avenue, City of Kalamazoo, Kalamazoo County, Michigan. The common street address is 2035 Broadway Avenue, Kalamazoo, Michigan.

Shape/Land Area: The site is rectangular in shape and contains 17,500 SF (0.402 acres) of net land area, excluding road right-of-way. The site has 100 feet of frontage along Broadway Avenue.

Ingress/Egress: The subject property has access to Broadway Avenue.

Topography: The subject site is mostly level.

Wetlands: The U.S. Fish and Wildlife Service National Wetlands Inventory indicates there are no apparent wetlands located on the subject property.

Soil Types: The appraisal assumes that the soils are suitable to support current and future site and building improvements.

Flood Plain: According to the National Flood Insurance Program map, Community Panel No. 26077C0188D (February 17, 2010), the subject property is located within Zone X, areas determined to be outside of the 0.2% annual chance flood plain. A flood plain map locating the subject property is located in the Addendum section of this report.

Utilities: Municipal water, sanitary sewer, electric, natural gas and telephone service are available to the property.

Site Improvements: Site improvements include an asphalt paved drive, concrete walkways and landscaping consisting of seeded lawn and plantings of trees and shrubbery.

Off-Site Improvements: Broadway Avenue is a two-lane, asphalt-paved roadway with concrete curbs and gutters.

RECEIVED by MSC 12/20/2021 10:30:09 AM

Easements: The appraisal assumes there are no easements that adversely affect the property, before the taking.

Deed Restrictions: According to the limited title certificate completed by Percheron (dated March 17, 2018), there is a Declaration of Restrictions recorded in Liber 799, Page 393 for the plat known as University Hills, which is the location of the subject property.

The appraisal assumes there are no deed restrictions that adversely affect the property, before the taking.

Hazardous Waste or Property Contamination: We have no knowledge of the existence of hazardous waste or substances, nor contamination that may or may not be present on or near the property. There were no obvious signs of hazardous substances or conditions observed during the inspection of the property, however, we are not trained or qualified to detect the existence of potentially hazardous material. The client is urged to retain an expert in this field to determine if the property is affected by hazardous contaminates or material. *The value estimate is predicated on the assumption that there is no contaminated material on or near the property that would result in a lower market value.*

We understand that the client, Consumers Energy Company, waives its rights to bring federal or state cost recovery actions against the present owner of the property arising out of a release of hazardous substances at the property, and the appraisal reflects this waiver.

Mineral Deposits: It is not known if any mineral rights have been leased for the subject property, or if there are commercially valuable mineral deposits. For the purposes of this appraisal we have assumed all mineral rights are part of the subject property and there are no commercially valuable mineral deposits.

Other: *To our knowledge there are no easements, deed restrictions, encroachments or encumbrances that adversely affect the property, and the appraisal assumes that none exist, before the taking.*

BUILDING DESCRIPTION

The property is improved with a single-family residence. According to public records, the 2,775 SF building was originally constructed in 1978.

RECEIVED by MSC 12/20/2021 10:30:09 AM

HIGHEST AND BEST USE – BEFORE TAKING

Highest and best use analysis is important in the appraisal process because it provides the foundation as to how to proceed with the valuation of the property. It provides the basis on which the subject value is estimated, because the market data used to estimate value for the subject is predicated on the property's highest and best use.

In highest and best use analysis, reasonable alternative uses for the property are explored within a framework of legal, physical and economic parameters. The definition of highest and best use is relied upon for this appraisal:

> By "highest and best use" we mean the most profitable and advantageous use the owner may make of the property even if the property is presently used for a different purpose or is vacant, so long as there is a market demand for such use.
>
> *(Source: Michigan Model Civil Jury Instructions 90.09)*

The highest and best use of the appraised property is that use which is legally permissible, physically possible and provides the highest return. With improved properties, a conclusion of the highest and best use is made both as vacant, and as improved. The analysis assuming an improved property as vacant is done to test and provide support for the concluded highest and best use as improved.

Highest and Best Use as Vacant:

Legal Permissible Use: The subject property is zoned RS-5, Residential Single-Dwelling. Permitted uses include detached dwelling; cluster housing development; adult foster care family home (6 or fewer residents); foster family group home (5 or 6 children); foster family home (4 or fewer children); open space/nature preserve; parks/recreation facility; government office; public safety substation; family day-care home (6 or fewer residents); building-mounted wind energy units and small freestanding (not primary use) wind energy units. Special uses include community service center; drop-in center; cultural exhibits, libraries and museums; postal service; religious assembly; school; utilities and public service; group day-care home (7 to 12 residents); cemeteries and mausoleums.

The City of Kalamazoo master plan designates the future land use of the subject property as R1, Residential.

RECEIVED by MSC 12/20/2021 10:30:09 AM

Physical Possible Use: The subject site has good functional utility for residential use. The U.S. Fish and Wildlife Service National Wetlands Inventory indicates there are no apparent wetlands located on the subject property and the appraisal assumes that the soils are suitable to support future site and building improvements. Municipal water, sanitary sewer, electric, natural gas and telephone service are available to the property.

Financial Feasibility/Maximum Profitability: Based upon the legally permissible and physically possible uses, the research completed for vacant land sales indicates residential use provides maximum profitability for the subject. Therefore, it is our opinion that the highest and best use of the subject site, as vacant, before taking, is for residential use.

Highest and Best Use as Improved: The property is improved with a single-family residence, which is considered maximally productive. Therefore, the highest and best use of the subject property, as improved, before taking, is for continued residential use.

RECEIVED by MSC 12/20/2021 10:30:09 AM

SECTION V. DESCRIPTION OF TAKING

The taking consists of an easement for the protection of electric facilities. The easement is being acquired by Consumers Energy Company to properly and safely maintain and operate its 46 kV high voltage distribution line. The easement grants the rights to clear cut all trees and brush within 40 feet of the Lindbergh to Phillips Line, and to trim or remove all trees in excess of 35 feet in height and located between 40 and 80 feet from the distribution line. In addition, the easement restricts the construction of buildings and structures within 20 feet of the distribution line.

A complete copy of the easement agreement is provided in the Addendum section of this report. Brian and Erin Storm are referred to as the "Owner" and Consumers Energy Company is referred to as "Consumers." A summary of the easement is as follows:

- ***No build area*** - Owner agrees not to build, create, construct, or permit to be built, created, or constructed, any obstruction, building, septic system, drain field, fuel tank, pond, swimming pool, lake, pit, well, foundation, engineering works, installation or any other type of structure over, under, on, or within that portion of the Easement Area identified as "20' No Build" on the easement sketch, whether temporary or permanent, without the express authorization of Consumers, which may be withheld in Consumers' sole discretion, and which authorization shall be recorded in the register of deeds for the county in which Owner's Land is situated expressly allowing the aforementioned

- ***Clear cut area*** - Owner shall not plant any trees within that portion of the Easement Area identified as "40' Clear Cut" on the easement sketch. Consumers shall have the right from time to time hereafter to enter that portion of the Easement Area identified as "40' Clear Cut" on the easement sketch to, without compensation to Owner, trim, cut down, and otherwise remove and control any trees, brush, roots, and other vegetation within the "40' Clear Cut" portion of the Easement Area.

  Owner shall not materially alter the ground elevation within that portion of the Easement Area identified as "40' Clear Cut" on the easement sketch, without the express authorization of Consumers, which may be withheld in Consumers' sole discretion, and which authorization shall be recorded in the register of deeds for the county in which Owner's Land is situated expressly allowing the aforementioned.

RECEIVED by MSC 12/20/2021 10:30:09 AM

Consumers shall have the right to utilize the portion of the Easement Area described as the "40' Clear Cut" on the easement sketch to, from within the Easement Area, construct, operate, maintain, inspect (including aerial patrol), survey, replace, reconstruct, improve, remove, relocate, change the size of, enlarge, and protect a line or lines of electric facilities together with any wires, cables, conduits, crossarms, braces, guys, transformers, electric control circuits and devices, communication systems, utility lines, protective apparatus and all other equipment, appurtenances, associated fixtures, and facilities that are useful or incidental to or for the operation or protection thereof and located on the Adjoining Land, and to conduct such other activities as may be convenient in connection therewith as determined by Consumers for the purpose of transmitting and distributing electricity, but without the right to locate any of the aforementioned facilities on Owner's Land or within the Easement Area pursuant to this Easement.

- ***Danger tree area*** - Consumers shall have the right from time to time hereafter to enter that portion of the Easement Area identified as "40' Danger Trees" on the easement sketch to, without compensation to Owner, trim, cut down, and otherwise remove and control any trees, brush, roots, and other vegetation within the Easement Area that are in excess of 35 feet in height.

- Consumers shall have the right of unimpaired access to the Easement Area for any and all purposes necessary, convenient, or incidental to the exercise by Consumers of the rights granted hereunder and Owner shall not interfere with said access by any means.

RECEIVED by MSC 12/20/2021 10:30:09 AM

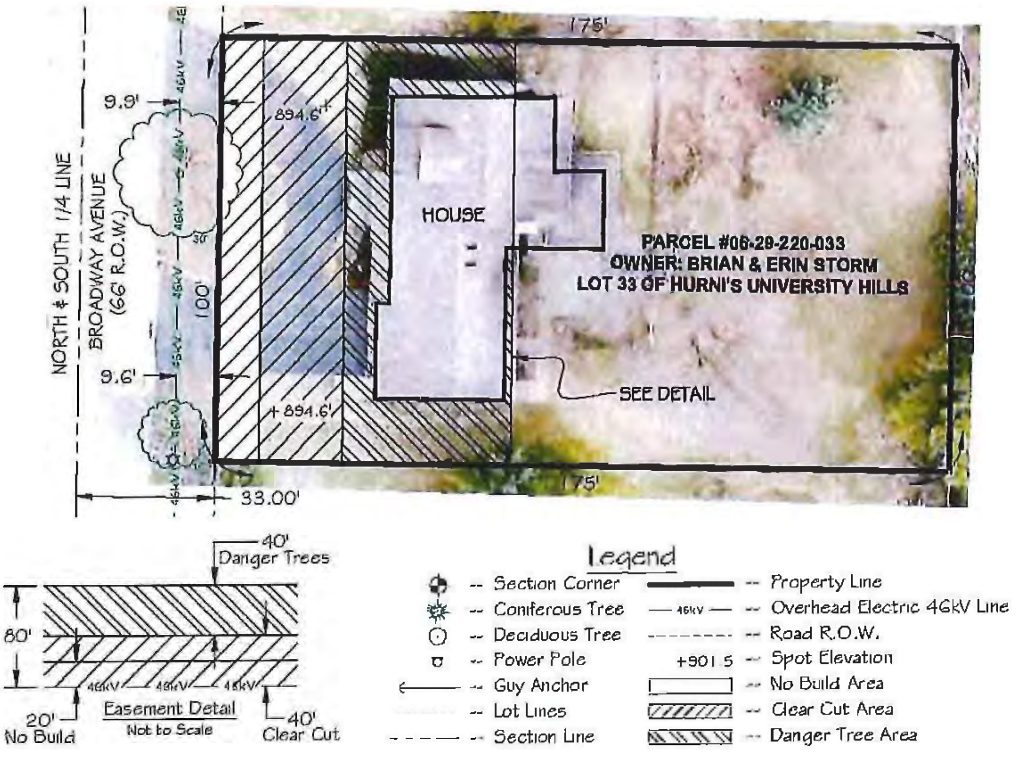
SECTION VI. DESCRIPTION OF PROPERTY - AFTER TAKING

The market value, after taking, is based upon the hypothetical condition that the easement for the protection of electric facilities is in place as of the effective date of value. If this condition is not in place, the value conclusion could be impacted.

The taking consists of an easement for the protection of electric facilities. The total easement area contains 7,029 SF, excluding easement area located in the road right-of-way. The easement area includes 1,029 SF of no build and clear cut area, 2,000 SF of clear cut only area and 4,000 SF of danger tree area. The building improvements are located outside of the no build easement area.

The subject property, after taking, can best be visualized by the following easement sketch. A complete copy of the easement sketch is located in the Addendum section of this report.

Easement Sketch



RECEIVED by MSC 12/20/2021 10:30:09 AM

The appraisal involves what is known as a "partial taking"; that is to say, the property being acquired by Consumers Energy Company is part of a larger parcel under the control of the owner. When only part of a larger parcel is taken, as is the case here, the owner is entitled to recover not only for the property taken, but also for any loss in the value to his or her remaining property. In valuing the property that is left after the taking, various factors should be taken into account, which include:

1. Reduced size
2. 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
6. The use which Consumers Energy Company intends to make of the property it is acquiring and the effect of that use upon the owner's remaining property.

In the following discussion, each of the six factors will be addressed for the subject after taking.

1. Reduced size - The taking is an easement. Therefore, the net land area of the subject property does not change from before the taking.
2. Altered shape - The taking is an easement. Therefore, the shape of the subject property does not change from before the taking.
3. Reduced access - The property owner may use the easement area for vehicular access, parking and on-site storage. Therefore, access to the subject property does not change from before the taking.
4. Any change in utility or desirability of what is left after the taking – There is no change in utility or desirability of what is left after the taking. This will be discussed further in Factor No. 6 (The use which the condemning authority intends to make of the property it is acquiring and the effect of that use upon the owner's remaining property).
5. The effect of the applicable zoning ordinances on the remaining property - The taking is an easement. Easement areas are included in land area, setback and frontage dimensions when determining zoning conformance. Therefore, the effect of the applicable zoning ordinance on the remaining property does not change from before the taking.
6. The use which the condemning authority intends to make of the property it is acquiring and the effect of that use upon the owner's remaining property – The easement is being acquired by Consumers Energy Company to properly and safely maintain and operate its 46 kV high

RECEIVED by MSC 12/20/2021 10:30:09 AM

voltage distribution line. The distribution line is located in the street right-of-way. 100% of the no build and clear cut area is located within the front setback area required by the zoning ordinance. A separate landscape appraisal has been completed and the property owner will be compensated for the value of loss of landscaping, if any, due to the vegetation management rights granted in the easement. The property owner may use the easement area for vehicular access, parking and on-site storage.

Based upon the location of the easement and the property rights granted, we determined there is no diminution in value to the remaining property and building improvements, after the taking. Therefore, the subject property will be appraised "as vacant land" in the valuation analysis before and after the taking.

Loss of trees and other damages, if any, caused by Consumers Energy Company's use of the easement for the protection of electric facilities, if any, will be handled separately from this appraisal by Consumers Energy Company.

HIGHEST AND BEST USE - AFTER TAKING

The highest and best use of the subject property, after taking, is unchanged from the highest and best use, before taking. Therefore, the highest and best use of the subject site, as vacant, after taking, is for residential use. The highest and best use of the subject property, as improved, after taking, is for continued residential use.

RECEIVED by MSC 12/20/2021 10:30:09 AM

SECTION VII. VALUATION OF PROPERTY - BEFORE TAKING

COST APPROACH - BEFORE TAKING

The cost approach involves estimating the current replacement or reproduction cost of building and site improvements, subtracting depreciation and adding land value. The subject property is appraised as vacant land. We considered, but did not develop the cost approach.

SALES COMPARISON APPROACH - BEFORE TAKING

The sales comparison approach involves the search for sales of similar type property, analyzing the sales, and estimating a value for the subject based on the analysis. The principle of substitution is particularly relevant in this approach whereby the theory is that value is controlled by prices paid for similar properties having like utility.

Because the subject property is appraised as vacant land, vacant land sale comparables are analyzed for the valuation of the subject site. The analysis process involves making adjustments to the sale prices of comparable properties for differences in the "elements of comparison" between the comparables and the appraised property. The elements of comparison include property rights conveyed, financing terms, conditions of sale, market conditions, location and physical characteristics.

Adjustments to the comparables are usually made on a percentage or dollar basis and are applied to a unit rate of comparison, such as sale price per square foot of land or building area, or some other appropriate unit. The unit rate determined to be most applicable in making comparisons between the comparables and the subject is price/SF of net land area.

The extent of collecting, confirming and analyzing the market data for use in the sales comparison approach was based properties located in the City of Kalamazoo in the Kalamazoo School District. Research sources included the Genzink Appraisal Company internal database, public records, MLS data and market participants. The data was confirmed with public records, MLS and/or a third party such as a real estate broker or property owner where available.

We have selected five comparable vacant land sales. The following page provides a summary chart of the adjustments for the comparable properties. A map locating the comparable properties and a description of each property is located in the Addendum section of this report.

/20/2021 10:30:09 AM

Summary of Adjustments - Vacant Land Sales (Before Taking)

	Subject	Comp No. 1	Comp No. 2	Comp No. 3	Comp No. 4	Comp No. 5
Comparable Reference No.		3009939	3010291	3009933	3009934	3010292
Location						
Street Number	2035	210	3521	2334	1911	2222
Street Name	Broadway Avenue	Albany Street	Lowden Street	Amherst Avenue	Stearns Avenue	Shelter Pointe Drive
City/Township	City of Kalamazoo	City of Kalamazoo	City of Kalamazoo	City of Kalamazoo	City of Kalamazoo	City of Kalamazoo
County	Kalamazoo	Kalamazoo	Kalamazoo	Kalamazoo	Kalamazoo	Kalamazoo
School District	Kalamazoo	Kalamazoo	Kalamazoo	Kalamazoo	Kalamazoo	Kalamazoo
Sales Data						
Property Rights	Fee Simple	Fee Simple	Fee Simple	Fee Simple	Fee Simple	Fee Simple
Financing Terms	Cash	Cash	Cash	Cash	Cash	Land Contract
Conditions of Sale	Arm's Length	Arm's Length	Arm's Length	Arm's Length	Arm's Length	Arm's Length
Sale Price		$4,000	$8,000	$10,000	$22,000	$55,000
Cash Price		$4,000	$8,000	$10,000	$22,000	$55,000
Sale Date	10/25/2018	5/15/2017	4/25/2018	9/15/2017	7/27/2017	10/10/2018
Site Description						
Access	Average	Average	Average	Average	Average	Average
Physical Location	Interior	Corner	Interior	Interior	Corner	Interior
Net Land Area (Acres)	0.402	0.206	0.145	0.165	0.191	0.335
Net Land Area (SF)	17,500	8,990	6,300	7,200	8,309	14,593
Primary Street Frontage (Feet)	100.00	116.00	45.00	45.00	115.50	150.39
Street Name	Broadway Avenue	Albany Street	Lowden Street	Amherst Avenue	Stearns Avenue	Shelter Pointe Drive
Shape	Rectangular	Rectangular	Rectangular	Rectangular	Rectangular	Irregular
Topography	Mostly Level	Mostly Level	Mostly Level	Mostly Level	Mostly Level	Mostly Level to Sloping
Zoning	RS-5, Residential Single-Dwelling	RM-15, Residential Multi-Dwelling	RS-5, Residential Single-Dwelling	RS-5, Residential Single-Dwelling	RM-15, Residential Multi-Dwelling	RS-5, Residential Single-Dwelling
Future Land Use	R1, Residential	R2, Residential	R1, Residential	R1, Residential	R2, Residential	R1, Residential
Utilities						
Water	Public	Public	Public	Public	Public	Public
Sewer	Public	Public	Public	Public	Public	Public
Highest and Best Use	Single Family	Single Family	Single Family	Single Family	Single Family	Single Family
Ratios						
Land to Street Frontage Ratio	175	78	140	160	72	97
Units of Comparison						
Price/SF - Net Land Area		$0.44	$1.27	$1.39	$2.65	$3.77
Adjustments						
Market Conditions	0.0%	0.00	0.00	0.00	0.00	0.00
Adjusted for Market Conditions		$0.44	$1.27	$1.39	$2.65	$3.77
Location		0.20	0.20	0.20	0.20	-0.20
Access		0.00	0.00	0.00	0.00	0.00
Land Area		-0.10	-0.10	-0.10	-0.10	0.00
Shape		0.00	0.00	0.00	0.00	0.00
Topography		0.00	0.00	0.00	0.00	0.00
Utilities		0.00	0.00	0.00	0.00	0.00
Net Adjustment		0.10	0.10	0.10	0.10	-0.20
Gross adjustment		0.30	0.30	0.30	0.30	0.20
Indication of Value (Price/SF - Net Land Area)		$0.46	$1.40	$1.53	$2.92	$3.02

RECEIVED by MSC 12/20/2021 10:30:09 AM

Discussion of the Adjustments

A discussion of the adjustment analysis for differences with the subject follows.

Property Rights Conveyed: An adjustment is required if the property rights for the comparable properties are different from the subject. No adjustment is necessary for real property rights conveyed for Comparable Nos. 1 through 5.

Financing Terms: Comparable Nos. 1, 2, 3 and 4 were based upon cash terms or cash equivalent terms. Comparable No. 5 was sold on land contract, which was considered cash equivalent by the listing agent. Therefore, no adjustment is necessary for financing terms.

Conditions of Sale: An adjustment for this element of comparison is required when non-market, or atypical conditions, influence a sale. Comparable Nos. 1 through 5 were arm's length transactions. Therefore, no adjustment is necessary for conditions of sale.

Market Conditions: This element of comparison considers changes in market conditions between the sale date of the comparable and the effective date of value for the subject (October 25, 2018). Comparable Nos. 1 through 5 sold from May 2017 through October 2018. Based upon our research, market conditions for vacant residential lots in the subject neighborhood have been stable. Therefore, market conditions for Comparable Nos. 1 through 5 are considered similar to the effective date and no adjustment is required.

Location: This adjustment considers the surrounding neighborhood. Comparable Nos. 1 through 4 are considered inferior to the subject and an upward adjustment is required. Comparable No. 5 is considered superior to the subject and a downward adjustment is required.

Access: This adjustment considers the overall accessibility and ease to get to the subject site for residential use. The subject is considered to have average access. Comparable Nos. 1 through 5 are considered similar to the subject and no adjustment is required.

Land Area: Generally, smaller sites will sell at higher unit rates (price/SF) than a larger site because of the higher demand for smaller properties. Comparable Nos. 1, 2, 3 and 4 have less land area in comparison the subject and a downward adjustment is required. Comparable No. 5 is considered similar to the subject and no adjustment is required.

RECEIVED by MSC 12/20/2021 10:30:09 AM

Shape: The shape of the property influences the functional utility of the site. Comparable Nos. 1 through 5 are considered similar to the subject in functional utility due to shape and no adjustment is required.

Topography: The topography of the property influences the functional utility of the site. Comparable Nos. 1 through 5 are considered similar to the subject in functional utility due to topography and no adjustment is required.

Utilities: The availability of public utilities such as public water and sanitary sewer may impact the desirability of a parcel for future development. Public water and sanitary sewer are typically preferred. Public water and sanitary sewer are available to the subject property. Comparable Nos. 1 through 5 are similar to the subject and no adjustment is required.

Summary: Before adjustments, Comparable Nos. 1 through 5 range in sale (cash) price from $4,000 to $55,000, or $0.44/SF to $3.77/SF. The following table provides a range of value for the subject property based upon Comparable Nos. 1 through 5, after adjustments.

Value Range Indicators
(Applied to 17,500 SF at subject property)

Comparable No.	Unit Rate	Indicated Value
1	$0.48	$8,400
2	$1.40	$24,500
3	$1.53	$26,775
4	$2.92	$51,100
5	$3.02	$52,850

Based upon the definition of market value relied upon for this report, we have reconciled to a value at the upper end of the range indicated by this approach, which is between the two highest value indicators. Therefore, the indicated vacant land value of the fee simple estate, based upon the sales comparison approach, before taking, as of October 25, 2018 is $52,000, equivalent to $2.97/SF.

INCOME CAPITALIZATION APPROACH - BEFORE TAKING

The income approach to value converts anticipated future benefits of ownership, typically income received during a holding period, into a value estimate. The anticipated future income is converted, or discounted, to a present value by applying an appropriate capitalization or yield rate. The subject property is appraised as vacant land. We considered, but did not develop the income capitalization approach.

RECEIVED by MSC 12/20/2021 10:30:09 AM

CORRELATION AND CONCLUSION OF VALUE - BEFORE TAKING

The indicated vacant land market values, before taking, of each approach are broken down as follows:

Cost Approach	n/a
Sales Comparison Approach	$52,000
Income Capitalization Approach	n/a

Based upon the previous analyses, the vacant land market value of the fee simple estate, before taking, as of October 25, 2018 is $52,000.

RECEIVED by MSC 12/20/2021 10:30:09 AM

SECTION VIII. VALUATION OF PROPERTY - AFTER TAKING

COST APPROACH - AFTER TAKING

The cost approach involves estimating the current replacement or reproduction cost of building and site improvements, subtracting depreciation and adding land value. The subject property is appraised as vacant land. We considered, but did not develop the cost approach.

SALES COMPARISON APPROACH - AFTER TAKING

The vacant land market value of the fee simple estate determined in the valuation analysis, before taking, will be used as a basis for the valuation after the taking ($52,000, equivalent to $2.97/SF). As previously discussed, we determined there is no diminution in value to the remaining property (outside of the easement), based upon the location of the easement and the property rights granted.

To determine the diminished value of the easement area, a factor is estimated and applied to the contributory market value of the fee simple interest of the land area encumbered by the easements. The easement factor reflects the property rights encumbered by the easement. As written in *Real Estate Valuation in Litigation, Second Edition, Appraisal Institute, Chicago, IL (P. 361)*, "The full impact of an easement acquisition cannot be estimated until the appraiser determines: 1) the loss of present utility, 2) the loss of future utility, 3) the accessory rights acquired, and 4) the obligations of the parties." The easement factor is estimated after consideration of the beneficial interest that the property owner will lose within the easement area.

The taking consists of an easement for the protection of electric facilities. The total easement area contains 7,029 SF, excluding easement area located in the road right-of-way. The easement area includes 1,029 SF of no build and clear cut area, 2,000 SF of clear cut only area and 4,000 SF of danger tree area.

In determining the easement factors, primary consideration is given to the easement restrictions, location of the easement, topography of the easement area, easement area as a percentage of net land area and building setbacks located within the easement area.

To determine the easement factor for the no build and clear cut area (1,029 SF), primary emphasis is given to the following:

1. The no build restrictions and clear cut rights restrict surface use by the property owner.
2. The easement is located at the boundary of the subject along the road right-of-way.

RECEIVED by MSC 12/20/2021 10:30:09 AM

3. The topography of the area is mostly level.
4. The no build and clear cut area represents 5.9% of the net land area.
5. 100% of the no build and clear cut area is located within the front setback area required by the zoning ordinance.
6. The property owner may use the easement area for vehicular access, parking and on-site storage.

As a result of the previous discussion, it is our opinion that an easement factor of 70% of the contributory fee simple market value for the no build and clear cut area (1,029 SF), is appropriate considering the loss of present utility, the loss of future utility, the accessory rights acquired and the obligations of the parties related to the easement.

To determine the easement factor for the clear cut area only area (2,000 SF), primary emphasis is given to the following:

1. Surface use is not restricted in this area, with the exception of vegetation management.
2. Future building or site improvements are permitted within this area, in conformance with local ordinances.
3. The property owner may use the easement area for vehicular access, parking and on-site storage.

As a result of the previous discussion, it is our opinion that an easement factor of 50% of the contributory fee simple market value for the clear cut area only area (2,000 SF), is appropriate considering the loss of present utility, the loss of future utility, the accessory rights acquired and the obligations of the parties related to the easement.

To determine the easement factor for the danger tree area (4,000 SF), primary emphasis is given to the following:

1. Surface use is not restricted in this area, with the exception of vegetation management.
2. Future building or site improvements are permitted within this area, in conformance with local ordinances.
3. This is not a clear cut area. It includes vegetation that is in excess of 35 feet in height.
4. The property owner may use the easement area for vehicular access, parking and on-site storage.

RECEIVED by MSC 12/20/2021 10:30:09 AM

As a result of the previous discussion, it is our opinion that an easement factor of 20% of the contributory fee simple market value for the danger tree area (4,000 SF) is appropriate considering the loss of present utility, the loss of future utility, the accessory rights acquired and the obligations of the parties related to the easement.

The calculation to determine the diminished value of the easement area is as follows:

Diminished Value of the Easement Area					
		No Build and Clear Cut	Clear Cut Only	Danger Tree	
Area (SF)		1,029	2,000	4,000	
Market Value/SF	×	$2.97	$2.97	$2.97	
Sub-Total		$3,056	$5,940	$11,880	
Easement Factor	×	-70%	-50%	-20%	Total
Total		-$2,139	-$2,970	-$2,376	-$7,485

Therefore, the diminished value of the easement area is $7,485.

Sales Comparison Approach – After Taking Summary

The calculation of the indicated vacant land market value, after taking, is as follows:

Summary – After Taking	
Vacant Land Market Value - Before Taking	$52,000
Diminished Value of Easement Area	-$7,485
Sub-Total	$44,515
Rounded	$44,500

Therefore, the indicated vacant land value of the fee simple estate (subject to an easement for the protection of electric facilities), based upon the sales comparison approach, after taking, as of October 25, 2018 is $44,500.

INCOME CAPITALIZATION APPROACH - AFTER TAKING

The income approach to value converts anticipated future benefits of ownership, typically income received during a holding period, into a value estimate. The anticipated future income is converted, or discounted, to a present value by applying an appropriate capitalization or yield rate. The subject property is appraised as vacant land. We considered, but did not develop the income capitalization approach.

RECEIVED by MSC 12/20/2021 10:30:09 AM

CORRELATION AND CONCLUSION OF VALUE - AFTER TAKING

The indicated vacant land market values, after taking, of each approach are broken down as follows:

Cost Approach	n/a
Sales Comparison Approach	$44,500
Income Capitalization Approach	n/a

Based upon the previous analyses, the vacant land market value of the fee simple estate (subject to an easement for the protection of electric facilities), after taking, as of October 25, 2018 is $44,500.

The market value, after taking, is based upon the hypothetical condition that the easement for the protection of electric facilities is in place as of the effective date of value. If this condition is not in place, the value conclusion could be impacted.

Loss of trees and other damages, if any, caused by Consumers Energy Company's use of the easement for the protection of electric facilities, if any, will be handled separately from this appraisal by Consumers Energy Company.

The client has requested that we report the value of landscaping located in the easement area. According to Aurora Design and Appraisal, LLC, the total value of landscaping is $0. A complete copy of the landscape appraisal is provided in the Addendum section of this report.

RECEIVED by MSC 12/20/2021 10:30:09 AM

SECTION IX. RECAPITULATION OF BEFORE & AFTER VALUES

The market values of the fee simple estate, both before and after the taking, as of October 25, 2018, are as follows:

Before and After Values	
Vacant Land Market Value Before Taking	$52,000
Vacant Land Market Value After Taking [1]	- $44,500
Difference	$7,500
Loss of Trees and Landscaping [2]	+$0
Total	$7,500

(1) Subject to an easement for the protection of electric facilities.
(2) Value of landscaping was provided by Aurora Design and Appraisal, LLC.

The market value, after taking, is based upon the hypothetical condition that the easement for the protection of electric facilities is in place as of the effective date of value. If this condition is not in place, the value conclusion could be impacted.

Loss of trees and other damages, if any, caused by Consumers Energy Company's use of the easement for the protection of electric facilities, if any, will be handled separately from this appraisal by Consumers Energy Company.

EXPOSURE AND MARKETING TIMES

As indicated in the sales comparison approach, the following exposure times were required:

Exposure Time	
Comp No.	Months
1	22
2	3
3	9
4	21
5	16

It is estimated that a sale of the appraised property could be consummated within a 6 to 18 month period assuming adequate, sufficient and reasonable marketing. This includes both the exposure time prior to the date of value, and a required marketing period after the date of value.

RECEIVED by MSC 12/20/2021 10:30:09 AM

SECTION X. CERTIFICATION

The undersigned certify that, to the best of their knowledge and belief:

- The statements of fact contained in this report are true and correct.
- The reported analyses, opinions and conclusions are limited only by the reported assumptions and limiting conditions and are my personal, impartial, and unbiased professional analyses, opinions, and conclusions.
- We have no present or prospective interest in the property that is the subject of this report and no personal interest with respect to the parties involved.
- We have no bias with respect to the property that is the subject of this report or to the parties involved with this assignment.
- Our engagement in this assignment was not contingent upon the developing or reporting of predetermined results.
- Our compensation for completing this assignment is not contingent upon the development or reporting of a predetermined value or direction in value that favors the cause of the client, the amount of value opinion, the attainment of a stipulated result, or the occurrence of a subsequent event directly related to the intended use of this appraisal.
- The analyses, opinions and conclusions were developed based on, and this report has been prepared in conformance with, our interpretation of the guidelines and recommendations set forth in the Uniform Standards of Professional Appraisal Practice (USPAP), the requirements of the Code of Professional Ethics and Standards of Professional Appraisal Practice of the Appraisal Institute, and the Uniform Condemnation Procedures Act (UCPA).
- We have completed a personal drive-by inspection of the property that is the subject of this report.
- No one provided significant real property appraisal assistance to the person(s) signing this report.
- We have not provided appraisal services for the subject property within the past three years.
- That the use of this report is subject to the requirements of the Appraisal Institute relating to review by its duly authorized representatives.
- As of the date of this report, Jeffrey G. Genzink, MAI has completed the continuing education program of the Appraisal Institute.
- As of the date of this report, Michael A. Tyska, MAI has completed the continuing education program of the Appraisal Institute.

Jeffrey G. Genzink, MAI
Certified General Real Estate Appraiser

Michael A. Tyska, MAI
Certified General Real Estate Appraiser

RECEIVED by MSC 12/20/2021 10:30:09 AM

SECTION XI. ASSUMPTIONS AND LIMITING CONDITIONS

This appraisal report has been made with the following general assumptions and limiting conditions:

- No responsibility is assumed for the legal description provided or for matters pertaining to legal or title considerations. Title to the property is assumed to be good and marketable unless otherwise stated.
- The property is appraised free and clear of any or all liens or encumbrances unless otherwise stated.
- Responsible ownership and competent property management are assumed.
- The information furnished by others is believed to be reliable, but no warranty is given for its accuracy.
- All engineering studies are assumed to be correct. The plot plans and illustrative material in this report are included only to help the reader visualize the property.
- It is assumed that there are no hidden or unapparent conditions of the property, subsoil, or structures that render it more or less valuable. No responsibility is assumed for such conditions or for obtaining the engineering studies that may be required to discover them.
- It is assumed that the property is in full compliance with all applicable federal, state, and local environmental regulations and laws unless the lack of compliance is stated, described, and considered in the appraisal report.
- It is assumed that the property conforms to all applicable zoning and use regulations and restrictions unless nonconformity has been identified, described, and considered in the appraisal.
- It is assumed that all required licenses, certificates of occupancy, consents, and other legislative or administrative authority from any local, state, or national government or private entity or organization have been or can be obtained or renewed for any use on which the opinion of value contained in this report is based.
- It is assumed that the use of the land and improvements is confined within the boundaries or property lines of the property described and that there is no encroachment or trespass unless noted in the report.
- The appraiser, by reason of this appraisal, is not required to give further consultation or testimony or to be in attendance in court with reference to the property in question unless arrangements have been previously made.

RECEIVED by MSC 12/20/2021 10:30:09 AM

ASSUMPTIONS AND LIMITING CONDITIONS (cont.)

- Unless otherwise stated in this report, the existence of hazardous materials, which may, or may not be present on the property, was not observed by the appraiser. The appraiser has no knowledge of the existence of such materials on or in the property. The appraiser, however, is not qualified to detect such substances. The presence of substances such as asbestos, urea-formaldehyde foam insulation and other potentially hazardous materials may affect the value of the property. The value estimated is predicated on the assumption that there is no such material on or in the property that would cause a loss in value. No responsibility is assumed for such conditions or for any expertise or engineering knowledge required to discover them. The intended user is urged to retain an expert in this field, if desired.

- Possession of this report, or a copy thereof, does not carry with it the right of publication.

- Neither all nor any part of the contents of this report (especially any conclusions as to value, the identity of the appraiser, or the firm with which the appraiser is connected) shall be disseminated to the public through advertising, public relations, news, sales, or other media without the prior written consent and approval of the appraiser.

- The Americans with Disabilities Act (ADA) became effective January 26, 1992. The appraiser has not made a specific compliance survey or analysis of the property to determine whether or not it is in conformity with the various detailed requirements of ADA. It is possible that a compliance survey of the property and a detailed analysis of the requirements of the ADA would reveal that the property is not in compliance with one or more of the requirements of the act. If so, this fact could have negative impact upon the value of the property. Since the appraiser has no direct evidence relating to this issue, possible noncompliance with the requirements of ADA was not considered in estimating the value of the property.

RECEIVED by MSC 12/20/2021 10:30:09 AM

SECTION XII. A D D E N D U M

Aerial View
Subject Photographs
Regional Area Data
Legal Description
Flood Plain Map
Vacant Land Sale Comparables
Easement for the Protection of Electric Facilities
Easement Sketch
Landscape Appraisal
(Aurora Landscape Design and Appraisal, LLC)
Appraiser Qualifications and Licenses

RECEIVED by MSC 12/20/2021 10:30:09 AM

Aerial View

RECEIVED by MSC 12/20/2021 10:30:09 AM



Source: City of Kalamazoo GIS (2013 Imagery)

RECEIVED by MSC 12/20/2021 10:30:09 AM

Subject Photographs

RECEIVED by MSC 12/20/2021 10:30:09 AM

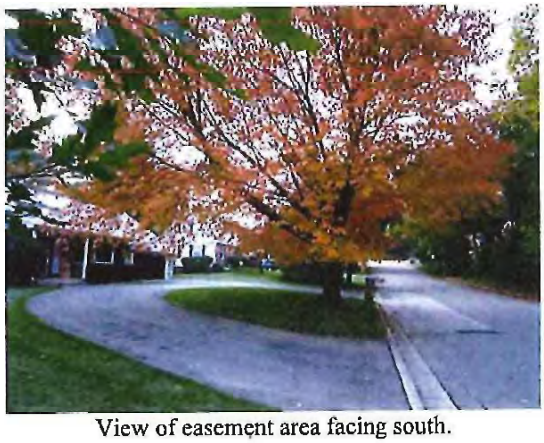
SUBJECT PHOTOGRAPHS
TAKEN BY: JGG PHOTO DATE: 10/25/2018


View of Broadway Avenue facing north.


View of Broadway Avenue facing south.


View of subject facing southeast.


View of subject facing northeast.


View of easement area facing south.

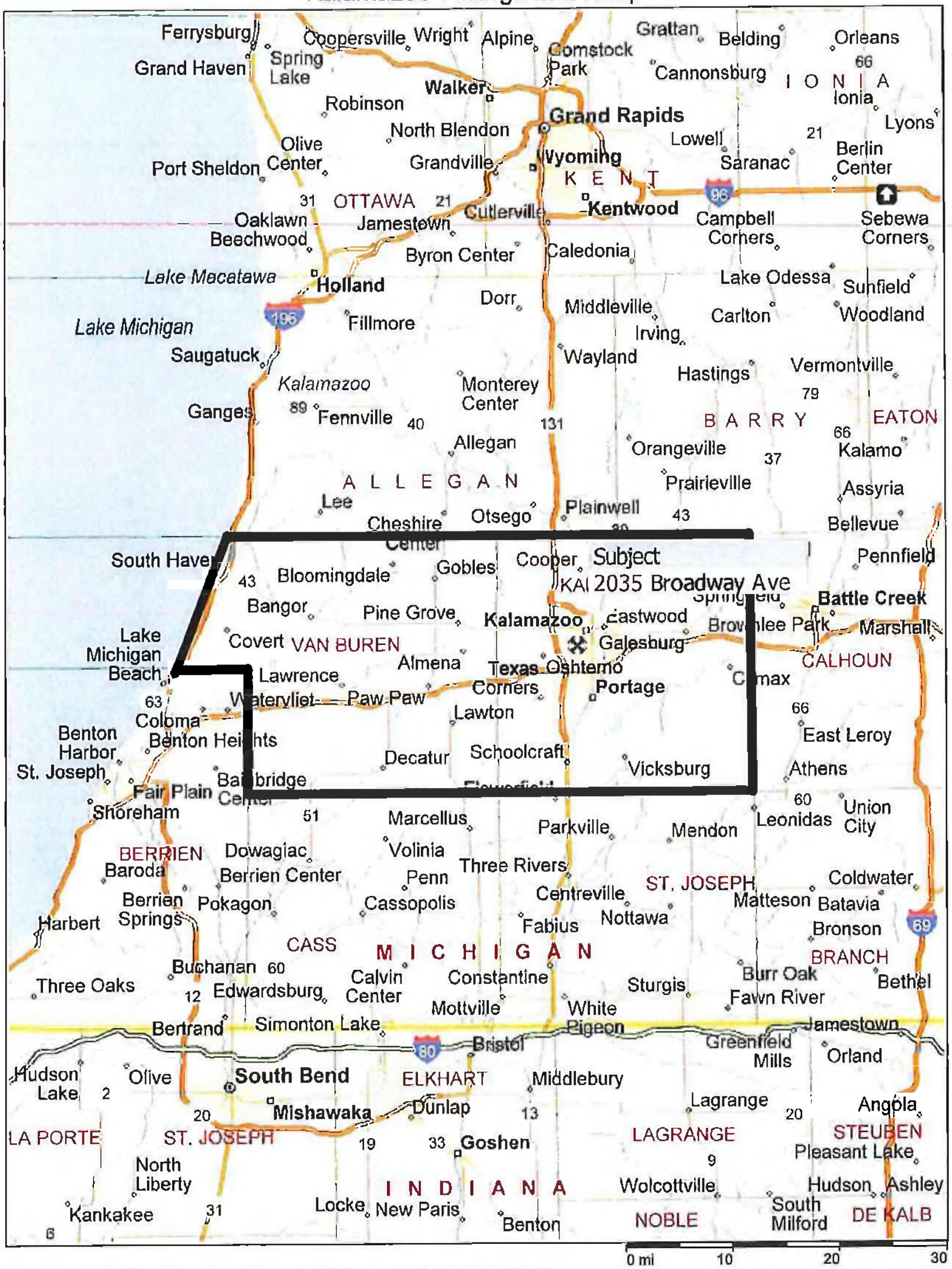

View of easement area facing north.

RECEIVED by MSC 12/20/2021 10:30:09 AM

Regional Area Data

RECEIVED by MSC 12/20/2021 10:30:09 AM

Kalamazoo-Portage MSA Map



Copyright © and (P) 1988–2006 Microsoft Corporation and/or its suppliers. All rights reserved. http://www.microsoft.com/streets/
Portions © 1990–2006 InstallShield Software Corporation. All rights reserved. Certain mapping and direction data © 2005 NAVTEQ. All rights reserved. The Data for areas of Canada includes information taken with permission from Canadian authorities, including: © Her Majesty the Queen in Right of Canada, © Queen's Printer for Ontario. NAVTEQ and NAVTEQ ON BOARD are trademarks of NAVTEQ. © 2005 Tele Atlas North America, Inc. All rights reserved. Tele Atlas and Tele Atlas North America are trademarks of Tele Atlas, Inc.

RECEIVED by MSC 12/20/2021 10:30:09 AM

2018 Regional Area Data

Introduction:

The Kalamazoo-Portage Metropolitan Statistical Area (MSA) covers the counties of Kalamazoo and Van Buren, with many workers commuting from adjacent Barry, Calhoun, St. Joseph and Allegan counties.

Kalamazoo County is located west of Battle Creek (Calhoun County) and approximately 30 miles east of Lake Michigan. Van Buren County is located west of Kalamazoo County. The city of Kalamazoo is located approximately 140 miles west of Detroit; 150 miles northeast of Chicago; 70 miles southwest of Lansing, the state capital; and 11 miles west of Battle Creek.

Transportation:

U.S. Highway 131 and Interstate 94 are divided, four-lane highways servicing the Kalamazoo-Portage MSA. Interstate 94 bisects Kalamazoo and Van Buren counties, and is a primary east/west travel route between Detroit and Chicago. U.S. Highway 131 intersects Interstate 94 in Kalamazoo County, and is a primary north/south travel route between Indiana, West Michigan and Northern Michigan.

Passenger and freight service is rendered at the Kalamazoo/Battle Creek International Airport in Kalamazoo. Scheduled flights and private charter operators provide good connections to regional facilities. Conrail and Grand Trunk Railroad provide freight service and the Amtrak system services rail passengers. There are 33 general carriers and three bus lines that use the two state highways to serve the Kalamazoo-Portage MSA. Seaport proximity for international markets is located on both sides of the state. The above transportation facilities play a major role in the area's economy.

Population:

The population growth rate in Kalamazoo County was similar to the United States and greater than the State of Michigan, while population in Van Buren County was stable from 2010 to 2017. A breakdown of total population is provided in the following table.

Total Population								
Year	Kalamazoo County	% Annual Change	Van Buren County	% Annual Change	State of Michigan	% Annual Change	United States	% Annual Change
2010	250,331	n/a	76,258	n/a	9,883,640	n/a	308,745,538	n/a
2017	261,802	0.7%	76,230	0.0%	10,024,786	0.2%	327,514,334	0.9%
2022	270,435	0.7%	76,184	0.0%	10,131,034	0.2%	341,323,594	0.8%

Source: 2010 U.S. Bureau of the Census and ESRI forecasts for 2017 and 2022.

RECEIVED by MSC 12/20/2021 10:30:09 AM

Employment:

The employment base is relatively diversified. The following tables provide a breakdown of major industry employers.

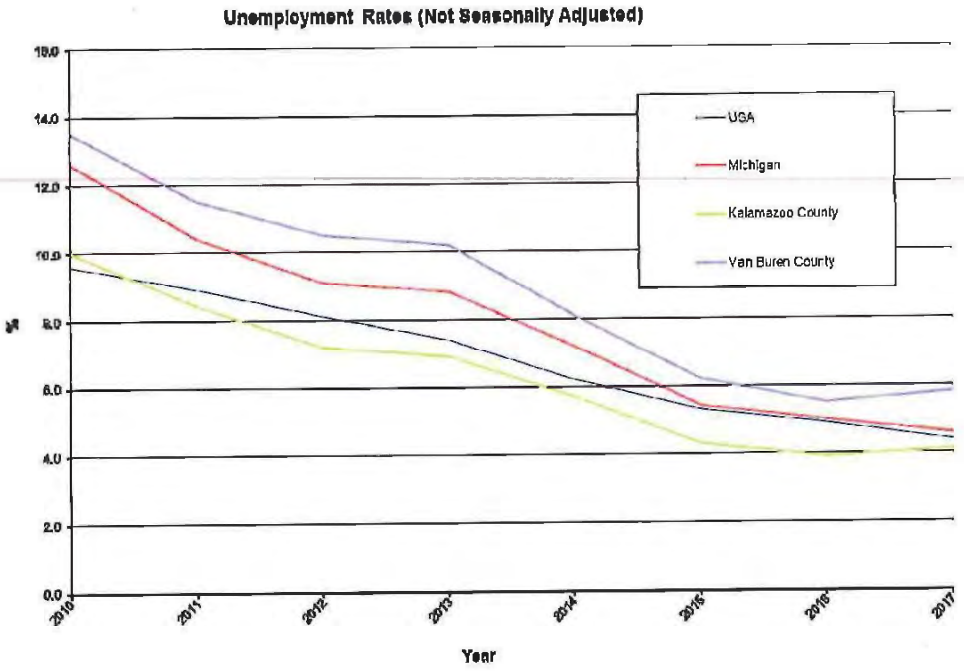
Major Industry Employers

Industry	Kalamazoo County	Van Buren County	State of Michigan	United States
Agriculture, Forestry, Fishing & Hunting	0.5%	5.3%	0.4%	0.4%
Mining	0.1%	0.0%	0.2%	0.3%
Utilities	0.1%	1.3%	0.4%	0.5%
Construction	4.4%	2.2%	3.6%	4.5%
Manufacturing	10.3%	11.8%	12.1%	8.3%
Wholesale Trade	7.0%	2.5%	4.4%	4.4%
Retail Trade	11.5%	14.3%	15.1%	13.3%
Transportation & Warehousing	1.8%	1.5%	2.2%	2.6%
Information	1.5%	0.7%	1.9%	2.8%
Finance & Insurance	2.6%	1.5%	3.5%	4.1%
Real Estate, Rental & Leasing	2.5%	1.3%	2.1%	2.7%
Professional, Scientific & Tech Services	8.8%	3.1%	6.0%	6.7%
Management of Companies & Enterprises	0.2%	0.0%	0.1%	0.2%
Admin. & Support & Waste Management & Remediation Serv.	2.6%	1.3%	2.6%	2.8%
Educational Services	10.6%	9.2%	8.6%	8.3%
Health Care & Social Assistance	16.9%	13.1%	14.7%	14.3%
Arts, Entertainment & Recreation	1.6%	10.3%	2.5%	2.4%
Accommodation & Food Services	8.2%	9.1%	8.4%	8.8%
Other Services (except Public Administration)	5.2%	5.1%	5.6%	5.6%
Public Administration	3.4%	6.1%	5.3%	6.7%
Unclassified Establishments	0.3%	0.1%	0.2%	0.3%

Source: ESRI forecast for 2017.

Unemployment levels have decreased in Kalamazoo County, Van Buren County, State of Michigan and the United States since 2010, as shown in the chart on the following page.

RECEIVED by MSC 12/20/2021 10:30:09 AM



Income:

As shown in the following table, the median household income in Kalamazoo and Van Buren counties is below the State of Michigan and the United States.

Median Household Income								
Year	Kalamazoo County	% Annual Change	Van Buren County	% Annual Change	State of Michigan	% Annual Change	United States	% Annual Change
2017	$48,612	n/a	$47,174	n/a	$52,121	n/a	$56,124	n/a
2022	$52,807	1.7%	$52,285	2.2%	$56,370	1.6%	$62,316	2.2%

Source: ESRI forecasts for 2017 and 2022.

Housing Units:

The following tables consider figures for permanent residents. There is a large seasonal influx of part-time residents in Kalamazoo County during the school year (fall, winter and spring months) due to Western Michigan University's students. Vacant units provided in the table below are primarily rental and second homes that are not rented on an annual basis. Kalamazoo County is projected to continue attracting new permanent residents and seasonal residents, as shown in the following table.

Total Housing Units - Kalamazoo County										
	2010 [1]		2017 [2]		Total % change	Average Annual % change	2022 [2]		Total % change	Average Annual % change
Occupied-Owner	64,254	58.4%	64,866	56.8%	1.0%	0.14%	66,748	56.7%	2.9%	0.6%
Occupied-Renter	36,356	33.0%	39,757	34.8%	9.4%	1.34%	41,105	34.9%	3.4%	0.7%
Vacant	9,397	8.5%	9,488	8.3%	1.0%	0.14%	9,804	8.3%	3.3%	0.7%
Total	110,007		114,111		3.7%	0.53%	117,657		3.1%	0.6%

[1] 2010 Census
[2] ESRI Forecast

As shown in the following table, the total number of occupied housing units in Van Buren County has been relatively stable, which is consistent with the population previously discussed.

Total Housing Units - Van Buren County										
	2010 [1]		2017 [2]		Total % change	Average Annual % change	2022 [2]		Total % change	Average Annual % change
Occupied-Owner	22,533	61.3%	22,069	59.4%	-2.1%	-0.30%	22,041	58.8%	-0.1%	0.0%
Occupied-Renter	6,395	17.4%	6,794	18.3%	6.2%	0.89%	6,780	18.1%	-0.2%	0.0%
Vacant	7,857	21.4%	8,262	22.3%	5.2%	0.74%	8,663	23.1%	4.9%	1.0%
Total	36,785		37,125		0.9%	0.13%	37,484		1.0%	0.2%

[1] 2010 Census
[2] ESRI Forecast

Summary:

The population in Kalamazoo County is projected to grow at a greater rate than the State of Michigan and there is no population growth projected for Van Buren County. Although the median household income for Kalamazoo and Van Buren counties is below the median rates for the State of Michigan and United States, it is expected to grow at a similar rate in comparison to state and national averages. Unemployment rates have decreased since 2010 and unemployment rates in both counties have been below the rates for the State of Michigan and United States. Projections for housing units in Kalamazoo County are consistent with population projections, and the additional projected housing units in Van Buren County will result in an increase in vacancy.

Approximately 80% of the population of the Kalamazoo-Portage Metropolitan Statistical Area (MSA) is located in Kalamazoo County. Overall, Kalamazoo County is project to see continued growth, while Van Buren County is projected to remain relatively stable.

RECEIVED by MSC 12/20/2021 10:30:09 AM

RECEIVED by MSC 12/20/2021 10:30:09 AM

Legal Description

RECEIVED by MSC 12/20/2021 10:30:09 AM

A parcel of land situated and being in the City of Kalamazoo, County of Kalamazoo, State of Michigan described as:

Lot 33 of Hurni's University Hills, according to the plat thereof, recorded in Liber 28 of Plats, Page 3, Kalamazoo County Records. Being part of the Northeast 1/4 of Section 29, T2S, R11W.

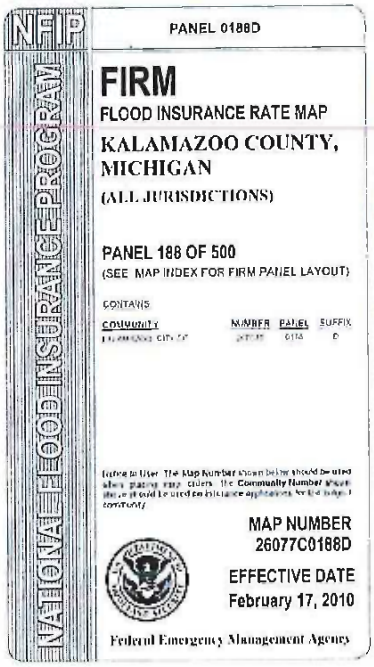
Parcel ID: 06-29-220-033

RECEIVED by MSC 12/20/2021 10:30:09 AM

Flood Plain Map

RECEIVED by MSC 12/20/2021 10:30:09 AM





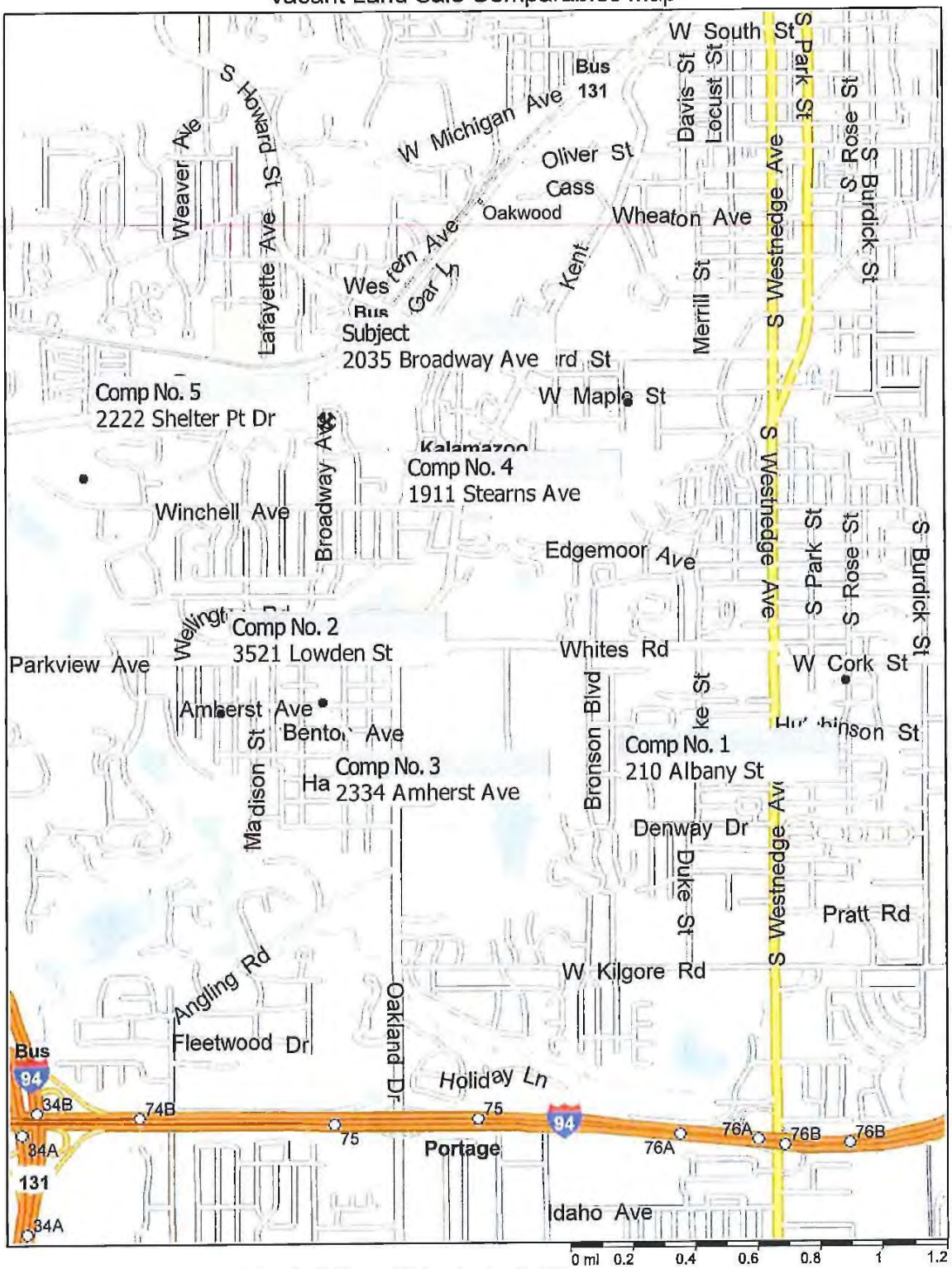
ZONE X Areas determined to be outside of the 0.2% annual chance floodplain.

RECEIVED by MSC 12/20/2021 10:30:09 AM

Vacant Land Sale Comparables

RECEIVED by MSC 12/20/2021 10:30:09 AM

Vacant Land Sale Comparables Map



Copyright © and (P) 1988–2006 Microsoft Corporation and/or its suppliers. All rights reserved. http://www.microsoft.com/streets/
Portions © 1990–2006 InstallShield Software Corporation. All rights reserved. Certain mapping and direction data © 2005 NAVTEQ. All rights reserved. The Data for areas of Canada includes information taken with permission from Canadian authorities, including: © Her Majesty the Queen in Right of Canada, © Queen's Printer for Ontario. NAVTEQ and NAVTEQ ON BOARD are trademarks of NAVTEQ. © 2005 Tele Atlas North America, Inc. All rights reserved. Tele Atlas and Tele Atlas North America are trademarks of Tele Atlas, Inc.

RECEIVED by MSC 12/20/2021 10:30:09 AM

Vacant - Sale - Single Family

COMPARABLE # 3009939



Source: City of Kalamazoo GIS (2013 Imagery)

LOCATION

Cross Street:	Northwest corner of Albany Street and Rose Street.
Street Number:	210
Street Name:	Albany Street
City or Township:	City of Kalamazoo
County:	Kalamazoo
State:	MI
Tax ID Number:	06-34-109-001
Comments:	Kalamazoo Public Schools

SALE INFORMATION

Sale Date:	5/16/2017
Sale Price:	$ 4,000.00
Cash Price:	$ 4,000.00
Seller:	Randy Borden
Buyer:	Miriam S. Hernandez
Marketing Time (Months):	22
Comments:	Listing history: 7/10/15 - $9,500 5/14/16 - $8,500 7/1/16 - $6,500 10/4/16 - $5,500 4/2/17 - $4,000

INSTRUMENT

Type of Instrument:	Warranty Deed
Date Recorded:	6/2/2017
Document Number:	2017-018754

FINANCING

Financing:	Cash

RECEIVED by MSC 12/20/2021 10:30:09 AM

LAND DESCRIPTION

Net Land Area:	8,990 Sq Ft	0.206 Acres
Primary Frontage (Ft):	116.000	
Physical Location:	Corner	
Shape:	Rectangular	
Topography:	Mostly Level	
Environmental Contamination:	None Known	
Anticipated Improvements:	Purchased by adjacent owner to the west.	
Comments:	There is 116 feet of frontage along Albany Street and 77.5 feet along Rose Street.	

ZONING & UTILITIES

Current Zoning:	RM-15, Residential Multi-Dwelling
Master Plan:	R2, Residential
Water:	Public
Sewer:	Public
Gas:	Natural
Electricity:	Public

HIGHEST AND BEST USE Single Family

REAL PROPERTY RIGHTS Fee Simple

CONDITION OF SALE Arm's Length

UNITS OF COMPARISON

Physical Characteristics

Price/Sq Ft (Net Land Area):	$ 0.44
Price/Acre (Net Land Area):	$ 19,382
Price/Frt Ft (Primary Roadway):	$ 34
Front Feet/Net Acre:	562.06

SOURCE

Contact:	MLS# 16050812 Debbie Giddings, Listing/Selling Agent Evenboer-Walton Realtors
	Public Records Assessing Record Warranty Deed
Confirmation Date:	11/20/2018
Appraiser:	MAT 4090

RECEIVED by MSC 12/20/2021 10:30:09 AM

Vacant - Sale - Single Family

COMPARABLE # 3010291



Source: City of Kalamazoo GIS (2013 Imagery)
Property consisted of vacant land at time of sale.

LOCATION

Cross Street:	East side of Lowden Street, south of Amherst Avenue.
Street Number:	3521
Street Name:	Lowden Street
City or Township:	City of Kalamazoo
County:	Kalamazoo
State:	MI
Tax ID Number:	06-32-118-095
Comments:	Kalamazoo Public Schools

SALE INFORMATION

Sale Date:	4/25/2018
Sale Price:	$ 8,000.00
Cash Price:	$ 8,000.00
Seller:	Adam Pound
Buyer:	Mekkel Jackson
Marketing Time (Months):	3
Comments:	Listing history: 1/26/18 - $10,000 3/22/18 - $8,900

INSTRUMENT

Type of Instrument:	Warranty Deed
Date Recorded:	5/9/2018
Document Number:	2018-015212

FINANCING

Financing:	Cash

RECEIVED by MSC 12/20/2021 10:30:09 AM

LAND DESCRIPTION

Net Land Area:	6,300 Sq Ft	0.145 Acres
Primary Frontage (Ft):	45.000	
Physical Location:	Interior	
Shape:	Rectangular	
Topography:	Mostly Level	
Environmental Contamination:	None Known	
Anticipated Improvements:	Purchased by adjacent owner to the north.	

ZONING & UTILITIES

Current Zoning:	RS-5, Residential Single-Dwelling
Master Plan:	R1, Residential
Water:	Public
Sewer:	Public
Gas:	Natural
Electricity:	Public

HIGHEST AND BEST USE Single Family

REAL PROPERTY RIGHTS Fee Simple

CONDITION OF SALE Arm's Length

UNITS OF COMPARISON

Physical Characteristics

Price/Sq Ft (Net Land Area):	$ 1.27
Price/Acre (Net Land Area):	$ 55,314
Price/Frt Ft (Primary Roadway):	$ 178
Front Feet/Net Acre:	311.14

SOURCE

Contact:	MLS# 18002977 Ben Barber, Listing/Selling Agent Keller Williams Kalamazoo Market Center
	Public Records Assessing Record Warranty Deed
Confirmation Date:	11/20/2018
Appraiser:	MAT 4090

RECEIVED by MSC 12/20/2021 10:30:09 AM

Vacant - Sale - Single Family

COMPARABLE # 3009933



Source: City of Kalamazoo GIS (2013 Imagery)

LOCATION

Cross Street:	North side of Amherst Avenue, west of Laird Avenue.
Street Number:	2334
Street Name:	Amherst Avenue
City or Township:	City of Kalamazoo
County:	Kalamazoo
State:	MI
Tax ID Number:	06-32-210-073
Comments:	Kalamazoo Public Schools

SALE INFORMATION

Sale Date:	9/15/2017
Sale Price:	$ 10,000.00
Cash Price:	$ 10,000.00
Seller:	Arlene B. McCune Revocable Trust
Buyer:	Mitchell Cohn and Elena Diamond
Marketing Time (Months):	9
Listing Price:	$ 15,200.00
Date of Listing:	12/16/2016

INSTRUMENT

Type of Instrument:	Warranty Deed
Date Recorded:	10/6/2017
Document Number:	2017-033513

FINANCING

Financing:	Cash

RECEIVED by MSC 12/20/2021 10:30:09 AM

LAND DESCRIPTION

Net Land Area:	7,200 Sq Ft	0.165 Acres
Primary Frontage (Ft):	45.000	
Physical Location:	Interior	
Shape:	Rectangular	
Topography:	Mostly Level	
Environmental Contamination:	None Known	
Anticipated Improvements:	Adjacent owner to east purchased to combine parcels and construct a garage on this site.	

ZONING & UTILITIES

Current Zoning:	RS-5, Residential Single-Dwelling
Master Plan:	R1, Residential
Water:	Public
Sewer:	Public
Gas:	Natural
Electricity:	Public

HIGHEST AND BEST USE Single Family

REAL PROPERTY RIGHTS Fee Simple

CONDITION OF SALE Arm's Length

UNITS OF COMPARISON

Physical Characteristics

Price/Sq Ft (Net Land Area):	$ 1.39
Price/Acre (Net Land Area):	$ 60,500
Price/Frt Ft (Primary Roadway):	$ 222
Front Feet/Net Acre:	272.25

SOURCE

Contact:	MLS# 16060296 Frank Barber, Listing/Selling Agent Five Star Real Estate
	Public Records Assessing Record Warranty Deed
Confirmation Date:	3/23/2018
Appraiser:	MAT 4090

RECEIVED by MSC 12/20/2021 10:30:09 AM

Vacant - Sale - Single Family

COMPARABLE # 3009934



Source: City of Kalamazoo GIS (2013 Imagery)

LOCATION

Cross Street:	Southeast corner of Stearns Avenue and Maple Street.
Street Number:	1911
Street Name:	Stearns Avenue
City or Township:	City of Kalamazoo
County:	Kalamazoo
State:	MI
Tax ID Number:	06-28-210-001
Comments:	Kalamazoo Public Schools

SALE INFORMATION

Sale Date:	7/27/2017
Sale Price:	$ 22,000.00
Cash Price:	$ 22,000.00
Seller:	Jason Brinkhuis
Buyer:	Jeff and Erin Marsh
Marketing Time (Months):	21
Comments:	Listing history: 10/15/15 - $30,000 12/4/15 - $29,000 4/5/16 - $27,500 4/20/16 - $24,900 8/2/16 - $26,900 9/21/16 - $23,200

INSTRUMENT

Type of Instrument:	Warranty Deed
Date Recorded:	8/29/2017
Document Number:	2017-029054

FINANCING

Financing:	Cash

RECEIVED by MSC 12/20/2021 10:30:09 AM

LAND DESCRIPTION

Net Land Area:	8,309 Sq Ft	0.191 Acres
Primary Frontage (Ft):	115.500	
Physical Location:	Corner	
Shape:	Rectangular	
Topography:	Mostly Level	
Environmental Contamination:	None Known	
Anticipated Improvements:	Single-family residence	
Comments:	There is 115.5 feet of frontage along Stearns Avenue and 71.94 feet along Maple Street.	

ZONING & UTILITIES

Current Zoning:	RM-15, Residential Multi-Dwelling
Master Plan:	R2, Residential
Water:	Public
Sewer:	Public
Gas:	Natural
Electricity:	Public

HIGHEST AND BEST USE Single Family

REAL PROPERTY RIGHTS Fee Simple

CONDITION OF SALE Arm's Length

UNITS OF COMPARISON

Physical Characteristics

Price/Sq Ft (Net Land Area):	$ 2.65
Price/Acre (Net Land Area):	$ 115,335
Price/Frt Ft (Primary Roadway):	$ 190
Front Feet/Net Acre:	605.51

SOURCE

Contact:	MLS# 17012202 Josh Nagy, Listing/Selling Agent Evenboer-Walton Realtors
	Public Records Assessing Record Warranty Deed
Confirmation Date:	3/23/2018
Appraiser:	MAT 4090

RECEIVED by MSC 12/20/2021 10:30:09 AM

Vacant - Sale - Single Family

COMPARABLE # 3010292



Source: City of Kalamazoo GIS (2013 Imagery)

LOCATION

Cross Street:	West side of Shelter Pointe Drive, north of Winchell Avenue.
Street Number:	2222
Street Name:	Shelter Pointe Drive
City or Township:	City of Kalamazoo
County:	Kalamazoo
State:	MI
Tax ID Number:	06-30-264-014
Comments:	Kalamazoo Public Schools

SALE INFORMATION

Sale Date:	10/10/2018
Sale Price:	$ 55,000.00
Cash Price:	$ 55,000.00
Seller:	John A. Patten and Jeanine M. Platt
Buyer:	Holly M. Bonine and William E. Stutz
Marketing Time (Months):	16
Comments:	Listing history: 6/16/17 - $65,900 7/17/18 - $59,900

INSTRUMENT

Type of Instrument:	Land Contract
Date Recorded:	10/12/2018
Document Number:	2018-032377

FINANCING

Financing:	Land Contract
Comments:	According to the listing agent, the land contract was considered cash equivalent.

RECEIVED by MSC 12/20/2021 10:30:09 AM

LAND DESCRIPTION

Net Land Area:	14,593 Sq Ft	0.335 Acres
Primary Frontage (Ft):	150.390	
Physical Location:	Cul-de-sac	
Shape:	Irregular	
Topography:	See Comments	
Environmental Contamination:	None Known	
Anticipated Improvements:	Single-family residence	
Comments:	The site is mostly level, and slopes to lowland area at west boundary.	

ZONING & UTILITIES

Current Zoning:	RS-5, Residential Single-Dwelling
Master Plan:	R1, Residential
Water:	Public
Sewer:	Public
Gas:	Natural
Electricity:	Public

HIGHEST AND BEST USE Single Family

REAL PROPERTY RIGHTS Fee Simple

CONDITION OF SALE Arm's Length

UNITS OF COMPARISON

Physical Characteristics

Price/Sq Ft (Net Land Area):	$ 3.77
Price/Acre (Net Land Area):	$ 164,175
Price/Frt Ft (Primary Roadway):	$ 366
Front Feet/Net Acre:	448.91

SOURCE

Contact:	MLS# 18033782 Pat O'Brien, Listing Agent O'Brien Real Estate
	Public Records Assessing Record Land Contract
Confirmation Date:	11/20/2018
Appraiser:	MAT 4090

RECEIVED by MSC 12/20/2021 10:30:09 AM

Easement for the Protection of Electric Facilities

RECEIVED by MSC 12/20/2021 10:30:09 AM

EASEMENT FOR THE PROTECTION OF ELECTRIC FACILITIES

Lindbergh to Phillips

SAP# 22787258
Master Tract# TRN000916034041
Agreement # MI00000022266

BRIAN STORM and ERIN STORM, husband and wife, 2035 Broadway, Kalamazoo, MI 49008. (hereinafter "Owner")

for $1.00 and other good and valuable consideration [*exempt from real estate transfer tax pursuant to MCLA 207.505(f) and from State real estate transfer tax pursuant to MCLA 207.526(f)*] grants and warrants to

CONSUMERS ENERGY COMPANY, a Michigan corporation, One Energy Plaza, Jackson, Michigan 49201 (hereinafter "Consumers")

a permanent easement to enter the Easement Area described in the attached Exhibit B (hereinafter "Easement Area") located in the City of Kalamazoo, County of Kalamazoo, and State of Michigan as more particularly described in the attached Exhibit B and 1) to trim, cut down, and otherwise remove and control, without compensation to Owner, any trees, brush, roots, and other vegetation standing or growing within the Easement Area, which right is more fully defined below in the "Trees and Other Vegetation" provision, for the purpose of protecting, maintaining, and providing access to Consumers' facilities, which are currently located on land contiguous to the Easement Area and Owner's land described in the attached Exhibit A (hereinafter "Owner's Land"), which land is currently a public road right-of-way (hereinafter "Adjoining Land"); and 2) to utilize the portion of the Easement Area described as the 40' Clear Cut area below to, from within the Easement Area, construct, operate, maintain, inspect (including aerial patrol), survey, replace, reconstruct, improve, remove, relocate, change the size of, enlarge, and protect a line or lines of electric facilities together with any wires, cables, conduits, crossarms, braces, guys, transformers, electric control circuits and devices, communication systems, utility lines, protective apparatus and all other equipment, appurtenances, associated fixtures, and facilities that are useful or incidental to or for the operation or protection thereof and located on the Adjoining Land, and to conduct such other activities as may be convenient in connection therewith as determined by Consumers for the purpose of transmitting and distributing electricity, but without the right to locate any of the aforementioned facilities on Owner's Land or within the Easement Area pursuant to this Easement.

Access: Consumers shall have the right of unimpaired access to the Easement Area for any and all purposes necessary, convenient, or incidental to the exercise by Consumers of the rights granted hereunder and Owner shall not interfere with said access by any means.

Trees and Other Vegetation: Owner shall not plant any trees within that portion of the Easement Area identified as "40' Clear Cut" on the Easement Sketches (hereinafter "Easement Sketches") in the attached Exhibit C. Consumers shall have the right from time to time hereafter to enter that portion of the Easement Area identified as "40' Clear Cut" on the Easement Sketches in the attached Exhibit C to, without compensation to Owner, trim, cut down, and otherwise remove and control any trees, brush, roots, and other vegetation within the "40' Clear Cut" portion of the Easement Area. Consumers shall have the right from time to time hereafter to enter that portion of the Easement Area identified as "40' Danger Trees" on the Easement Sketches in the attached Exhibit C to, without compensation to Owner, trim, cut down, and otherwise remove and control any trees, brush, roots, and other vegetation within the Easement Area that are in excess of 35 feet in height.

RECEIVED by MSC 12/20/2021 10:30:09 AM

Buildings/Structures: Owner agrees not to build, create, construct, or permit to be built, created, or constructed, any obstruction, building, septic system, drain field, fuel tank, pond, swimming pool, lake, pit, well, foundation, engineering works, installation or any other type of structure over, under, on, or within that portion of the Easement Area identified as "20' No Build" on the Easement Sketches in the attached Exhibit C, whether temporary or permanent, without the express authorization of Consumers, which may be withheld in Consumers' sole discretion, and which authorization shall be recorded in the register of deeds for the county in which Owner's Land is situated expressly allowing the aforementioned.

Ground Elevation: Owner shall not materially alter the ground elevation (as shown on the Easement Sketches in the attached Exhibit C) within that portion of the Easement Area identified as "40' Clear Cut" on the Easement Sketches in the attached Exhibit C, without the express authorization of Consumers, which may be withheld in Consumers' sole discretion, and which authorization shall be recorded in the register of deeds for the county in which Owner's Land is situated expressly allowing the aforementioned.

Exercise of Easement: Consumers' nonuse or limited use of this Easement shall not preclude Consumers' later use of this Easement to its full extent.

Ownership: Owners covenant with Consumers that they are the lawful fee simple owner of Owner's Land, subject to existing easements, restrictions and reservations of record, if any, and that they have the right and authority to make this grant, and that they will forever warrant and defend the title thereto against all claims whatsoever.

Successors: This easement shall bind and benefit Owner's and Consumers' respective heirs, successors, lessees, licensees, and assigns.

Counterparts: This easement may be executed simultaneously in two or more counterparts, each of which shall be deemed an original and all of which together shall constitute one and the same instrument. It is not necessary that all parties execute any single counterpart if each party executes at least one counterpart.

RECEIVED by MSC 12/20/2021 10:30:09 AM

Date: _____

_____
BRIAN STORM

_____
ERIN STORM

Acknowledgment

The foregoing instrument was acknowledged before me in _____ County, Illinois,

on _____, by BRIAN STORM and ERIN STORM, husband and wife.

_____
Notary Public
_____County, Illinois
Acting in _____ County
My Commission expires: _____

Prepared By:
Ady Simmons, 10-08-2018
Consumers Energy Company
One Energy Plaza
Jackson, MI 49201

After recording, return to:
Carrie Main, EP7-471
Consumers Energy Company
One Energy Plaza
Jackson, MI 49201

RECEIVED by MSC 12/20/2021 10:30:09 AM

EXHIBIT A

Owner's Land

A parcel of land situate and being in the City of Kalamazoo, County of Kalamazoo, State of Michigan described as:

Lot 33 of Hurni's University Hills, according to the plat thereof, recorded in Liber 28 of Plats, Page 3, Kalamazoo County Records. Being part of the Northeast 1/4 of Section 29, T2S, R11W.

Parcel ID: 06-29-220-033

RECEIVED by MSC 12/20/2021 10:30:09 AM

EXHIBIT B

Easement Area

An area of land in Lot 33 of Hurni's University Hills Subdivision, as recorded in Liber 28 of Plats, Page 3, In Section 29, Township 2 South, Range 11 West, City of Kalamazoo, Kalamazoo County, Michigan described as follows: Beginning at the Southwest corner of said Lot 33; thence N.01°07'16"E., on the West line of said Lot, 100.00 feet to the Northwest corner of said Lot; thence S.88°52'44"E., on the North line of said Lot, 70.08 feet; thence S.00°53'02"W., parallel with the centerline of the existing 46kV overhead electric line, 100.00 feet to the South line of said Lot; thence N.88°52'44"W., on said South Lot line, 70.49 feet to the point of beginning.

RECEIVED by MSC 12/20/2021 10:30:09 AM

EXHIBIT C

Easement Sketches

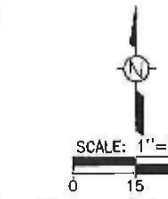
RECEIVED by MSC 12/20/2021 10:30:09 AM

Easement Sketch

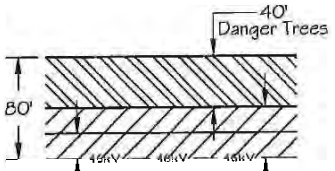
RECEIVED by MSC 12/20/2021 10:30:09 AM

EASEMENT SKETCH

Lindbergh-Phillips 46 kV Line
Tax ID #06-29-220-033



Basis of Bearing
Michigan State Plane Coordinate System
South Zone (NAD83 2011)
Referenced to Kalamazoo CORS

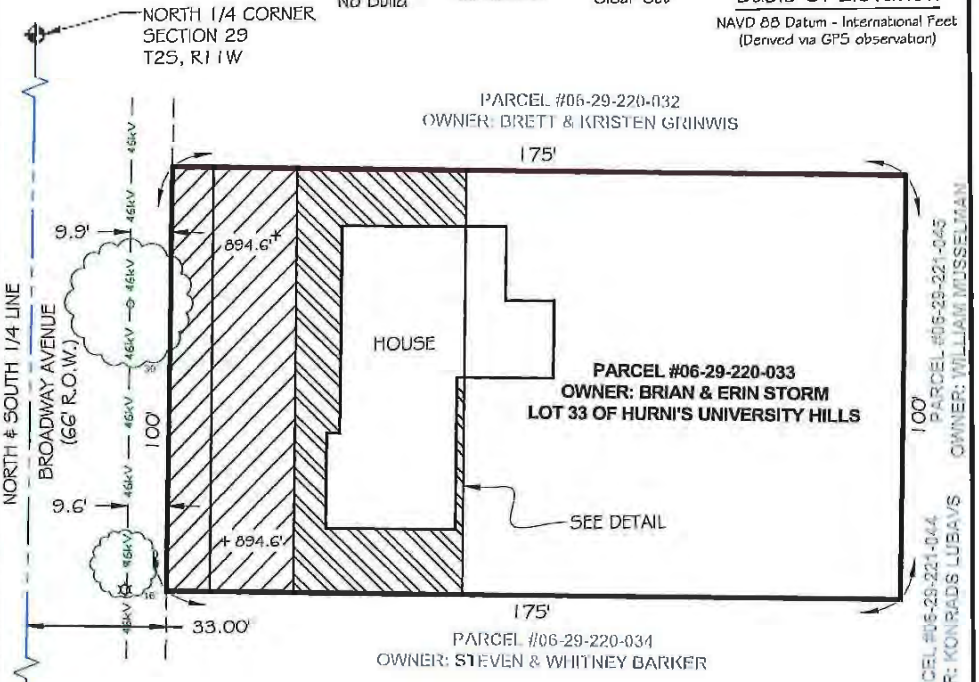


Easement Detail
Not to Scale



Location Map
Not to Scale

Basis of Elevation
NAVD 88 Datum - International Feet
(Derived via GPS observation)



Surveyor's Notes

1) Property boundary shown is approximate. The lot dimensions shown hereon are record dimensions provided for reference.
2) The existing 46kV centerline was located in the field and dimensions shown from said existing centerline are depicted accurately.
3) Not all improvements and utilities are shown.
4) Parcel is described per title report provided by Consumers Energy.
5) No Build Area - 1029 Sq. Ft., Clear Cut Area - 3029 Sq. Ft. (Including 1029 Sq. Ft. of No-Build), Danger Tree Area - 4000 Sq. Ft.

STATE OF MICHIGAN
MATTHEW M. SCHUELKE
PROFESSIONAL SURVEYOR
No. 63594
LICENSED PROFESSIONAL SURVEYOR

Legend

--	Section Corner	--	Property Line
--	Coniferous Tree	--	Overhead Electric 46kV Line
--	Deciduous Tree	--	Road R.O.W.
--	Power Pole	+901.5 --	Spot Elevation
--	Guy Anchor	--	No Build Area
--	Lot Lines	--	Clear Cut Area
--	Section Line	--	Danger Tree Area

Revision A (4/27/18): Added No Build, Clear Cut, & Danger Tree easement areas. Added ground shots within easement areas

Consumers Energy

surveying solutions, inc.

Storm Parcel
NE 1/4 Section 29
T2S, R11W
City of Kalamazoo
Kalamazoo Co., Michigan
71

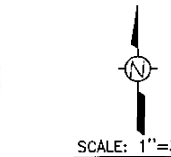
Drawing No. SB-23519_06-29-220-033

Filename: 23519base.DWG
Field Crew: BAT/CSD
Field Book No. 551 #18273
Drawn By: MMS
Date: 4/27/2018
Scale: 1" = 30'
Sheet 1 of 3

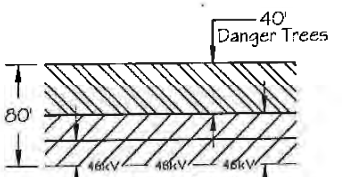
RECEIVED by MSC 12/20/2021 10:30:09 AM

EASEMENT SKETCH

Lindbergh-Phillips 46 kV Line
Tax ID #06-29-220-033



Basis of Bearing
Michigan State Plane Coordinate System
South Zone (NAD83 2011)
Referenced to Kalamazoo CORS





Location Map
Not to Scale

Basis of Elevation
NAVD 88 Datum - International Feet
(Derived via GPS observation)



Surveyor's Notes

1) Property boundary shown is approximate. The lot dimensions shown hereon are record dimensions provided for reference.
2) The existing 46kV centerline was located in the field and dimensions shown from said existing centerline are depicted accurately.
3) Not all improvements and utilities are shown.
4) Parcel is described per title report provided by Consumers Energy.
5) No Build Area - 1029 Sq. Ft., Clear Cut Area - 3029 Sq. Ft. (Including 1029 Sq. Ft. of No-Build), Danger Tree Area - 4000 Sq. Ft.

STATE OF MICHIGAN
MATTHEW M. SCHUELKE
PROFESSIONAL SURVEYOR
No. 63594
LICENSED PROFESSIONAL SURVEYOR

Matt Schuelke

Legend

--	Section Corner	--	Property Line
--	Coniferous Tree	46kV	-- Overhead Electric 46kV Line
--	Deciduous Tree	--	-- Road R.O.W.
--	Power Pole	+901.5	-- Spot Elevation
--	Guy Anchor	--	-- No Build Area
--	Lot Lines	--	-- Clear Cut Area
--	Section Line	--	-- Danger Tree Area

Revision A (4/27/18): Added No Build, Clear Cut, & Danger Tree easement areas. Added ground shots within easement areas.

Consumers Energy

SSI surveying solutions, inc.

Storm Parcel
NE 1/4 Section 29
T2S, R11W
City of Kalamazoo
Kalamazoo Co., Michigan
72

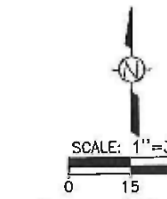
Drawing No. 58-23519_06-29-220-033

Filename: 23519base.DWG
Field Crew: BAT/CSD
Field Book No. SSI #18273
Drawn By: MMS
Date: 4/27/2018
Scale: 1" = 30'
Sheet 2 of 3

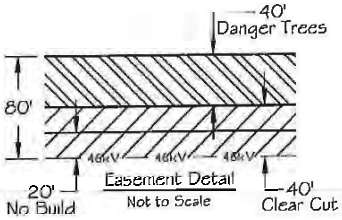
RECEIVED by MSC 12/20/2021 10:30:09 AM

EASEMENT SKETCH

Lindbergh-Phillips 46 kV Line
Tax ID #06-29-220-033



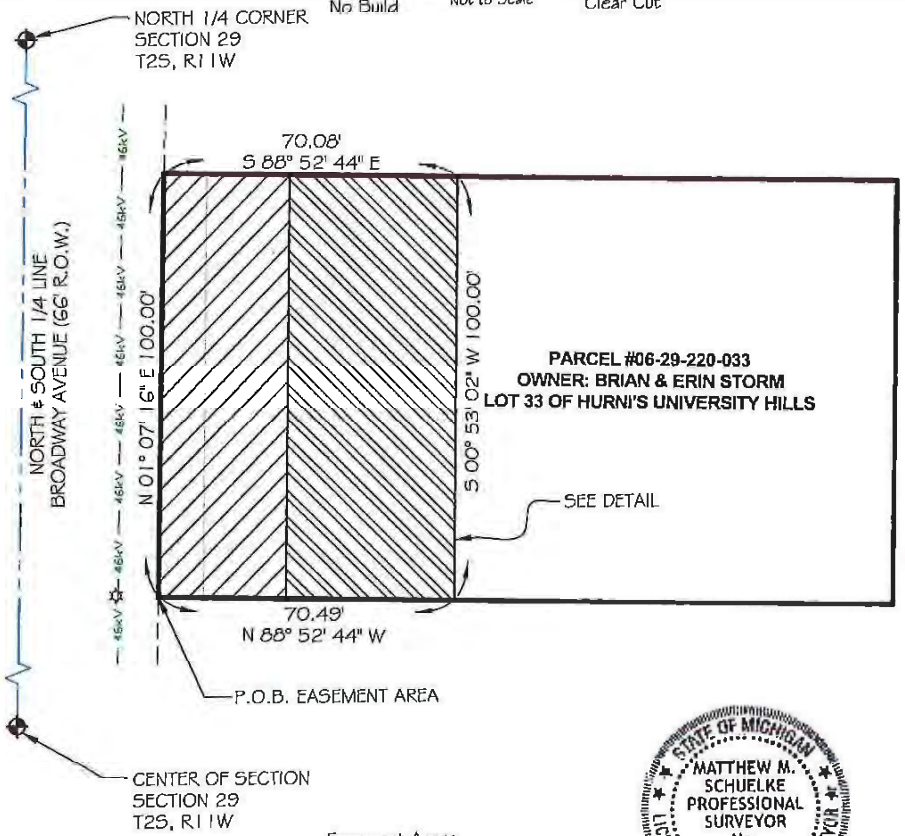
Basis of Bearing
Michigan State Plane Coordinate System
South Zone (NAD83 2011)
Referenced to Kalamazoo CORS



Easement Detail
Not to Scale



Location Map
Not to Scale



STATE OF MICHIGAN
MATTHEW M. SCHUELKE
PROFESSIONAL SURVEYOR
No. 63594
LICENSED PROFESSIONAL SURVEYOR

Matt Schuelke

Easement Areas
No Build Area - 1029 Sq. Ft.
Clear Cut Area - 3029 Sq. Ft.
(Including 1029 Sq. Ft. of No-Build)
Danger Tree Area - 4000 Sq. Ft.
Total Easement Area - 7029 Sq. Ft.

Legal Description: Easement Area

An area of land in Lot 33 of Hurni's University Hills Subdivision, as recorded in Liber 28 of Plats, Page 3, in Section 29, Township 2 South, Range 11 West, City of Kalamazoo, Kalamazoo County, Michigan described as follows: Beginning at the Southwest corner of said Lot 33; thence N.01°07'16"E., on the West line of said Lot, 100.00 feet to the Northwest corner of said Lot; thence S.88°52'44"E., on the North line of said Lot, 70.08 feet; thence S.00°53'02"W., parallel with the centerline of the existing 46kV overhead electric line, 100.00 feet to the South line of said Lot; thence N.88°52'44"W., on said South Lot line, 70.49 feet to the point of beginning.

Revision A (4/27/18): Added No Build, Clear Cut, & Danger Tree easement areas. Added ground shots within easement areas.

Consumers Energy

surveying solutions, inc.

Storm Parcel
NE 1/4 Section 29
T2S, R11W
City of Kalamazoo
Kalamazoo Co., Michigan
73

Drawing No. 58-23519_06-29-220-033

Filename: 23519base.DWG
Field Crew: BAT/CSD
Field Book No. 551 #18273
Drawn By: MMS
Date: 4/27/2018
Scale: 1" = 30'
Sheet 3 of 3

RECEIVED by MSC 12/20/2021 10:30:09 AM

Landscape Appraisal
(Aurora Landscape Design and Appraisal, LLC)

RECEIVED by MSC 12/20/2021 10:30:09 AM

AURORA
LANDSCAPE DESIGN AND APPRAISAL, L.L.C.

325 Red Oak Lane
Rochester Hills, MI 48307

Telephone (248) 563-0797
tmhurst@att.net

Landscape Appraisal For: **June 25, 2018**

Brian and Erin Storm Property
2035 Broadway Ave.
Kalamazoo, MI
Parcel #06-29-220-033
Consumers Energy Lindbergh to Phillips Project

There are a number of ways to approach the valuation of plants, such as contributory, income, replacement, and cost of cure. Additionally, where there is no demonstrated use for the plants they may be valued as timber, pulp, or firewood. The valuation method utilized can be different with the individual assignment. Before addressing the specific monetary values of this case, it is important to outline the components of a landscape appraisal, so as to give a clear foundation to my findings.

Landscape appraisal is essentially a valuation of the landscape, or a portion of the landscape in relation to its worth within the entire property in question. This definition is derived from the official publication on this subject. The Guide for Plant Appraisal, 9th Edition ("GPA") is the definitive work for this important area of arboriculture. Published by the International Society of Arboriculture it sets the ground rules of this process here in the United States. It states on page 10:

> In the plant appraisal process, the value of individual plants and the whole landscape should be reasonably and closely dependent upon the value of the land they occupy. A major factor for the plant appraiser to consider when making an appraisal is the possible need to ascertain some estimate of the property's total value.

The GPA further explains on page 101:

> Research indicates that well-maintained landscapes can contribute up to 20 percent to the value of an improved residential property; and mature, well-placed trees can increase property values when compared to undeveloped or bare properties.
>
> ...in the urban environment, ...contributory values of trees and vegetation

RECEIVED by MSC 12/20/2021 10:30:09 AM

will be in the 10 to 20 percent range of property value.

Finally, on page 19:

> Traditionally, plants and landscapes are considered part of real estate. Real estate is defined as the physical land and appurtenances affixed to the land-or land and all the features that are a natural part of the land, as well as the features that people attach to it, such as buildings, trees, shrubs and yard improvements.

With these important guidelines, the landscape appraiser "has immediately established realistic limits within which to derive the plant value estimates." (pg.101).

It is imperative for the qualified landscape appraiser to not get caught up in the erroneous course of placing values on individual trees which are so high and unrealistic that if added to the remainder of the landscaping, would equal a price greater than the total worth of the real estate property. It is important for all factors of the property, such as separate standing structures, the lot itself, and landscaping come together to provide a value which is fair and reasonable for the total real estate worth.

I also consider the guidelines of the Michigan Tree Valuation Guide- Eleventh Revision ("MTVG"), prepared by the Michigan Forestry and Park Association and the Michigan State University Forestry Department for a more local means of determining values. This guide outlines the significance of four important factors in determining tree values: 1) tree size, 2) species, 3) condition, which includes but is not limited to trunk, structure, evidence of insects and disease, life expectancy, and 4) location, which not only reflects on its function within a residential yard or along a highway or public park, but also its exact position in that yard- front focal point, or perhaps too closely grown amongst a group of many. Location also addresses city distinctions. For example, an oak in a more prestigious neighborhood will be worth more than the same tree in a more run-down community.

In certain instances where there is a significant amount of existing landscape and the individual values would escalate beyond what would be fair and reasonable a fifth factor or "special factor" is utilized. As stated in the MTVG on page 10:

> The special factor can be used to depreciate the value of trees where a lower value is warranted. Examples of disproportionately high values include single trees from within a group of trees, trees growing in easements, and where the total of tree losses are unreasonably high in relation to the total value of the property.

I utilize the trunk formula method from this guide as a basis for determining these plant values. To this formula, I apply my years of gathering comparables, and experience in the field to derive the value amounts for the five factors listed above. Also, in estimating the value of the property as a whole, I generally review publicly available tax records. The importance of considering all the sources I've mentioned to determine the proper

RECEIVED by MSC 12/20/2021 10:30:09 AM

landscape values cannot be stressed enough. It is my job as a professional landscape appraiser to analyze all factors of each case and to determine what is, in the end, a fair and reasonable compensation to the property owner for their loss.

It is essential to understand that bringing the value of the property back to what it was before the taking does not necessarily mean replacement as tree for tree, or size for size. That is an incorrect manner in which to approach proper landscape appraisal. The professional landscape appraiser must be very careful not to submit replacement values which constitute a *more than* fair and reasonable compensation.

Finally, the ultimate question to be taken into account is the following: Would the asking price of this salable real estate property afford a value any less after the removal of these plants? This question should be addressed with each case. It is important to note that in the United States today trees do have value; however, just as importantly one must not ignore the fact that a tree within a residential yard, or a vacant lot, or a commercial complex is a piece of property. It is owned by that property owner in the same manner as the house, driveway, or fence. Therefore, for a professional landscape appraiser to do the job correctly, plant values *must be considered* in relation to their worth within the total property.

Turning to the application of this information to this case, the subject property is located at: 2035 Broadway Ave, Kalamazoo. It is a residential property within a more urban community. Due to the Lindbergh to Phillips Project which extends through a portion this residence, the landscaping which exists there is subject to possible disturbance in the process of easement construction/maintenance. Some landscaping exists throughout this parcel. It is important to remember that although we are only applying value to a specific section, the entire scope of the landscaping must be considered as a whole. Individual values can and do decrease when there are more trees that exist on a site.

When the proposal involves the removal of plants, the ultimate focus should be on the value of the property, the entire landscaping that can contribute to it, and that portion that will be removed. Placing the emphasis on this bottom line insures that individual values are kept in control and are reasonable and correct. With so many plants, the biggest limiting factor sometimes is the worth of the property.

I did not have permission to access this property, but feel I had enough information to make a relatively accurate assessment. This appraisal does not include those plants within the existing road right of way.

Plants are as follows:
Those in the "Clear Cut Area":

There don't appear to be any plants in this area.

Those in the "Danger Tree Area":

There don't appear to be any trees in this area.

RECEIVED by MSC 12/20/2021 10:30:09 AM

"CLEAR CUT AREA" TOTAL:	$0
"DANGER TREE AREA" TOTAL:	$0
TOTAL VALUE OF LANDSCAPING:	**$0**

In conclusion, I certify that, to the best of my knowledge and belief:
-The statements of fact contained in this report are true and correct.
-The reported analyses, opinions, and conclusions are limited only by the reported assumptions and limiting conditions, and are my personal, impartial, and unbiased professional analyses, opinions, conclusions, and recommendations.
-I have no present or prospective interest in the property that is the subject of this report, and I have no personal interest with respect to the parties involved.
-I have performed no services, as an appraiser or in any other capacity, regarding the property that is the subject of this report within the three-year period immediately preceding acceptance of this assignment.
-I have no bias with respect to any property that is the subject of this report or to the parties involved with this assignment.
-My engagement in this assignment was not contingent upon developing or reporting predetermined results.
-My compensation for completing this assignment is not contingent upon the development or reporting of a predetermined value or direction in value that favors the cause of the client, the amount of the value opinion, the attainment of a stipulated result, or the occurrence of a subsequent event directly related to the intended use of this appraisal consulting assignment.
-I have NOT been allowed access to this site and have made my inspection from the road or adjacent property. This appraisal reserves the right to update this report if provided access to the property.

The purpose of this appraisal is to provide information to be utilized by Consumers Energy Company. I have also included a list of my qualifications. If you have any questions on any portion of this appraisal report, please do not hesitate to contact me.

Respectfully submitted,

Teresa Hurst
Certified Arborist
Michigan Certified Nurseryman (CGIP)
Limited Real Estate Appraiser

RECEIVED by MSC 12/20/2021 10:30:09 AM

QUALIFICATIONS OF TERESA M. HURST
LANDSCAPE APPRAISER AND DESIGNER

Over the last thirty-nine years I have gained a broad range of experience in the fields of horticulture and arboriculture. I'm knowledgeable in plant identification, insect and disease diagnosis, plant care, and tree and shrub evaluation.

EDUCATION

1983- Michigan State University, East Lansing, Michigan.
Landscape and Nursery Agricultural Technology Program graduate
G.P.A. 3.78 Graduate with honors
-Attendance at numerous horticultural seminars offered through the MNLA & ASM

EXPERIENCE

1980-1981- Moehr's Nursery, Fraser, Michigan. -maintenance of plant stock
1982, 1984-88- Bordine's Nursery, Rochester Hills, Michigan. -nursery retail sales
1983- Wyevale's Nurseries LTD, Hereford, England. -plant propagation
1988-1994- Auburn Oaks Inc., Rochester Hills, Michigan. -nursery retail sales, landscape design, appraisal
1994-present Aurora Landscape Design and Appraisal, L.L.C., Rochester Hills, Michigan. -own and operate

-Certified Arborist
-Michigan Certified Nurseryman (Certified Green Industry Professional)
-Limited Real Estate Appraiser

-Qualified as expert witness in Oakland County Circuit, 48th District, Macomb County Circuit, and 13th Judicial Circuit Courts.
-Extensive experience in landscape appraisal- having completed thousands of residential and commercial evaluations for condemnation and easement acquisitions, as well as determining pulp and timber values, documenting tree inventories and tagging, cost of cure reports, orchard and nursery valuation, rebuttal reports, overseeing installation of replacement plantings, identifying nuisance trees, and native trees for reimplementation.
-I've given numerous educational talks to local garden clubs on a variety of horticultural topics.
-I have written many "garden column" articles for various local newspapers.
-Member- Michigan Nursery and Landscape Association.
-Member- Arboriculture Society of Michigan
-Member- International Society of Arboriculture.
-Member- International Right of Way Association, Michigan Chapter 7.

LIST OF CLIENTS

Burgoyne Appr. - David Burgoyne, ITC Holdings Corp., Andrew Reed & Associates
Andrew Chamberlain Appraisers, Oakland County Circuit Court, Vector Pipeline
Consumers Energy Company, Oakland County Drain Commission, Enbridge Pipeline Co.
Mario Galli Appraisers, Oakland County Road Commission, Branch Tree Service
Macomb County Drain Commission, City of Troy, Macomb County Road Commission
Fred Philippeau and Associates, Clark Hill, PLC, John O'Connor Appraisal
Mi. Dept. Of Transportation, Mark Sheppell – Appraiser, Sunoco Pipeline
ML Jacobs and Assoc. Inc., RS Thomas and Assoc. - Norm Thomas
Wayne County Road Commission, White Pine Land Company, Detroit Electric Co.
Shelby Twsp. Public Works, Boris Yakima, Hubbell. Roth & Clark, Inc.
David Maturen and Associates, Howard and Howard, P.C., Detroit Public Works
Harvey Deson – Appraiser, James Howard Turner, P.C., Summit Resources, LLC
Kohl, Secrest, Wardle, P.C., Dickinson, Wright, P.C., Cummings, McClorey,P.C.
Alan Ackerman, P.C., Kallas & Henk, P.C., Civil Engineering Solutions, Inc.
Cooper, Shifman, Gabe, Quinn & Seymour, P.C.
Leibenguth, Boos & Assoc., PC Beeding Legal Group, PC

RECEIVED by MSC 12/20/2021 10:30:09 AM

Appraiser Qualifications and Licenses

RECEIVED by MSC 12/20/2021 10:30:09 AM

QUALIFICATIONS OF JEFFREY G. GENZINK, MAI

APPRAISAL EMPLOYMENT:

Genzink Appraisal Company, Grand Rapids, Michigan
Owner (2001-current).

Genzink Sabin Group, Grand Rapids, Michigan
Partner (1998-2000).

The Oetzel-Williams Group, Lansing, Michigan
Real Estate Appraiser (1990-1997).

EDUCATION:

Bachelor of Arts Degree with Major in Business Administration and Sociology, Calvin College, Grand Rapids, Michigan, 1988

APPRAISAL EDUCATION:

Numerous courses, seminars and continuing education classes taken through the Appraisal Institute and American Institute of Real Estate Appraisers. A detailed completed course list is available upon request.

COURT EXPERIENCE:

Court Qualified as an Expert Witness in Michigan Tax Tribunal, United States District Court, Berrien County Circuit Court, Ottawa County Circuit Court, Kalamazoo County Circuit Court, Kent County Circuit Court and Lapeer County Circuit Court

PROFESSIONAL ACTIVITIES:

Board Member, Commercial Alliance of Realtors of West Michigan, 2011-2014
Great Lakes Chapter; Alternate Regional Representative, 2007
Great Lakes Chapter; Regional Representative, 2004
Leadership Development & Advisory Council; Member - Second Year, 2001
Great Lakes Chapter; Candidate Guidance Chair – General, 2000
Young Advisory Council; Member - First Year, 1998

LICENSES AND PROFESSIONAL AFFILIATIONS:

MAI, Appraisal Institute, Certification No. 11133.
Certified General Real Estate Appraiser - Michigan, No. 1201002640
Licensed Real Estate Broker - Michigan No. 6501238572
Commercial Alliance of Realtors, Broker Member
Grand Rapids Association of Realtors, Broker Member
Michigan Association of Realtors, Broker Member
National Association of Realtors, Broker Member
International Right of Way Association, No. 7926553

RECEIVED by MSC 12/20/2021 10:30:09 AM

RICK SNYDER
GOVERNOR

M930566

STATE OF MICHIGAN
DEPARTMENT OF LICENSING AND REGULATORY AFFAIRS
BUREAU OF PROFESSIONAL LICENSING

CERTIFIED GENERAL APPRAISER
LICENSE

JEFFREY GLENN GENZINK

LICENSE NO.	EXPIRATION DATE	AUGIT NO	
1201002640	07/31/2019	3220976	THIS DOCUMENT IS DULY ISSUED UNDER THE LAWS OF THE STATE OF MICHIGAN

RECEIVED by MSC 12/20/2021 10:30:09 AM

QUALIFICATIONS OF MICHAEL A. TYSKA, MAI

APPRAISAL EXPERIENCE:

Mr. Tyska has been appraising commercial properties since 2004. He has experience in the appraisal of apartments, condominium developments, multi-tenant retail, big box retail, bank branches, restaurants, single-family residential, general office, medical office, industrial, agricultural land, development land for residential, commercial, office and industrial use, and special purpose properties including schools and churches. Mr. Tyska has extensive experience in the appraisal of easements including surface, sub-surface and air rights. Valuation assignments have been completed for property owners, attorneys, investors, private and public companies, government agencies and financial institutions.

APPRAISAL EMPLOYMENT:

Independent Contractor
Appraiser: August 2004 to Present

EDUCATION:

Western Michigan University, B.B.A. in Management and Minor in Math, 1991

APPRAISAL EDUCATION:

Numerous courses, seminars and continuing education classes taken through the Appraisal Institute and American Real Estate and Appraising Institute. A detailed completed course list is available upon request.

LICENSES AND PROFESSIONAL AFFILIATIONS:

Appraisal Institute - MAI Designation, Certificate No. 14486
Michigan - Certified General Real Estate Appraiser, License No. 1201071392
Michigan - Real Estate Salesperson, License No. 6501335639
National Association of Realtors
Michigan Association of Realtors
Commercial Alliance of Realtors
Grand Rapids Association of Realtors

RECEIVED by MSC 12/20/2021 10:30:09 AM

RICK SNYDER
GOVERNOR

STATE OF MICHIGAN
DEPARTMENT OF LICENSING AND REGULATORY AFFAIRS
BUREAU OF PROFESSIONAL LICENSING

M930452

CERTIFIED GENERAL APPRAISER
LICENSE

MICHAEL TYSKA

LICENSE NO.	EXPIRATION DATE	AUDIT NO	
1201071392	07/31/2019	3221002	THIS DOCUMENT IS ONLY ISSUED UNDER THE LAWS OF THE STATE OF MICHIGAN

RECEIVED by MSC 12/20/2021 10:30:09 AM

EXHIBIT B

RECEIVED by MSC 12/20/2021 10:30:09 AM



COUNTY OF KALAMAZOO
OFFICE OF TREASURER
201 W KALAMAZOO AVE
KALAMAZOO MI 49007

OFFICIAL RECEIPT

Receipt Number	2400-056904

Deposit number	EAM	Receipt date	04/09/2019
Payee name	CONSUMERS ENERGY	Check number	21194
Receipt desc	STORM PARCEL 06-29-220-033	Check date	04/09/2019

Description	Account	Amount
JUDGEMENTS PAYABLE		
	B 101-000-205.00	7,500.00

Receipt amount	7,500.00
Check amount	7,500.00
Cash amount	0.00
Credit Card amount	0.00
Change tendered	0.00

Cashier eamein

RECEIVED by MSC 12/20/2021 10:30:09 AM

EXHIBIT C

RECEIVED by MSC 12/20/2021 10:30:09 AM

EASEMENT FOR THE PROTECTION OF ELECTRIC FACILITIES

Lindbergh to Phillips

SAP# 22787258
Master Tract# TRN000916034041
Agreement # MI00000022266

BRIAN STORM and ERIN STORM, husband and wife, 2035 Broadway, Kalamazoo, MI 49008. (hereinafter "Owner")

for $1.00 and other good and valuable consideration [*exempt from real estate transfer tax pursuant to MCLA 207.505(f) and from State real estate transfer tax pursuant to MCLA 207.526(f)*] grants and warrants to

CONSUMERS ENERGY COMPANY, a Michigan corporation, One Energy Plaza, Jackson, Michigan 49201 (hereinafter "Consumers")

a permanent easement to enter the Easement Area described in the attached Exhibit B (hereinafter "Easement Area") located in the City of Kalamazoo, County of Kalamazoo, and State of Michigan as more particularly described in the attached Exhibit B and 1) to trim, cut down, and otherwise remove and control, without compensation to Owner, any trees, brush, roots, and other vegetation standing or growing within the Easement Area, which right is more fully defined below in the "Trees and Other Vegetation" provision, for the purpose of protecting, maintaining, and providing access to Consumers' facilities, which are currently located on land contiguous to the Easement Area and Owner's land described in the attached Exhibit A (hereinafter "Owner's Land"), which land is currently a public road right-of-way (hereinafter "Adjoining Land"); and 2) to utilize the portion of the Easement Area described as the 40' Clear Cut area below to, from within the Easement Area, construct, operate, maintain, inspect (including aerial patrol), survey, replace, reconstruct, improve, remove, relocate, change the size of, enlarge, and protect a line or lines of electric facilities together with any wires, cables, conduits, crossarms, braces, guys, transformers, electric control circuits and devices, communication systems, utility lines, protective apparatus and all other equipment, appurtenances, associated fixtures, and facilities that are useful or incidental to or for the operation or protection thereof and located on the Adjoining Land, and to conduct such other activities as may be convenient in connection therewith as determined by Consumers for the purpose of transmitting and distributing electricity, but without the right to locate any of the aforementioned facilities on Owner's Land or within the Easement Area pursuant to this Easement.

Access: Consumers shall have the right of unimpaired access to the Easement Area for any and all purposes necessary, convenient, or incidental to the exercise by Consumers of the rights granted hereunder and Owner shall not interfere with said access by any means.

Trees and Other Vegetation: Owner shall not plant any trees within that portion of the Easement Area identified as "40' Clear Cut" on the Easement Sketches (hereinafter "Easement Sketches") in the attached Exhibit C. Consumers shall have the right from time to time hereafter to enter that portion of the Easement Area identified as "40' Clear Cut" on the Easement Sketches in the attached Exhibit C to, without compensation to Owner, trim, cut down, and otherwise remove and control any trees, brush, roots, and other vegetation within the "40' Clear Cut" portion of the Easement Area. Consumers shall have the right from time to time hereafter to enter that portion of the Easement Area identified as "40' Danger Trees" on the Easement Sketches in the attached Exhibit C to, without compensation to Owner, trim, cut down, and otherwise remove and control any trees, brush, roots, and other vegetation within the Easement Area that are in excess of 35 feet in height.

RECEIVED by MSC 12/20/2021 10:30:09 AM

Buildings/Structures: Owner agrees not to build, create, construct, or permit to be built, created, or constructed, any obstruction, building, septic system, drain field, fuel tank, pond, swimming pool, lake, pit, well, foundation, engineering works, installation or any other type of structure over, under, on, or within that portion of the Easement Area identified as "20' No Build" on the Easement Sketches in the attached Exhibit C, whether temporary or permanent, without the express authorization of Consumers, which may be withheld in Consumers' sole discretion, and which authorization shall be recorded in the register of deeds for the county in which Owner's Land is situated expressly allowing the aforementioned.

Ground Elevation: Owner shall not materially alter the ground elevation (as shown on the Easement Sketches in the attached Exhibit C) within that portion of the Easement Area identified as "40' Clear Cut" on the Easement Sketches in the attached Exhibit C, without the express authorization of Consumers, which may be withheld in Consumers' sole discretion, and which authorization shall be recorded in the register of deeds for the county in which Owner's Land is situated expressly allowing the aforementioned.

Exercise of Easement: Consumers' nonuse or limited use of this Easement shall not preclude Consumers' later use of this Easement to its full extent.

Ownership: Owners covenant with Consumers that they are the lawful fee simple owner of Owner's Land, subject to existing easements, restrictions and reservations of record, if any, and that they have the right and authority to make this grant, and that they will forever warrant and defend the title thereto against all claims whatsoever.

Successors: This easement shall bind and benefit Owner's and Consumers' respective heirs, successors, lessees, licensees, and assigns.

Counterparts: This easement may be executed simultaneously in two or more counterparts, each of which shall be deemed an original and all of which together shall constitute one and the same instrument. It is not necessary that all parties execute any single counterpart if each party executes at least one counterpart.

RECEIVED by MSC 12/20/2021 10:30:09 AM

Date: _____

_____
BRIAN STORM

_____
ERIN STORM

Acknowledgment

The foregoing instrument was acknowledged before me in _____ County, Illinois,

on _____ by BRIAN STORM and ERIN STORM, husband and wife.

_____
Notary Public
_____ County, Illinois
Acting in _____ County
My Commission expires: _____

Prepared By:
Ady Simmons, 10-08-2018
Consumers Energy Company
One Energy Plaza
Jackson, MI 49201

After recording, return to:
Carrie Main, EP7-471
Consumers Energy Company
One Energy Plaza
Jackson, MI 49201

RECEIVED by MSC 12/20/2021 10:30:09 AM

EXHIBIT A

Owner's Land

A parcel of land situated and being in the City of Kalamazoo, County of Kalamazoo, State of Michigan described as:

Lot 33 of Hurni's University Hills, according to the plat thereof, recorded in Liber 28 of Plats, Page 3, Kalamazoo County Records. Being part of the Northeast 1/4 of Section 29, T2S, R11W.

Parcel ID: 06-29-220-033

RECEIVED by MSC 12/20/2021 10:30:09 AM

EXHIBIT B

Easement Area

An area of land in Lot 33 of Hurni's University Hills Subdivision, as recorded in Liber 28 of Plats, Page 3, in Section 29, Township 2 South, Range 11 West, City of Kalamazoo, Kalamazoo County, Michigan described as follows: Beginning at the Southwest corner of said Lot 33; thence N.01°07'16"E., on the West line of said Lot, 100.00 feet to the Northwest corner of said Lot; thence S.88°52'44"E., on the North line of said Lot, 70.08 feet; thence S.00°53'02"W., parallel with the centerline of the existing 46kV overhead electric line, 100.00 feet to the South line of said Lot; thence N.88°52'44"W., on said South Lot line, 70.49 feet to the point of beginning.

RECEIVED by MSC 12/20/2021 10:30:09 AM

EXHIBIT C

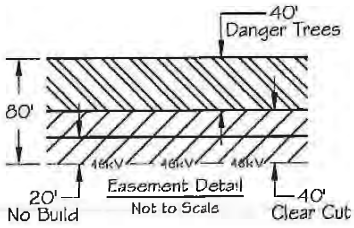
Easement Sketches

RECEIVED by MSC 12/20/2021 10:30:09 AM

EASEMENT SKETCH

Lindbergh-Phillips 46 kV Line
Tax ID #06-29-220-033

Basis of Bearing
Michigan State Plane Coordinate System
South Zone (NAD83 2011)
Referenced to Kalamazoo CORS

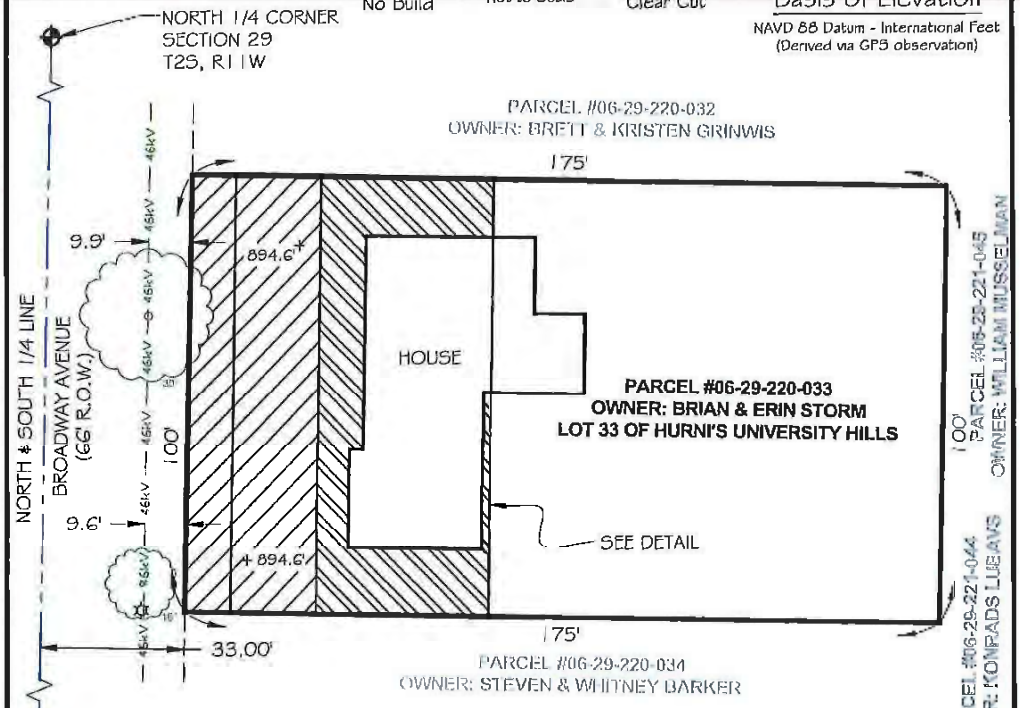


Easement Detail
Not to Scale



Location Map
Not to Scale

Basis of Elevation
NAVD 88 Datum - International Feet
(Derived via GPS observation)



Surveyor's Notes

1) Property boundary shown is approximate. The lot dimensions shown hereon are record dimensions provided for reference.
2) The existing 46kV centerline was located in the field and dimensions shown from said existing centerline are depicted accurately.
3) Not all improvements and utilities are shown.
4) Parcel is described per title report provided by Consumers Energy.
5) No Build Area - 1029 Sq. Ft., Clear Cut Area - 3029 Sq. Ft. (Including 1029 Sq. Ft. of No-Build), Danger Tree Area - 4000 Sq. Ft.

STATE OF MICHIGAN
MATTHEW M. SCHUELKE
PROFESSIONAL SURVEYOR
No. 63594
LICENSED PROFESSIONAL SURVEYOR

Matt Schuelke

Legend

⊕	-- Section Corner	———	-- Property Line
✳	-- Coniferous Tree	—46kV—	-- Overhead Electric 46kV Line
⊙	-- Deciduous Tree	- - - - - - -	-- Road R.O.W.
ơ	-- Power Pole	+901.5	-- Spot Elevation
←—	-- Guy Anchor	▭	-- No Build Area
	-- Lot Lines	▨	-- Clear Cut Area
— - —	-- Section Line	▨	-- Danger Tree Area

Revision A (4/27/18): Added No Build, Clear Cut, & Danger Tree easement areas. Added ground shots within easement areas.

Consumers Energy

SSI surveying solutions, inc.

Storm Parcel
NE 1/4 Section 29
T2S, R11W
City of Kalamazoo
Kalamazoo Co., Michigan

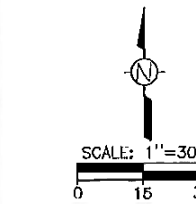
Drawing No. SB-23519_06-29-220-033

Filename: 23519base.DWG
Field Crew: BAT/CSD
Field Book No. SSI #18273
Drawn By: MMS
Date: 4/27/2018
Scale: 1" = 30'
Sheet 1 of 3

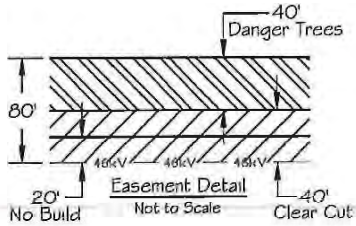
RECEIVED by MSC 12/20/2021 10:30:09 AM

EASEMENT SKETCH

Lindbergh-Phillips 46 kV Line
Tax ID #06-29-220-033



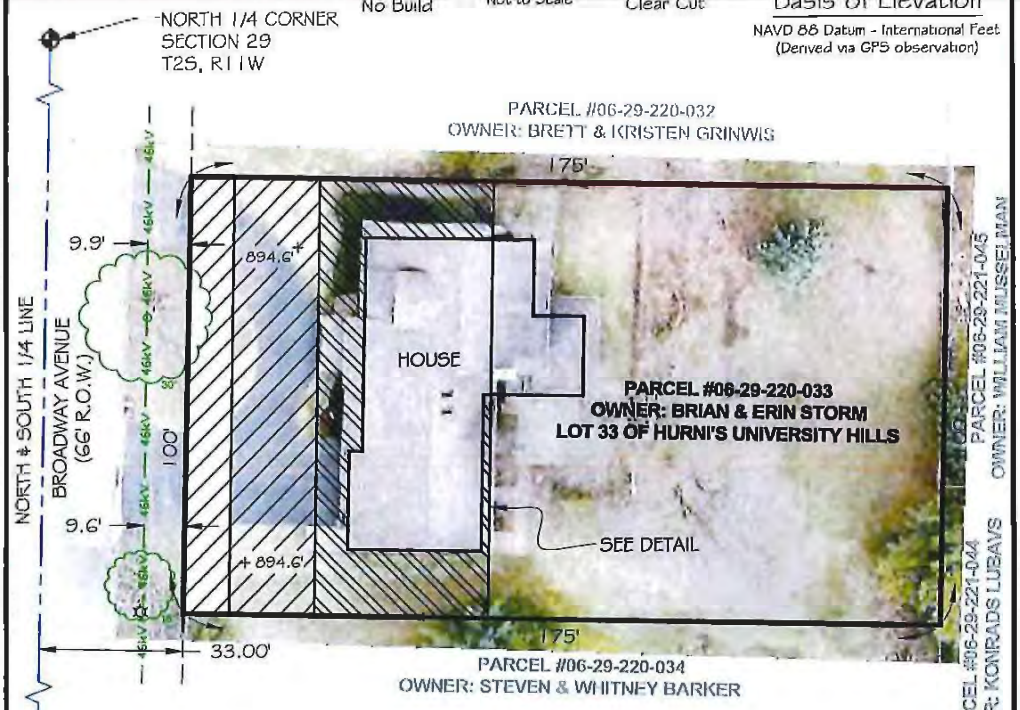
Basis of Bearing
Michigan State Plane Coordinate System
South Zone (NAD83 2011)
Referenced to Kalamazoo CORS





Location Map
Not to Scale

Basis of Elevation
NAVD 88 Datum - International Feet
(Derived via GPS observation)



Surveyor's Notes

1) Property boundary shown is approximate. The lot dimensions shown hereon are record dimensions provided for reference.
2) The existing 46kV centerline was located in the field and dimensions shown from said existing centerline are depicted accurately.
3) Not all improvements and utilities are shown.
4) Parcel is described per title report provided by Consumers Energy.
5) No Build Area - 1029 Sq. Ft., Clear Cut Area - 3029 Sq. Ft. (Including 1029 Sq. Ft. of No-Build), Danger Tree Area - 4000 Sq. Ft.

STATE OF MICHIGAN
MATTHEW M. SCHUELKE
PROFESSIONAL SURVEYOR
No. 63594
LICENSED PROFESSIONAL SURVEYOR

Matt Schuelke

Legend

--	Section Corner	--	Property Line
--	Coniferous Tree	46kV	-- Overhead Electric 46kV Line
--	Deciduous Tree	--------	-- Road R.O.W.
--	Power Pole	+901.5	-- Spot Elevation
--	Guy Anchor		-- No Build Area
--	Lot Lines		-- Clear Cut Area
--	Section Line		-- Danger Tree Area

Revision A (4/27/18): Added No Build, Clear Cut, & Danger Tree easement areas. Added ground shots within easement areas.

Consumers Energy

SSI surveying solutions, inc.

Storm Parcel
NE 1/4 Section 29
T2S, R11W
City of Kalamazoo
Kalamazoo Co., Michigan

Drawing No. SB-23519_06-29-220-033

Filename: 23519base.DWG
Field Crew: BAT/CSD
Field Book No. SSI #18273
Drawn By: MMS
Date: 4/27/2018
Scale: 1" = 30'
Sheet 2 of 3

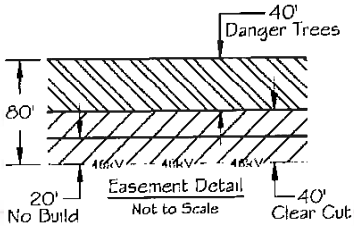
RECEIVED by MSC 12/20/2021 10:30:09 AM

EASEMENT SKETCH

Lindbergh-Phillips 46 kV Line
Tax ID #06-29-220-033

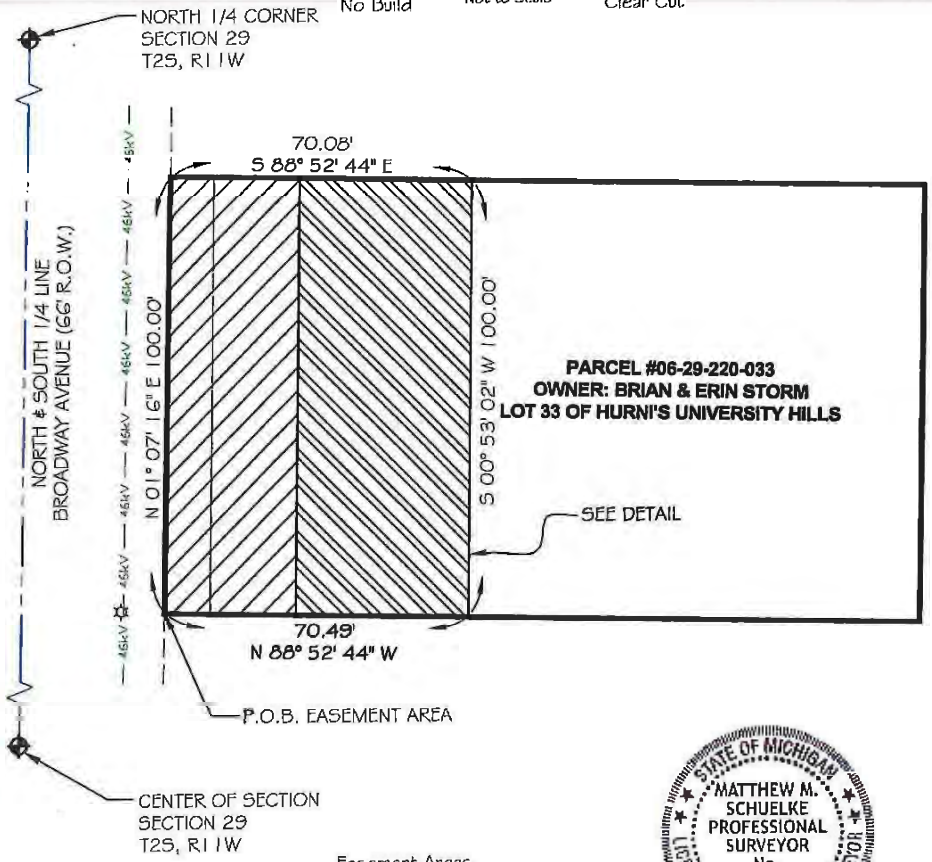


Basis of Bearing
Michigan State Plane Coordinate System
South Zone (NAD83 2011)
Referenced to Kalamazoo CORS





Location Map
Not to Scale



Easement Areas
No Build Area - 1029 Sq. Ft.
Clear Cut Area - 3029 Sq. Ft.
(Including 1029 Sq. Ft. of No-Build)
Danger Tree Area - 4000 Sq. Ft.
Total Easement Area - 7029 Sq. Ft.

Legal Description: Easement Area

An area of land in Lot 33 of Hurni's University Hills Subdivision, as recorded in Liber 28 of Plats, Page 3, in Section 29, Township 2 South, Range 11 West, City of Kalamazoo, Kalamazoo County, Michigan described as follows: Beginning at the Southwest corner of said Lot 33; thence N.01°07'16"E., on the West line of said Lot, 100.00 feet to the Northwest corner of said Lot; thence S.88°52'44"E., on the North line of said Lot, 70.08 feet; thence S.00°53'02"W., parallel with the centerline of the existing 46kV overhead electric line, 100.00 feet to the South line of said Lot; thence N.88°52'44"W., on said South Lot line, 70.49 feet to the point of beginning.

Revision A (4/27/18): Added No Build, Clear Cut, & Danger Tree easement areas. Added ground shots within easement areas.

Consumers Energy

SSI surveying solutions, inc.

Storm Parcel
NE 1/4 Section 29
T2S, R11W
City of Kalamazoo
Kalamazoo Co., Michigan

Drawing No. SB-23519_06-29-220-033
Filename: 23519base.DWG
Field Crew: BAT/CSD
Field Book No. SSI #18273
Drawn By: MMS
Date: 4/27/2018
Scale: 1" = 30'
Sheet 3 of 3

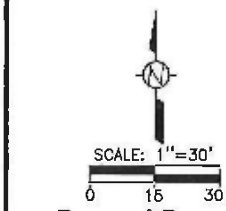
RECEIVED by MSC 12/20/2021 10:30:09 AM

EXHIBIT D

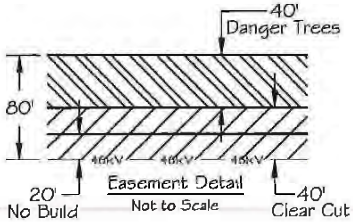
RECEIVED by MSC 12/20/2021 10:30:09 AM

EASEMENT SKETCH

Lindbergh-Phillips 46 kV Line
Tax ID #06-29-220-033



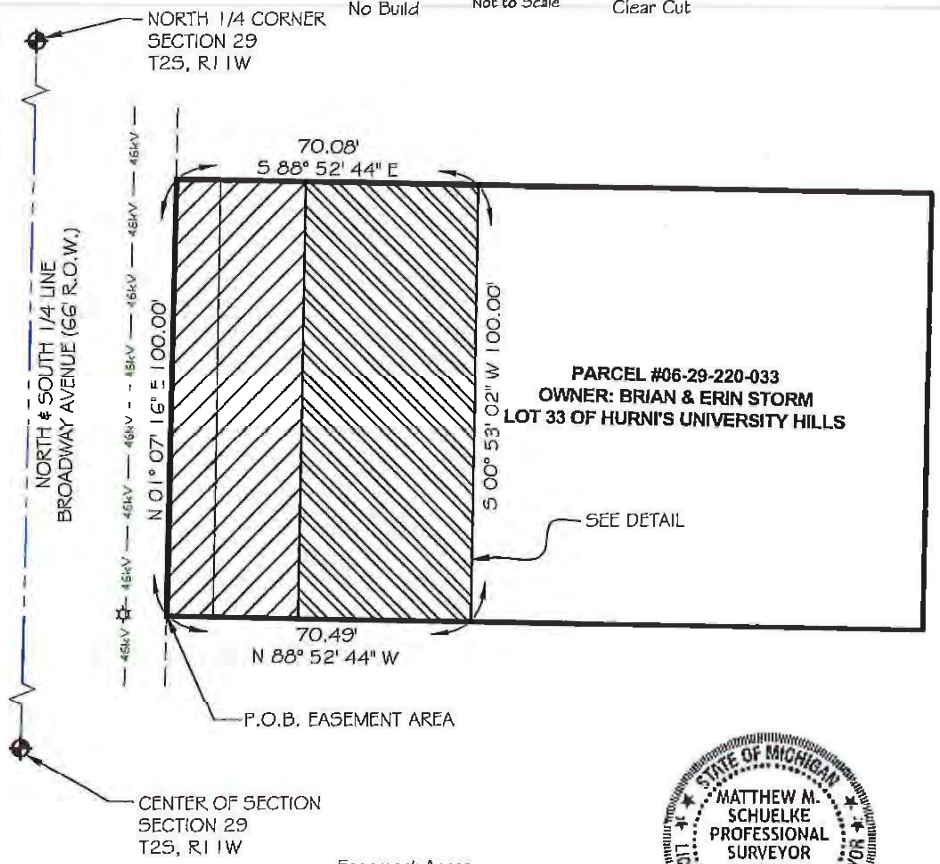
Basis of Bearing
Michigan State Plane Coordinate System
South Zone (NAD83 2011)
Referenced to Kalamazoo CORS



Easement Detail
Not to Scale



Location Map
Not to Scale



Easement Areas
No Build Area - 1029 Sq. Ft.
Clear Cut Area - 3029 Sq. Ft.
(Including 1029 Sq. Ft. of No-Build)
Danger Tree Area - 4000 Sq. Ft.
Total Easement Area - 7029 Sq. Ft.

STATE OF MICHIGAN
MATTHEW M. SCHUELKE
PROFESSIONAL SURVEYOR
No. 63594
LICENSED PROFESSIONAL SURVEYOR

Matthew Schuelke

Legal Description: Easement Area

An area of land in Lot 33 of Hurni's University Hills Subdivision, as recorded in Liber 28 of Plats, Page 3, in Section 29, Township 2 South, Range 11 West, City of Kalamazoo, Kalamazoo County, Michigan described as follows: Beginning at the Southwest corner of said Lot 33; thence N.01°07'16"E., on the West line of said Lot, 100.00 feet to the Northwest corner of said Lot; thence S.88°52'44"E., on the North line of said Lot, 70.08 feet; thence S.00°53'02"W., parallel with the centerline of the existing 46kV overhead electric line, 100.00 feet to the South line of said Lot; thence N.88°52'44"W., on said South Lot line, 70.49 feet to the point of beginning.

Revision A (4/27/18): Added No Build, Clear Cut, & Danger Tree easement areas. Added ground shots within easement areas.

Consumers Energy

SSI surveying solutions, inc.

Storm Parcel
NE 1/4 Section 29
T2S, R11W
City of Kalamazoo
Kalamazoo Co., Michigan

Drawing No. SB-23519_06-29-220-033

Filename: 23519base.DWG
Field Crew: BAT/CSD
Field Book No. SSI #18273
Drawn By: MMS
Date: 4/27/2018
Scale: 1" = 30'
Sheet 3 of 3

RECEIVED by MSC 12/20/2021 10:30:09 AM

EXHIBIT E

20/2021 10:30:09 AM



RECEIVED by MSC 12/20/2021 10:30:09 AM

EXHIBIT F

Received in Kalamazoo, MI Mar 26, 2019 03:48 PM

2019-007108 DEC
03/26/2019 03:58:52 PM Page 1 of 14
Timothy A. Snow County Clerk/Register
Kalamazoo County, MI

RECEIVED by MSC 12/20/2021 10:30:09 AM

DECLARATION OF TAKING

STATE OF MICHIGAN)
) SS.
COUNTY OF JACKSON)

I, Timothy J. Sparks, Vice President of Electric Grid Integration for Consumers Energy Company ("Consumers Energy"), having been duly sworn hereby state and affirm the following in support of this Declaration of Taking:

1. Consumers Energy is a public utility, organized and existing under Public Act 238 of 1923, MCL 486.251, *et seq.*, as amended, with a principal address of One Energy Plaza, Jackson, Michigan 49201.

2. Consumers Energy has been granted statutory authority by the Legislature of the State of Michigan to "condemn all lands and any and all interests therein, easements, rights of way, and other property...which may be necessary to generate, transmit, and transform electric energy for the public use in, upon, or across private property." See MCL 486.252.

3. I am authorized by the Board of Directors of Consumers Energy to declare the taking of property by eminent domain under the applicable statutes of the State of Michigan.

4. Based on Consumers Energy's obligation as a public utility to provide adequate and reliable electric service to customers in Kalamazoo County and the City of Kalamazoo, Consumers Energy hereby determines it is necessary to obtain permanent easement rights across

RECEIVED by MSC 12/20/2021 10:30:09 AM

certain property described further below for the protection and maintenance of its existing high-voltage electric lines that are supported by a line of existing poles and related electric facilities adjacent to such property.

5. The Lindbergh to Phillips 46 kV Line is a high voltage distribution line, approximately 7.3 miles long, within Consumers Energy's integrated electric transmission and distribution system located in and providing electric service to Kalamazoo County and the City of Kalamazoo. The Lindbergh to Phillips Line delivers electricity at 46,000 Volts to Consumers Energy's Kendall and Oakwood Substations. An outage or failure of the Lindbergh to Phillips Line directly impacts over 8,220 electric customers. Without permanent rights for the maintenance and protection of this necessary component of its electric system, Consumers Energy is unable to ensure that it will be able to continually meet its obligation to provide adequate and reliable electric service to customers in Kalamazoo County and the City of Kalamazoo.

6. To support the Lindbergh to Phillips Line, which is used to transmit and/or distribute electricity for public use, Consumers Energy has determined that it is necessary to acquire by condemnation a perpetual easement in, over and across the following described lands ("Property"):

> A parcel of land situated and being in the City of Kalamazoo, County of Kalamazoo, State of Michigan described as:
>
> Lot 33 of Hurni's University Hills, according to the plat thereof, recorded in Liber 28 of Plats, Page 3, Kalamazoo County Records. Being part of the Northeast 1/4 of Section 29, T2S, R11W.
>
> Parcel ID: 06-29-220-033

7. The rights to be acquired are fully described in the Easement for the Protection of Electric Facilities, attached as Exhibit 1 to this Declaration of Taking.

2019-007108 DEC.
03/26/2019 03:58:52 PM Page 2 of 14
Timothy A. Snow County Clerk/Register Kalamazoo County, MI

RECEIVED by MSC 12/20/2021 10:30:09 AM

8. The record, fee-simple owner of the Property is Brian Storm and Erin Storm. Consumers Energy also has identified Lake Michigan Credit Union as having an interest in the Property that is relevant under Michigan law.

9. Based on an appraisal report for the property affected by the easement, Consumers Energy has estimated the amount of just compensation for the easement rights to be acquired as the full and complete sum of $7,500.00, which sum will be deposited with the Kalamazoo County Treasurer and will be paid to the above-named interest holders in accordance with applicable law.

10. Consumers Energy waives the right to bring federal and state cost-recovery actions against the current owners of the Property.

Further affiant sayeth naught.

CONSUMERS ENERGY COMPANY

By: Timothy J. Sparks
Title: Vice President of Electric Grid Integration

Subscribed and sworn to before me this 26th day of Feb, 2019

Michelle M Leutz, Notary Public
State of Michigan, Jackson County
Acting in Jackson County, Michigan
My Commission Expires: Sep 21, 2019

MICHELLE M LEUTZ
Notary Public, State of Michigan
County of Jackson
My Commission Expires Sep. 21, 2019
Acting in the County of Jackson

2019-007108 DEC
03/26/2019 03:58:52 PM Page 3 of 14
Timothy A. Snow County Clerk/Register Kalamazoo County, MI

RECEIVED by MSC 12/20/2021 10:30:09 AM

Prepared by:

Aaron L. Vorce (P68797)
Consumers Energy Company
One Energy Plaza, EP11-449
Jackson, MI 49201

When recorded, return to:

Consumers Energy Company
Business Services – Real Estate
Attn: Debra Dennis, EP7-436
One Energy Plaza
Jackson, MI 49201-2357

2019-007108 DEC
03/26/2019 03:58:52 PM Page 4 of 14
Timothy A. Snow County Clerk/Register Kalamazoo County, MI

RECEIVED by MSC 12/20/2021 10:30:09 AM

Exhibit 1
to Declaration of Taking
(Easement for the Protection of Electric Facilities)

2019-007108 DEC
03/26/2019 03:58:52 PM Page 5 of 14
Timothy A. Snow County Clerk/Register Kalamazoo County, MI

RECEIVED by MSC 12/20/2021 10:30:09 AM

EASEMENT FOR THE PROTECTION OF ELECTRIC FACILITIES

Lindbergh to Phillips

SAP# 22787258
Master Tract# TRN000916034041
Agreement # MI00000022266

BRIAN STORM and ERIN STORM, husband and wife, 2035 Broadway, Kalamazoo, MI 49008. (hereinafter "Owner")

for $1.00 and other good and valuable consideration [*exempt from real estate transfer tax pursuant to MCLA 207.505(f) and from State real estate transfer tax pursuant to MCLA 207.526(f)*] grants and warrants to

CONSUMERS ENERGY COMPANY, a Michigan corporation, One Energy Plaza, Jackson, Michigan 49201 (hereinafter "Consumers")

a permanent easement to enter the Easement Area described in the attached Exhibit B (hereinafter "Easement Area") located in the City of Kalamazoo, County of Kalamazoo, and State of Michigan as more particularly described in the attached Exhibit B and 1) to trim, cut down, and otherwise remove and control, without compensation to Owner, any trees, brush, roots, and other vegetation standing or growing within the Easement Area, which right is more fully defined below in the "Trees and Other Vegetation" provision, for the purpose of protecting, maintaining, and providing access to Consumers' facilities, which are currently located on land contiguous to the Easement Area and Owner's land described in the attached Exhibit A (hereinafter "Owner's Land"), which land is currently a public road right-of-way (hereinafter "Adjoining Land"); and 2) to utilize the portion of the Easement Area described as the 40' Clear Cut area below to, from within the Easement Area, construct, operate, maintain, inspect (including aerial patrol), survey, replace, reconstruct, improve, remove, relocate, change the size of, enlarge, and protect a line or lines of electric facilities together with any wires, cables, conduits, crossarms, braces, guys, transformers, electric control circuits and devices, communication systems, utility lines, protective apparatus and all other equipment, appurtenances, associated fixtures, and facilities that are useful or incidental to or for the operation or protection thereof and located on the Adjoining Land, and to conduct such other activities as may be convenient in connection therewith as determined by Consumers for the purpose of transmitting and distributing electricity, but without the right to locate any of the aforementioned facilities on Owner's Land or within the Easement Area pursuant to this Easement.

Access: Consumers shall have the right of unimpaired access to the Easement Area for any and all purposes necessary, convenient, or incidental to the exercise by Consumers of the rights granted hereunder and Owner shall not interfere with said access by any means.

Trees and Other Vegetation: Owner shall not plant any trees within that portion of the Easement Area identified as "40' Clear Cut" on the Easement Sketches (hereinafter "Easement Sketches") in the attached Exhibit C. Consumers shall have the right from time to time hereafter to enter that portion of the Easement Area identified as "40' Clear Cut" on the Easement Sketches in the attached Exhibit C to, without compensation to Owner, trim, cut down, and otherwise remove and control any trees, brush, roots, and other vegetation within the "40' Clear Cut" portion of the Easement Area. Consumers shall have the right from time to time hereafter to enter that portion of the Easement Area identified as "40' Danger Trees" on the Easement Sketches in the attached Exhibit C to, without compensation to Owner, trim, cut down, and otherwise remove and control any trees, brush, roots, and other vegetation within the Easement Area that are in excess of 35 feet in height.

2019-007108 DEC
03/26/2019 03:58:52 PM Page 6 of 14
Timothy A. Snow County Clerk/Register Kalamazoo County, MI

RECEIVED by MSC 12/20/2021 10:30:09 AM

Buildings/Structures: Owner agrees not to build, create, construct, or permit to be built, created, or constructed, any obstruction, building, septic system, drain field, fuel tank, pond, swimming pool, lake, pit, well, foundation, engineering works, installation or any other type of structure over, under, on, or within that portion of the Easement Area identified as "20' No Build" on the Easement Sketches in the attached Exhibit C, whether temporary or permanent, without the express authorization of Consumers, which may be withheld in Consumers' sole discretion, and which authorization shall be recorded in the register of deeds for the county in which Owner's Land is situated expressly allowing the aforementioned.

Ground Elevation: Owner shall not materially alter the ground elevation (as shown on the Easement Sketches in the attached Exhibit C) within that portion of the Easement Area identified as "40' Clear Cut" on the Easement Sketches in the attached Exhibit C, without the express authorization of Consumers, which may be withheld in Consumers' sole discretion, and which authorization shall be recorded in the register of deeds for the county in which Owner's Land is situated expressly allowing the aforementioned.

Exercise of Easement: Consumers' nonuse or limited use of this Easement shall not preclude Consumers' later use of this Easement to its full extent.

Ownership: Owners covenant with Consumers that they are the lawful fee simple owner of Owner's Land, subject to existing easements, restrictions and reservations of record, if any, and that they have the right and authority to make this grant, and that they will forever warrant and defend the title thereto against all claims whatsoever.

Successors: This easement shall bind and benefit Owner's and Consumers' respective heirs, successors, lessees, licensees, and assigns.

Counterparts: This easement may be executed simultaneously in two or more counterparts, each of which shall be deemed an original and all of which together shall constitute one and the same instrument. It is not necessary that all parties execute any single counterpart if each party executes at least one counterpart.

RECEIVED by MSC 12/20/2021 10:30:09 AM

Date: _____

_____
BRIAN STORM

_____
ERIN STORM

Acknowledgment

The foregoing instrument was acknowledged before me in _____ County, Illinois,

on _____ by BRIAN STORM and ERIN STORM, husband and wife.

_____
Notary Public
_____ County, Illinois
Acting in _____ County
My Commission expires: _____

Prepared By:
Ady Simmons, 10-08-2018
Consumers Energy Company
One Energy Plaza
Jackson, MI 49201

After recording, return to:
Carrie Main, EP7-471
Consumers Energy Company
One Energy Plaza
Jackson, MI 49201

2019-007108 DEC
03/26/2019 03:58:52 PM Page 8 of 14
Timothy A. Snow County Clerk/Register Kalamazoo County, MI

RECEIVED by MSC 12/20/2021 10:30:09 AM

EXHIBIT A

Owner's Land

A parcel of land situated and being in the City of Kalamazoo, County of Kalamazoo, State of Michigan described as:

Lot 33 of Hurni's University Hills, according to the plat thereof, recorded in Liber 28 of Plats, Page 3, Kalamazoo County Records. Being part of the Northeast 1/4 of Section 29, T2S, R11W.

Parcel ID: 06-29-220-033

2019-007108 DEC
03/26/2019 03:58:52 PM Page 9 of 14
Timothy A. Snow County Clerk/Register Kalamazoo County, MI

RECEIVED by MSC 12/20/2021 10:30:09 AM

EXHIBIT B

Easement Area

An area of land in Lot 33 of Hurnl's University Hills Subdivision, as recorded in Liber 28 of Plats, Page 3, in Section 29, Township 2 South, Range 11 West, City of Kalamazoo, Kalamazoo County, Michigan described as follows: Beginning at the Southwest corner of said Lot 33; thence N.01°07'16"E., on the West line of said Lot, 100.00 feet to the Northwest corner of said Lot; thence S.88°52'44"E., on the North line of said Lot, 70.08 feet; thence S.00°53'02"W., parallel with the centerline of the existing 46kV overhead electric line, 100.00 feet to the South line of said Lot; thence N.88°52'44"W., on said South Lot line, 70.49 feet to the point of beginning.

RECEIVED by MSC 12/20/2021 10:30:09 AM

EXHIBIT C

Easement Sketches

2019-007108 DEC
03/26/2019 03:58:52 PM Page 11 of 14
Timothy A. Snow County Clerk/Register Kalamazoo County, MI

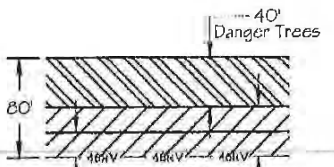
RECEIVED by MSC 12/20/2021 10:30:09 AM

EASEMENT SKETCH

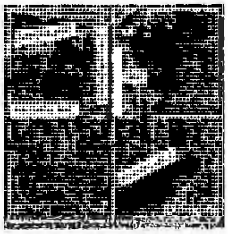
Landbergh-Phillips 46 kV Line
Tax ID #06-29-220-033



Basis of Bearing
Michigan State Plane Coordinate System
South Zone (NAD83 2011)
Referenced to Kalamazoo CORS

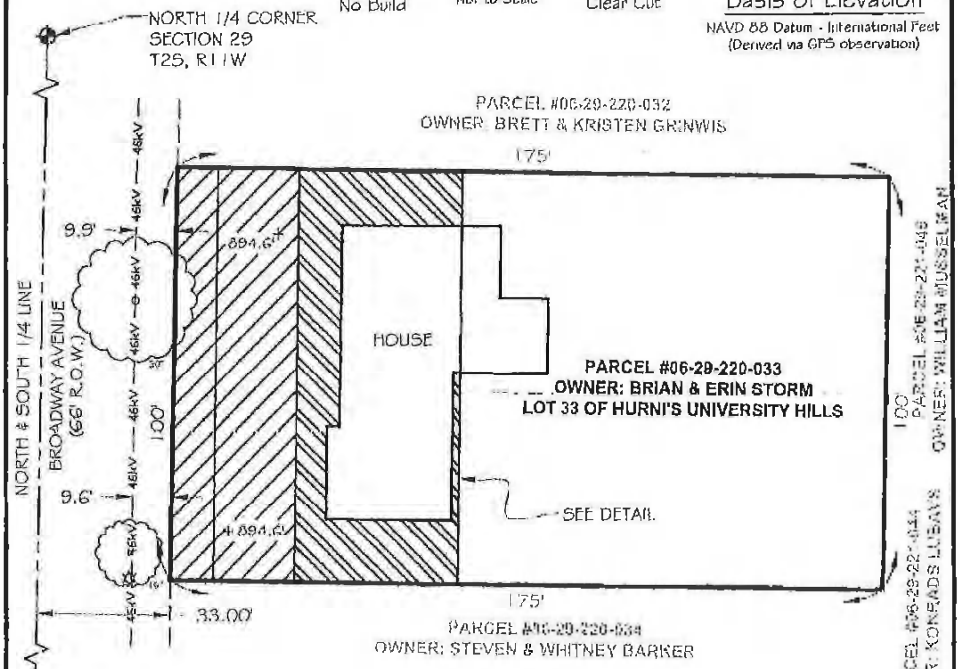


Easement Detail
Not to Scale



Location Map
Not to Scale

Basis of Elevation
NAVD 88 Datum - International Feet
(Derived via GPS observation)



Surveyor's Notes

1) Property boundary shown is approximate. The lot dimensions shown hereon are record dimensions provided for reference.
2) The existing 46kV centerline was located in the field and dimensions shown from said existing centerline are depicted accurately.
3) Not all improvements and utilities are shown.
4) Parcel is described per title report provided by Consumers Energy.
5) No Build Area - 1029 Sq. Ft., Clear Cut Area - 3029 Sq. Ft. (Including 1029 Sq. Ft. of No-Build), Danger Tree Area - 4000 Sq. Ft.

STATE OF MICHIGAN
MATTHEW M. SCHUELKE
PROFESSIONAL SURVEYOR
No. 63594
LICENSED PROFESSIONAL SURVEYOR

Matt Schuelke

Legend

- Section Corner
- Coniferous Tree
- Deciduous Tree
- Power Pole
- Guy Anchor
- Lot Lines
- Section Line
- Property Line
- 46kV — Overhead Electric 46kV Line
- Road R.O.W.
- +901.5 — Spot Elevation
- No Build Area
- Clear Cut Area
- Danger Tree Area

Revision A (4/27/18): Added No Build, Clear Cut & Danger Tree easement areas. Added ground shots within easement area.

Consumers Energy

surveying solutions, inc.

Storm Parcel
NE 1/4 Section 29
T2S, R11W
City of Kalamazoo
Kalamazoo Co., Michigan

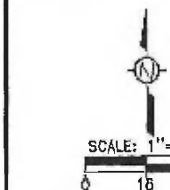
Drawing No. SB-23519_06-29-220-033
Filename: 23519base.DWG
Field Crew: BAT/CSD
Field Book No. SSI #18273
Drawn By: MMS
Date: 4/27/2018
Scale: 1" = 30'
Sheet 1 of 1

Liber 9800 Page 198 DEC
03/26/2018 09:05:52 AM Page 12 of 14
Timothy A. Snow County Clerk/Register Kalamazoo County, MI

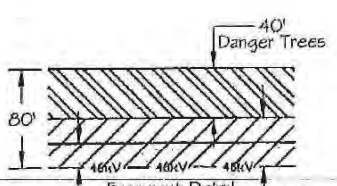
RECEIVED by MSC 12/20/2021 10:30:09 AM

EASEMENT SKETCH

Lindbergh-Phillips 46 kV Line
Tax ID #06-29-220-033



Basis of Bearing
Michigan State Plane Coordinate System
South Zone (NAD83 2011)
Referenced to Kalamazoo CORS

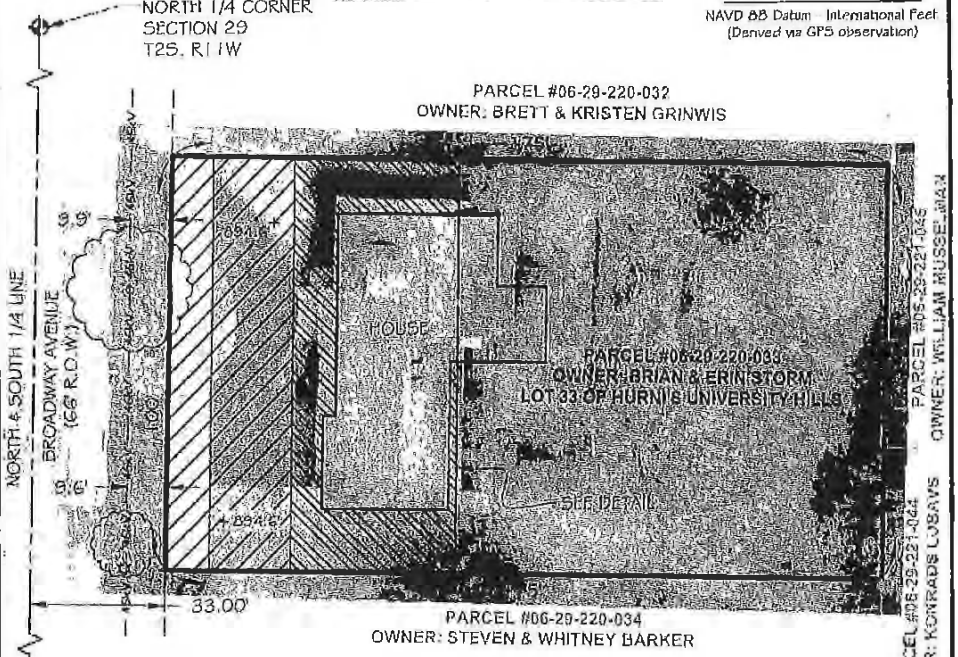


Easement Detail
Not to Scale



Location Map
Not to Scale

Basis of Elevation
NAVD 88 Datum - International Feet
(Derived via GPS observation)



Surveyor's Notes

1) Property boundary shown is approximate. The lot dimensions shown hereon are record dimensions provided for reference.
2) The existing 46kV centerline was located in the field and dimensions shown from said existing centerline are depicted accurately.
3) Not all improvements and utilities are shown.
4) Parcel is described per title report provided by Consumers Energy.
5) No Build Area - 1029 Sq. Ft., Clear Cut Area - 3029 Sq. Ft. (including 1029 Sq. Ft. of No Build), Danger Tree Area - 4000 Sq. Ft.

STATE OF MICHIGAN
MATTHEW M. SCHUELKE
PROFESSIONAL SURVEYOR
No. 63594
LICENSED PROFESSIONAL SURVEYOR

Matt Schuelke

Legend

--	Section Corner	--	Property Line
--	Coniferous Tree	46kV	-- Overhead Electric 46kV Line
--	Deciduous Tree	--	-- Road R.O.W.
--	Power Pole	+901.5	Spot Elevation
--	Guy Anchor	--	-- No Build Area
--	Lot Lines	--	Clear Cut Area
--	Section Line	--	-- Danger Tree Area

Revision A (4/27/18): Added No Build, Clear Cut, & Danger Tree easement areas. Added ground shots within easement areas.

Consumers Energy

surveying solutions, inc.

Storm Parcel
NE 1/4 Section 29
T2S, R11W
City of Kalamazoo
Kalamazoo Co., Michigan

Drawing No. SB-23519_06-29-220-033
Filename: 23519base.DWG
Field Crew: BAT/CSD
Field Book No. SSI #18273
Drawn By: MMS
Date: 4/27/2018
Scale: 1" = 30'
Sheet 6 of 8

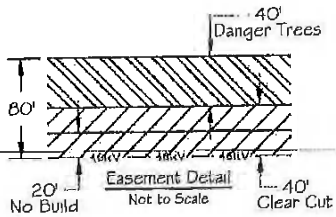
2019-007105 DEC
03/26/2019 03:56:52 PM Page 13 of 14
Timothy A. Snow County Clerk/Register Kalamazoo County, MI

EASEMENT SKETCH

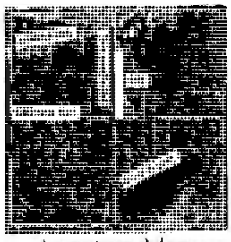
Lindbergh-Phillips 46 kV Line
Tax ID #06-29-220-033

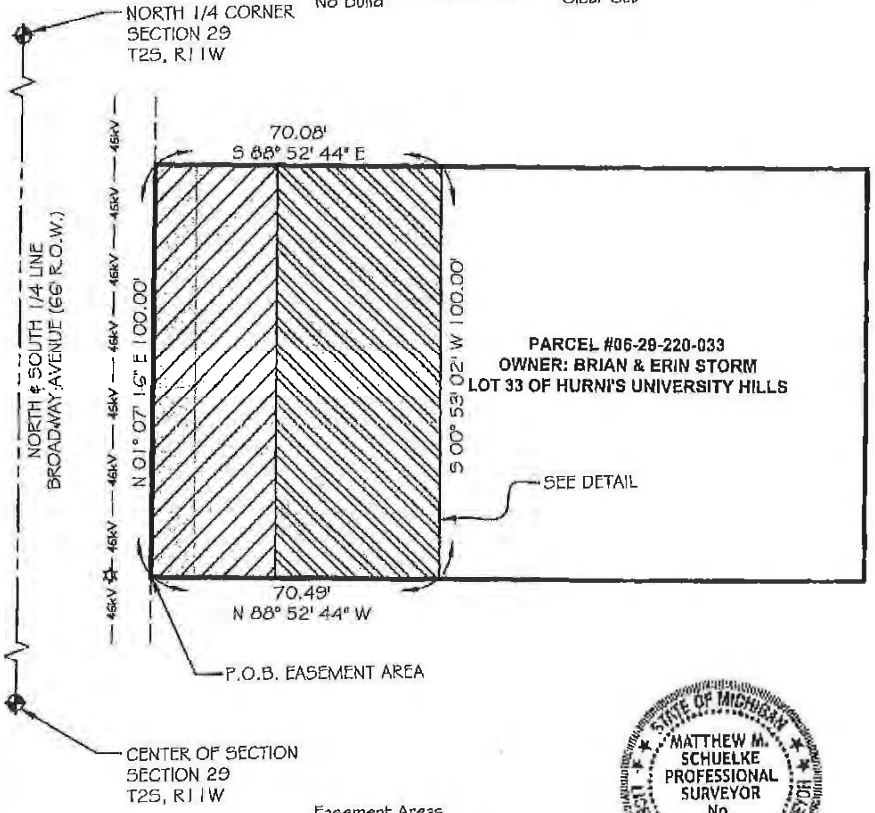
SCALE: 1"=30'
0 15 30

Basis of Bearing
Michigan State Plane Coordinate System
South Zone (NAD83 2011)
Referenced to Kalamazoo CORS



Easement Detail
Not to Scale


Location Map
Not to Scale



STATE OF MICHIGAN
MATTHEW M. SCHUELKE
PROFESSIONAL SURVEYOR
No. 63594
LICENSED PROFESSIONAL SURVEYOR

Matt Schuelke

Easement Areas
No Build Area - 1029 Sq. Ft.
Clear Cut Area - 3029 Sq. Ft.
(Including 1029 Sq. Ft. of No-Build)
Danger Tree Area - 4000 Sq. Ft.
Total Easement Area - 7029 Sq. Ft.

Legal Description: Easement Area

An area of land in Lot 33 of Hurni's University Hills Subdivision, as recorded in Liber 28 of Plats, Page 3, in Section 29, Township 2 South, Range 11 West, City of Kalamazoo, Kalamazoo County, Michigan described as follows: Beginning at the Southwest corner of said Lot 33; thence N.01°07'16"E., on the West line of said Lot, 100.00 feet to the Northwest corner of said Lot; thence S.88°52'44"E., on the North line of said Lot, 70.08 feet; thence S.00°53'02"W., parallel with the centerline of the existing 46kV overhead electric line, 100.00 feet to the South line of said Lot; thence N.88°52'44"W., on said South Lot line, 70.49 feet to the point of beginning.

Revision A (4/27/18): Added No Build, Clear Cut, & Danger Tree easement areas. Added ground shots within easement areas.

Consumers Energy

surveying solutions, inc.

Storm Parcel
NE 1/4 Section 29
T2S, R11W
City of Kalamazoo
Kalamazoo Co., Michigan

Drawing No. SD-23519_06-29-220-033

Filename: 23519base.DWG
Field Crew: BAT/CSD
Field Book No. 551 #18273
Drawn By: MMS
Date: 4/27/2018
Scale: DEC 30'

Page 14 of 14
Timothy L. Snow County Clerk/Register Kalamazoo County, MI

RECEIVED by MSC 12/20/2021 10:30:09 AM

RECEIVED by MSC 12/20/2021 10:30:09 AM

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF KALAMAZOO

CONSUMERS ENERGY COMPANY,

Plaintiff,

v.

BRIAN STORM, ERIN STORM, and LAKE MICHIGAN CREDIT UNION,

Defendants.

Case No. 2019-0160-CC

HONORABLE ALEXANDER C. LIPSEY

Nikole L. Canute (P68713)
Richard M. Wilson, Jr. (P29717)
MIKA MEYERS, PLC
Attorneys for Plaintiff
900 Monroe NW
Grand Rapids, Michigan 49503
Telephone: (616) 632-8000

Craig H. Lubben (P33154)
MILLER JOHNSON
Attorneys for Defendants
Brian Storm and Erin Storm
Radisson Plaza Hotel & Suites
100 West Michigan Avenue, Suite 200
Kalamazoo, Michigan 49007-3960
Telephone: (269) 226-2958

AFFIDAVIT OF BRIAN STORM

STATE OF MICHIGAN)
) ss.
COUNTY OF KALAMAZOO)

Brian Storm, being first duly sworn, deposes and says:

1. I have personal knowledge of the facts stated in this affidavit and could testify competently to them if called as a witness.

2. My spouse, Erin Storm, and I own a single-family house located at 2035 Broadway Avenue, Kalamazoo, Michigan 49008 (the "property").

RECEIVED by MCOA 1/6/2020 2:37:43 PM

3. We bought the property in the Fall of 2015.

4. There is an electric power line that runs along the front of our property down Broadway Avenue. Consumers Energy ("Consumers") has informed us that this is a 46,000 volt electricity distribution line called the Lindbergh to Phillips 46 kV line (the "distribution line"). Consumers Energy delivers electricity using that distribution line.

5. The distribution line has been there as long as we have owned the property.

6. To the best of my knowledge, Consumers is able to access and perform maintenance on the line from Broadway Avenue.

7. During the time we have lived at our property, Consumers has never asked me or my spouse to trim or remove any trees or other vegetation on our property. Nor has Consumers asked for permission to come on our property to remove trees or vegetation or to do maintenance on the distribution line.

8. Attached as **Exhibit 1** is a 3-page Easement Sketch dated 4/27/2018 which Consumers provided showing the location of the proposed easement on our property.

9. The easement requested by Consumers would cover nearly our entire front yard and almost all of our side yard.

10. As shown in the easement sketch, Consumers' proposed easement would declare the front approximately 40' of our property to be a "40' Clear Cut" area. Consumers' proposed easement under the paragraph entitled *Trees and Other Vegetation* says in pertinent part regarding the "40' Clear Cut" area:

RECEIVED by MSC 12/20/2021 10:30:09 AM

RECEIVED by MCOA 1/6/2020 2:37:43 PM

> Owner shall not plant any trees within that portion of the Easement Area identified as "40' Clear Cut" on the Easement Sketches (hereinafter "Easement Sketches") in the attached Exhibit C. Consumers shall have the right from time to time hereafter to enter that portion of the Easement Area identified as "40' Clear Cut" on the Easement Sketches in the attached Exhibit C to, without compensation to Owner, **trim, cut down, and otherwise remove and control and trees, brush, roots, and other vegetation within the "40' Clear Cut" portion of the Easement Area.** (bold added)

11. As shown on the aerial photo which is the second page of **Exhibit 1**, there are two trees in front of our property which are on the Broadway Avenue right of way. They are not on our property. In fact, currently we have no trees in the area that Consumers wishes to burden with a 40' Clear Cut Easement.

12. Consumers has not offered any explanation as to why they need to impose a 40' Clear Cut easement on our property when there are no trees on our property in that area and they have allowed trees to stand on the Broadway Avenue right of way which they could have removed if it was a necessity.

13. Consumers' proposed easement that would prevent me and my spouse from doing additional landscaping in the clear cut area.

14. Prohibiting landscaping in the first forty feet of the front yard will diminish the value of our property.

15. In addition to declaring the front 40' of our property as a "clear cut" area, Consumers' proposed easement would declare the next 40' to be a "40' Danger Tree" area. As shown in the sketch, this area covers nearly the entire side yard on both sides of our house.

16. Consumers' proposed easement under the paragraph entitled Trees and Other Vegetation says in pertinent part regarding the "40' Danger Tree" area:

RECEIVED by MSC 12/20/2021 10:30:09 AM
RECEIVED by MCOA 1/6/2020 2:37:43 PM

> Consumers shall have the right to enter that portion of the Easement Area identified as "40' Danger Trees" on the Easement Sketches in the attached Exhibit C to, without compensation to Owner, **trim, cut down, or otherwise remove and control any trees, brush, roots, and other vegetation within the Easement Area that are in excess of 35 feet in height.** (bold added)

17. In other words, this portion of the proposed easement effectively restricts us from planting other trees that have the potential to exceed 35 feet in height.

18. Consumers has not offered any explanation as to why they need to impose a 40' Danger Tree easement on our property when: (1) there are no trees on our property in that area; (2) if we would plant trees in that areas they would be over 40' from the distribution line; and (3) they have allowed trees to stand on the Broadway Avenue right of way which they could have removed if it was a necessity.

19. Finally, Consumers' proposed easement would declare the front 20 feet of our property a "no build" area. Consumers' proposed easement under the paragraph entitled *Buildings/Structures* says in pertinent part regarding the "no build area:"

> Owner agrees **not to build, create, construct or permit to be built, created or constructed, any obstruction, building, septic system, drain field, fuel tank, pond, swimming pool, lake, pit, well, foundation, engineering works, installation or any other type of structure** over, under, on, or within that portion of the Easement Area identified as "20' No Build" on the Easement Sketches in the attached Exhibit C, **without the express authorization of Consumers, which may be withheld in Consumers' sole discretion,** and which authorization shall be recorded in the register of deeds for the county in which Owner's Land is situated expressly allowing the aforementioned. (bold added)

20. Consumers has offered no explanation why it is necessary for them to have "sole discretion" about what, if anything, we build on the front 20' of our property.

RECEIVED by MSC 12/20/2021 10:30:09 AM
RECEIVED by MCOA 1/6/2020 2:37:43 PM

21. To the best of my knowledge, there has been no recent change of circumstances that would justify the easement that Consumers seeks.

Brian Storm

Subscribed and sworn to before me, a Notary Public, this 13th day of May, 2019.

Deborah Ann Koppers
Notary Public
State of Michigan, County of Kalamazoo
My Commission Expires: 3/22/20

RECEIVED by MSC 12/20/2021 10:30:09 AM

RECEIVED by MCOA 1/6/2020 2:37:43 PM

RECEIVED by MSC 12/20/2021 10:30:09 AM

Exhibit 1

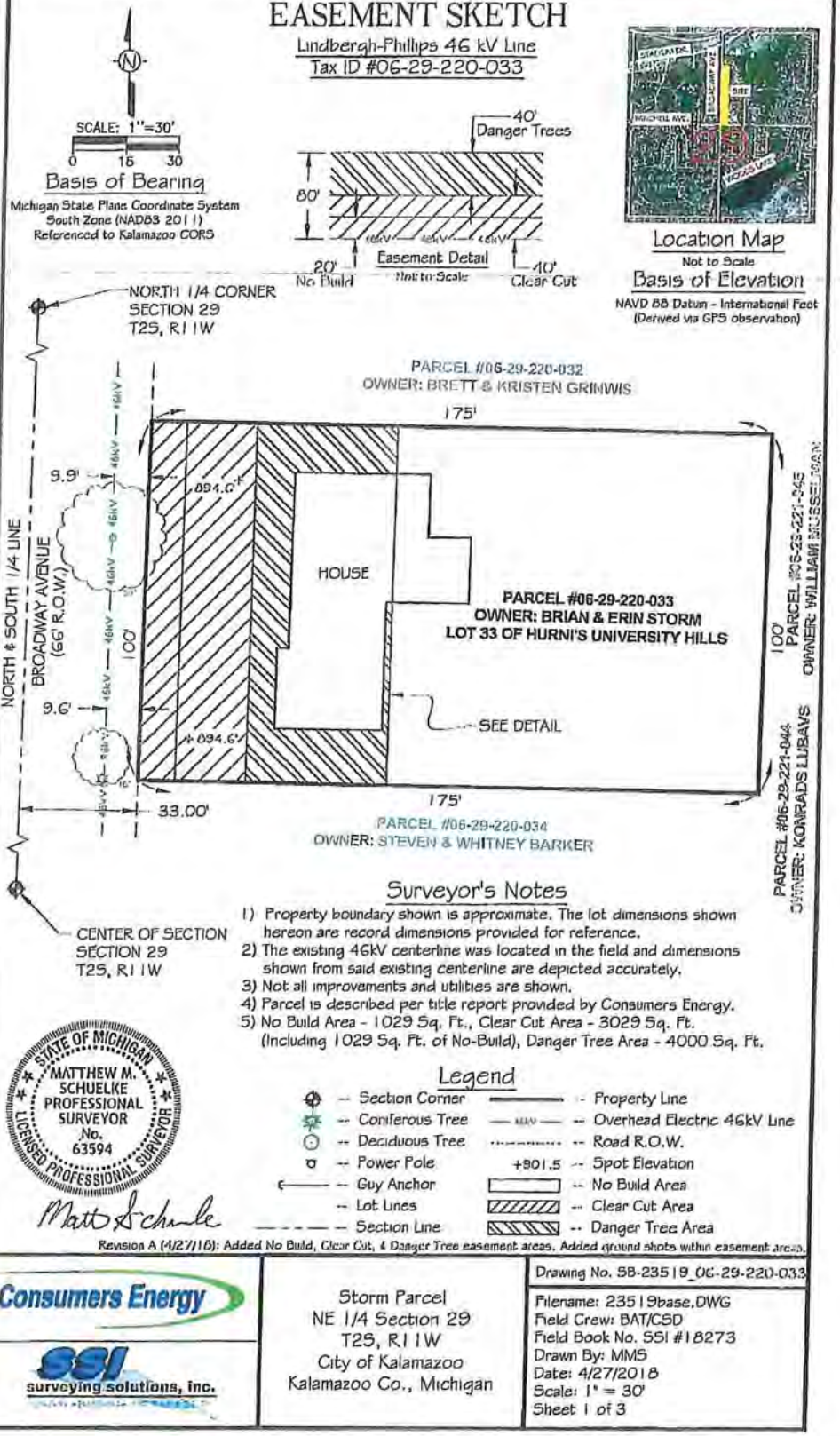
RECEIVED by MCOA 1/6/2020 2:37:43 PM

RECEIVED by MSC 12/20/2021 10:30:09 AM

RECEIVED by MCOA 1/6/2020 2:37:43 PM

EASEMENT SKETCH

Lindbergh-Phillips 46 kV Line
Tax ID #06-29-220-033



Surveyor's Notes

1) Property boundary shown is approximate. The lot dimensions shown hereon are record dimensions provided for reference.
2) The existing 46kV centerline was located in the field and dimensions shown from said existing centerline are depicted accurately.
3) Not all improvements and utilities are shown.
4) Parcel is described per title report provided by Consumers Energy.
5) No Build Area - 1029 Sq. Ft., Clear Cut Area - 3029 Sq. Ft. (Including 1029 Sq. Ft. of No-Build), Danger Tree Area - 4000 Sq. Ft.

STATE OF MICHIGAN
MATTHEW M. SCHUELKE
PROFESSIONAL SURVEYOR
No. 63594
LICENSED PROFESSIONAL SURVEYOR

Legend

- Section Corner
- Coniferous Tree
- Deciduous Tree
- Power Pole
- Guy Anchor
- Lot Lines
- Section Line
- Property Line
- Overhead Electric 46kV Line
- Road R.O.W.
- +901.5 -- Spot Elevation
- No Build Area
- Clear Cut Area
- Danger Tree Area

Revision A (4/27/18): Added No Build, Clear Cut, & Danger Tree easement areas. Added ground shots within easement area.

Consumers Energy

SSI surveying solutions, inc.

Storm Parcel
NE 1/4 Section 29
T2S, R11W
City of Kalamazoo
Kalamazoo Co., Michigan

Drawing No. SB-23519_06-29-220-033

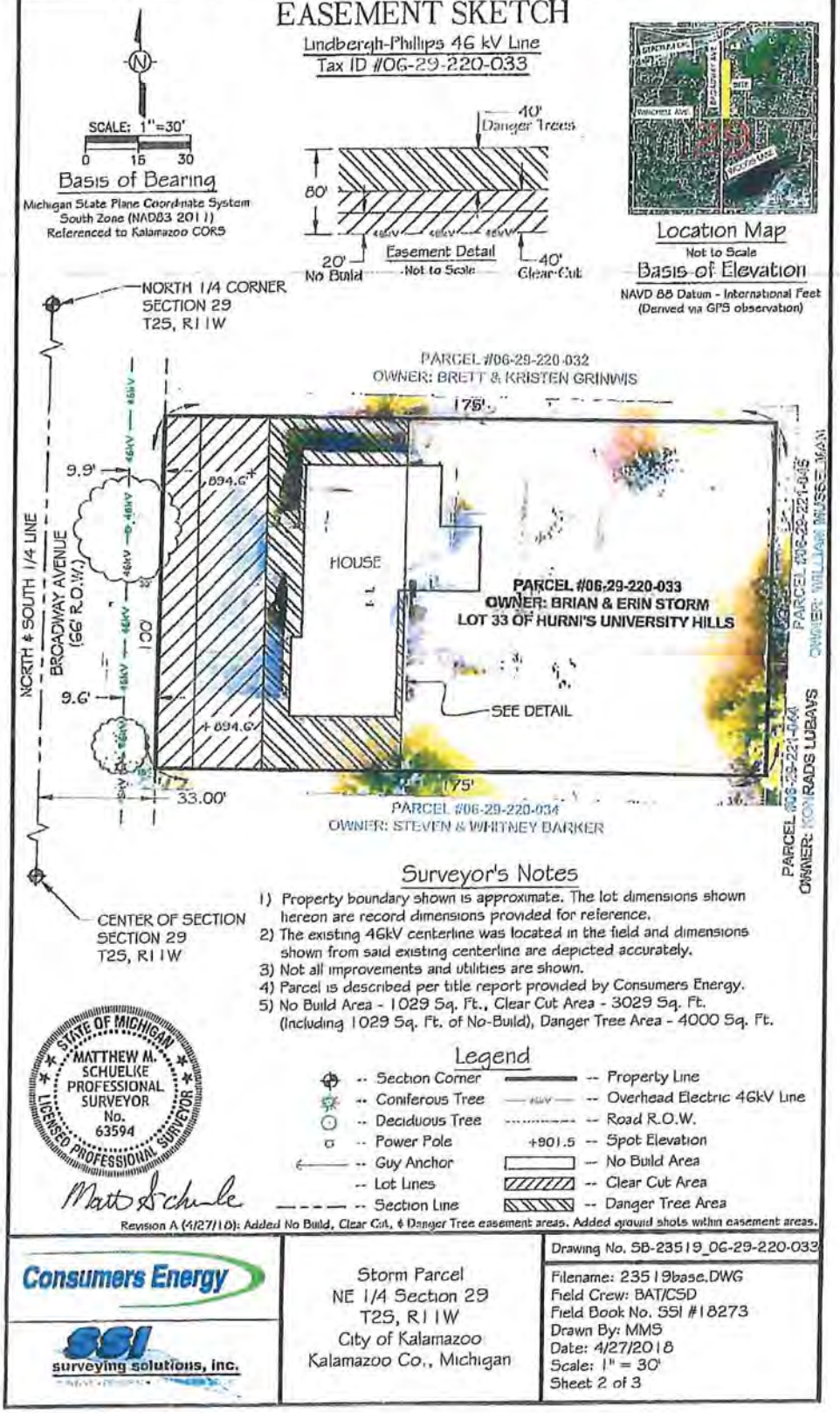
Filename: 23519base.DWG
Field Crew: BAT/CSD
Field Book No. SSI #18273
Drawn By: MMS
Date: 4/27/2018
Scale: 1" = 30'
Sheet 1 of 3

RECEIVED by MSC 12/20/2021 10:30:09 AM

RECEIVED by MCOA 1/6/2020 2:37:43 PM

EASEMENT SKETCH

Lindbergh-Phillips 46 kV Line
Tax ID #06-29-220-033



Surveyor's Notes

1) Property boundary shown is approximate. The lot dimensions shown hereon are record dimensions provided for reference.
2) The existing 46kV centerline was located in the field and dimensions shown from said existing centerline are depicted accurately.
3) Not all improvements and utilities are shown.
4) Parcel is described per title report provided by Consumers Energy.
5) No Build Area - 1029 Sq. Ft., Clear Cut Area - 3029 Sq. Ft. (Including 1029 Sq. Ft. of No-Build), Danger Tree Area - 4000 Sq. Ft.

STATE OF MICHIGAN
MATTHEW M. SCHUELKE
PROFESSIONAL SURVEYOR
No. 63594
LICENSED PROFESSIONAL SURVEYOR

Matt Schuelke

Legend

-- Section Corner	-- Property Line
-- Coniferous Tree	-- Overhead Electric 46kV Line
-- Deciduous Tree	-- Road R.O.W.
-- Power Pole	+901.5 -- Spot Elevation
-- Guy Anchor	-- No Build Area
-- Lot Lines	-- Clear Cut Area
-- Section Line	-- Danger Tree Area

Revision A (4/27/18): Added No Build, Clear Cut, & Danger Tree easement areas. Added ground shots within easement areas.

Consumers Energy

SSI surveying solutions, inc.

Storm Parcel
NE 1/4 Section 29
T2S, R11W
City of Kalamazoo
Kalamazoo Co., Michigan

Drawing No. SB-23519_06-29-220-033
Filename: 23519base.DWG
Field Crew: BAT/CSD
Field Book No. SSI #18273
Drawn By: MMS
Date: 4/27/2018
Scale: 1" = 30'
Sheet 2 of 3

RECEIVED by MSC 12/20/2021 10:30:09 AM

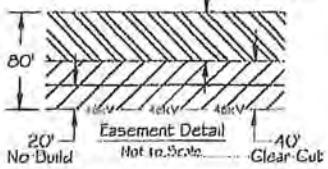
RECEIVED by MCOA 1/6/2020 2:37:43 PM

EASEMENT SKETCH

Lindbergh-Phillips 46 kV Line
Tax ID #06-29-220-033

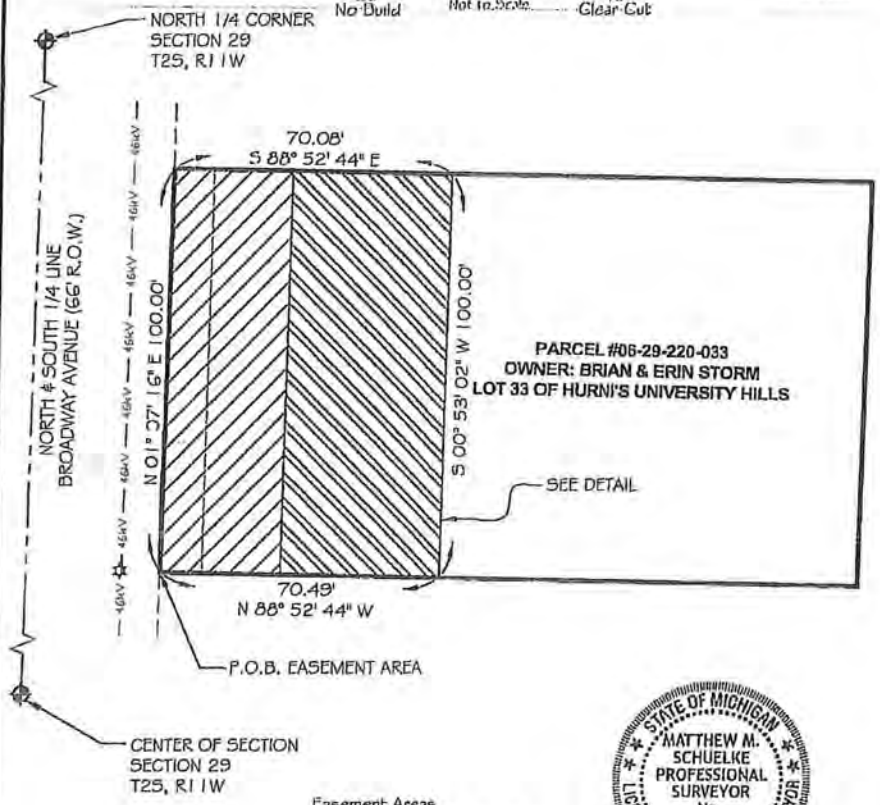


Basis of Bearing
Michigan State Plane Coordinate System
South Zone (NAD83 2011)
Referenced to Kalamazoo CORS





Location Map
Not to Scale



STATE OF MICHIGAN
MATTHEW M. SCHUELKE
PROFESSIONAL SURVEYOR
No. 63594
LICENSED PROFESSIONAL SURVEYOR

Matt Schuelke

Easement Areas
No Build Area - 1029 Sq. Ft.
Clear Cut Area - 3029 Sq. Ft.
(Including 1029 Sq. Ft. of No-Build)
Danger Tree Area - 4000 Sq. Ft.
Total Easement Area - 7029 Sq. Ft.

Legal Description: Easement Area

An area of land in Lot 33 of Hurni's University Hills Subdivision, as recorded in Liber 28 of Plats, Page 3, in Section 29, Township 2 South, Range 11 West, City of Kalamazoo, Kalamazoo County, Michigan described as follows: Beginning at the Southwest corner of said Lot 33; thence N.01°07'16"E., on the West line of said Lot, 100.00 feet to the Northwest corner of said Lot; thence S.88°52'44"E., on the North line of said Lot, 70.08 feet; thence S.00°53'02"W., parallel with the centerline of the existing 46kV overhead electric line, 100.00 feet to the South line of said Lot; thence N.88°52'44"W., on said South Lot line, 70.49 feet to the point of beginning.

Revision A (4/27/18): Added No Build, Clear Cut, & Danger Tree easement areas. Added ground shots within easement areas.

Consumers Energy

SSI surveying solutions, inc.

Storm Parcel
NE 1/4 Section 29
T2S, R11W
City of Kalamazoo
Kalamazoo Co., Michigan

Drawing No. SB-23519_06-29-220-033

Filename: 23519base.DWG
Field Crew: BAT/CSD
Field Book No. 551 #18273
Drawn By: MMS
Date: 4/27/2018
Scale: 1" = 30'
Sheet 3 of 3

RECEIVED by MSC 12/20/2021 10:30:09 AM

STATE OF MICHIGAN

IN THE 9TH CIRCUIT COURT FOR THE COUNTY OF KALAMAZOO

CONSUMERS ENERGY COMPANY

Plaintiff,

v Case No.: 2019-0160-CC

BRIAN STORM, ERIN STORM and LAKE MICHIGAN CREDIT UNION

Defendants.
_____/

EVIDENTIARY HEARING

BEFORE THE HONORABLE ALEXANDER C. LIPSEY, CIRCUIT COURT JUDGE

Kalamazoo, Michigan – Friday, June 28, 2019

APPEARANCES:

For the Plaintiff	RICHARD M. WILSON, JR. (P29717) MIKA MEYERS PLC 414 WATER STREET MANISTEE, MICHIGAN 49660 231-723-3888
For the Defendant:	CRAIG H. LUBBEN (P33154) MILLER JOHNSON 100 WEST MICHIGAN AVENUE STE 200 KALAMAZOO, MICHIGAN 49007 269-226-2958
RECORDED BY:	VIDEO RECORDED
TRANSCRIBED BY:	REBECCA D. ABBS-KUCKS (CER 7921) Certified Electronic Reporter PO BOX 24 VICKSBURG, MICHIGAN 49097 269-352-9227

RECEIVED by MCOA 1/6/2020 2:37:43 PM

RECEIVED by MSC 12/20/2021 10:30:09 AM

RECEIVED by MCOA 1/6/2020 2:37:43 PM

TABLE OF CONTENTS

WITNESSES:	PAGE
BRIAN STORM	
Direct Examination by Attorney Lubben	4
Cross-Examination by Attorney Wilson	19
Redirect Examination by Attorney Lubben	23
Examination by the Court	25
JACK VANDER MAAS	
Direct Examination by Attorney Wilson	28
Cross-Examination by Attorney Lubben	40
Redirect Examination by Attorney Wilson	56
Recross Examination by Attorney Lubben	60
Examination by the Court	64
PETER MULHEARN	
Direct Examination by Attorney Wilson	66
Cross-Examination by Attorney Lubben	83
Redirect Examination by Attorney Wilson	87

EXHIBITS:	DESCRIPTIONS	IDENTIFIED	ADMITTED
NONE			
DX#A	Document	6	6
DX#B	Document	10	10
DX#C	Document	14	15
PX#1	Plaintiff Declaration of Taking		27
PX#2	Document	32	33
PX#3	Document	68	69
PX#4	Document	68	69

Kalamazoo, Michigan

Friday, June 28, 2019 - 2:57:06 p.m.

THE CLERK: All rise.

The court is now in session. Please be seated.

Court calls the case of Consumers Energy Company versus Brian Storm; case number 2019-0160-CC.

Please, state your appearances for the record.

MR. WILSON: Richard Wilson on behalf of Consumers Energy, your Honor.

MR. LUBBEN: Good afternoon, your Honor. Craig Lubben here on behalf of Brian Storm. Mr. Storm is with me here today.

THE COURT: Okay.

Good afternoon.

This is the time and place set for defendants' for determination of necessity. This was filed--it's in response to a complaint filed by Consumers seeking to take the easement of defendants' property relating to their operation of a transmission line for energy, or at least a portion of the community.

The court has had a chance to review the briefs and supporting documents in this matter. I believe that requirements are with regard to a determination of necessity there are proofs that would be necessary to

RECEIVED by MSC 12/20/2021 10:30:09 AM

RECEIVED by MCOA 1/6/2020 2:37:43 PM

either establish that there's not a--not a need for this particular property or that there is.

So, in that regard since it's your motion, Mr. Lubben.

MR. LUBBEN: Very good, your Honor.

We would like to call Brian Storm to the stand.

THE COURT: That's fine.

You can come here to be sworn.

Do you solemnly swear the testimony you're about to give in this matter will be the truth, the whole truth and nothing but the truth, so help you God?

MR. STORM: Yes.

THE COURT: Okay.

Please be seated. State and spell your name for the record.

THE WITNESS: Brian Storm, B-R-I-A-N, S-T-O-R-M.

THE COURT: Mr. Lubben?

BRIAN STORM

called by the defendant at 2:59:33 p.m., and sworn in by the court; testified:

DIRECT EXAMINATION

BY MR. LUBBEN:

Q Where do you live, Mr. Storm?

A 2035 Broadway Avenue.

RECEIVED by MSC 12/20/2021 10:30:09 AM

RECEIVED by MCOA 1/6/2020 2:37:43 PM

Q And, how long have you lived there?
A About three and a half years.
Q Does anyone live there with you?
A My wife Erin and our three children.
Q And, do you own that property?
A Yes.
Q What do you do for a living?
A Healthcare operations.
Q Explain to the court a little bit more about what you do in healthcare operations.
A Work for a firm that runs hospital systems, so we manage the business side of hospitals so they can focus on the care.
Q You're aware that the issue here today relates to the easement that Consumers Energy has--has requested on your property, right
A Yes.
Q Did Consumers provide you with an easement sketch kind of showing you what--what they were seeking to take on your property?
A Yes.

MR. LUBBEN: Your Honor, defendants do you use letters or numbers?

THE COURT: Defendants are letters. Plaintiffs

RECEIVED by MSC 12/20/2021 10:30:09 AM
RECEIVED by MCOA 1/6/2020 2:37:43 PM

are numbers.

MR. LUBBEN: Got it.

Your Honor, I've got a document I've had marked as Defendant's Exhibit A. I've provided a copy to counsel. I have a copy for the court as well.

BY MR. LUBBEN:

Q Mr. Storm--Storm, I've showed you the document I've had marked as Defendant's Exhibit A. Can you identify that document?

A This is the easement on our property that Consumers Energy is seeking.

(At 3:01:18 p.m., DX#A marked for identification)

Q And, is this the document that they provided to you as part of these proceedings?

A Yes.

MR. LUBBEN: Your Honor, I move for the admission of Exhibit A.

MR. WILSON: No objection, your Honor.

THE COURT: Okay.

It will be received.

(At 3:01:27 p.m., DX#A admitted into evidence)

RECEIVED by MSC 12/20/2021 10:30:09 AM

RECEIVED by MCOA 1/6/2020 2:37:43 PM

BY MR. LUBBEN:

Q What I'd like to have you do is kind of lay out for the court where your property is and Broadway Street where-- where you reside, so the court can just be oriented to your property. You understand the question?

A Yes.

So, Broadway Avenue is in the Winchell. It runs perpendicular to neighborhood. We're on kind of the horseshoe loop behind the elementary school.

Q Okay.

A The lines in question run parallel to Broadway and are right at the front of the property.

Q Looking at Exhibit A is the electric line itself - does that run on your property?

A No.

Q And, how far is it from your property line?

A About 20-feet.

Q It runs along the front of the property, is that right?

A Yep.

Q Okay.

I'd like to direct your attention to the second page of Exhibit A. And, that seems to be an aerial photo that shows some vegetation. What I'd like to do is have you explain to the court, first, are there any trees on the

RECEIVED by MSC 12/20/2021 10:30:09 AM

RECEIVED by MCOA 1/6/2020 2:37:43 PM

front of your property?

A There are.

Q What's in front of the house between your house and Broadway?

A There are two trees in front of the house between the house and Broadway, but neither of them are on our property.

Q And, looking at the second page of Exhibit A whose property are those trees on?

A Those are in the public right-of-way.

Q And, then focusing then specifically on your property and the property line that we see are there any trees on the front of your property?

A No.

Q And, what about the side yard of your property?

A No.

Q When did you say you bought your property?

A November of 2015.

Q Was the power-line there when you bought the property?

A Yes.

Q Has Consumers made any changes to that line during the time that you've lived there?

A Not that I'm aware of.

Q To your knowledge is Consumers able to access and perform maintenance on that line?

RECEIVED by MSC 12/20/2021 10:30:09 AM

RECEIVED by MCOA 1/6/2020 2:37:43 PM

A Yes.
Q How would they do that?
A From Broadway - from the street or in the public right-of-way.
Q During the time you have lived there has Consumers ever asked to trim or remove any trees or vegetation from your property?
A No.
Q Has Consumers ever asked for permission to come on to your property to do any trimming or maintenance of the line?
A No.

MR. LUBBEN: Your Honor, I have a document I've had marked as Exhibit B. I have an extra copy for the court.

THE COURT: Okay.

MR. LUBBEN: I provided a copy to counsel.

THE COURT: Thank you.

BY MR. LUBBEN:

Q Mr. Storm, I'm showing you the document I've had marked as Exhibit B. Do you recognize this document?
A Yes.
Q What is it?
A It is the easement for the protection of the electrical facilities.

RECEIVED by MSC 12/20/2021 10:30:09 AM
RECEIVED by MCOA 1/6/2020 2:37:43 PM

(At 3:05:27 p.m., DX#B marked for identification)

Q This is the easement that Consumers is requesting of you?

A Yes.

MR. LUBBEN: Your Honor, I move for the admission of Defendant's Exhibit B.

MR. WILSON: No objection, your Honor.

THE COURT: Okay.

It will be received.

(At 3:05:36 p.m., DX#B admitted into evidence)

BY MR. LUBBEN:

Q Coming back--. Keep Exhibit B in front of you. But, coming back to Exhibit A. You see that there is a portion on the front of your property that Consumers is asking to have declared a clear-cut area?

A Yes.

Q And, can you kind of show the court where on Exhibit A that is?

A The clear-cut is the middle section. It's the middle section of the three boxes with the grids in them.

Q So, there's a no-build section for the first 20-feet, correct?

A Yes.

Q And, then a clear-cut for the 40-feet?

A Yes.

RECEIVED by MSC 12/20/2021 10:30:09 AM

RECEIVED by MCOA 1/6/2020 2:37:43 PM

Q And, then finally a danger tree area for the next 40-feet--

A Yes.

Q --is that correct?

A Correct.

Q Okay.

If this easement was put into place how would it impact your ability to landscape your property?

MR. WILSON: Your Honor, I'll just interpose an objection on the basis of relevancy. That goes to just compensation on necessity.

THE COURT: I will acknowledge that objection, but I'll let him answer it.

MR. WILSON: Thank you, your Honor.

THE COURT: Thank you.

THE WITNESS: So, the impact of my ability to or our ability to landscape on the property - so, the no-build area we would not be able to do any landscaping or build anything without Consumers' expressed permission. So, if I wanted to add a fence to the property, add trees on the side to separate my property and my neighbor's property, I would not be able to do that.

BY MR. LUBBEN:

Q Does that concern you?

A Yes.

RECEIVED by MSC 12/20/2021 10:30:09 AM

RECEIVED by MCOA 1/6/2020 2:37:43 PM

Q Why?
A Well, because I can't use the property in the way that I as the property owner want to use it.
Q Let's focus on that danger tree zone for a moment. Are there any trees in that area currently?
A No.
Q You referenced earlier the trees in the public right-of-way that are in front of your house. How tall are those trees?
A Quite tall. They're--currently they're enveloping the current lines. So, I don't know the exact height, but they're quite big.
Q During the time you've lived at the property has Consumers taken any action to trim those trees?
A No.
Q All right.

Has Consumers--have you had some conversations with Consumers and their representatives about this easement?
A Yes.
Q And, when have those conversations taken place?
A Periodically over the last 3-years. We were--there was discussion when we first moved in about the project at that time; Spring of '16--2016. Then we've--the project was put on hold, almost died down, and then within the last 6 to 8-

RECEIVED by MSC 12/20/2021 10:30:09 AM
RECEIVED by MCOA 1/6/2020 2:37:43 PM

months or so it's picked back up, and obviously, we have the easement here.

Q During your conversations with Consumers have they ever explained to you why they need a danger tree zone on your property, first 40-feet of your property, when you don't have any trees there?

A The only explanation we've been provided is that this is the standard easement.

Q This is what they normally seek?

A Yeah.

Q That's the--

A Yes.

Q --explanation they gave.

Did they indicate there was anything special or unique about their--your property that required them to obtain such an easement?

A No.

MR. LUBBEN: Your Honor, I've got a document I've had marked as Defendant's Exhibit C. I've provided a copy to counsel, and I have an extra copy for the court.

THE COURT: Thank you.

RECEIVED by MSC 12/20/2021 10:30:09 AM

RECEIVED by MCOA 1/6/2020 2:37:43 PM

BY MR. LUBBEN:

Q Mr. Storm, do you recognize the document that's been marked as Defendant's Exhibit C?

A Yes.

Q What is it?

A It is the Consumers guidelines on treating vegetation around their lines.

(At 3:10:53 p.m., DX#C marked for identification)

Q And, is this particular document available on Consumers Energy's website?

A Yes.

Q And, you've seen it there?

A Correct. Yes.

Q I'd like to direct your attention to the--. Excuse me.

MR. LUBBEN: Your Honor, I'd move for the admission of Exhibit C.

MR. WILSON: Your Honor, we would object to Exhibit C on a couple of basis. First of all, there's no foundation that anything contained in this brochure relates to high-voltage distribution lines. The line that is depicted here in this brochure, and that counsel reproduced in his brief is a low-voltage distribution line that has different standards relating to it. So, it's--there's lack of foundation first of all.

RECEIVED by MSC 12/20/2021 10:30:09 AM

RECEIVED by MCOA 1/6/2020 2:37:43 PM

And, then, second a lack of relevancy, because it doesn't impress the type of line that we're talking about in this case.

THE COURT: Mr. Lubben, do you have reaction to that?

MR. LUBBEN: I do, your Honor. There are--in the brochure itself there are specific references both to a transmission line, and also speaking to the trees that should be planted around. So, I think it's their document. I think it's admissible--it is admissible. If it is admitted then I'll get into the substance of it, and try and direct the court to the area that I think is particularly pertinent.

THE COURT: Okay.

The court will receive the document.

(At 3:12:17 p.m., DX#C admitted into evidence)

BY MR. LUBBEN:

Q Mr. Storm, I'd like to direct your attention to the third page of Exhibit C. You see that?

A Yes.

Q First, I'd like to direct your attention to the lower left-hand corner where there's a little chart that says "electric line type voltage clearing areas". You see that?

A Yes.

RECEIVED by MSC 12/20/2021 10:30:09 AM

RECEIVED by MCOA 1/6/2020 2:37:43 PM

Q Now, have you been informed that the particular line they're talking about in this case is a 46,000 volt transmission line?

A Yes.

Q Looking at that box do you see the second heading down being a reference to a transmission line?

A I do, yes.

Q And, do you see it referencing the voltage as 46,000 volts?

A Yes.

Q Now, with respect to the clearing area it says 40-feet on both sides of the pole line in undeveloped or unmaintained areas, and hazard trees beyond this area. Let me ask you - is your neighborhood in Winchell an undeveloped area?

A No.

Q Describe the development for the court.

A It's a mature residential neighborhood.

Q Is it an unmaintained area?

A No.

Q And, describe how it's maintained.

A The--many cases very meticulously. It's a prideful neighborhood. The homeowners maintain their properties very well.

Q Now, I would like to direct your attention to the--the same page, but this time the lower right-hand corner of that

RECEIVED by MSC 12/20/2021 10:30:09 AM

RECEIVED by MCOA 1/6/2020 2:37:43 PM

page, at least how I'm holding it, where there's a box that says "smart planting". Do you see that?

A Yes.

Q I'd like to focus your attention on the diagram that Consumers has included with that document.

First, with regard to the 30-feet around the line, and it's hard for me to tell, but I think it's 15-feet on either side of the line. What does Consumers says would be "smart planting" in that area?

MR. WILSON: Again, your Honor, the objection is that this is a low-voltage distribution standard described in that photograph; it's not a high-voltage distribution standard. I acknowledge that it says 46,000 volts in the lower right-hand corner, but there's nothing that identifies--

THE COURT: Yeah.

MR. WILSON: --the power-lines shown in the drawing or the--

THE COURT: Yeah.

MR. WILSON: --cartoon here that shows a minimum 10-foot tree pruning area - that that's a high voltage distribution line and we'll have testimony that it's not.

THE COURT: Okay.

MR. LUBBEN: Your Honor, it's their document.

RECEIVED by MSC 12/20/2021 10:30:09 AM
RECEIVED by MCOA 1/6/2020 2:37:43 PM

They didn't specify in this drawing that that only applies to 46,000 volts distribution lines, and it seems to me that they're bound by what they wrote.

THE COURT: Well, I--I'll accept the testimony for its particular weight understanding that this is not a technical document. It is designed to be consumed by the general public, and therefore, there may be some uncertainties with regard to exactly what they're--the specifics would be in this type of case. But, I will, at least, accept the testimony at this point for what it's worth.

MR. LUBBEN: And, I'm not sure if we got that testimony or not with--

THE COURT: Yeah.

MR. LUBBEN: --with respart--respect to the 30-feet around the line; 15-feet on either side.

BY MR. LUBBEN:

Q But, what does the brochure say can be planted there?

A Trees with a mature height of 20-feet or less.

Q If the easement that Consumers is seeking, which would label this a clear-cut area, were put in place would you be able to plant small trees with a height of 20-feet or less?

A No.

Q Looking at the next 30-feet, which appears to me to be

RECEIVED by MSC 12/20/2021 10:30:09 AM
RECEIVED by MCOA 1/6/2020 2:37:43 PM

about 45-feet from the line, 15 on one side plus 30. What does Consumers say would be "smart planting" in that area?

A It would be a mature height of 40-feet or less.

Q If Consumers' easement was put in place with the clear-cut zone would you be able to plant medium size trees with a height of 40-feet?

A No.

Q And, then finally this tall tree area, which isn't defined, but that appears to be the side yard of the house that's shown. Would you agree with that?

A Yes.

Q If the easement that Consumers is seeking was put in place on your property would you be able to grow tall trees in that area?

A No.

MR. LUBBEN: Thank you, your Honor.

Those are all my questions, Mr. Storm.

THE COURT: Mr. Wilson?

MR. WILSON: Thank you, your Honor.

CROSS-EXAMINATION

BY MR. WILSON:

Q Mr. Storm, is there any place that you found in this brochure, your Exhibit C, that addressed access and inspection rights for power-lines?

RECEIVED by MSC 12/20/2021 10:30:09 AM

RECEIVED by MCOA 1/6/2020 2:37:43 PM

A I don't believe so.
Q And, do you recognize in Exhibit B that one of the rights that Consumers is seeking in this case is not only the right to--to manage the vegetation along the line, but to also to access your property within 40-feet of the line for purposes of inspection, repairing and maintaining the line?
A Yes.
Q Now, you said that your property--your neighborhood is--is both developed and maintained, is that--did I hear you correctly?
A Yes.
Q All right.

Are there any tall trees in your neighborhood?
A There are.
Q Do you know if any of them are within 80-feet of the line?
A I'm sure they are.
Q Okay.

Has there been any dead trees that you've noticed in your neighborhood the last 3 ½ years?
A I'm sure there have been.
Q Okay.

You mentioned that during your discussions with representatives of Consumers Energy over the last 3-years, you periodically discussed the project. What project were

RECEIVED by MSC 12/20/2021 10:30:09 AM
RECEIVED by MCOA 1/6/2020 2:37:43 PM

you discussing?

A The upgrade of the line in question.

Q Okay.

So, it's the one that's described in Mr. Mulhearn affidavit about replacing the poles the conductors and so on along that line?

A Yes.

Q Okay.

A That's correct.

Q Do you have any background in engineering?

A I do not.

Q Have any background in construction?

A No.

Q Okay.

So, you don't know what type of access rights Consumers Energy may need in order to rebuild the Lindbergh Phillips line do you?

A I do not.

Q Okay.

And, if you look at Exhibit A, the easement sketch, I believe I heard your direct testimony as saying that the line is approximately 20-feet from your property line, is that what you believe?

A Yes, it may be closer to 15, but yes right around there.

RECEIVED by MSC 12/20/2021 10:30:09 AM

RECEIVED by MCOA 1/6/2020 2:37:43 PM

Q First page of Exhibit A indicates that the distances between the 46 kV line and your front property line is 9.9 feet. Do you see that on the north, and 9.6 feet at the south?

A I do.

Q Would you dispute those survey dimensions?

A No.

Q Okay.

It's your position in this case, Mr. Storm, that you should have the right to plant whatever trees you want in your front yard?

A That's correct.

Q Okay.

And, is it your position in this case that Consumers Energy needs to wait until you actually plant trees and they grow 30-feet tall before we can seek any rights against your property?

A No, it obviously hasn't stopped it up to this point.

Q I'm sorry.

A It hasn't stopped the seeking of the rights to the property up to this point, so no not at all.

Q Okay.

So, you don't think Consumers has to wait until you've actually grown trees on your property before they

RECEIVED by MSC 12/20/2021 10:30:09 AM
RECEIVED by MCOA 1/6/2020 2:37:43 PM

can obtain easement rights to control that vegetation?

A I--no, I don't think.

Q Okay.

MR. WILSON: Nothing further, your Honor.

THE COURT: (Inaudible).

REDIRECT EXAMINATION

BY MR. LUBBEN:

Q Sticking with Exhibit A, excuse me, for just a minute. First, with regard to the question of access to the line. Looking at Exhibit A does Consumers need to come onto your property to have access to the line?

MR. WILSON: Objection, your Honor; lack of foundation.

THE COURT: Overruled. You may answer the question.

THE WITNESS: No, I don't believe they do need access or access to the property--come on to my property to access the line.

BY MR. LUBBEN:

Q Because, it's 9.6 to 9.9 feet from your property line?

A Correct.

Q Has Consumers ever asked in the time that you have lived there to come onto your property so they could have access to your line?

RECEIVED by MSC 12/20/2021 10:30:09 AM
RECEIVED by MCOA 1/6/2020 2:37:43 PM

MR. WILSON: Again, irrelevant, your Honor.

THE COURT: As to the question of necessity, I think (inaudible) for the use of the property. You may answer.

THE WITNESS: No.

BY MR. LUBBEN:

Q You were asked the question about tall trees in your neighborhood. Are there any tall trees on your property?

A Yes.

Q And, where are the tall trees on your property?

A In the backyard behind the house.

Q So, looking at the second page of Exhibit B can you show the court where the tall tree is?

A Yes. There's one in the back left-corner if you're facing the front door. Then there's one, you know, right--further down in the backyard closer to the house in this section.

Q And, are either of those trees impacted by Consumers proposed easement?

A No.

Q So, at least with respect to those trees Consumers does not view the easement as a necessity?

A Correct.

MR. LUBBEN: That's all I have, your Honor.

THE COURT: Anything further, Mr. Wilson?

RECEIVED by MSC 12/20/2021 10:30:09 AM
RECEIVED by MCOA 1/6/2020 2:37:43 PM

MR. WILSON: Nothing further, your Honor.

THE COURT: The court has a couple of questions.

First of all, at this point you don't have any particular plans with regard to either constructing a facility or making any plantings on the property?

THE WITNESS: No.

THE COURT: Okay.

And--well, you testified that basically the front of your house is a lawn at this point, and is that pretty much true with regard to your neighbors?

THE WITNESS: That varies.

THE COURT: Okay.

THE WITNESS: There are different--yards with more trees and those with less.

THE COURT: Okay.

And, then you also indicated that the--there are at least a couple of trees, not on your property but in the right-of-way that are growing directly underneath the power-lines?

THE WITNESS: Correct.

THE COURT: And, have you seen--have you seen Consumers come and trim those?

THE WITNESS: No.

THE COURT: Okay.

RECEIVED by MSC 12/20/2021 10:30:09 AM
RECEIVED by MCOA 1/6/2020 2:37:43 PM

In light of the court's questions any further questions from the parties?

MR. LUBBEN: No, your Honor.

MR. WILSON: Nothing, your Honor. Thank you.

THE COURT: Okay.

You may step down. Thank you.

(At 3:25:42 p.m., witness excused)

MR. STORM: Thank you.

THE COURT: Anything further, Mr. Lubben?

MR. LUBBEN: That's it, your Honor.

THE COURT: Okay.

Mr. Wilson, anything in the way of testimony you'd like present?

MR. WILSON: Your Honor, just briefly a housekeeping matter. I'd like to introduce the company's declaration of taking. I provided a copy to counsel. It's attached to the complaint. It's attached to everybody's brief. But, it is my prima facie case and I would like to make it a matter of record without counsel's objection; unless he's got one.

MR. LUBBEN: Your Honor, I have no objection to the admissibility of the document. As you know, from the briefing--

THE COURT: Yep.

RECEIVED by MSC 12/20/2021 10:30:09 AM
RECEIVED by MCOA 1/6/2020 2:37:43 PM

MR. LUBBEN: --we strongly contest whether this is the prima facie case.

THE COURT: Yeah.

The court will receive the declaration.

(At 3:26:37 p.m., plaintiff's declaration of taking received)

MR. WILSON: Thank you, your Honor.

THE COURT: Thank you.

MR. WILSON: Your Honor, we would call Jack Vander Maas.

THE COURT: Do you solemnly swear the testimony you're about to give in this matter will be the truth, the whole truth and nothing but the truth, so help you God?

MR. VANDER MAAS: Yes.

THE COURT: Okay.

Please be seated. State and spell your name for the record.

THE WITNESS: Your Honor, my first name is Jack, J-A-C-K, Alan, A-L-A-N, Vander Maas, V-A-N-D-E-R-M-A-A-S as in Sam.

RECEIVED by MSC 12/20/2021 10:30:09 AM
RECEIVED by MCOA 1/6/2020 2:37:43 PM

JACK VANDER MAAS

called by the plaintiff at 3:27:43 p.m., and sworn in by the court; testified:

DIRECT EXAMINATION

BY MR. WILSON:

Q Mr. Vander Maas, would you please state your current business address?

A 1945 West Parnell in Jackson, Michigan.

Q And, what is your current occupation?

A I'm senior system forester for high-voltage distribution for the whole state--

Q For the State of Michigan.

A --for Consumers Power.

Q Okay.

And, briefly what is your educational background?

A I got a business degree from Hope College back in 1983, and a master's of science in silviculture, which is a branch of forestry from Michigan State University in 1985.

Q All right.

And, you've been employed Consumers Energy Company since 1986?

A That's correct.

Q All right.

And, what are some of your duties today as a

RECEIVED by MSC 12/20/2021 10:30:09 AM
RECEIVED by MCOA 1/6/2020 2:37:43 PM

senior HVD forester?

A I have six foresters that work for me. I have three that are in the operation and maintenance of H--HVD, if I can use that term, your Honor.

THE COURT: Yes, you may.

THE WITNESS: For High-voltage distribution. They are the ones that main--go out and maintain the vegetation on our 46 and 138 lines. They're located in the east, west and south of Michigan. They have their own regions. I also have a construction forester who works directly on projects like these. I have--

Q Like the Lindbergh/Phillips project?

A Yes.

Q Okay.

Go ahead.

A I have a gas transmission forester who does vegetation management work on our gas lines. I--I also have another forester that does HVD and LVD bid work--

Q Okay.

A --on projects.

Q I'm handing you what's been admitted as Defendant's Exhibit C. Have you seen that before?

A Yes, I have.

Q Are you familiar with the, I call it the cartoon, but it's

RECEIVED by MSC 12/20/2021 10:30:09 AM
RECEIVED by MCOA 1/6/2020 2:37:43 PM

a color drawing, depiction, sketch, something on the lower right-hand corner of the third page. The counsel for Mr. Storm--

A Yep.

Q --referred to.

A Yeah, this is--this is an informational brochure that is carried by our LVD foresters, low-voltage distribution foresters.

Q Okay.

A This does not apply to the 46 kV system that I'm working on. It's informational. It helps property owners to understand what we do out in the field and how we can eliminate issues by, in some of these cases, planting the right tree in the right place.

Q Okay.

You--you testified that you currently are employed HVD division of--

A Yes.

Q --Consumers. Are you familiar though with the low-voltage distribution standards?

A I am familiar with--I'm pretty familiar with them, yes.

Q Okay.

A I would not say I'm an expert, but I work with the LVD foresters.

RECEIVED by MSC 12/20/2021 10:30:09 AM
RECEIVED by MCOA 1/6/2020 2:37:43 PM

Q The--the drawing and the--the 10-foot minimum pruning circle that's around the wires and that - that's an LVD standard not a--

A That's--that is--. Yes.

Q Is it not? Yes. Okay.

A Absolutely.

Q Would you tell the court what the--the basic rationale is behind the 20/40/80 standard that the company seeks in this case? Why do we--why do we need a 40-foot clear-cut zone, for example, on both sides of an HVD line?

A Basically, because we have issues not only safety, but for access and we need that because if we have trees of any size in that 40-foot area that could either hit the wires, the pole, or a down-guy. It could cause an outage, which could be anywhere from a couple thousand customers to 10,000 customers in some cases. And--and, it's for the safety of--and protection of our line, and also safety for the public and our workers.

Q Mr. Vander Maas, I'm handing you what's been marked as Plaintiff's Exhibit 2. Can you describe what that is? Don't tell me what it depicts just tell me what it--what it is.

A It's a picture of a tree that had come off the outside of our right--our 40-foot clear-cut and had--was on--was on

RECEIVED by MSC 12/20/2021 10:30:09 AM
RECEIVED by MCOA 1/6/2020 2:37:43 PM

our 46 kV line and they're in the mist of getting that tree off of it and repairing.

(At 3:34:21 p.m., PX#2 marked for identification)

Q Okay.

So, were you at that scene--

A No, I wasn't.

Q --when that photograph was taken?

A No.

Q All right.

Have you been at scenes that are similar--

A Yes.

Q --to that photograph?

A Yes.

Q Okay.

Have you seen and are you familiar with the type of equipment that the company needs in order to repair a 46 kV line if it breaks?

A Mm-hmm.

Q Is that a yes? You have to say yes--

A Yes.

Q --or no. Okay.

A Yes.

Q Would those be similar to the equipment that are depicted here in proposed Exhibit B or Exhibit 2?

RECEIVED by MSC 12/20/2021 10:30:09 AM
RECEIVED by MCOA 1/6/2020 2:37:43 PM

A Yes, it is.

Q All right.

MR. WILSON: Your Honor, we would offer Exhibit 2.

MR. LUBBEN: No objection.

THE COURT: Two will be received.

(At 3:35:05 p.m., PX#2 admitted into evidence)

BY MR. WILSON:

Q Mr. Vander Maas, for the court--. I'm going to hand you a different one, so that the--I'm actually going to hand the court one.

THE COURT: Thank you.

MR. WILSON: --so they can see it.

BY MR. WILSON:

Q Tell me what's going on in this picture. What--what--what do we see? I see at least three trucks.

A Well, we--

Q Is that--. Go ahead.

A We have possibly two--two different limbs, large limbs, coming down and effecting the line. There may even be three here. I can see--I can see where they've done work up on the upper right just above the yellow bloom of the Davey truck, and then where the Davey bucket is working, and then also a large limb that's below that yet.

RECEIVED by MSC 12/20/2021 10:30:09 AM
RECEIVED by MCOA 1/6/2020 2:37:43 PM

Q The Davey truck is the green truck in the lower--
A Yes, lower--
Q --left--
A --right.
Q -hand--lower--
A Lower right.
Q Okay.
Is Davey a contractor of Consumers Energy?
A Yes.
Q All right.
And, the blue and white truck on the other side that's a--
A That's a Consumers Energy Company truck, and they are-- they've got that hooked up so that they're holding up the limb, and so the Davey contract tree trimmer can work on that.
Q Okay.
And, those trucks are positioned on both sides of the power-line, is that--
A Yes.
Q --correct?
A Yes.
Q All right.
Is that the normal configuration for attacking a

RECEIVED by MSC 12/20/2021 10:30:09 AM
RECEIVED by MCOA 1/6/2020 2:37:43 PM

problem where a tree has fallen on the line?

A It all depends on the location and where it's at. They could be working on both sides of the line or all set-up on one side or--

Q Okay.

A --or the other.

Q The Consumers Energy truck, the blue and white one in the picture, do you know how long that is?

A It's probably--it's 30--probably good 30-feet in length.

Q Okay.

And, that would take up most of a 40-foot access right?

A Yes.

Q In your opinion, Mr. Vander Maas, is a 40-foot access right is that adequate for the company to maintain, inspect and protect a 46 kV line?

MR. LUBBEN: Your Honor, I object. I don't think there's been a foundation established that he's able to speak to the engineering specifications of a line; he's a forester.

MR. WILSON: I'm not asking him for the vegetation clearance, your Honor. I'm asking him for what he needs for his crews to get in and fix a line if a power--if a power-line is broken because of a tree falling on it.

RECEIVED by MSC 12/20/2021 10:30:09 AM
RECEIVED by MCOA 1/6/2020 2:37:43 PM

THE COURT: I'll allow the question.

THE WITNESS: Yeah, I feel 40-feet is adequate.

BY MR. WILSON:

Q And, that's the company standard--

A Yes.

Q --access easement along 46 kV lines?

A Yes.

Q All right.

What is your response to people like Mr. Storm here who says, we don't have any trees on our property at the present time, therefore why are you bugging us for an easement? You don't need one. There's nothing going to fall on your line in the front yard of Mr. and Mrs. Storm's property. Explain to the court what's going on here.

A Your Honor, my--my experience and--and knowledge over the years of working at Consumers Energy has been that properties change and even though there's--there may not be, and I've seen it over the years many times, that, you know, have, even in this picture here there's--where there's a lawn. One year there's a lawn there and the next year you have trees planted underneath the line.

So, it's--it's a long the--. What's important about this easement is it's a long term document and it stays with the property until our structures are no longer

RECEIVED by MSC 12/20/2021 10:30:09 AM
RECEIVED by MCOA 1/6/2020 2:37:43 PM

there, and that--that's what helps us protect and be able to maintain and do the work that is needed to be done on our properties, your Honor.

Q Mr. Vander Maas, you're familiar with the--with the--the Lindbergh to Phillips upgrade project scheduled for 2010?

A Yes.

Q All right.

As part of the planning for a project like that does your department review what easement rights there are along the line that's being reconstructed?

A No, it usually--it usually starts with planning and engineering and then at some point there's a review and then our land and right-of-way real-estate folks also get involved if there's missing pieces.

Q Okay.

So, are there--to your knowledge are there gaps in the company rights along the Lindbergh/Phillips line?

A Yes, there is.

Q And, is Mr. and Mrs. Storm's property one of the gaps?

A Yes, it is.

Q And, why is--why are uniform rights along the power-line like this important?

A Because, in most cases on the higher voltages that we work on property lines are not distinct, and so it would be very

RECEIVED by MSC 12/20/2021 10:30:09 AM
RECEIVED by MCOA 1/6/2020 2:37:43 PM

tough to go from--and try and identify one property from the next to the next. So, that's why we--we like uniformity, so that we know when we're working on a line we're not going to be trespassing in a sense on someone's property.

Q Okay.

Is it more efficient when you have--

A Oh, yes.

Q Yeah.

A And, then it also gives us, you know, we may have to go through a property to get to the property where the work is at.

Q Right.

So, it also gives you access to other properties--

A Yes.

Q --where the actual work needs to be done? Okay.

Now, in your affidavit that you filed with this court, you also mentioned the need for a fire-break. That's not really crucial in this case is it - a fire-break?

A No.

Q Yeah. That's more for the heavily wooded areas?

A Yes.

RECEIVED by MSC 12/20/2021 10:30:09 AM
RECEIVED by MCOA 1/6/2020 2:37:43 PM

Q Okay.

I think you mentioned this briefly, but the rights that the company seeks in this case are permanent, correct?

A Yes.

Q Were you here Wednesday afternoon--

A Yes, I was.

Q --in this courtroom?

A Yes.

Q Did you hear testimony from a property owner about how they planted trees 40-years ago right next to the power-line?

A Yes.

MR. LUBBEN: Your Honor, I object; this isn't relevant to this particular parcel, and I wasn't here on Wednesday.

THE COURT: I--I appreciate that.

MR. LUBBEN: Thank you.

THE COURT: Court will take it into account. I also note that the court in reviewing that particular photograph would note that there are a number of trees that draping under a power-line that were probably much more of a danger in that case. (Inaudible)--.

MR. WILSON: I--I won't argue with the court on that point at all. But, the point of my question is

RECEIVED by MSC 12/20/2021 10:30:09 AM
RECEIVED by MCOA 1/6/2020 2:37:43 PM

property owners planting trees--

THE COURT: Correct.

MR. WILSON: --if we don't have an easement that prevents them from planting trees.

THE COURT: That--that--

MR. WILSON: And, that's the problem, right?

THE WITNESS: That's correct.

THE COURT: That (inaudible) question. Yeah. Okay.

MR. WILSON: Nothing further of this witness, your Honor.

THE COURT: Mr. Lubben?

MR. LUBBEN: I'm going to place these exhibits in front of the witness. That would have been earlier--

THE COURT: Thank you.

MR. LUBBEN: --defendant's A, B and C.

CROSS-EXAMINATION

BY MR. LUBBEN:

Q Mr. Vander Maas, when this particular distribution line was set-up that was in 1969, correct?

A This is--

Q The Lindbergh line was--

A The Lindbergh to Phillips line.

Q Right. That was established originally in 1969 would you

RECEIVED by MSC 12/20/2021 10:30:09 AM
RECEIVED by MCOA 1/6/2020 2:37:43 PM

agree?

A I don't know the date it was established.

Q You didn't go back to check?

A No, Sir.

Q Okay.

So, you don't know how long that line has been there and I understanding correctly?

MR. WILSON: He just testified that he doesn't.

THE COURT: Yeah.

MR. LUBBEN: Okay. All right.

BY MR. LUBBEN:

Q Do you know whether Consumers obtained a certificate of public necessity from the Public Service Commission when they first installed that line?

MR. WILSON: Objection, your Honor. That is entirely irrelevant in this case. We will acknowledge and agree, as we have in our brief and in our complaint, I believe. We have not acquired a certificate of public need from the PSC in this case. We don't need one in this case and we've cited the statute to the court.

MR. LUBBEN: I just want to know what he knows, your Honor.

THE COURT: Well, he--he--he--since he doesn't know the origins of this particular line in terms of date

RECEIVED by MSC 12/20/2021 10:30:09 AM
RECEIVED by MCOA 1/6/2020 2:37:43 PM

or time, I suspect he probably couldn't testify as to whether there was a certificate of need or necessity that attached at that particular time.

I guess we'll--we'll let you ask--answer if you do you know. Do you know any of the circumstances surrounding how Consumers developed this particular line?

THE WITNESS: No, Sir--

THE COURT: Okay.

Yep.

THE WITNESS: --your Honor.

THE COURT: That's fine.

BY MR. LUBBEN:

Q Are involved in helping Consumers apply for cert-- certificates of public necessity and convenience from the Public Service Commission at this time?

A No.

Q You ever get involved in that process?

A No.

Q Do you know whether at the present time Consumers seeks to have the Public Service Commission approve the granting of easements to control vegetation as is being sought in this case?

MR. WILSON: Your Honor, there's no foundation for that question.

RECEIVED by MSC 12/20/2021 10:30:09 AM
RECEIVED by MCOA 1/6/2020 2:37:43 PM

THE COURT: He's--he's simply asking does he know.

MR. WILSON: Okay.

THE COURT: So, that's fine.

THE WITNESS: No.

MR. LUBBEN: All right.

BY MR. LUBBEN:

Q Are you familiar with the National Electric Safety Code Standards?

A I am familiar with it, yes, Sir. But, that is not my expertise.

Q It's not an area of expertise for you?

A No.

Q But, you are familiar with the standard?

A I know of the standard, yes.

MR. LUBBEN: What am I up to "D"?

BY MR. LUBBEN:

Q I've got a document that I've had marked as Defendant's Exhibit D, as in dog. I have a copy for the court. Let me ask you, Mr. Vander Maas, do you recognize that document?

A Yes.

Q And, is that, at least, a portion of the National Electrical Safety Code?

A Yes.

RECEIVED by MSC 12/20/2021 10:30:09 AM
RECEIVED by MCOA 1/6/2020 2:37:43 PM

Q And, we've included the table of contents for that code. If you look to page 26 of the table of contents; they're roman numerals. You see that there is a Section 218 related to vegetation management?

MR. LUBBEN: May I approach the witness, your Honor?

THE COURT: You may.

MR. WILSON: What page, counsel, was it?

THE WITNESS: Yes.

MR. LUBBEN: So--

THE WITNESS: Well, it says 83.

BY MR. LUBBEN:

Q I'm directing your attention first--

A But, it's on here--

Q --to the table.

A --26 roman numeral.

Q Right.

A Yep.

Q And, there is a heading, part 2, Safety Rules for the Installation and Maintenance of Overhead Electric Supply and Communication Lines, correct?

A (Inaudible).

Q That's the--that's the previous page.

A Okay.

RECEIVED by MSC 12/20/2021 10:30:09 AM
RECEIVED by MCOA 1/6/2020 2:37:43 PM

Q You see that heading?
A Yep.
Q And, then when you come over to the next page there's a section entitled Vegetation Management on page 83--
A Yes.
Q --correct?
A Yep.
Q And, if we go to page 83, which is part of the document, it says in Section 218A1 on page 83--.
A Okay.
Q Are you with me?
A Yep.
Q It says, vegetation management should be performed around supply and communication lines as experience has shown to be necessary, correct?
A Yep.
Q It goes on to say, vegetation that may damage ungrounded supply conductors should be pruned or removed, correct?
A Yes.
Q Did you go back to see what experience has shown to be necessary with regard to vegetation management of the Lindbergh line on Broadway Street?
A Could you--could you rephrase that?
Q Sure.

RECEIVED by MSC 12/20/2021 10:30:09 AM
RECEIVED by MCOA 1/6/2020 2:37:43 PM

Did you go back to see how many times Consumers has had problems with the line, the Lindbergh line, because vegetation on Broadway Street came into contact with the line?

A No, Sir.

Q So, you have no idea whether that has every happened?

A No.

Q And, again, I think we established this - you just don't even know how long that line has been there, correct?

A Correct.

Q I'd like to direct your attention to what was marked--it was admitted as Exhibit A, which is the easement sketch; in particular, the second page of that sketch. You have that in front of you?

A Mm-hmm. Yes, Sir.

Q You see that there are no trees on the Storm property in the area that is marked as danger tree zone, correct?

A Correct.

Q And, in fact there are no trees located on the Storm property in the area that is marked as clear-cut zone, correct?

A That's correct.

Q And, there are no structures in the area that's marked as no-build zone, correct?

RECEIVED by MSC 12/20/2021 10:30:09 AM
RECEIVED by MCOA 1/6/2020 2:37:43 PM

A Correct.
Q Would you agree with me that there are no trees that you can see on the Storm property that threaten the Lindbergh line in any way?
A That's correct.
Q Now, see that there are two large trees depicted in the right-of-way in front of the Strom property. You see that?
A Yes.
Q Did you go back to check whether those trees have ever caused a problem with the Lindberg line?
A They have not.
Q Did you go back to see if those trees have ever been trimmed by Consumers?
A They have been trimmed by Consumers, yes.
Q And, when was the last time those trees were trimmed by Consumers?
A I don't know the date, Sir.
Q How do you know that they were trimmed by Consumers?
A Because, we have worked with the City of Kalamazoo on trimming and replacing trees in that area.
Q All right.

Do you know specifically whether you worked with the City of Kalamazoo on these two trees that are depicted in the right-of-way in front of the Storm property?

RECEIVED by MSC 12/20/2021 10:30:09 AM
RECEIVED by MCOA 1/6/2020 2:37:43 PM

A I don't know exactly when, Sir.
Q Do you know the type of trees they are?
A No, Sir.
Q Do you get involved with the Public Service Commission on behalf of Consumers?
A No, Sir.
Q I'd like to direct your attention to the brochure that was marked as Defendant's Exhibit C. Now, this is a brochure that is provided to the general public by Consumers Energy, correct?
A Yes. This is a brochure that is handed out by our low-voltage distribution folks--
Q And, it's--. Sorry. Were you done?
A --to homeowners when they have questions, and--and it's also on our forestry website.
Q For example, if homeowners have questions about what kind of vegetation can we plant without causing danger to the line this is a brochure that you provide to them?
A For low-voltage distribution.
Q Okay.

And, this particular brochure is on Consumers Energy's website, isn't it?
A Yes.
Q Now, you said--. I'd like to direct your attention to the

RECEIVED by MSC 12/20/2021 10:30:09 AM
RECEIVED by MCOA 1/6/2020 2:37:43 PM

third page where it says "smart planting" and there's a little drawing there. You see that?

A Mm-hmm. Yes.

Q Okay.

That says, no trees should be planted near power-lines or if prohibited by an easement. However, many trees are attractive additions to your yard, and under normal conditions will not grow tall enough to interfere with our distribution lines. That's what it says, correct?

A Correct.

Q And, so--

MR. WILSON: Again, your Honor--

MR. LUBBEN: --there are certain trees--.

MR. WILSON: --the witness has testified this is for low-voltage distribution not high-voltage distribution. They're entirely separate.

THE COURT: That's a reasonable argument. I think we'll get through this faster if we just mull-ahead.

BY MR. LUBBEN:

Q Mr. Vander Maas, can you show me where in the section entitled "smart planting" it says this does not apply to transmission lines it only applies to low-voltage distribution lines?

A It doesn't.

RECEIVED by MSC 12/20/2021 10:30:09 AM
RECEIVED by MCOA 1/6/2020 2:37:43 PM

Q That language is not used anywhere in the brochure that Consumers provides to citizens who are looking how to do smart planting around a line does it?

A No.

Q Using this particular definition of smart planting that Consumers puts out in its brochure, Mr. and Mrs. Storm would be able to plant medium size trees with a--with a mature height of 40-feet or less on the front 30-feet of their property wouldn't they?

MR. WILSON: Objection, your Honor.

THE COURT: It's--

MR. WILSON: Went over this.

THE COURT: That calls for something beyond his particular expertise.

MR. LUBBEN: Okay.

THE COURT: I mean, that's a conclusion.

BY MR. LUBBEN:

Q Do you have a brochure - that is to say, does Consumers have a brochure that it provides to consumers that explains what safe planting is around high-voltage distribution lines?

A This is--this is the brochure that I'm familiar with that they have for low-voltage distribution.

Q Is there a different brochure that's provided to consumers

RECEIVED by MSC 12/20/2021 10:30:09 AM

RECEIVED by MCOA 1/6/2020 2:37:43 PM

for other--

A Not that--

Q --distributions?

A --I'm aware of, Sir.

Q So, this is the only brochure that Consumers publishes to your knowledge?

A To my knowledge, yes. This is an informational brochure just to give homeowners some information on what's going on.

Q I'd like to come back to what was marked as Plaintiff's Exhibit 2, which was the picture--

A Mm-hmm.

Q --that you had of the trucks.

Now, it looks to me like those trucks are actually on a public right-of-way, is that correct?

A I don't--I don't know in this case, Sir.

Q You can't say one way or another?

A No.

Q If that was--. You see that an area that at least looks like either a street or perhaps it's a driveway, right?

A Yes.

Q And, that area is sufficient, obviously, in this photo to give access to attracting those--addressing those poles, correct?

RECEIVED by MSC 12/20/2021 10:30:09 AM
RECEIVED by MCOA 1/6/2020 2:37:43 PM

A Yes.

Q If we look at Exhibit A, in particular the first page, you see where the poles for the distribution line are on the public right-of-way on Broadway Street?

A Yes.

Q And, so the Consumers trucks would be able to pull in on either side of a pole similar to what they did in Exhibit 2, but remain on Broadway Street and not go onto the Storm's property. Would you agree with that?

A No, I would not.

Q And, would you at least agree that there is 10-feet or 9.6 and 9.9 feet from the line to the beginning of the Storm's property?

A Yes.

Q And, would--how wide is a truck--is one of these trucks?

A They're around 100-inches.

Q Okay.

So, my quick math--

THE COURT: Nine.

MR. LUBBEN: Nine feet?

MR. WILSON: Nine feet, yeah.

MR. LUBBEN: Yeah. All right.

RECEIVED by MSC 12/20/2021 10:30:09 AM

RECEIVED by MCOA 1/6/2020 2:37:43 PM

BY MR. LUBBEN:

Q So, in any event, if they were--they could park on either side of a pole and they wouldn't necessarily have to go onto the Storm property. Would you agree?

A They could park, but to do the work.

Q So, to do the work they would have to, I assume, elevate the boom as they are showing here, correct?

A Or position the vehicles so they have--

Q All right.

A --so, that's why.

Q As we look here, which is the second page of Exhibit A, you see that there are no tall trees on the Storm property, correct?

A Correct.

Q So, they wouldn't have to address any trees on the storm property. They wouldn't have to access the Storm property to address trees, because there are no tall trees on the Storm property. Can we agree on that?

A Yeah.

Q And, if I heard you correctly in your direct examination your concern is that someday the Storms' might plant trees on their property, correct?

A Correct.

Q And, your concern is someday those trees might grow up and

RECEIVED by MSC 12/20/2021 10:30:09 AM
RECEIVED by MCOA 1/6/2020 2:37:43 PM

present a problem to the line?

A Correct.

Q Now, one alternative to Consumers is to wait to see if that happens and then to pursue an easement, true?

A That would be--that would be very inefficient.

Q So, it could be done, but it would be inefficient that's your testimony?

A My testimony is that it would be inefficient and it would not be uniformed with the building of that line.

Q Well, that's a good point. You said it would not be uniformed with the building of that line, but you don't know when that line was originally built, correct?

A Well, we have gaps and rights.

Q Bingo. In other words, when the line was built Consumers concluded that it did not need these vegetation-- vegetation's easements in certain areas--

MR. WILSON: Objection, your Honor.

MR. LUBBEN: --true?

MR. WILSON: Argumentative and this witness has no foundation to know what Consumers Power intended back in 1969.

THE COURT: That is correct. All you can testify to is that they didn't.

MR. WILSON: Right.

RECEIVED by MSC 12/20/2021 10:30:09 AM
RECEIVED by MCOA 1/6/2020 2:37:43 PM

MR. LUBBEN: That's fair.

THE COURT: Which I think is on the record.

BY MR. LUBBEN:

Q You know that there are gaps, correct?

A Correct.

Q So, you know that Consumers did not obtain vegetation easements when the line was constructed, correct?

A Correct.

Q And, as we looked at a moment ago with the electrical code, you also know that the National Electric Safety Code that says that vegetation management should be performed as experience has shown to be necessary, correct?

A Correct.

Q You don't know what experience has shown to be necessary on--on Broadway Street with respect to the Lindbergh line, correct?

A Correct.

MR. LUBBEN: Those are all my questions, your Honor.

THE COURT: Anything further, Mr. Wilson?

MR. WILSON: Yes, your Honor, just a few.

RECEIVED by MSC 12/20/2021 10:30:09 AM
RECEIVED by MCOA 1/6/2020 2:37:43 PM

REDIRECT EXAMINATION

BY MR. WILSON:

Q Mr. Vander Maas, do you know what the plan is for these two trees in front of Mr. and Mrs. Storm's house as part of the upgrade to the Lindbergh/Phillips line?

A My understanding is we're working with--we'll be working with the City of Kalamazoo.

Q But, is it--are they going to be removed do you know?

A That is our hope just to get those removed.

Q All right.

But, because these are in the Kalamazoo--the City of Kalamazoo's right-of-way, that has to be negotiated with the city?

A Yes.

Q If it was up to you, Mr. Vander Maas, what would you do with those trees?

A I would cut those down.

Q All right.

Now, counsel has pointed you to the table of contents of the National Electric Safety Code and then one small little area about vegetation management, and quoted out of there that vegetation should be managed as experience has shown to be necessary. Do you remember that?

RECEIVED by MSC 12/20/2021 10:30:09 AM
RECEIVED by MCOA 1/6/2020 2:37:43 PM

A Yep. Yes.

Q In your reading or your understanding of the National Electric Safety Code is your experience as the code uses it intended to be a parcel by parcel by parcel experience, or is it your experience in regards to 46 kV high voltage distribution lines?

MR. LUBBEN: Your Honor, object. There's no foundation that this witness knows what this language in the National Electric Safety Code means when it says "as shown to be necessary by experience".

MR. WILSON: Counsel--

MR. LUBBEN: So, for him to--

MR. WILSON: --counsel--

MR. LUBBEN: --try to interpret it is--is lack of foundation.

THE COURT: I--I--I will allow the question.

BY MR. WILSON:

Q Do you understand the question, Jack?

A What we do is we--we don't--we cannot manage tree by tree. So, when we work a line, we work the whole line and all the trees on that line.

Q Okay.

So, experience is experience for the entire line not for this parcel or that parcel?

RECEIVED by MSC 12/20/2021 10:30:09 AM
RECEIVED by MCOA 1/6/2020 2:37:43 PM

A Right.
Q Okay.
That's your understanding anyway?
A Yes.
Q All right.
Let me ask you this. Counsel, asked you if it was possible to wait until there are trees growing on Mr. and Mrs. Storm's property before we acquired any easement rights to control that vegetation. Let me ask you this questions - can you predict where the next car is going to hit a power pole and shear it off?
A No, Sir.
Q Can you predict where the next lightning bolt is going to strike a transformer or whatever you call those things on the top of a pole and blow it up?
A No, Sir.
Q Is it possible--is it one of the options, as counsel would have put it, for a driver to hit one of these poles on Broadway?
A Yes.
Q Is it possible for lightning to strike one of those poles on the driveway--
A Yes.
Q --or on Broadway? In that case what do you need to replace

RECEIVED by MSC 12/20/2021 10:30:09 AM
RECEIVED by MCOA 1/6/2020 2:37:43 PM

that pole? Do you need trucks that look like--

A Yes.

Q --what you got here in Exhibit 2, I think it is?

A Yes.

Q All right.

And, counsel asked you if you could park these trucks parallel to the right-of-way and if the truck is only a 100-inches wide, you could stick it into a 10-foot space without trespassing couldn't you?

A Yes.

Q You'd have about a foot--6-inches on either side?

A Yes.

Q Is that truck or either of those trucks in that photo appear to be parked parallel to the right-of-way?

A No, Sir.

Q In fact, those bucket trucks have to be pretty perpendicular to the right-of-way or to the power-line, anyway, in order to effectively operate?

A Yes.

Q And, if you have a 30-foot truck parked perpendicularly to the Lindbergh/Phillips line will that extend into Mr. and Mrs. Storm's front yard?

A Yes.

Q By about 20-feet, correct?

RECEIVED by MSC 12/20/2021 10:30:09 AM
RECEIVED by MCOA 1/6/2020 2:37:43 PM

A Yes.

Q All right.

And, that would put you 10-feet into the clear-cut area?

A Yes.

MR. WILSON: Nothing further, your Honor.

THE COURT: Anything further, Mr. Lubben?

RECROSS EXAMINATION

BY MR. LUBBEN:

Q You indicated examples for--that it's possible, for example, that car could hit a pole and that would require maintenance, correct?

A Yes.

Q And, you can't predict when a car will hit a pole, correct?

A No.

Q You said that lightning could strike something and that could require maintenance, correct?

A Yes.

Q And, you can't predict when lightning will strike?

A Correct.

Q It's also possible that no tree on Broadway would ever fall on a line--on the Lindbergh line, correct? You can't predict what--

A You mean on Mr. Ross' property or on Broadway the whole

RECEIVED by MSC 12/20/2021 10:30:09 AM
RECEIVED by MCOA 1/6/2020 2:37:43 PM

street?

Q Well, let's break it down. You know that as it stands right now there's no possibility of a tree from the Storm property falling on the Lindbergh line, correct?

A Correct.

Q Because, there are no such trees, correct?

A Correct.

Q You--you are not able to predict whether a tree on Broadway is likely to hit the line, correct?

A Co--. Well, it depends if there's dead--if there's dead or diseased trees out there, or with the weather that we've had this year would saturation--saturated soils it would be a higher--I could not predict when, but it would be a very high risk of that happening.

Q One way to predict would be to go back and look to see how many times an incident like that has occurred on the Lindbergh line in that area of Broadway Street, agreed?

MR. WILSON: Objection. Past performances is not a prediction of future events, your Honor.

THE COURT: Court is fully aware of that.

MR. LUBBEN: Ture in the stock market, but maybe not in other areas.

THE COURT: I--I--I know the questions you have, and I know, quite frankly, what the answers will be. So, I

RECEIVED by MSC 12/20/2021 10:30:09 AM
RECEIVED by MCOA 1/6/2020 2:37:43 PM

guess, what I will say is move on, because I don't think we need to spend a whole lot of time dragging out an answer that we both know is probably not coming.

MR. LUBBEN: Fair enough, your Honor.

BY MR. LUBBEN:

Q I did have a question though on Exhibit 2, because when I was asking you question, you told me you didn't know if this was a public right-of-way, correct?

A Right here.

Q Yeah, you said the street--

A Yeah.

Q --that the pavement or whatever that is that the trucks were on, you didn't know if that was a public right-of-way or not, correct?

A I knew--I knew this was a public--probably a public right-of-way.

Q So, you knew that the section perpendicular to where the trucks are is a public right-of-way, correct?

A Yeah.

Q And, how do you know that?

A 'Cause it's a public road there.

Q How can you tell that's a public road? Is there a speed sign?

A I don't--I don't see one in that picture, no.

RECEIVED by MSC 12/20/2021 10:30:09 AM
RECEIVED by MCOA 1/6/2020 2:37:43 PM

Q Do you know this particular area where this photo was taken?

A No, Sir.

Q So, you--

MR. WILSON: Your Honor, the relevancy of whether that's a public road or not in that photograph is really irrelevant to these proceedings.

THE COURT: The court will accept the picture as an indication of the orientation that the trucks will need to have with regard to the service of the wires.

MR. WILSON: Thank you, your Honor. That's the point of--

MR. LUBBEN: Okay.

THE COURT: That's--that's probably the most we could have taken out of it anyway.

BY MR. LUBBEN:

Q Perhaps we can--we can agree on this. If this is a public right-of-way then the trees are parked, or excuse me, then the trucks are parked parallel on the public right-of-way, correct?

A Correct.

Q You just don't know if it is or isn't, correct?

A Correct.

MR. LUBBEN: That's all I have, your Honor.

RECEIVED by MSC 12/20/2021 10:30:09 AM
RECEIVED by MCOA 1/6/2020 2:37:43 PM

THE COURT: Anything further, Mr. Wilson?

MR. WILSON: Nothing further, your Honor.

THE COURT: Okay.

At the risk of stirring up a hornets nest. Mr. Vander Maas, the question nagging the court at this point is what do you now if a tree falls down on Broadway and you need to access the line?

THE WITNESS: We clean it up.

THE COURT: I understand, you get in and clean it up, but obviously, you don't have 40-foot right-of-way at this point to put a truck on. What do you do?

THE WITNESS: Our H--our HVD Department will either get the go-ahead--

THE COURT: Okay.

So, you would--you would ask the property owners or someone responsible to allow you on site?

THE WITNESS: Yeah.

THE COURT: Okay.

(Inaudible) from that standpoint.

THE WITNESS: Well, on a line like this, your Honor, when there's probably, you know, thousands of people out-of-power, I think they'll let us do the work.

THE COURT: Okay.

In light of the court's questions any questions

RECEIVED by MSC 12/20/2021 10:30:09 AM
RECEIVED by MCOA 1/6/2020 2:37:43 PM

from counsel?

MR. WILSON: None, your Honor.

MR. LUBBEN: No, your Honor.

THE COURT: Okay.

Thank you. You may step down.

(At 4:14:26 p.m., witness excused)

MR. VANDER MAAS: Thank you.

THE COURT: Any other witnesses?

MR. WILSON: Your Honor, we would call Pete Mulhearn.

THE COURT: Do you solemnly swear the testimony you're about to give in this matter will be the truth, the whole truth and nothing but the truth, so help you God?

MR. MULHEARN: I do.

THE COURT: Please be seated. State and spell your name for the record.

THE WITNESS: Excuse me.

Peter Anthony Mulhearn, P-E-T-E-R, A-N-T-H-O-N-Y, and then Mulhearn is M-U-L-H-E-A-R-N.

THE COURT: Okay. Okay.

Mr. Wilson?

MR. WILSON: Thank you, your Honor.

RECEIVED by MSC 12/20/2021 10:30:09 AM
RECEIVED by MCOA 1/6/2020 2:37:43 PM

PETER MULHEARN

called by the plaintiff at 4:15:29 p.m., and sworn in by the court; testified:

DIRECT EXAMINATION

BY MR. WILSON:

Q Mr. Mulhearn, what is your current business address?

A 1945 West Parnell Road, Jackson, Michigan.

Q And, what is your occupation?

A I am principal engineer lead for Consumers Energy's high-voltage science standard section.

Q All right.

And, it's late on a Friday afternoon. Do you recall signing an affidavit in this case?

A Yes.

Q And, as part of that affidavit you provided the court some professional background and CV information, is that--was that accurate?

A That--that information is accurate.

Q All right.

Then I'm not going to repeat it here today.

Are you licensed professional engineer?

A Yes.

Q And, tell me what some of the duties that you have as the principal engineer lead in the high-voltage distribution

RECEIVED by MSC 12/20/2021 10:30:09 AM
RECEIVED by MCOA 1/6/2020 2:37:43 PM

lines design and standard section?

A I'm responsible for oversight of all of the Consumers Energy's standards for the design instruction of the high-voltage distribution lines.

Q And, what is the company standard for a high-voltage distribution line?

A 46,000 volt up to 138,000 for high-voltage distribution.

Q Okay.

And, anything less than 46,000 is a low-voltage distribution?

A That is correct.

Q All right.

And, anything above 345 or thereabouts is--

A That gets up into upper transmission, which we don't-- Consumer Energy, yeah, we don't--

Q You don't deal with that do you?

A No. No, we don't deal with that.

Q Okay.

You've worked for the company for how long?

A Coming up on 17-years.

Q And, when you arrived at the company 17-years ago what was the standard easement rights that were obtained for 46 kV lines?

A When I arrived it was at 20/40/80 as the 20/40/80 has been

RECEIVED by MSC 12/20/2021 10:30:09 AM
RECEIVED by MCOA 1/6/2020 2:37:43 PM

described in the affidavits previously in the case.

Q In the easement that we're seeking here?

A Correct.

Q Okay.

And, did you provide a drawing to--on your affidavit as to those standards?

A Yes.

MR. WILSON: Let me just--

MR. LUBBEN: Are these--

MR. WILSON: --mark these. Pardon?

MR. LUBBEN: Are these separate or the same?

(At 4:18:13 p.m., sidebar conversation between Attorney Wilson and Attorney Lubben)

BY MR. WILSON:

Q Mr. Mulhearn, I'm handing you what has been marked as Plaintiff's Exhibit 3 and Plaintiff's Exhibit 4. Do you recognize those documents?

A Yes, I do.

Q What are those?

A These are pages from one of our standard manuals indicating a graphic representation of what we try to utilize for our rights--acquisitions for 46 kV lines.

(At 4:19:12 p.m., PX#3 and PX#4 marked for identification)

RECEIVED by MSC 12/20/2021 10:30:09 AM
RECEIVED by MCOA 1/6/2020 2:37:43 PM

Q And, what's--what the date of Exhibit 3?
A Exhibit 3 is 2017.
Q And, what is the date of Exhibit 4?
A Then Exhibit 4 is 2003.
Q Okay.

So, 16-years ago?

A Yes. Correct. Yes.
Q Are the standards shown on those two exhibits the same?
A Yes.

MR. WILSON: Your Honor, I would offer 3 and 4.

MR. LUBBEN: No objection.

THE COURT: They will be received.

(At 4:19:39 p.m., PX#3 and PX#4 admitted into evidence)

BY MR. WILSON:
Q Mr. Mulhearn, part of your duties are design standards or line, design and standards?
A That's correct, yeah.
Q Okay.

And, do you have familiarity with the National Electrical Safety Code?

A Yes.
Q And, in your department do you refer to the vegetation management portion of the National Electrical Safety Code?

RECEIVED by MSC 12/20/2021 10:30:09 AM
RECEIVED by MCOA 1/6/2020 2:37:43 PM

A We reviewed it, yes.
Q Okay.
Are there other sections though that are applicable to your work?
A Yes.
Q Okay.
What sections would those be? Do you recall?
A Well, we review most of the whole book, so it's kind of difficult to go with--
Q Okay.
A --which sections you're going to start being applicable for.
Q All right.
So, the entire book--that--the entire code is something that you reference constantly?
A Our--yes, our department--
Q Regularly, I should say.
A --utilizes constantly.
Q Yes.
A Regularly, yes.
Q And, it's not just the one section on page 83 or whatever it is that counsel had referenced--
A No.
Q --on vegetation?

RECEIVED by MSC 12/20/2021 10:30:09 AM
RECEIVED by MCOA 1/6/2020 2:37:43 PM

A No, it's not.

Q Okay.

When you are looking at the National Electrical Safety Code what are you focused on?

A Can you be a little bit more specific?

Q Briefly.

A (Inaudible).

Q You--well, Mr. Mulhearn, you describe in your affidavit how you developed or how the company developed the 20-foot no-build--

A Okay.

Q --zone. Okay.

A Mm-hmm.

Q Explain to the court what goes into coming up with that number?

A Yeah. What we're evaluating in order to do--we need to maintain clearances from our--from the line and infrastructure for the public safety and well-being, and maintenance and inspection requirements for the line.

In so doing there's a lot of parameters that we look at to evaluate the line to try to establish what those clearances need to be. In the National Electrical Safety Code there's dimensions that they would utilize specific to voltage and specific to certain criteria that have to be

RECEIVED by MSC 12/20/2021 10:30:09 AM
RECEIVED by MCOA 1/6/2020 2:37:43 PM

maintained at all times for the public safety parameter.

So, we take those all--you have to combine all of the conditions in utilizations for as it applies to that line as well.

Q What are some of those conditions?

A Oh, ice-loading. We have--. Michigan - we get ice in the line, so the--the wires will be loaded differently with ice. We have to take into certain wind condition considerations. We have to take other elements that are even put into place such as how much the--well, the strength of the wind, the sun, how much the reflective issues are in terms of how that heats the line. We try to take that all into--the type of conductor you're utilizing, which is a type of wire whether it's copper and aluminum or steel reinforced; all those modifications are put into the line.

Q And, do those--

A You evaluate the sage and the--how the wire is--

Q Okay.

That's what--that--

A --(inaudible).

Q --that's where this was sort of going - is all of those different conditions of ice and wind and heat and weather affect the sag of the line, is that correct?

RECEIVED by MSC 12/20/2021 10:30:09 AM
RECEIVED by MCOA 1/6/2020 2:37:43 PM

A Yes.
Q Okay.
A Yeah.
Q And, then if you factor in wind that sag--saggy line begins to oscillate back and forth?
A Well, it can--
Q It can, yeah, right.
A --under certain conditions going through, yeah.
Q Okay.
A The big issue we'll have with the wind is when--more of a straight-line wind that would be applied to it perpendicular to the direction of line. Your sag wire's going to be able to--it will blow straight out--
Q Okay.
A --as it comes through and will move from being straight in line between the poles outward in the direction of, you know, of the--the wind--that the wind is blowing.
Q Okay.
And, you've done these calculations?
A We have had them done, yeah.
Q Yes.
A Mm-hmm.
Q And, I think in your affidavit you said you calculated it when you apply all the relevant factors it comes out to 18-

RECEIVED by MSC 12/20/2021 10:30:09 AM
RECEIVED by MCOA 1/6/2020 2:37:43 PM

feet something?

A Our calculation has--they come out to--. The calculation directly and related to the National Electrical Safety Code dimensions equals out to 15-feet. We added our 3-feet buffer that we always try to apply on top of that--

Q Okay.

A --as a Consumers Energy Standard. That would carry that a little bit beyond that to just past 18-feet. So, we usually try to cover, again, for the safety parameters that are involved. There's other characteristics that we're trying to include within that buffer, so to help ensure--assure the safety is--is applicable and is never broached or really limited. So, we try to add that on to it to ensure that takes it up to those dimensions.

Q Okay.

46,000 volts is a lot of volts, right?

A Yes.

Q Okay.

Dangerous if it comes down?

A Yes.

Q If you were constructing a new 46 kV line today are the rights that we're seeking in this case the same rights that we would seek in those--in a new construction?

A Yes.

RECEIVED by MSC 12/20/2021 10:30:09 AM
RECEIVED by MCOA 1/6/2020 2:37:43 PM

Q Okay.

And, do you know when the company builds a new 46 kV line does it acquire the 20/40/80 rights along the entire length of that line?

A That's what we request right now. Correct.

Q Yes.

A Yes.

Q All right.

And, that would apply even if the line was crossing a farmer's field?

A Yes.

Q All right.

Or a vacant lot?

A Yep.

Q All right.

You want to acquire the rights along the entire line?

A Yep.

Q All right.

For the reasons that Mr. Vander Maas suggested?

A Well, the lot of the reasons he's got for suggestion and-- yeah, in fact that the--. Well, things change on the properties, so we want to have that going through in the line. It's for--it's expected to be there continuously

RECEIVED by MSC 12/20/2021 10:30:09 AM
RECEIVED by MCOA 1/6/2020 2:37:43 PM

forever aspect.

Q Okay.

These are permanent rights we're asking?

A Permanent factor, yeah--

Q Right.

A --of the rights as applied, because of that permanency. Yeah.

Q And, that line has already been there 50-years. Is there any reason it can't stay there another 50-years?

A No.

Q Do you have lines, do you know, that have been in place--

A Yes.

Q --that long? Hundred years?

A Yes.

Q All right.

Are you involved in the Lindbergh to Phillips rebuild project?

A Yes.

Q All right.

And, are you aware of the rights that the company has along that line generally?

A Yes.

Q Yeah. All right.

And, there are gaps in our rights--the company's

RECEIVED by MSC 12/20/2021 10:30:09 AM
RECEIVED by MCOA 1/6/2020 2:37:43 PM

rights?
A Yes.
Q All right.
And, Mr. and Mrs. Storm's property is one of those gaps, correct?
A Yes.
Q It is. All right.
And, I'll ask you the same question, but I presume you can't predict where a car's going to shear off a pole?
A No.
Q All right.
How tall are these poles by the way?
A The current poles?
Q The current poles.
A I'm not real sure. I don't recall what the dimensions were on the current poles--
Q All right.
A --right now.
Q Do you know what the new poles will be?
A The new poles will be 85 to 90-feet tall.
Q All right.
A Now, that's the full pole height from top to--
Q From the bottom of the pole, right?

RECEIVED by MSC 12/20/2021 10:30:09 AM
RECEIVED by MCOA 1/6/2020 2:37:43 PM

A --the bottom of pole.
Q Right.
A Yeah. Which is berried in other length differentials.
Q Right.
A Yeah.
Q How much of that ends up sticking out of the ground more or less? I'm not going to hold you to the exact dimensions.
A It's--our general rule of thumb is like 10-percent plus 2-feet. So, for like a 90-foot pole, you would have 9-feet plus 2 - 11-feet berried.
Q Mm-hmm.
A Then the remaining--so, subtracting that from 90 would be 79--feet.
Q Okay.

And, you have to maneuver these poles and get up right and into a hole in the ground?

A Correct.
Q All right.

In your experience is 40-feet of access rights on either side of a pole--a power-line adequate for HVD to install a 90-foot pole?

A It's actually pushing the boundaries of adequacy on our--doing it--there may be a need to even have further. Traditionally on a lot of the poles when they get up to

RECEIVED by MSC 12/20/2021 10:30:09 AM
RECEIVED by MCOA 1/6/2020 2:37:43 PM

that--that--that height that we're talking right now.

Q Okay.

A Cranes are required in addition when we get above--at the 85 and above height variations, which is right in line with where we're at with a lot of these poles. So, it's not just going to be truck. It's going to be an additional crane rented--higher crane rental that is required in order to maneuver--

Q Okay.

To get the poles in place.

A --to get the poles in place. Correct.

And, also the wires to attach to the poles on top of them.

Q Okay.

A So, it's not just the pole (inaudible).

Q And, if you only have 9.6-feet of rights on one side of the pole does that make it more difficult to install the pole?

A Yes.

Q All right.

One of the other rights that you seek in construction a new 46 kV line is the right to actually install the power poles and the lines on the property owner's property, is that true?

A Can you repeat the questions again? I'm sorry.

RECEIVED by MSC 12/20/2021 10:30:09 AM
RECEIVED by MCOA 1/6/2020 2:37:43 PM

Q Yes, it was a bad question.

When you construct a new 46 kV line across property do you also have to acquire rights to install the poles and the wires and the other equipment that go along with that? You don't have--those are now in the public right-of-way here, but if you were running across--. If--let me just start all over again.

If we--if we were--if we were running the Lindbergh/Phillips line say across Mr. Storm's property would there be other rights you would need to acquire in order to do that?

A Outside of the 20/40/80?

Q Yes. I mean, outside the 20/40/80 vegetation and access rights. Do you also needs the rights to put the poles on his property?

A Well, I thought that was part of the 20/40 rights, so that's why I'm confused with--

Q Oh, okay.

A --what you're saying. To me, I mean, that's an exclusive element, so I'm a little--I'm not sure what--

Q All right.

I--I should not ask an engineer questions relating to legal matters. You--you state in your affidavit, for example though, that if we were building a

RECEIVED by MSC 12/20/2021 10:30:09 AM
RECEIVED by MCOA 1/6/2020 2:37:43 PM

new line we would also acquire, not only the vegetation and access rights, but the rights to construct the poles and keep the--

A Yes.

Q --poles on the property.

A Yes.

Q But, we're not doing that in this case, because the poles are already in a public right-of-way. We don't need any rights to construct a pole on Mr. Storm's property.

A Correct.

Q Okay.

A Yes.

Q That's where I was going.

A Yeah.

Q Okay. Good.

A Yeah. Sorry.

Q Didn't mean to confuse you.

A I get confused.

Q Finally, Mr. Mulhearn, are you familiar with the public service requirements that relate to vegetation management along high-voltage distribution lines?

A We have some familiarity with it, yes.

Q Okay.

And, is it your understanding that--that the MPSC

RECEIVED by MSC 12/20/2021 10:30:09 AM
RECEIVED by MCOA 1/6/2020 2:37:43 PM

has required Consumers to develop a program to manage vegetation?

A I am aware that there's a program to manage that, yes.

Q Okay.

How about inspections. Does the Public Service Commission require you to inspect these lines regularly?

A There is inspection programs for the lines--

Q Okay.

A --to--for the liability purposes--

Q That's not in your department though?

A It's not in my department, no.

Q Okay.

Mr. Mulhearn, one last question. In--in your experience and based upon your educational background, your knowledge and experience in this area is a 20/40/80 configuration of vegetation and access rights, as we seek in this case, will that be adequate to protect the Lindbergh/Phillips line?

A Yes, it would.

Q All right.

And, that is what you would acquire if this was a new line?

A Yes.

Q Do you have any reason why the company didn't acquire

RECEIVED by MSC 12/20/2021 10:30:09 AM
RECEIVED by MCOA 1/6/2020 2:37:43 PM

rights like this whenever they built the line?

A No, I don't know why they didn't. I really wish I did. I don't.

Q Okay.

That's all you need to know.

MR. WILSON: Nothing further, your Honor.

THE COURT: Mr. Lubben?

CROSS-EXAMINATION

BY MR. LUBBEN:

Q Is it fair to say you do know that this line was established and built in 1969?

A I will say more--there's portions of it. Most of it, I believe, was in 1969. There's even portions of it that were built 1948 depending on which portion of the segment you're lying in. In this community area, I think--it might even be '65 to '69. There's some other parameters on how the interconnections work, but--

Q Okay.

A --yeah you want to go into the mid-late '60s, yeah I'm definitely with you there.

Q So, there's no question the line, at least as it runs in front of the Storm property on Broadway, has been there at least 50-years?

A I believe so, yes.

RECEIVED by MSC 12/20/2021 10:30:09 AM
RECEIVED by MCOA 1/6/2020 2:37:43 PM

Q And, you mentioned the National Electrical Safety Code. You heard the other testimony. You're aware that it says that vegetation management should be performed around supply and communication lines as experience has shown to be necessary?

A That's correct, yes.

Q And, that's kind of common sense too, right? I mean, you're looking to see what's happen, to see what kind of vegetation management you need to do. Fair statement?

A Yes.

Q Did you go back to look to see whether Consumers has had issues with trees falling on the line--in--on Broadway Street in the area where you're seeking this easement?

A No.

Q So, you don't know what experience has shown to be necessary at least with regard to that street?

A Well, that's not the only street that this line's in (inaudible).

Q I understand that.

A All right then.

Q But, you understand the Storm's property is on Broadway--

A Yes.

Q --street, correct?

A Right.

RECEIVED by MSC 12/20/2021 10:30:09 AM
RECEIVED by MCOA 1/6/2020 2:37:43 PM

Q And, the easement you're seeking in this case is with respect to their property on Broadway Street, you understand that?

A Yes. Yes.

Q Okay.

And, you don't know what experience has shown to be necessary over the last 50-years to maintain the line against tree falling on Broadway Street, correct?

A For the past, no.

Q No.

Are you involved in preparation of applications for certificate of public necessity and convenience from the Public Service Commission?

A No. They're not needed for 46,000 volt lines.

Q Okay.

So, you're saying that they are--a certificate of public necessity and convenience is never necessary for the construction of a 46,000 volt distribution line?

A That's correct.

Q Did you go back to see whether Consumers obtained a certificate of public need--necessity and convenience before it constructed this line in 1969?

A No.

Q Now, you mentioned you have some familiarity with the

RECEIVED by MSC 12/20/2021 10:30:09 AM
RECEIVED by MCOA 1/6/2020 2:37:43 PM

Public Service Commission's orders about piolet programs to develop hazardous tree removal programs, is that right?

A I have some familiarity.

Q Okay.

And, in particular you're aware--. Well, let me ask you - are you aware that the Public Service Commission has ordered that Consumers have increased communication with customers about the dangers of hazardous trees and the importance of tree removal?

A Yeah.

Q And, I'd like to direct your attention to Exhibit C, which should be in front of you there.

A No, it's not, Sir.

THE COURT: You can use mine.

MR. LUBBEN: Oh, sorry.

THE COURT: You can use mine.

MR. LUBBEN: Thanks, your Honor.

BY MR. LUBBEN:

Q You're familiar with this particular Exhibit C, the Share-the Space Line Clearing and Safe Reliable Electrical Service brochure?

A I've seen it.

Q Does the high-voltage distribution part of the copy that

RECEIVED by MSC 12/20/2021 10:30:09 AM
RECEIVED by MCOA 1/6/2020 2:37:43 PM

you're with have its own brochure?

A No.

Q So, this is the only brochure that Consumers provides to advice customers about the importance of line clearing and safe reliable electrical service, is that correct?

A Yeah.

MR. LUBBEN: Thank you, your Honor. Those are all my questions.

THE COURT: Anything further, Mr. Wilson?

MR. WILSON: Just one.

THE COURT: Sure.

REDIRECT EXAMINATION

BY MR. WILSON:

Q Mr. Mulhearn, you have some familiarity or some understanding of the MPSC requirements--

A Some.

Q --(inaudible)?

A Yeah.

Q Anything in your understanding of the MPSC requirements that relate to line clearings and safety and so on, indicate that the company can only obtain rights to control vegetation after a tree has fallen on their line?

A No.

Q Okay.

RECEIVED by MSC 12/20/2021 10:30:09 AM

RECEIVED by MCOA 1/6/2020 2:37:43 PM

Is there anything in your understanding of the Public Service Commission requirements that the company cannot proactively acquire rights to prevent trees from falling on the line?

MR. LUBBEN: Objection, your Honor. Best evidence would be the Public Service Commission requirements, and frankly there's no foundation established that he knows exactly what they are. In fact, I think he said he's not familiar with them.

MR. WILSON: Well, the regulations are cited in our brief, your Honor. I'm asking this witness' understanding if his understanding of what the PSE requires of the company prohibits us from proactively inquiring rights.

THE COURT: I--I'll allow the question, if you can recall it.

THE WITNESS: Yeah, that's what happens. Exactly--

THE COURT: Basically, do you know of anything that the Public Service Commission has in their rules that would prohibit you from being proactive and basically getting the clearance in those areas even if there has not been a history?

THE WITNESS: I'm not familiar with the--the MPSC

RECEIVED by MSC 12/20/2021 10:30:09 AM
RECEIVED by MCOA 1/6/2020 2:37:43 PM

prohibiting that action, no.

THE COURT: Okay.

Thank you.

MR. WILSON: That's the only question I had, your Honor.

THE COURT: The court does not have a question of you. Thank you very much.

(At 4:40:27 p.m., witness excused)

MR. MULHEARN: Do you want me to leave these here?

THE COURT: Yes, please. Just leave them there.

MR. MULHEARN: All right.

Thanks.

THE COURT: We'll sort through it.

Anything further, Mr. Wilson?

MR. WILSON: Nothing further, your Honor.

THE COURT: Okay.

I guess, technically rebuttal. Mr. Lubben, do you have anything you want (sic)?

MR. LUBBEN: We have no rebuttal witnesses, your Honor.

THE COURT: Thank you.

Okay.

Interesting arguments. We'll start with you, Mr.

RECEIVED by MSC 12/20/2021 10:30:09 AM
RECEIVED by MCOA 1/6/2020 2:37:43 PM

Lubben.

MR. LUBBEN: May it please the court?

First, the burden of proving necessity is on Consumers, because it is a private agency that did not obtain a certificate of public need and convenience from the Public Service Commission.

We think that is the only proper interpretation of MCL 213.56, because if you look at that statute you see that Subsection 1, requires the owner to file a motion asking that necessity be reviewed, which we did.

You see that Subsection 2, says that with respect to 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 or of law or abuse of discretion. Consumers is a private agency not a public one. Therefore, Subsection 2 does not apply to Consumers.

Finally, Subsection 3, says that with respect to an acquisition by a private agency, the court at the hearing shall determine the public necessity of the acquisition of the particular parcel. I want to emphasize that language "particular parcel". Because, each owner of each parcel that Consumers seeks to inquire is entitled to its own determination of public necessity. It is not a group analysis, as Consumers has tried to argue here. By

RECEIVED by MSC 12/20/2021 10:30:09 AM
RECEIVED by MCOA 1/6/2020 2:37:43 PM

virtual of the language of the statute it's an analysis of the particular parcel.

That section, by the way, goes on to say the granting of a certificate of public convenience and necessity by the Public Service Commission pursuant to the Electric Transmission Certification Act is binding on the court. So, if Consumers had bothered to get that certificate, we wouldn't have this hearing today; it would be binding on the court.

When Consumers obtained a certificate of--for public--in 1969 for the construction of this line it did not seek the vegetation maintenance easements that they're seeking at this time. How do we know? Because, they're not there. And, they've not sought a certificate from the Public Service Commission that they're necessary now. Therefore, there is no deference to their desire to get this. The burden is on Consumers, because this is taking.

Not a single case that Consumers cite in its brief held that the declaration of a private agency is, quote, "prima facie showing of necessity". It just--not authority is not there.

Now, recognizing that Consumers has that burden it cannot met it for the following reasons:

First, I think you know that the actual easement

RECEIVED by MSC 12/20/2021 10:30:09 AM
RECEIVED by MCOA 1/6/2020 2:37:43 PM

itself has three components. There's the 20-foot no-build zone without the express--express authorization of Consumers, so if the Storms would want to build on the front 20-feet on their property, if they want to build a fence or whatever it might be, they would need the express authorization of Consumers.

Front 40-feet would be clear-cut area, which means that Consumers would have the right to trim, cut-down or remove and control any trees, bush and roots and other vegetation within that 40-foot clear-cut area. So, they can come in any time they want and cut whatever was down--whatever was put in there.

Then the next 40-feet is a danger tree area where Consumers could come in and trim anything in excess of 35-feet. That's what they're asking.

Now, the first reason that they cannot--that they cannot prove necessity is that line has existed for 50-years without the need of that easement. Your Honor, I think that is the most compelling point.

In reviewing whether a taking is necessary the consideration is not the advantage to the public, but whether the project needs the property involved. That's *Troy versus Barnard*, 183 Mich App 565.

The mere fact that it may cost effective, more

RECEIVED by MSC 12/20/2021 10:30:09 AM
RECEIVED by MCOA 1/6/2020 2:37:43 PM

convenient, I think they said, more efficient to effect a taking is not enough to justify a taking. The intended project must be physically possible to perform without the condemned property. That's *Nelson Drainage District*, 174 Mich App at 407.

Consumers has not pointed to any outages that occurred in this particular area of line attributable to vegetation on the Storm's property. They've not pointed to any vegetation on the Storm's property that may become a problem in the future. They acknowledge that there are no trees in that area. The testimony you heard was, well we're concerned that maybe someday they might plant something that might grow up and affect our line.

Your Honor, that is not the standard for taking someone's property. A taking of property by--by a public authority or using the public's constitutional authority through the constitution, a power intimate domain, that's a really significant thing. You don't get to do it just because you think, well it might be convenient. I has to be a necessity.

The second reason that the consumer--that Consumers cannot prove necessity is that sketch of the Storm property shows that there are no trees or structures threatening this line. In fact, the large trees in front

RECEIVED by MSC 12/20/2021 10:30:09 AM
RECEIVED by MCOA 1/6/2020 2:37:43 PM

of the Storm property are on the public right-of-way not the Storm property. Consumers has done nothing. I think there was testimony, well he thought there was some trimming done to those trees, but unclear. And, as Mr. Storm testified they've lived there there's been nothing done to trim those trees. Which belies the argument that this particular easement is a necessity.

The third reason that Consumers cannot prove necessity is that its own brochure from its web--website shows that what they're asking is not a necessity. In fact, they say smart planting would allow small trees with a mature height of 20-feet or less within 15-feet of the line. Now, they're quick to say, well that's only for low-voltage distribution lines; it's not for high-voltage distribution lines. But, that's not in that section. Counsel--I mean, I think the witness acknowledged it doesn't say that anywhere. In fact, what it says is as long as the vegetation doesn't grow to 20-feet or higher it's not going to be a problem.

Similarly, it says medium size trees with a mature height of 40-feet or less may be planted within the next 30-feet of line, and then tall trees beyond that. So, Consumers proposed easement would prohibit the smart planting that it tells customers in its brochure that they

RECEIVED by MSC 12/20/2021 10:30:09 AM
RECEIVED by MCOA 1/6/2020 2:37:43 PM

can do.

Now, Consumers in its brief tried to make two arguments as to why it should be permitted. First, they cited the National Electrical Code standards, an actual electric safety code, and you saw that we put that in front of you. We put the specific section about vegetation management in front of you, because I think it's significant. First, it doesn't say anything about the 20/40/80 stuff that they're talking about. I think they intimated in their filings that it did. It certainly does not.

But, what it does say is that vegetation management should be performed as shown to be--as experience has shown to be necessary. You've got 50-years of experience with this particular line, and we--I think you can reasonably infer that this has not been a problem with this line, because if he had been they surely would have pointed out to you where these problems occurred. They have access to this information--this information. They know when they failures occur and they have not presented any evidence of that.

The second thing that Consumers argued was that, well its Public Service Commission order somehow supported the requested easement. First, I think they attached a

RECEIVED by MSC 12/20/2021 10:30:09 AM
RECEIVED by MCOA 1/6/2020 2:37:43 PM

copy of the wrong case - not the one they cited.

THE COURT: Yeah, that's--

MR. LUBBEN: But, I went and got the one they cited, and it said, that they should use a piolet program to develop a hazardous tree removal program for trees outside the right-of-way; perfectly fine. They did not suggest, however, that the--that the substances of this program should be that they obtain permanent easement rights prohibiting a property owner from growing trees on their property.

In fact, the commissions' order acknowledges that increased communications with customers--

THE COURT: Customers, yeah.

MR. LUBBEN: --about the dangers of hazardous trees and the importance of tree removal; thereby encouraging the customers to trim their trees would be important--would be an important part of Consumers efforts. I think that was sort of reinforced by the witnesses' testimony. Let's face it - that line serves the people who live on that street. They don't want a power outage any more than Consumers does, and frankly, they are more directly affected or at least immediately by it than Consumers is.

So, talking to homeowners about, you know,

RECEIVED by MSC 12/20/2021 10:30:09 AM
RECEIVED by MCOA 1/6/2020 2:37:43 PM

whether or not you need to maintain your trees like they do in this brochure is the proper way to handle it.

Now, in this particular case, as I said already, with respect to the Storms, they don't have any trees in the areas that Consumers is seeking to impose with an easement. So, there is absolutely no showing of any necessity with respect to their--to use the language of the statute "particular parcel".

So, for all those reasons, your Honor, we submit that Consumers has not met its burden of proof of establishing that proposed easement is a public necessity, and we respect that the court dismiss the complaint against Storms and order Consumers to pay Storms' their attorney fees that the statute provides.

THE COURT: Mr. Wilson?

MR. WILSON: Your Honor, MCL 213.56(1) says, that a property owner may challenge an agency decision to condemn property and taking their property for the purposes stated in the complaint. Counsel ignores that language in 213.56(1), because it's the crux of this case.

As we said in our brief, the purpose of this case, the project that is undertaken by Consumers here, the improvement that is sought to be made in the words of the Supreme Court in the *Vanderklook* case is not to control

RECEIVED by MSC 12/20/2021 10:30:09 AM
RECEIVED by MCOA 1/6/2020 2:37:43 PM

vegetation immediately on Mr. and Mrs. Storm's property. It is to acquire continuous easement rights along a high-voltage distribution line as the MPSC has told us we must do. The fact that we haven't experienced an outage on Mr. Storm's property is no argument against necessity in this case.

Mr. Vander Maas testified there are gaps in the company's rights along this line. Why the company did not acquire those rights back in 1969 or whenever counsel thinks the power-line was installed is irrelevant, number one. But, number two, we agree they were not acquired for whatever reasons.

But, this--the court of appeals in the *Zoner* case, and I'm not sure if the court is familiar with *Detroit Edison Company versus Zoner*, 12 Mich Appeal 612. It's a 1967 opinion of the Michigan Supreme Court. The issue in that case is whether an easement for power-lines that had been given to DTE should be interpreted to allow DT--DTE to upgrade those lines into a high-voltage transmission line.

The court said, yes it does. Even though the easement itself does not specifically mention high-voltage transmission lines, the court says that the law does not require the cessation of scientific advancement, and in

RECEIVED by MSC 12/20/2021 10:30:09 AM
RECEIVED by MCOA 1/6/2020 2:37:43 PM

this case will not permit the parties to claim they contracted to such cessation a decade ago.

Counsel's argument or Mr. Storm's argument here, that oh, you guys haven't needed to ever come onto our property in last 50-years is essential implied contract estoppel type of argument that, you know, you've been doing it for the last 50-years. This way--that's--there's no justification then for changing your mind.

I don't remember if it was Oliver Wendell Holmes or Benjamin Cardozo who once said, the fact that we did something one way in the time of Henry the VIII is no argument that we should continue to do it that way today. Yet that is the argument the defendants present here today against the necessity.

The project in this case is the protection of a 7.3 mile segment of high-voltage distribution line that has gaps in easements along the edges of it. We need to fill those gaps, and we need to fill those gaps as part of the project to rebuild that line in 2020. But, independently of that project - even if the project to upgrade the Lindbergh to Phillips line was not on the books for 2020, we would still have necessity to acquire these rights.

As Mr. Vander Maas testified, and it should be shelf evident to the court, you can never tell where a

RECEIVED by MSC 12/20/2021 10:30:09 AM
RECEIVED by MCOA 1/6/2020 2:37:43 PM

driver is going to crash into a pole, where a bolt of lightning is going to strike, and whether or not a tree falls on the line may be one element of that question. But, until somebody can tell us where the car is going to shear the pole off or where the lightning is going to strike, we need the rights everywhere because we can never tell where we're going to need them at any particular time.

The burden of proof in this case is not very tricky. We have never argued that we don't have the burden of proof in this case. Counsel, in their reply brief tries to suggest that we are trying to avoid our burden. That is not what's happening in this case.

What we do argue, and what we've argued in our brief with ample case law support, is that our Declaration of Taking, Exhibit Number 1, meets Consumers burden of proof, is a prima facie showing of necessity, and it is the defendant's burden of proof to overcome that prima facie showing. Does the risk of non-persuasion remain with Consumers Energy? Yes, it does. We've never argued otherwise.

But, the fact that we have the burden of proof here is supported by the deference that the court is required to give our determination of necessity. Counsel makes a point that, well you can't have any deference

RECEIVED by MSC 12/20/2021 10:30:09 AM
RECEIVED by MCOA 1/6/2020 2:37:43 PM

because there's different standards in 213.56(2) and 213.56(3). There are different standards, your Honor, but that has nothing to do with the deference that is entitled--that Consumers is entitled for its declaration of necessity.

And, I would point out to the court the discussion of that very point in the *City of Novi* decision that we've cited in our brief, where the Supreme Court just a few years ago described all of the reasons in the Uniform Condemnation Procedures Act that are applicable to both public and private agencies that indicate the legislative intent that the agency's decision be given deference. That applies both public and private agency.

The fallacy in defendant's argument on this point is that the defendant tries to equate the standards of review that are contained in 213.56(2) and (3), and equate those with a burden of proof and an evidentiary standard. 213.56(2) and 213.56(3) are the standards of review. That is quote, "standard of review", unquote. That is out of the *Nelson Drainage District* case and out of a hundred other cases. That's what those two standards are in those two sections of the UCPA.

Those standards, however, say nothing about what is a prima facie showing or not. It doesn't say anything

RECEIVED by MSC 12/20/2021 10:30:09 AM
RECEIVED by MCOA 1/6/2020 2:37:43 PM

about what the burden of proof is.

Your Honor's findings of facts in a case are binding on the Court of Appeals with some limited exceptions. But, stating that doesn't say anything about what the burden of proof was in the case that you tried, or what the evidence--what evidence was allowed in that case.

Yet, counsel wants to say, well because there's two different standards of review there must also be a different burden of proof, there must also be a different quantum of evidence that is required. But, he cites no authority to that point. And, the fact that there is no authority on that point should suggest to the court that the point of distinction that counsel tries to make simply does not exist, because the burden of proof, the quantity of evidence has nothing to do with the standard of review. Those are two separate things.

And, the case law--yes, the--. We will admit that the case law is entirely public agency case law. I can't find a case addressing a private agency's burden. But, given the language of the Supreme Court in the City of Novi, and given the fact that Subsections 2 and 3 of 213.56 are standards of review and not evidentiary requirements or an allocation of the burden of proof, counsel's argument falls flat.

RECEIVED by MSC 12/20/2021 10:30:09 AM
RECEIVED by MCOA 1/6/2020 2:37:43 PM

The reason there's no case law is because there is no distinction. And, if there was a distinction between the burden of proof, in the case of a private agency, and a public agency there would have been a case by now or counsel would have brought it forth. But, there isn't any case and that's because there simply isn't any distinction.

213.56(2) and 213.56(3) simply do not address the questions of burden of proof or the quantity of evidence that's necessary.

Now, counsel would also have us believe that there's no necessity in this case, because there's never been a tree fall on the line in front of Mr. Storm's property. I think I sort of already addressed that to some extent, but that's a red herring and I think the court can see that.

Yes, there are cases that counsel has cited, and I've cited those in briefs in the past where there is excess condemnation. But, in the cases of excess condemnation that counsel--counsel relies on, the excess condemnation is actual physical occupation of the property by the condemning agency to the exclusion of the property owners.

That is not the case here. As I said in my brief - if Mr. and Mrs. Storm have no trees on their property

RECEIVED by MSC 12/20/2021 10:30:09 AM
RECEIVED by MCOA 1/6/2020 2:37:43 PM

then this easement will fall very very lightly on their property and impose a very small burden; other than the fact that they can't build a structure within 10-feet of the street, which is probably barred by the local zoning ordinance anyway. I'm presuming Kalamazoo has a zoning ordinance. Most places don't let you build that close to a street in any event.

So, you know, the fact that the company wants to prevent you from building something with 20-feet of the line - when you heard the testimony of Mr. Mulhearn that says, our calculation shows that a 46 kV line swinging in the wind can extend 18-feet out from the side of the line. Makes a 20-foot no-build zone infinitely reasonable.

It will also come as quite a shock, I think, to the MPSC and most of the utilities in this state if they cannot act proactively. If the rule is, is that we can't condemn vegetation management rights on Mr. Storm's property until such time as Mr. Storm grows a tree and lets it fall into the line, then utilities will have a hard-- will be very hard pressed to main efficient and reliable energy sources to the members of the public. Utilities--.

Justice Leven in the *Poletown* case, your Honor, is quoted extensively in the *Hathcock* case, which overruled *Poletown*. And, he brings out some points what has to

RECEIVED by MSC 12/20/2021 10:30:09 AM
RECEIVED by MCOA 1/6/2020 2:37:43 PM

happen in order for a private agency to take property for basically for use by that private agency.

The first element in his analysis is that the rights that are being taken have to be--. I want to--I want to quote him. Power-lines are like instruments of comer's and the rights that go with those, the vegetation rights, the access rights are all part of that line. And, the very existence of that line depends, this is where I'm quoting, "on the use land that can be assembled only by the coordination central government alone is capable of achieving".

We're like the railroad that's trying to close the gaps in its right-of-way. We're like the highway department that needs some vegetation management rights on people's property so that cars can see around corners. Those trees may never fall on--in the road right-of-way, but so what we need a clear vision area so cars don't run into each other. There's a host of--of analogist--areas of the law where this kind of action on the part of a public agency or a public utility in this case, which is a private agency, the concept behind concerted government action to assemble a reasonable, in this case power-line right-of-way, is necessary and that's why we're here.

The purpose stated in the complaint is the

RECEIVED by MSC 12/20/2021 10:30:09 AM
RECEIVED by MCOA 1/6/2020 2:37:43 PM

protection of the Lindbergh/Phillips line along its entire 7.3 mile length. It is not to simply come in and control what Mr. and Mrs. Storm can plant in their front yard. As part of protecting the Lindberg to Phillips line, however, we need to be able to control what Mr. and Mrs. Storm do on their property.

Mr. Storm said it's going to have an impact on his property. It may very well have an impact, your Honor, if it interferes with Mr. and Mrs. Storm's landscaping plans in some way, but that is not a challenged necessity. That is a question of how much money does Consumers Energy have to pay Mr. and Mrs. Storm for that inconvenience. That's not the elements of the case that are here before us today; that's for later on in this case.

Last, I want to point out that Mr. Mulhearn is a professional engineer. He testified that he uses the entire National Electric Safety Code. The defendant while they have pointed out one little section dealing with vegetation point to nothing dealing with safety, avoiding power-lines, hitting trees, railroad cars or whatever else. And, they've provided no expert testimony whatsoever on the meaning of the National Electric Safety Code and what its relevance is in this case.

The NESC code, by the way, your Honor, is in fact

RECEIVED by MSC 12/20/2021 10:30:09 AM
RECEIVED by MCOA 1/6/2020 2:37:43 PM

adopted as an administrative regulation of this state by the NESC and is applicable to all utilities, including Consumers.

Your Honor, if you look at this case as it should be looked at, and that is the purposes stated in the complaint are to protect the Lindbergh to Phillips line by acquiring rights in places where we no longer have them or didn't ever acquire them in the first place. Clearly, necessity is established here and we would ask the court to deny the motion.

THE COURT: Okay.

Thank you.

MR. LUBBEN: First, I'm pleased that he admitted that they have the burden of proving the necessity here, so I think we've got that established.

He made the argument that somehow his declaration is a prima facie case acknowledging that there's no cases that support that. I simply note that if you look at the title to the statute MCL 213.56, the title says in part "Certificate by Public Service Commission or Federal Agency as Prima Facie case". There's nothing in there that says certificate by private agency as prima facie case, and as counsel acknowledged there is no case law to support that.

So, recognizing that they have the burden of

RECEIVED by MSC 12/20/2021 10:30:09 AM

RECEIVED by MCOA 1/6/2020 2:37:43 PM

proving the necessity of putting this easement on as the statute says this particular parcel, I think that they have not met their burden for the following reasons.

Again, I've said before, 50-years they did not need this easement. They didn't need it before. They don't need it now. The line is not on the Storm's property. It's on the public right-of-way.

Counsel talked about, oh government has the authority to assemble parcels. That's what happened here. This is on the public right-of-way.

There is--. And, this is significant. Counsel quibbled with the portion of the National Electric Safety Code that we cited. But, your Honor, this whole argument is about vegetation management. Where the trees are going to fall on the line and their ability to dial that back and control that.

So, it's logical that we would look at the portion of the National Electric Safety Code that deals with vegetation management. I think that it's so significant that they talk about "as experience as shown to be necessary" when you come back to the fact that this line has been here for 50-years and it has not been necessary. And, they were not able to present any evidence that there's been any problems with the line in this area over

RECEIVED by MSC 12/20/2021 10:30:09 AM
RECEIVED by MCOA 1/6/2020 2:37:43 PM

the last 50-years.

Coming back to the concept of there's no problem with this particular parcel. You saw there are no trees on the Storm's property in the front yard at all, so there's nothing threatening this.

You saw that they can maintain the line. In addition to maintaining by accessing directly from the public right-of-way. You heard the witnesses' testimony that what they do now is if they have a problem and there's not any, they go to the landowner and they ask for permission. Guess what - when there's a power-line down people says, yeah fix it, please. So, there's not showing of necessity here on that ground either.

So, what counsel talks about is the fear of the unpredictable disaster. Maybe a car will hit the pole. Maybe lightning will strike the pole. But, that is not sufficient to establish the necessity of taking a particular parcel. If it were, your Honor, there would be no limit to the power of condemnation, because there's no limit to--imagination - the ability to think of disasters. So, that clearly is not the standard.

Then they argue at the end - well, really what's the harm. The Storm's don't have any structure on the front of their property right now. They don't have any big

RECEIVED by MSC 12/20/2021 10:30:09 AM
RECEIVED by MCOA 1/6/2020 2:37:43 PM

trees. At this point they don't have any plans to plant trees, so what difference does it make. But, that's turning the burden of proof on its head. This is their property. They're entitled to use it anyway that they want, unless it is interfering with a public necessity or purpose, and here it is not.

The fear that there is some potential that it may be someday is not sufficient evidence to meet the burden.

Your Honor, we think that Consumers, while we understand their desire for these broad rights, are not being just here. They have not established this public necessity and we ask that the court find that they have not met their burden of proof.

Thank you.

THE COURT: Thank you. Okay.

Actually, I do need to do one thing before I go to--. Okay.

This matter was filed by Consumers Energy Company; filed April 9th, 2019. This--there are several defendant's in this matter. The one that's appropriate--one that's appropriate in this proceeding would be Brian Storm, Erin Storm and Lake Michigan Credit Union, which I, quite frankly, assume is their mortgage company.

In essence seeking to obtain an easement and--in

RECEIVED by MSC 12/20/2021 10:30:09 AM
RECEIVED by MCOA 1/6/2020 2:37:43 PM

light which of complaint says, they note the location of the Lindbergh/Phillips 46 kV line. They by their attachments and other documents as part of that operation - Consumers has determined that it is necessary to acquire permanent easement and rights of entry across property for vegetation management and the performance of construction and maintenance activities as stated in their recorded Declaration of Taking.

At points, the courts actually to--one of the questions that was not specifically addressed by the parties - I'm not sure it's necessary for today's decision. I had some question with regard to MCL 460.565. It says, quote, "electric utility, affiliated transmission company, or independent transmission company shall not begin construction of a major transmission line for which a plan has been submitted until the commission receives a certificate for that transmission line. Except as otherwise provided, a certificate of public convenience and necessity under this act is not required for constructing a new transmission line other than a major transmission line or for reconstructing, repairing, replacing, or improving and existing transmission line, including the addition of circuits to an existing transmission line."

Unfortunately, for once (inaudible) previously

RECEIVED by MSC 12/20/2021 10:30:09 AM
RECEIVED by MCOA 1/6/2020 2:37:43 PM

was seated in the legislature, I believe that is rather confusing in terms of a statement. That may well be to the answer at some point in these processes.

The issue before the court, at this point, is whether in fact there is a necessity established with regard to this particular taking or proposed taking.

Parties have presented, basically, setting forth the arguments and I won't rehash, because I think they were very well articulated by each party. The parties have set forth their respective positions with regard to the question of necessity, and I will say this - that the defendant really argue two questions under the necessity.

First, whether in fact the plaintiff has satisfied its burden in terms of the establishing a prima facie argument with regard to necessity. Again, going back to that language as to whether a simple declaration of--of taking is sufficient to (inaudible) all the court examination as to the underlining necessity. The parties disagree with regard to that. Plaintiff saying that it does. Defendants saying that it doesn't.

The second issue is, I outlined in an earlier hearing, is whether in fact there has been a substantial demonstration of the need with regard to this particular property. It wasn't necessarily argued in these terms, but

RECEIVED by MSC 12/20/2021 10:30:09 AM
RECEIVED by MCOA 1/6/2020 2:37:43 PM

I think that what, that certainly the defendants are arguing, is that there is clearly case law, which establishes that the court has to balance beyond the constitutional right of--of the owner to have quite enjoyment of his property without interference from the government. Balance that interest against the public interest of having, in this case, reasonably secure access to electrical power, which is really the, I guess, the ignition, for lack of a better term, of the plaintiff.

In this particular case, they have presented rather substantial testimony with regard to exactly what the circumstances are with regard to the Lindbergh/Phillips line and its history. There are some pieces that are not necessarily clear, and there has not been definitive testimony with regard to that. But, I think that the court can rely on the overall observation that this line has been in existence for at least 50-years. There's some testimony that it's been, parts of it, have been in place decades beyond that.

That the property or the line, at least as it relates to the properties on Broadway, has not had a history of creating any issues relating to vegetation, and repairs related to vegetation. And, that for whatever reason, at the time that the parties have established as

RECEIVED by MSC 12/20/2021 10:30:09 AM
RECEIVED by MCOA 1/6/2020 2:37:43 PM

kind of the bright-line initiation of this particular line, namely late 1960s. That for whatever reason Consumers Energy did not have a blanket pronouncement or prescription as to an easement on the--in support of the line as it went through this particular part of Kalamazoo.

There are, quite frankly, arguments that can be made in both directions as to why there has not been a problem over the years. Why there are, in words of the parties, gaps in the ability to obtain easements, and why at least with regard to the plaintiff's actions - why they should or should not be allowed to proceed based on their Declaration of Taking.

I'm going to set aside any determination with regard to the Declaration of Taking and simply say, that based upon the evidence and testimony present today, the court does not believe that plaintiff has established a basis on which a taking of this particular property for the easements that are being proposed has established a necessity.

As I pointed out on Wednesday, a necessity in need need to be parsed out, and certainly as that second place need there is not, from the court's standpoint, sufficient evidence to support the absolute need of the plaintiff to have these parcels--this particular parcel

RECEIVED by MSC 12/20/2021 10:30:09 AM
RECEIVED by MCOA 1/6/2020 2:37:43 PM

taken in the manner of the easement that is being prescribed.

Therefore, I guess, Mr. Lubben, you can prepare an order dismissing this--this action in conforming with the statute.

MR. LUBBEN: I'll do so, your Honor.

THE COURT: Thank you.

Court will stand in recess.

MR. WILSON: Thank you, your Honor.

(At 5:23:03 p.m., proceedings concluded)

RECEIVED by MSC 12/20/2021 10:30:09 AM

RECEIVED by MCOA 1/6/2020 2:37:43 PM

STATE OF MICHIGAN)
)
COUNTY OF KALAMAZOO)

I certify that this transcript consisting of 116 pages, is a complete, true, and correct transcript of the EVIDENTIARY HEARING to the best of my ability, of the proceedings held in this case on Friday, June 28,2 019, before the Honorable Alexander C. Lipsey.

July 3, 2019

Date

Rebecca Abbs-Kucks CER #7921
PO BOX 24
Vicksburg, MI 49097
269-352-9227

RECEIVED by MSC 12/20/2021 10:30:09 AM
RECEIVED by MCOA 1/6/2020 2:37:43 PM

RECEIVED by MSC 12/20/2021 10:30:09 AM

STATE OF MICHIGAN

IN THE MICHIGAN SUPREME COURT

CONSUMERS ENERGY COMPANY,

Plaintiff-Appellant/
Cross-Appellee,

v.

BRIAN STORM and ERIN STORM,

Defendants-Appellees/
Cross-Appellants

Supreme Court Docket No. 162416

Court of Appeals Docket No. 350617

Lower Court Case No.: 2019-0160-CC
Kalamazoo County Circuit Court

Aaron L. Vorce (P68797)
CONSUMERS ENERGY COMPANY
Attorney for Plaintiff-Appellant/Cross-Appellee
One Energy Plaza
Jackson, MI 49201
(517) 416-4741

Craig H. Lubben (P33154)
MILLER JOHNSON
Attorneys for Defendants-Appellees/Cross-Appellants
Radisson Plaza Hotel & Suites
100 West Michigan Avenue, Suite 200
Kalamazoo, Michigan 49007-3960
(269) 226-2958

Stephen J. van Stempvoort (P79828)
MILLER JOHNSON
Attorneys for Defendants-Appellees/Cross-Appellants
45 Ottawa Avenue, SW – Suite 1100
Grand Rapids, MI 49503
(616) 831-1765

Appendix of Cross-Appellants Brian and Erin Storm

Volume II of II

RECEIVED by MSC 12/20/2021 10:30:09 AM

Table of Contents
Volume II of II

Appendix Page

Defendant's Exhibit C: "Share the Space" Brochure
Admitted June 28, 2019 ..... 265b

Defendant's Exhibit D: Portion of 2017 National Electric Safety Code
Admitted June 28, 2019 ..... 269b

Transcript of Defendant's Motion Regarding Attorneys' Fees
Held August 21, 2019 ..... 288b

Order of Dismissal and Awarding Attorneys' Fees and Expenses
Filed August 26, 2019 ..... 309b

Court of Appeals' Order Granting In Part Defendant's Motion to Strike
Filed August 4, 2020 ..... 311b

Court of Appeals' Order Denying Motion for Leave to File Amicus Brief
Filed July 28, 2020 ..... 312b

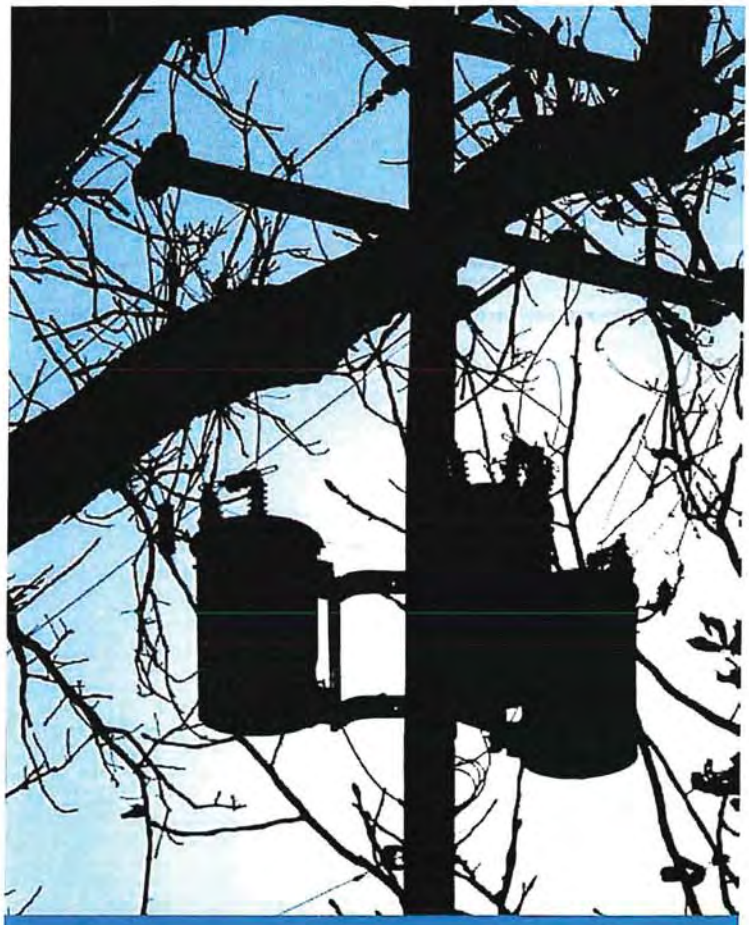
Court of Appeals' Published Opinion Dismissing In Part and Vacating In Part
Filed November 19, 2020 ..... 313b

Detroit/Wayne Cty Stadium Auth v Aubrey, unpublished opinion per curiam of the Court of Appeals, issued Sept. 28, 1999 (Docket No. 208679), 1999 WL 33435465 ..... 322b

Grosse Ile Twp v Grosse Ile Bridge Co, unpublished opinion per curiam of the Court of Appeals, issued Sept. 28, 2010 (Docket No. 291255), 2010 WL 3767578 ..... 324b

In re Hahn Drainage Dist, unpublished opinion per curiam of the Court of Appeals, issued Dec. 20, 1996 (Docket No. 173316), 1996 WL 33347677 ..... 334b

S & M Mach, Inc v Paravis Indus, Inc, unpublished opinion per curiam of the Court of Appeals, issued Feb. 15, 2007 (Docket No. 266316), 2007 WL 490951, at *4 ..... 342b



SHARE THE SPACE

LINE CLEARING AND SAFE, RELIABLE ELECTRIC SERVICE

Consumers Energy
Count on Us®

Ex. C.

RECEIVED by MSC 12/20/2021 10:30:09 AM
RECEIVED by MCOA 1/6/2020 2:37:43 PM

OUR PLEDGE TO YOU

WE STRIVE TO PROVIDE safe, reliable electric service to our customers while making a sincere effort to minimize the risk to the health of trees and shrubs in the communities we serve.

Trees and safe, reliable electric service

Trees are part of Michigan's natural splendor, providing summer shade and a golden glory in the fall.

It takes skilled management to ensure that the trees we delight in and the electric power we depend on can happily coexist.

Left unattended, trees that grow near electric lines can be dangerous and cause power outages. In fact, trees are involved in one-third of all outages.

In this brochure, you'll find tips and resources to help you plant the right tree in the right place.

You'll also learn how our certified and trained foresters work to ensure that Michigan's trees and Michigan's energy continue to share the same space safely and dependably for decades to come.

Keeping on schedule

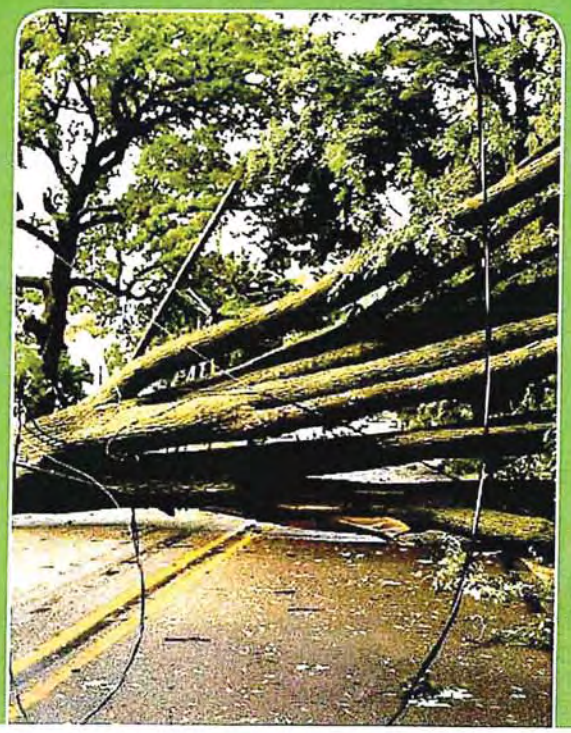
Our purpose is to promote electric reliability and safety for our Michigan communities and neighbors. That's why it's important we maintain an efficient electric line-clearing plan. This helps reduce the number and duration of power outages.

Trees are involved in about 33 percent of all power outages.

Professionalism and guidelines

Our foresters are members of and certified by the International Society of Arboriculture. Here are some of the guidelines we follow:

- Trees next to electric distribution lines are removed or trimmed a safe, clear distance from the lines. The distance can depend on the location and type of tree, electric voltage and other factors.
- The safety of our employees and the public, particularly children, may require removal of a tree. For example, a tree may be removed because it is under or too close to the line, dead, dying, damaged or at risk of falling.
- Our goals are achieving adequate clearance, helping the tree heal and directing future growth away from electric lines.
- In wooded areas, trimmings will be turned into brush piles to provide cover for wildlife.



RECEIVED by MSC 12/20/2021 10:30:09 AM
RECEIVED by MCOA 1/6/2020 2:37:43 PM

What to expect

If you have received notice, either mailed or left as a door hanger, and have trees on your property near electric lines, it is likely the trees will be trimmed or removed. If you have questions about the work intended for your property, please call the number on the letter or door card.

We clear areas to industry-accepted specifications depending on the voltage of the electric line. In many situations, we'll remove all trees within our approved area.



Trimming Examples

Here are some examples of work that may be taking place on power lines on and close to your property. A tree may be removed because it's under or too close to a line, dead, dying, damaged or at risk of falling.

Bottom line: clearing trees and limbs near electric lines keeps electric service safe and reliable.

Here are the minimum clearances necessary to minimize tree-related outages. Sometimes it is necessary to obtain greater clearances than the amount listed below:

Electric Line Type	Voltage	Clearing Area
Distribution	4,800-14,400	15 feet on both sides of pole line in undeveloped or unmaintained areas and hazard trees beyond this area
Transmission	46,000	40 feet on both sides of pole line in undeveloped or unmaintained areas and hazard trees beyond this area
Transmission	138,000	45 to 60 feet on both sides of pole/tower line depending on construction style
Transmission	345,000	75 feet on both sides of structure

Vegetation management

At Consumers Energy, we use various vegetation management methods. Line-clearing crews are the most common method, but we also use heavy equipment and herbicides to control vegetation near electric lines.

Line-clearing crews

One of our forestry planners will identify tree and brush work that needs to be done. Consumers Energy then contracts line-clearing projects to several contractors, who use qualified line-clearance arborists.

Workers are required to follow our work specifications. In lawn areas, they usually chip all brush. Larger wood from line clearing will be cut into manageable pieces and left onsite.

In areas that are not maintained, the brush will be piled in windrows, creating good habitat for wildlife and helping to suppress future tree growth. When trees are removed, stumps are left and cut as close to the ground as possible.

Heavy equipment use

The most commonly used heavy equipment are mowers. They are usually used in unmaintained areas.

Herbicide use

Our forestry professionals and contractors are trained and certified in the use of herbicides. Herbicides maintain cleared areas beneath our electric lines and are used to treat the stumps of removed trees to prevent resprouting.

Herbicides are used in areas with heavy brush to control the vegetation, but leaves it standing to create animal habitat and suppress future tree growth.

Our forestry planner or contract employee will attempt to notify property owners if herbicides will be used on their property, as required by state regulation.

Trees and safety

- Power lines are not insulated. If you touch a power line, you may be severely injured or killed. Always assume a power line is energized and dangerous.
- Three working days before planting or doing other digging projects, contact MISS DIG 811 so that underground utilities are marked and you can work safely. This service is free.
- If a tree branch breaks off and lands on an electric line, call us immediately at 800-477-5050. Do not touch the branch or wire.
- Do not cut down trees or branches near power lines, unless qualified or using a qualified contractor.
- Stay clear of power lines when removing any object caught in a tree, such as a kite or balloon.
- Stay at least 10 feet away from power lines when using a ladder.
- Do not allow children to climb trees that are anywhere near overhead power lines.
- Before you plant a tree, check to see if it will grow too close to overhead lines as it matures.

Safe and reliable service

As one of the state's largest utilities, we take care of more than 62,000 miles of electric and natural gas lines.

Since the late 1800s, it has been our practice to secure an easement to install, maintain and expand overhead and underground electric lines and underground gas pipelines on property not owned by Consumers Energy. Many of our lines are also installed in road rights of way pursuant to state law.

We sometimes encounter trees growing outside of our easement area that are dead, dying or diseased and pose a significant risk to the safe and reliable operation of our system. We ask for your cooperation with our crews to address these hazardous trees.

While easements vary, they run with the title of the land and allow our facilities to remain in place regardless of future ownership of the land.

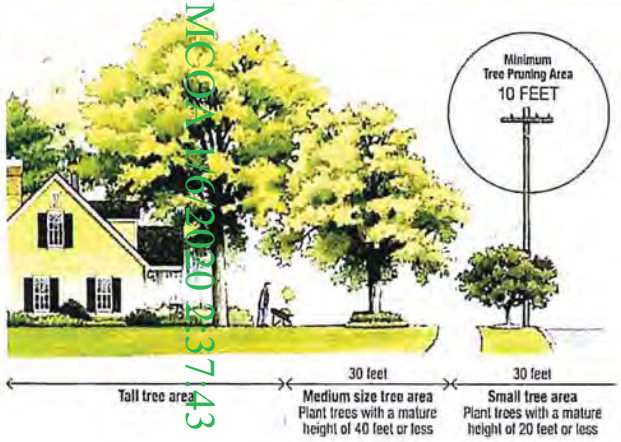
continued on back panel

Smart planting

No trees should be planted near power lines or if prohibited by an easement. However, many trees are attractive additions to your yard and, under normal conditions, will not grow tall enough to interfere with our distribution lines.

Avoid planting tall-growing trees such as the following near or under power lines:

- Norway Maple
- Silver Maple
- Oak
- Willows
- Colorado Blue Spruce
- White Spruce
- Most pines



RECEIVED by MCOA 6/20/2021 10:30:09 AM

APPX - 691

Safe Digging Starts Here

Michigan Public Act 174 requires anyone — a business owner or homeowner — to contact MISS DIG 811 three full working days before you dig to have public utility lines marked. There is no charge for this service.

Operators at MISS DIG take calls from contractors, homeowners and others and pass the information to member utilities.

When MISS DIG notifies Consumers Energy, we send a worker to locate and mark — with small flags — the approximate locations of all Consumers Energy underground electric and gas lines.

Contacting 811 helps protect you and your neighbors from injury or loss of energy service. Failure to comply with the MISS DIG law can result in liability for resulting injuries and damages.

811

FOR DETAILS:
missdig811.org

Know what's below. Call before you dig.

When required, we obtain permits from federal, state, county and municipal agencies before any work is done. We also try to inform customers of our plans to trim or remove nearby trees.

Remember

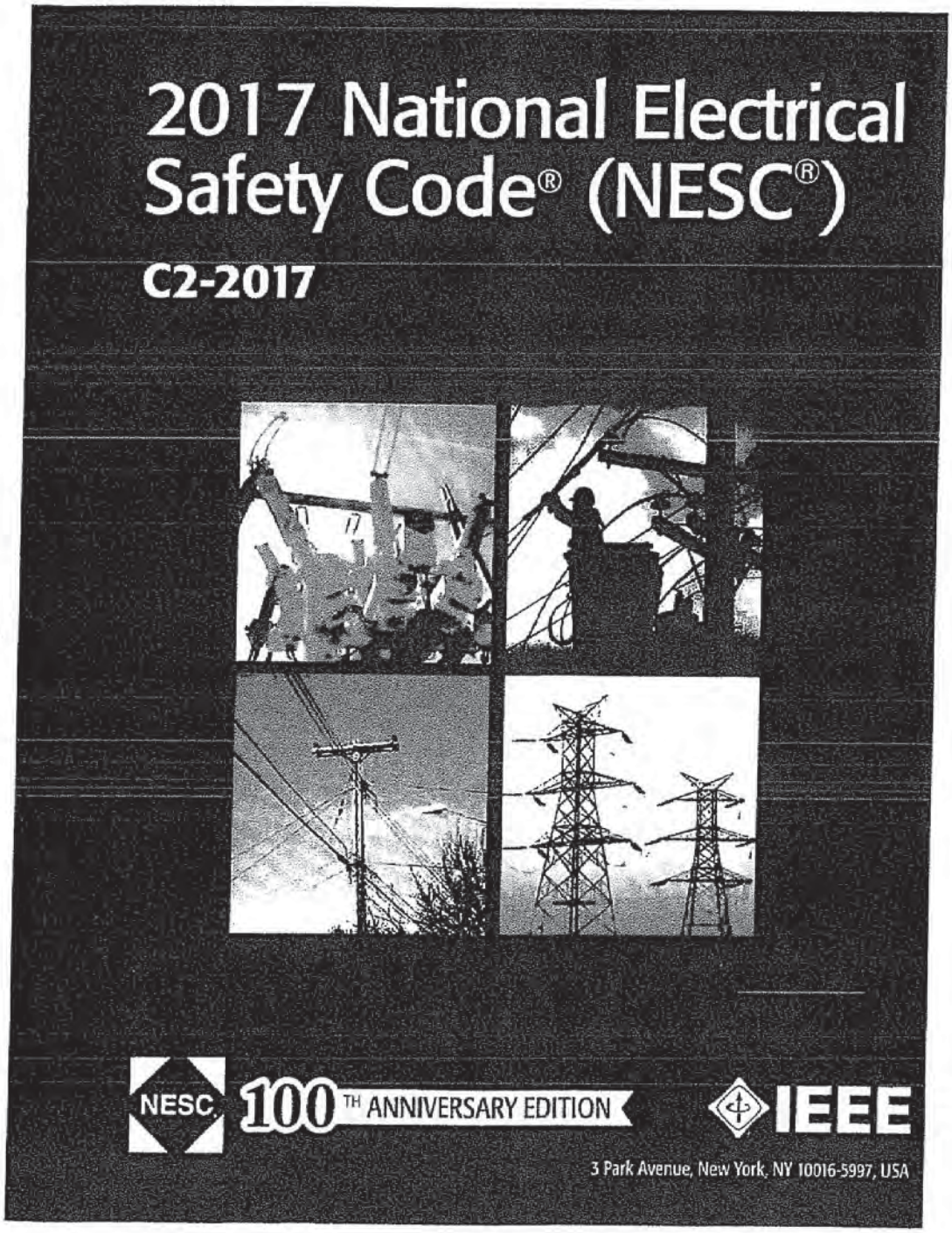
In the event of downed wires, gas emergencies, security concerns or vandalism, call Consumers Energy at 800-477-5050.

Consumers Energy
Count on Us®

Connect with us at:

10103853
15599 250M 3/16

RECEIVED by MSC 12/20/2021 10:30:09 AM
RECEIVED by MCOA 1/6/2020 2:37:43 PM



RECEIVED by MSC 12/20/2021 10:30:09 AM
RECEIVED by MCOA 1/6/2020 2:37:43 PM

Contents

Letter symbols for units xlii

Section 1. Introduction to the National Electrical Safety Code® 1
010. Purpose 1
011. Scope 1
A. Covered 1
B. Not covered 2
C. Types of requirements 3
012. General rules 4
013. Application 4
A. New installations and extensions 4
B. Existing installations 4
C. Inspection and work rules 5
014. Waiver for emergency and temporary installations 5
A. Emergency installations 5
B. Temporary overhead installations 5
015. Intent 5
016. Effective date 6
017. Units of measure 6
018. Method of calculation 6

Section 2. Definitions of special terms 7

Section 3. References 21

Section 9. Grounding methods for electric supply and communications facilities 24
090. Purpose 24
091. Scope 24
092. Point of connection of grounding conductor 24
A. Direct-current systems that are required to be grounded 24
1. 750 V and below 24
2. Over 750 V 24
B. Alternating current systems that are required to be grounded 24
1. 750 V and below 24
2. Over 750 V 24
3. Separate grounding conductor 25
C. Messenger wires and guys 25
1. Messenger wires 25
2. Guys 25
3. Common grounding of messengers and guys on the same supporting structure 25
D. Current in grounding conductor 26
E. Fences 26
093. Grounding conductor and means of connection 27
A. Composition of grounding conductors 27
B. Connection of grounding conductors 27
C. Ampacity and strength 27
1. System grounding conductors for single-grounded systems 27
2. System grounding conductors for multi-grounded alternating current systems 28
3. Grounding conductors for instrument transformers 28
4. Grounding conductors for primary surge arresters 28
5. Grounding conductors for equipment, messenger wires, and guys 28

Copyright © 2016 IEEE. All rights reserved.

RECEIVED by MSC 12/20/2021 10:30:09 AM
RECEIVED by MCOA 1/6/2020 2:37:43 PM

Contents

Section — Page

6. Fences ... 28
7. Bonding of equipment frames and enclosures ... 28
8. Ampacity limit ... 28
9. Strength ... 29
D. Guarding and protection ... 29
E. Underground ... 29
F. Common grounding conductor for circuits, metal raceways, and equipment ... 30
094. Grounding electrodes ... 30
A. Existing electrodes ... 30
1. Metallic water piping system ... 30
2. Local systems ... 30
3. Steel reinforcing bars in concrete foundations and footings ... 30
B. Made electrodes ... 30
1. General ... 30
2. Driven rods, buried wire, strips, or plates ... 31
3. Pole-butt plates and wire wraps ... 32
4. Concentric neutral cable ... 32
5. Concrete-encased electrodes ... 32
6. Directly embedded metal poles ... 33
095. Method of connection to electrode ... 33
A. Ground connections ... 33
B. Point of connection to piping systems ... 33
C. Contact surfaces ... 34
096. Ground resistance requirements ... 34
A. General ... 34
B. Supply stations ... 34
C. Multi-grounded systems ... 34
D. Single-grounded (unigrounded or delta) systems ... 35
097. Separation of grounding conductors ... 35
098. Number 098 not used in this edition ... 36
099. Additional requirements for grounding and bonding of communication apparatus ... 36
A. Electrode ... 36
B. Electrode connection ... 36
C. Bonding of electrodes ... 37

Part 1. Safety Rules for the Installation and Maintenance of Electric Supply Stations and Equipment

Section 10. Purpose and scope of rules ... 39
100. Purpose ... 39
101. Scope ... 39
102. Application of rules ... 39
103. Referenced sections ... 39

Section 11. Protective arrangements in electric supply stations ... 40
110. General requirements ... 40
A. Enclosure of equipment ... 40
1. Types of enclosures ... 40
2. Safety clearance zone ... 40
B. Rooms and spaces ... 41
1. Construction ... 41
2. Use ... 41
3. Ventilation ... 41
4. Moisture and weather ... 41

Copyright © 2016 IEEE. All rights reserved.

RECEIVED by MSC 12/20/2021 10:30:09 AM

RECEIVED by MCOA 1/6/2020 2:37:43 PM

RECEIVED by MSC 12/20/2021 10:30:09 AM

RECEIVED by MCOA 1/6/2020 2:37:43 PM

Contents

Section — Page

C. Electric equipment ... 41
111. Illumination ... 43
A. Under normal conditions ... 43
B. Emergency lighting ... 43
C. Fixtures ... 44
D. Attachment plugs and receptacles for general use ... 44
E. Receptacles in damp or wet locations ... 44
112. Floors, floor openings, passageways, and stairs ... 45
A. Floors ... 45
B. Passageways ... 45
C. Railings ... 45
D. Stair guards ... 45
E. Top rails ... 45
113. Exits ... 45
A. Clear exits ... 45
B. Double exits ... 45
C. Exit doors ... 46

Section 12. Installation and maintenance of equipment ... 47
120. General requirements ... 47
121. Inspections ... 47
A. In-service equipment ... 47
B. Idle equipment ... 47
C. Emergency equipment ... 47
D. New equipment ... 47
122. Guarding shaft ends, pulleys, belts, and suddenly moving parts ... 47
A. Mechanical transmission machinery ... 47
B. Suddenly moving parts ... 47
123. Protective grounding ... 47
A. Protective grounding or physical isolation of non-current-carrying metal parts ... 47
B. Grounding method ... 48
C. Provision for grounding equipment during maintenance ... 48
D. Grounding methods for direct-current systems over 750 V ... 48
124. Guarding live parts ... 48
A. Where required ... 48
B. Strength of guards ... 48
C. Types of guards ... 49
1. Location or physical isolation ... 49
2. Shields or enclosures ... 49
3. Supplemental barriers or guards within electric supply stations ... 49
4. Mats ... 49
5. Live parts below supporting surfaces for persons ... 49
6. Insulating covering on conductors or parts ... 49
D. Taut-string distances ... 49
125. Working space about electric equipment ... 60
A. Working space (600 V or less) ... 60
1. Clear spaces ... 60
2. Access and entrance to working space ... 60
3. Working space ... 60
4. Headroom working space ... 60
5. Front working space ... 60
B. Working space over 600 V ... 61
126. Equipment for work on energized parts ... 61
127. Classified locations ... 61

Copyright © 2016 IEEE. All rights reserved.

Section Page

A. Coal-handling areas 61
B. Flammable and combustible liquids 62
C. Flammable liquid storage area 62
D. Loading and unloading facilities for flammable and combustible liquids 62
F. Boilers 62
G. Gaseous hydrogen systems for supply equipment 62
H. Liquid hydrogen systems 63
I. Sulfur 63
J. Oxygen 63
K. Liquefied petroleum gas (LPG) 63
L. Natural gas (methane) 63
128. Identification 63
129. Mobile hydrogen equipment 63

Section 13. Rotating equipment 64
130. Speed control and stopping devices 64
A. Automatic overspeed trip device for prime movers 64
B. Manual stopping devices 64
C. Speed limit for motors 64
1. Separately excited dc motors 64
2. Series motors 64
D. Number 130D not used in this edition. 64
E. Adjustable-speed motors 64
F. Protection of control circuits 64
131. Motor control 64
132. Number 132 not used in this edition. 65
133. Short-circuit protection 65

Section 14. Storage batteries 66
140. General 66
141. Location 66
142. Ventilation 66
143. Racks 66
144. Floors in battery areas 66
145. Illumination for battery areas 66
146. Service facilities 66

Section 15. Transformers and regulators 68
150. Current-transformer secondary circuits protection when exceeding 600 V 68
151. Grounding secondary circuits of instrument transformers 68
152. Location and arrangement of power transformers and regulators 68
A. Outdoor installations 68
B. Indoor installations 68
153. Short-circuit protection of power transformers 69

Section 16. Conductors 70
160. Application 70
161. Electrical protection 70
A. Overcurrent protection required 70
B. Grounded conductors 70
C. Insulated power cables 70
162. Mechanical protection and support 70
163. Isolation 70
164. Conductor terminations 70

Copyright © 2016 IEEE. All rights reserved.

RECEIVED by MSC 12/20/2021 10:30:09 AM
RECEIVED by MCOA 1/6/2020 2:37:43 PM

Contents

Section — Page

A. Insulation ... 70
B. Metal-sheathed or shielded cable ... 70

Section 17. Circuit breakers, reclosers, switches, and fuses ... 71
170. Arrangement ... 71
171. Application ... 71
172. Circuit breakers, reclosers, and switches containing oil ... 71
173. Switches and disconnecting devices ... 71
A. Capacity ... 71
B. Provisions for disconnecting ... 71
174. Disconnection of fuses ... 71

Section 18. Switchgear and metal-enclosed bus ... 73
180. Switchgear assemblies ... 73
A. General requirements for all switchgear ... 73
B. Metal-enclosed power switchgear ... 73
C. Dead-front power switchboards ... 74
D. Motor control centers ... 74
E. Control switchboards ... 74
181. Metal-enclosed bus ... 74
A. General requirements for all types of bus ... 74
B. Isolated-phase bus ... 75

Section 19. Surge arresters ... 76
190. General requirements ... 76
191. Indoor locations ... 76
192. Grounding conductors ... 76
193. Installation ... 76

Part 2. Safety Rules for the Installation and Maintenance of Overhead Electric Supply and Communication Lines

Section 20. Purpose, scope, and application of rules ... 77
200. Purpose ... 77
201. Scope ... 77
202. Application of rules ... 77

Section 21. General requirements ... 78
210. Referenced sections ... 78
211. Number 211 not used in this edition ... 78
212. Induced voltages ... 78
213. Accessibility ... 78
214. Inspection and tests of lines and equipment ... 78
A. When in service ... 78
1. Initial compliance with rules ... 78
2. Inspection ... 78
3. Tests ... 78
4. Inspection records ... 78
5. Corrections ... 78
B. When out of service ... 79
1. Lines infrequently used ... 79
2. Lines temporarily out of service ... 79
3. Lines permanently abandoned ... 79

Copyright © 2016 IEEE. All rights reserved.

RECEIVED by MSC 12/20/2021 10:30:09 AM

RECEIVED by MCOA 1/6/2020 2:37:43 PM

RECEIVED by MSC 12/20/2021 10:30:09 AM

RECEIVED by MCOA 1/6/2020 2:37:43 PM

Contents

Section — Page

215. Grounding of circuits, supporting structures, and equipment ... 79
A. Methods ... 79
B. Circuits ... 79
1. Common neutral ... 79
2. Other neutrals ... 79
3. Other conductors ... 79
4. Surge arresters ... 79
5. Use of earth as part of circuit ... 79
C. Non-current-carrying parts ... 79
1. General ... 79
2. Guys ... 80
3. Span wires ... 80
4. Insulators used to limit galvanic corrosion ... 81
5. Multiple messengers on the same structure ... 81
216. Arrangement of switches ... 81
A. Accessibility ... 81
B. Indicating open or closed position ... 81
C. Locking ... 81
D. Uniform position ... 81
E. Remotely controlled, automatic transmission, or distribution overhead line switching devices ... 81
217. General ... 82
A. Supporting structures ... 82
1. Protection of structures ... 82
2. Readily climbable supporting structures ... 82
3. Identification ... 83
4. Attachments, decorations, and obstructions ... 83
B. Unusual conductor supports ... 83
C. Protection and marking of guys ... 83
218. Vegetation management ... 83
A. General ... 83
B. At line crossings, railroad crossings, limited-access highway crossings, or navigable waterways requiring crossing permits ... 84

Section 22. Relations between various classes of lines and equipment ... 85
220. Relative levels ... 85
A. Standardization of levels ... 85
B. Relative levels: supply and communication conductors and equipment ... 85
1. Preferred levels ... 85
2. Special construction for railroad supply circuits of 600 V or less and carrying power not in excess of 5 kW ... 85
C. Relative levels: Supply lines of different voltage classifications (0 to 750 V, over 750 V to 8.7 kV, over 8.7 kV to 22 kV, over 22 kV to 50 kV, and over 50 kV) ... 86
1. At crossings or conflicts ... 86
2. On structures used only by supply conductors ... 86
D. Identification of overhead conductors and cables ... 86
E. Identification of equipment on supporting structures ... 86
221. Avoidance of conflict ... 86
222. Joint use of structures ... 87
223. Communications protective requirements ... 87
A. Where required ... 87
B. Means of protection ... 87

Copyright © 2016 IEEE. All rights reserved.

Contents

Section — Page

224. Communication circuits located within the supply space and supply circuits located within the communication space ... 87
A. Communication circuits located in the supply space ... 87
B. Supply circuits used exclusively in the operation of communication circuits ... 88
225. Electric railway construction ... 89
A. Trolley-contact conductor fastenings ... 89
B. High-voltage contact conductors ... 89
C. Third rails ... 89
D. Prevention of loss of contact at railroad crossings at grade ... 89
E. Guards under bridges ... 89

Section 23. Clearances ... 90
230. General ... 90
A. Application ... 90
1. Permanent and temporary installations ... 90
2. Emergency installations ... 90
3. Measurement of clearance and spacing ... 90
4. Rounding of calculation results ... 91
B. Ice and wind loading for clearances ... 91
C. Supply cables ... 93
D. Covered conductors ... 93
E. Neutral conductors ... 93
F. Fiber-optic cable ... 93
1. Fiber-optic—supply cable ... 93
2. Fiber-optic—communication cable ... 94
G. Alternating- and direct-current circuits ... 94
H. Constant-current circuits ... 94
I. Maintenance of clearances and spacings ... 94
231. Clearances of supporting structures from other objects ... 96
A. From fire hydrants ... 96
B. From streets, roads, and highways ... 96
C. From railroad tracks ... 96
232. Vertical clearances of wires, conductors, cables, and equipment aboveground, roadway, rail, or water surfaces ... 96
A. Application ... 96
B. Clearance of wires, conductors, cables, equipment, and support arms mounted on supporting structures ... 97
1. Clearance to wires, conductors, and cables ... 97
2. Clearance to unguarded rigid live parts of equipment ... 97
3. Clearance to support arms, switch handles, and equipment cases ... 97
4. Street and area lighting ... 97
C. Additional clearances for wires, conductors, cables, and unguarded rigid live parts of equipment ... 97
1.Voltages exceeding 22 kV ... 97
D. Alternate clearances for voltages exceeding 98 kV ac to ground or 139 kV dc to ground ... 98
1. Sag conditions of line conductors ... 98
2. Reference heights ... 98
3. Electrical component of clearance ... 98
4. Limit ... 99
233. Clearances between wires, conductors, and cables carried on different supporting structures ... 114
A. General ... 114
1. Conductor movement envelope ... 115

Copyright © 2016 IEEE. All rights reserved.

RECEIVED by MSC 12/20/2021 10:30:09 AM

RECEIVED by MCOA 1/6/2020 2:37:43 PM

RECEIVED by MSC 12/20/2021 10:30:09 AM

RECEIVED by MCOA 1/6/2020 2:37:43 PM

Contents

Section — Page

2. Clearance envelope ... 115
B. Horizontal clearance ... 115
1. Clearance requirements ... 115
2. For voltages exceeding 50 kV ... 115
3. Alternate clearances between conductors of different circuits ... 115
C. Vertical clearance ... 115
1. Clearance requirements ... 115
2. Voltages between the wires, conductors, or cables exceeding 22 kV ... 116
3. Alternate clearances for voltage exceeding 98 kV ac to ground or 139 kV dc to ground ... 116
234. Clearance of wires, conductors, cables, and equipment from buildings, bridges, rail cars, swimming pools, and other installations ... 126
A. Application ... 126
1. Vertical and horizontal clearances (no wind displacement) ... 126
2. Horizontal clearances (with wind displacement) ... 126
3. Transition between horizontal and vertical clearances ... 126
B. Clearances of wires, conductors, and cables from other supporting structures ... 127
1. Horizontal clearances ... 127
2. Vertical clearances ... 127
C. Clearances of wires, conductors, cables, and rigid live parts from buildings, signs, billboards, chimneys, radio and television antennas, tanks, flagpoles and flags, banners, and other installations except bridges ... 128
1. Vertical and horizontal clearances ... 128
2. Guarding of supply conductors and rigid live parts ... 128
3. Supply conductors attached to buildings or other installations ... 128
4. Communication conductors attached to buildings or other installations ... 129
D. Clearance of wires, conductors, cables, and unguarded rigid live parts from bridges ... 130
1. Vertical and horizontal clearances ... 130
2. Guarding trolley-contact conductors located under bridges ... 130
E. Clearance of wires, conductors, cables, or unguarded rigid live parts installed over or near swimming areas with no wind displacement ... 130
1. Swimming pools ... 130
2. Beaches and waterways restricted to swimming ... 131
3. Waterways subject to water skiing ... 131
F. Clearances of wires, conductors, cables, and rigid live parts from grain bins ... 131
1. Grain bins loaded by permanently installed augers, conveyers, or elevator systems ... 131
2. Grain bins loaded by portable augers, conveyers, or elevators ... 131
G. Additional clearances for voltages exceeding 22 kV for wires, conductors, cables, and unguarded rigid live parts of equipment ... 132
H. Alternate clearances for voltages exceeding 98 kV ac to ground or 139 kV dc to ground ... 132
1. Sag conditions of line conductors ... 132
2. Reference distances ... 132
3. Electrical component of clearance ... 132
4. Limit ... 133
I. Clearance of wires, conductors, and cables to rail cars ... 133
J. Clearance of equipment mounted on supporting structures ... 133
1. Clearance to unguarded rigid live parts of equipment ... 133
2. Clearance to equipment cases ... 133
235. Clearance for wires, conductors, or cables carried on the same supporting structure ... 157
A. Application of rule ... 157
1. Multiconductor wires or cables ... 157
2. Conductors supported by messengers or span wires ... 157
3. Line conductors of different circuits ... 157

Copyright © 2016 IEEE. All rights reserved.

RECEIVED by MSC 12/20/2021 10:30:09 AM

RECEIVED by MCOA 1/6/2020 2:37:43 PM

Contents

Section — Page

B. Horizontal clearance between line conductors ... 158
1. Fixed supports ... 158
2. Suspension insulators ... 159
3. Alternate clearances for different circuits where one or both circuits exceed 98 kV ac to ground or 139 kV dc to ground ... 159
C. Vertical clearance at the support for line conductors and service drops ... 160
1. Basic clearance for line wires, conductors, and cables, and service drops of same or different circuits ... 160
2. Additional clearances ... 160
3. Alternate clearances for different circuits where one or both exceed 98 kV ac, or 139 kV dc to ground ... 163
4. Communication worker safety zone ... 163
D. Diagonal clearance between line wires, conductors, and cables located at different levels on the same supporting structure ... 163
E. Clearances in any direction at or near a support from line conductors to supports, and to vertical or lateral conductors, service drops, and span or guy wires, attached to the same support ... 163
1. Fixed supports ... 163
2. Suspension insulators ... 163
3. Alternate clearances for voltages exceeding 98 kV ac to ground or 139 kV dc to ground ... 163
F. Clearances between circuits located in the supply space on the same support arm ... 164
G. Conductor spacing: vertical racks or separate brackets ... 165
H. Clearance and spacing between communication conductors, cables, and equipment ... 165
I. Communication antenna clearances in any direction from supply and communication lines attached to the same supporting structure ... 165
1. General ... 165
2. Communication antenna clearances ... 165
3. Equipment case that supports or is adjacent to a communication antenna ... 166
4. Vertical or lateral communication conductors and cables attached to a communication antenna ... 166
236. Climbing space ... 184
A. Location and dimensions ... 184
B. Portions of supporting structures in climbing space ... 184
C. Support arm location relative to climbing space ... 184
D. Location of equipment relative to climbing space ... 184
E. Climbing space between conductors ... 184
F. Climbing space on buckarm construction ... 184
G. Climbing space past longitudinal runs not on support arms ... 185
H. Climbing space past vertical conductors ... 185
I. Climbing space near ridge-pin conductors ... 185
237. Working space ... 188
A. Location of working spaces ... 188
B. Dimensions of working spaces ... 188
1. Along the support arm ... 188
2. At right angles to the support arm ... 188
3. Vertically ... 188
C. Location of vertical and lateral conductors relative to working spaces ... 188
D. Location of buckarms relative to working spaces ... 188
1. Standard height of working space ... 188
2. Reduced height of working space ... 188
E. Guarding of energized equipment ... 188
F. Working clearances from energized equipment ... 189

Copyright © 2016 IEEE. All rights reserved.

RECEIVED by MSC 12/20/2021 10:30:09 AM

RECEIVED by MCOA 1/6/2020 2:37:43 PM

Contents

Section — Page

238. Vertical clearance between specified communications and supply facilities located on the same structure ... 189
A. Equipment ... 189
B. Clearances in general ... 189
C. Clearances for span wires or brackets ... 189
D. Clearance of drip loops associated with luminaires and traffic signals ... 189
E. Communication worker safety zone ... 190
239. Clearance of vertical and lateral facilities from other facilities and surfaces on the same supporting structure ... 191
A. General ... 191
B. Location of vertical or lateral conductors relative to climbing spaces, working spaces, and pole steps ... 191
C. Conductors not in conduit ... 191
D. Guarding and protection near ground ... 191
E. Requirements for vertical and lateral supply conductors on supply line structures or within supply space on jointly used structures ... 192
1. General clearances ... 192
2. Special cases ... 192
F. Requirements for vertical and lateral communication conductors on communication line structures or within the communication space on jointly used structures ... 192
1. Clearances from communication conductors ... 192
2. Clearances from supply conductors ... 192
G. Requirements for vertical supply conductors and cables passing through communication space on jointly used line structures ... 193
1. Guarding—General ... 193
2. Cables and conductors in conduit or covering ... 193
3. Protection near trolley, ungrounded traffic signal, or ungrounded luminaire attachments ... 193
4. Service drops ... 193
5. Clearance from through bolts and other metal objects ... 193
H. Requirements for vertical communication conductors passing through supply space on jointly used structures ... 194
1. Metal-sheathed communication cables ... 194
2. Communication conductors ... 194
3. Communication grounding conductors ... 194
4. Clearance from through bolts and other metal objects ... 194
I. Operating rods ... 194
J. Additional rules for standoff brackets ... 195

Section 24. Grades of construction ... 198
240. General ... 198
241. Application of grades of construction to different situations ... 198
A. Supply cables ... 198
B. Order of grades ... 198
C. At crossings ... 198
1. Wires, conductors, or other cables of one line ... 198
2. Grade of upper line ... 198
3. Grade of lower line ... 198
4. Multiple crossings ... 198
D. Structure conflicts ... 199
242. Grades of construction for conductors ... 199
A. Constant-current circuit conductors ... 199
B. Railway feeder and trolley-contact circuit conductors ... 199
C. Communication circuit conductors and cables ... 199

Copyright © 2016 IEEE. All rights reserved.

RECEIVED by MSC 12/20/2021 10:30:09 AM

RECEIVED by MCOA 1/6/2020 2:37:43 PM

Contents

Section — Page

D. Fire-alarm circuit conductors ... 199
E. Neutral conductors of supply circuits ... 199
F. Surge-protection wires ... 199
243. Grades of construction for line supports ... 202
A. Structures ... 202
B. Crossarms and support arms ... 202
C. Pins, armless construction brackets, insulators, and conductor fastenings ... 202

Section 25. Loadings for Grades B and C ... 203
250. General loading requirements and maps ... 203
A. General ... 203
B. Combined ice and wind district loading ... 203
C. Extreme wind loading ... 203
1. Velocity pressure exposure coefficient, k_z ... 204
2. Gust response factor, G_{RF} ... 204
D. Extreme ice with concurrent wind loading ... 205
251. Conductor loading ... 221
A. General ... 221
B. Load components ... 221
1. Vertical load component ... 221
2. Horizontal load component ... 222
3. Total load ... 222
252. Loads on line supports ... 222
A. Assumed vertical loads ... 222
B. Assumed transverse loads ... 223
1. Transverse loads from conductors and messengers ... 223
2. Wind loads on structures ... 223
3. At angles ... 223
4. Wind span ... 223
C. Assumed longitudinal loading ... 223
1. Change in grade of construction ... 223
2. Jointly used poles at crossings over railroads, communication lines, or limited access highways ... 224
3. Deadends ... 224
4. Unequal spans and unequal vertical loads ... 224
5. Stringing loads ... 224
6. Communication conductors on unguyed supports at railroad and limited access highway crossings ... 224
D. Simultaneous application of loads ... 224
253. Load factors for structures, crossarms, support hardware, guys, foundations, and anchors ... 224

Section 26. Strength requirements ... 226
260. General (see also Section 20) ... 226
A. Preliminary assumptions ... 226
B. Application of strength factors ... 226
261. Grades B and C construction ... 227
A. Supporting structures ... 227
1. Metal, prestressed-, and reinforced-concrete structures ... 227
2. Wood structures ... 227
3. Fiber-reinforced polymer structures ... 228
4. Transverse strength requirements for structures where side guying is required, but can be installed only at a distance ... 228
5. Longitudinal strength requirements for sections of higher grade in lines of a lower grade construction ... 228

Copyright © 2016 IEEE. All rights reserved.

RECEIVED by MSC 12/20/2021 10:30:09 AM

RECEIVED by MCOA 1/6/2020 2:37:43 PM

Contents

Section — Page

B. Strength of foundations, settings, and guy anchors ... 229
C. Strength of guys and guy insulators ... 229
1. Metal and prestressed-concrete structures ... 229
2. Wood and reinforced-concrete structures ... 229
3. Fiber-reinforced polymer structures ... 229
D. Crossarms and braces ... 229
1. Concrete and metal crossarms and braces ... 229
2. Wood crossarms and braces ... 230
3. Fiber-reinforced polymer crossarms and braces ... 230
4. Crossarms and braces of other materials ... 230
5. Additional requirements ... 230
E. Insulators ... 231
F. Strength of pin-type or similar construction and conductor fastenings ... 231
1. Longitudinal strength ... 231
2. Double pins and conductor fastenings ... 231
3. Single supports used in lieu of double wood pins ... 231
G. Armless construction ... 231
1. General ... 231
2. Insulating material ... 232
3. Other components ... 232
H. Open supply conductors and overhead shield wires ... 232
1. Tensions ... 232
2. Splices, taps, dead-end fittings, and associated attachment hardware ... 232
3. Trolley-contact conductors ... 233
I. Supply cable messengers ... 233
J. Open-wire communication conductors ... 233
K. Communication cables and messengers ... 233
1. Communication cables ... 233
2. Messenger ... 233
L. Paired metallic communication conductors ... 233
1. Paired conductors supported on messenger ... 233
2. Paired conductors not supported on messenger ... 234
M. Support and attachment hardware ... 234
262. Number 262 not used in this edition ... 236
263. Grade N construction ... 236
A. Poles ... 236
B. Guys ... 236
C. Crossarm strength ... 236
D. Supply line conductors ... 236
1. Size ... 236
E. Service drops ... 236
1. Size of open-wire service drops ... 236
2. Tension of open-wire service drops ... 237
3. Cabled service drops ... 237
F. Trolley-contact conductors ... 237
G. Communication conductors ... 237
H. Street and area lighting equipment ... 237
I. Insulators ... 237
264. Guying and bracing ... 238
A. Where used ... 238
B. Strength ... 238
C. Point of attachment ... 238
D. Guy fastenings ... 239

Copyright © 2016 IEEE. All rights reserved.

Contents

Section — Page

E. Electrolysis ... 239
F. Anchor rods ... 239

Section 27. Line insulation ... 240
270. Application of rule ... 240
271. Material and marking ... 240
272. Ratio of flashover to puncture voltage ... 240
273. Insulation level ... 240
274. Factory tests ... 241
275. Special insulator applications ... 241
A. Insulators for constant-current circuits ... 241
B. Insulators for single-phase circuits directly connected to three-phase circuits ... 241
276. Number 276 not used in this edition ... 242
277. Mechanical strength of insulators ... 242
278. Aerial cable systems ... 243
A. Electrical requirements ... 243
B. Mechanical requirements ... 243
279. Guy and span insulators ... 244
A. Insulators ... 244
1. Properties of guy insulators ... 244
2. Galvanic corrosion and BIL insulation ... 244
B. Properties of span-wire insulators ... 244
1. Material ... 244
2. Insulation level ... 245
3. Mechanical strength ... 245
Section 28. Section number 28 not used in this edition ... 245
Section 29. Section number 29 not used in this edition ... 245

Part 3. Safety Rules for the Installation and Maintenance of Underground Electric Supply and Communication Lines

Section 30. Purpose, scope, and application of rules ... 247
300. Purpose ... 247
301. Scope ... 247
302. Application of rules ... 247

Section 31. General requirements applying to underground lines ... 248
310. Referenced sections ... 248
311. Installation and maintenance ... 248
312. Accessibility ... 248
313. Inspection and tests of lines and equipment ... 248
A. When in service ... 248
1. Initial compliance with safety rules ... 248
2. Inspection ... 248
3. Tests ... 248
4. Inspection records ... 248
5. Corrections ... 248
B. When out of service ... 249
1. Lines infrequently used ... 249
2. Lines temporarily out of service ... 249
3. Lines permanently abandoned ... 249
314. Grounding of circuits and equipment ... 249
A. Methods ... 249
B. Conductive parts to be grounded ... 249

Copyright © 2016 IEEE. All rights reserved.

RECEIVED by MSC 12/20/2021 10:30:09 AM
RECEIVED by MCOA 1/6/2020 2:37:43 PM

Section Page

C. Circuits 249
1. Neutrals 249
2. Other conductors 249
3. Surge arresters 249
4. Use of earth as part of circuit 249
315. Communications protective requirements 249
A. Where required 249
1.Lightning 249
2.Contact with supply conductors with voltages exceeding 300 V 249
3.Transient rise in ground potential exceeding 300 V 249
4.Steady-state induced voltage of a level that may cause personal injury 250
B. Means of protection 250
316. Induced voltage 250

Section 32. Underground conduit systems 251
320. Location 251
A. Routing 251
1. General 251
2. Natural hazards 251
3. Highways and streets 251
4. Bridges and tunnels 251
5. Railroad tracks 251
6. Water 252
B. Separation from other underground installations 252
1. General 252
2. Separations between supply and communication conduit systems 252
3. Sewers, sanitary and storm 252
4. Water lines 252
5. Gas and other lines that transport flammable material 252
6. Steam or cryogenic lines 252
321. Excavation and backfill 253
A. Trench 253
B. Quality of backfill 253
322. Conduit, ducts, and joints 253
A. General 253
B. Installation 253
1. Restraint 253
2. Joints 253
3. Externally coated pipe 253
4. Building walls, floors, or roofs 253
5. Bridges 253
323. Manholes, handholes, and vaults 254
A. Strength 254
B. Dimensions 254
C. Manhole access 254
D. Covers 255
E. Vault and utility tunnel access 255
F. Ladder requirements 255
G. Drainage 256
H. Ventilation 256
I. Mechanical protection 256
J. Identification 256

Copyright © 2016 IEEE. All rights reserved.

RECEIVED by MSC 12/20/2021 10:30:09 AM
RECEIVED by MCOA 1/6/2020 2:37:43 PM

RECEIVED by MSC 12/20/2021 10:30:09 AM

RECEIVED by MCOA 1/6/2020 2:37:43 PM

Contents

Section	Page
Section 33. Supply cable	258
330. General	258
331. Sheaths and jackets	258
332. Shielding	258
A. General	258
B. Material	258
333. Cable accessories and joints	258
Section 34. Cable in underground structures	260
340. General	260
341. Installation	260
A. General	260
B. Cable in manholes and vaults	260
1. Supports	260
2. Clearance	260
3. Identification	261
342. Grounding and bonding	261
343. Number not used in this edition.	261
344. Communication cables containing special supply circuits	261
Section 35. Direct-buried cable and cable in duct not part of a conduit system	263
350. General	263
351. Location and routing	264
A. General	264
B. Natural hazards	264
C. Other conditions	264
1. Swimming pools (in-ground)	264
2. Buildings and other structures	265
3. Railroad tracks	265
4. Highways and streets	265
5. Water	265
6. Bridges	265
352. Installation	265
A. Trenching	265
B. Plowing	266
C. Boring	266
D. Depth of burial	266
E. Supply cables shall not be installed in the same duct with communication cables unless all of the cables are operated and maintained by the same utility	266
F. Communication cables may be installed together in the same duct provided all utilities involved are in agreement	266
353. Deliberate separations—Equal to or greater than 300 mm (12 in) from underground structures or other cables	267
A. General	267
B. Crossings	267
C. Parallel facilities	267
D. Steam or cryogenic lines	267
354. Random separation—Separation less than 300 mm (12 in) from underground structures or other cables	267
A. General	267
B. Supply cables or conductors	268
C. Communication cables or conductors	268
D. Supply and communication cables or conductors	268
1. General	268

Copyright © 2016 IEEE. All rights reserved.

RECEIVED by MSC 12/20/2021 10:30:09 AM

RECEIVED by MCOA 1/6/2020 2:37:43 PM

Contents

Section — Page

2. Grounded bare or semiconducting jacketed neutral supply cables ... 268
3. Insulating jacketed effectively grounded neutral supply cables ... 269
4. Insulating jacketed grounded neutral supply cables in nonmetallic duct ... 269
E. Supply and communication cables or conductors and non-metallic water and sewer lines ... 269
355. Additional rules for duct not part of a conduit system ... 270

Section 36. Risers ... 271
360. General ... 271
361. Installation ... 271
362. Pole risers—Additional requirements ... 271
363. Pad-mounted installations ... 271

Section 37. Supply cable terminations ... 272
370. General ... 272
371. Support at terminations ... 272
372. Identification ... 272
373. Clearances in enclosures or vaults ... 272
374. Grounding ... 272

Section 38. Equipment ... 273
380. General ... 273
381. Design ... 273
382. Location in underground structures ... 274
383. Installation ... 274
384. Grounding and bonding ... 274
385. Identification ... 274

Section 39. Installation in tunnels ... 275
391. Environment ... 275

Part 4. Work Rules for the Operation of Electric Supply and Communications Lines and Equipment

Section 40. Purpose and scope ... 277
400. Purpose ... 277
401. Scope ... 277
402. Referenced sections ... 277

Section 41. Supply and communications systems—Rules for employers ... 278
410. General requirements ... 278
A. General ... 278
B. Emergency and first aid procedures ... 279
C. Responsibility ... 279
411. Protective methods and devices ... 283
A. Methods ... 283
B. Devices and equipment ... 283
C. Inspection and testing of protective devices and equipment ... 284
D. Signs and tags for employee safety ... 284
E. Identification and location ... 284
F. Fall protection ... 284

Section 42. General rules for employees ... 285
420. General ... 285

Copyright © 2016 IEEE. All rights reserved.

3. Identification

Supporting structures, including those on bridges, on which supply or communication conductors are maintained shall be so constructed, located, marked, or numbered so as to facilitate identification by employees authorized to work thereon.

4. Attachments, decorations, and obstructions

No attachment of any kind to a supporting structure of a utility line (including lighting and metering structures) shall be allowed without the concurrence of the structure owner. Non-utility attachments shall also have concurrence of the occupant(s) of the space in which the attachment is made.

a. No attachment shall cause any portion of the resulting installation to be in noncompliance with the clearance, grounding, strength, or other requirements of the NESC.

b. Attachments shall neither obstruct the climbing space nor present a climbing hazard to utility personnel. Through-bolts shall be properly trimmed. Vines, nails, tacks, or other items which may interfere with climbing should be removed before climbing.

B. Unusual conductor supports

Where line conductors are attached to structures other than those used solely or principally for their support, all rules shall be complied with as far as they apply. Such additional precautions as may be deemed necessary by the administrative authority shall be taken to avoid damage to the structures or injury to the persons using them. The supporting of conductors on trees and roofs should be avoided.

C. Protection and marking of guys

1. The ground end of anchor guys exposed to pedestrian traffic shall be provided with a substantial and conspicuous marker.

NOTE: There is no intent to require markers at all anchor guy locations.

2. Where an anchor is located in an established parking area, the guy shall either be protected from vehicle contact or marked.

This rule does not require protection or marking of anchor guys located outside of the traveled ways of roadways or established parking areas.

NOTE: Experience has shown that it is not practical to protect guys from contact by out of control vehicles operating outside of established traveled ways. See Rule 231B for clearances of structures adjacent to roadways.

NOTE: Visibility of markers can be improved by the use of color or color patterns that provide contrast with the surroundings.

218. Vegetation management

A. General

1. Vegetation management should be performed around supply and communication lines as experience has shown to be necessary. Vegetation that may damage ungrounded supply conductors should be pruned or removed.

NOTE 1: Factors to consider in determining the extent of vegetation management required include, but are not limited to: line voltage class, species' growth rates and failure characteristics, right-of-way limitations, the vegetation's location in relation to the conductors, the potential combined movement of vegetation and conductors during routine winds, and sagging of conductors due to elevated temperatures or icing.

NOTE 2: It is not practical to prevent all tree-conductor contacts on overhead lines.

2. Where pruning or removal is not practical, the conductor should be separated from the tree with suitable materials or devices to avoid conductor damage by abrasion and grounding of the circuit through the tree.

Copyright © 2016 IEEE. All rights reserved.

RECEIVED by MSC 12/20/2021 10:30:09 AM
RECEIVED by MCOA 1/6/2020 2:37:43 PM

B. At line crossings, railroad crossings, limited-access highway crossings, or navigable waterways requiring crossing permits

The crossing span and the adjoining span on each side of the crossing should be kept free from overhanging or decayed trees or limbs that otherwise might fall into the line.

Copyright © 2016 IEEE. All rights reserved.

RECEIVED by MSC 12/20/2021 10:30:09 AM

RECEIVED by MCOA 1/6/2020 2:37:43 PM

RECEIVED by MSC 12/20/2021 10:30:09 AM

STATE OF MICHIGAN

IN THE 9TH CIRCUIT COURT FOR THE COUNTY OF KALAMAZOO

CONSUMERS ENERGY COMPANY

Plaintiff,

v Case No.: 2019-0160-CC

BRIAN STORM, ERIN STORM and LAKE MICHIGAN CREDIT UNION

Defendants.
_____/

DEFENDANT'S MOTION REGARDING ATTORNEY FEES

BEFORE THE HONORABLE ALEXANDER C. LIPSEY, CIRCUIT COURT JUDGE

Kalamazoo, Michigan – Wednesday, August 21, 2019

APPEARANCES:

For the Plaintiff	RICHARD M. WILSON, JR. (P29717) MIKA MEYERS PLC 414 WATER STREET MANISTEE, MICHIGAN 49660 231-723-3888
For the Defendant:	CRAIG H. LUBBEN (P33154) MILLER JOHNSON 100 WEST MICHIGAN AVENUE STE 200 KALAMAZOO, MICHIGAN 49007 269-226-2958
RECORDED BY:	VIDEO RECORDED
TRANSCRIBED BY:	REBECCA D. ABBS-KUCKS (CER 7921) Certified Electronic Reporter PO BOX 24 VICKSBURG, MICHIGAN 49097 269-352-9227

RECEIVED by MSC 12/20/2021 10:30:09 AM

TABLE OF CONTENTS

WITNESSES:		PAGE
NONE		

EXHIBITS:	DESCRIPTIONS	IDENTIFIED	ADMITTED
NONE			

RECEIVED by MSC 12/20/2021 10:30:09 AM

Kalamazoo, Michigan

Wednesday, August 21, 2019 - 12:50:36 p.m.

THE CLERK: Court calls the case of Consumers Energy Company versus Brian Storm; case number 2019-0160-CC.

Please state your appearances for the record.

MR. WILSON: Richard Wilson on behalf of Consumers Energy Company, your Honor.

MR. LUBBEN: Good afternoon, your Honor. Craig Lubben on behalf of defendants Brian and Erin Storm.

THE COURT: Okay.

This is time and place for a hearing on motion for attorney fees pursuant to Mr. and Mrs. Storm's, basically, prevailing on the question of the need for use of the easement on their property.

Mr. Lubben?

MR. LUBBEN: Thank you, your Honor.

In effort to try to redeem our reputation with the court, Mr. Wilson and I are determined not to go past 5:30 this evening with this argument.

This--this is our motion for entry of judgment and for assessment of attorney fees. I understand from Mr. Wilson that there are two objections.

One is simply to the very concept of whether

we're entitled to recovery attorney fees, and the second is whether this should be called a judgment or whether it should be called an order of dismissal.

Importantly, I understand he is not contesting the reasonableness of the fee request, which you may recall we supported with an affidavit. So, I'm understanding I do not have to take the stand and present evidentiary support for--for the fee request beyond what I've done already.

MR. WILSON: That's correct, your Honor, and we acknowledge that under the statute the fees are mandatory if the court finds that the two--

THE COURT: Yeah.

MR. WILSON: -- prongs of the test are (inaudible).

THE COURT: Yeah.

MR. LUBBEN: I--I should add the original fee request at the time of the motion was $12,342.50. Since then there's an additional 3-hours at the rate of $450 an hour. That was to review and prepare the brief in response to the--the objection to the order. So, that's an additional 1,575, so that comes to $13,917.50; expenses obviously don't change.

We've also been here, I guess, a little more than 3-hours this morning, and I'll let the court make its own

RECEIVED by MSC 12/20/2021 10:30:09 AM

determination as to what's appropriate there.

MR. WILSON: Was that 917--13,917?

MR. LUBBEN: Yes.

MR. WILSON: Okay.

MR. LUBBEN: Yeah, 13,917.50 and that doesn't include time for today.

MR. WILSON: Right, I understand.

MR. LUBBEN: So, I'm just going to then, your Honor, right to the two issues.

With regard to whether the--we satisfied the requirement to obtain attorney fees. The court is aware of the statute, which says, "if the property owner by motion of--to review necessity or otherwise success--successfully challenges the agency's right to acquire the property, or the legal sufficiency of the proceedings and the court finds the proposed acquisition improper, the court shall order the agency to reimburse the owner for actual attorney--reasonable attorney fees and other expenses incurred in defending the improper acquisition."

The argument that counsel makes and that Consumers makes is well, that's a two-part statute. It's--number one, you have to have the successful challenge, but second the court has to find that it was improper, and they cited the *Escanaba* case.

RECEIVED by MSC 12/20/2021 10:30:09 AM

The *Escanaba* case, the court is probably aware, reviewed that question, and used a fairly broad definition of improper, which came from Webster's Dictionary.

Basically, in that case, they said, well that was procedurally improper, because they began the case without actually having made a good faith offer, which is one of the requirements. So, they found that it was procedurally defective and ruled in favor of the defendants.

The Court of Appeals held in--. Again, that case they are argued well, yes we--they prevailed, but they did not make a determination of improper. The Court of Appeals said--they rejected that argument and said, no in short, we hold that a finding that the condemnation proceedings are procedurally defective is per say a finding that the proposed acquisition isn't proper, and the trial court does not have to separately state on the record that it finds the acquisition improper.

We submit that that same analysis--the court went on to explain really the purpose of the eminent domain provision was to protect a property own--owner and to save him whole in condemnation proceedings. The words "actual expenses and reasonable attorney fees of all parties' - clearly import that the property owner shall not be made to suffer for a proceedings, which he did not initiate and

RECEIVED by MSC 12/20/2021 10:30:09 AM

which is one of the most extraordinary in the law of taking a private property.

In this case, the court found that the--the acquisition was not a necessity; that is that Consumers had not established that element of the requirement to have a condemnation. By finding that it was not a necessity, we believe under the language of *Escanaba* that's a per say finding that the--that was an improper proceeding.

And, as I say although *Escanaba* went off on the issue on the right procedure, the definition of improper that it used included not in accordant with fact, truth or right procedure, not regularly or normally formed or not properly so-called, not suited to the circumstances, designed or in, and it goes on from there.

We submit under that same definition a finding that a condemnation procedure was--or a condemnation action was--was seeking properly that was not a public necessity is a finding that it was not in accordance with the facts, that it was not suited to the circumstances; that it was improper.

Therefore, we submit that under the statute the Storms are entitled, as a matter--matter of law, it's a mandatory thing to be awarded their attorney fees and cost. So, that's our argument there.

RECEIVED by MSC 12/20/2021 10:30:09 AM

The second issue is simply whether it's called a judgment or whether it's called an order of dismissal. Under the language of the court rule a judgment is something that--basically, MCR 2.601(A), says every final judgment may grant the relief to which the party in whose favor it is rendered is entitled.

So, basically it's disposing of the claim. That's exactly what this does. Counsel also cited Black's Law Dictionary, which said a judgment is quoting court's final determination, rights and obligations of the parties in the case. That's what this is. So, we think this is properly called a judgment for the defendants.

So, for those two reasons, your Honor, we're asking the court to enter our judgment, and to make an award of attorney fees in the amount that I indicated earlier; $13,917.50, cost of $240.60 plus whatever amount the court might determine is appropriate for our time here today.

MR. WILSON: Good afternoon, your Honor.

I'm going to take Mr. Lubben's argument just in reverse real quickly.

Our objections to the order go beyond simply calling it a judgment or an order. We pointed out to the court that in transcript the court said prepare an order.

RECEIVED by MSC 12/20/2021 10:30:09 AM

It didn't say prepare a judgment. It said an order dismissing the case. I've been practicing almost as long as Mr. Lubben properly, and I have heard of a lot of orders of dismissals, but not many judgments of dismissals.

But, a rose is a rose is a rose, and you can call this whatever you want to call it if it dismisses the case then it does what the court is said it should do.

Our bigger concern is--that it not editorialize what is on the record. And, second of all, that it not employ the term entry or enter, which has a legal term of art under our court rules, and has significance in regards to the timing of appeals.

So, if we could use the word "issued and opinion", "rendered an opinion", "stated an opinion", something other than entered an opinion that indicates the court signed a document some place and put it in a file, and that started the clock on the appeal.

The next argument is on the attorney fees, and as Mr. Lubben said, we are not here today to challenge the fees in terms of their reasonableness, but only in terms of their award itself.

Under the case of *Escanaba and Lake Superior Railroad Company* that we both cited in our briefs, this is clearly a two-prong test. The defendants in this case,

RECEIVED by MSC 12/20/2021 10:30:09 AM

however, basically want to conflate those two-prongs into a single prong that says, you lost the motion on necessity therefore you have to pay attorney fees. That is not the rule either under MCL 213.66 Sub 2, or *Escanaba and Lake Superior Railroad Company.*

Improper as used in 213.66(2), may mean a number of things, and the court in *Escanaba* did cite the--a dictionary for its definition. But, improper as--as it has been used in the case law is beyond--goes beyond simply procedural improprieties.

In the *Escanaba* case, as counsel indicated, there was a failure to provide a good faith offer to one of the defendants prior to starting the condemnation action.

In the *Detroit International Bridge Company* case, which we've also both cited, in that case--the--the--the plaintiff was found not to have the legal authority to condemn the property. Now, the court other--said we're still going to make you pay the attorney fees as if you did have that power, because we're going to assert 213.66(2) against you, but you--your proceeding was improper, because you had no legal authority to condemn.

In the *City of Luna Pier*, they--the city in that case was found by the Court of Appeal to have attempted to circumvent state law by employing condemnation improperly.

RECEIVED by MSC 12/20/2021 10:30:09 AM

Then there are two, so far as counsel can find, two unreported decisions. We've cited the *Hahn Drainage* District case, which we have cited, and the *Grosse Ile Township* case, which the defendants have cited.

In the *Hahn District--Drainage District* case, again, there was a failure to give a GFO to all of the property owners, and a failure to join all of the property owners as defendants; that's a procedural defect. In fact, that deprives the court of jurisdiction under a recent Court of Appeals published opinion.

In the *Grosse Ile Township*, again, in that case the township was trying to condemn property outside of its boundary, and the court said, you don't have authority to condemn property outside of your boundary. So, therefore, they lacked the legal authority to condemn that property and the proposed acquisition was improper.

What improper as used in the statute cannot mean, however, is simply, as I said, failure to withstand a motion to review necessity. That is the first prong of the test, and if you ignore the second prong of the test or restate it simply that it's the same thing as the first prong of the test you're violating the rules of statutory construction, which say that every word in the statute has to be given some meaning.

RECEIVED by MSC 12/20/2021 10:30:09 AM

Now, finally, I'd like to point out to the court that nowhere in these proceedings, up until the point that we filed our objections to the proposed order have defendants pointed to any procedural defect or other impropriety in the nature of the infirmities in the cases I cited above.

The court made no finding that our action was improper in this case. The defendants have not pleaded any procedural or other defects in their answers, or their affirmative defenses. They raised no procedural or other improprieties in their motion to review necessity or in their brief. They offered no evidence of improper conduct at the hearing on necessity. They asked for no finding of impropriety in their motion to review necessity, in their brief in support or in their closing arguments to this court. And, finally, the court made no finding of any procedural defect or other impropriety in its ruling from the bench.

Accordingly, it's our position that the second prong of the test established in 213.66 Sub 2, and as--and as reinforced by the *Escanaba* decision simply is not met in this case and an award of attorney fees is not warranted under the statute.

Thank you.

RECEIVED by MSC 12/20/2021 10:30:09 AM

THE COURT: Thank you.

Go ahead.

I--well, okay. Let me ask - put this out there.

Throughout this process both parties have talked about necessity, and I have been very tempted to be very careful about differentiating the--the position, I guess, of the plaintiff is that there was a declaration of necessity regarding this particular project, which I think just about everybody is in agreement as to what Consumers is trying to do in order to protect this line.

What I've heard in all of the individual matters is whether the subject property is in fact needed to address that necessity, and I've delineated or distinguished between properties that I believe do effectuate the, I guess, the fulfillment of addressing the necessity as expressed by--by plaintiff, as opposed to those properties that are not needed to address that necessity.

So, the question, I guess I have, is whether in fact the argument that are being raised - whether the argument address the question of if there is a valid necessity, whether it's public or private entity, that seeks to include property that is not needed to address that necessity; whether that is improper condemnation.

RECEIVED by MSC 12/20/2021 10:30:09 AM

Now, the second--the second piece, and I'll address this. My--my--my belief is that this action was commenced by the plaintiffs in essence seeking a declaration that this property was in fact to be included in the process and therefore, the only issue before the court going forward would be the--the amount of any damages that--or not damages, but the compensation that would be due to the property owners.

And, in that regard, the court believe that this property was not necessary to--not necessary to the process and therefore that the, quote/unquote--quote/unquote "complaint" should be dismissed.

So, looking at it in that light the court believes that an order of dismissal is the appropriate response. So, putting that aside.

As to the other, Mr. Lubben, do you have any thoughts with regard to the court's general question as to whether if--if some property is not needed to address the necessity whether it's improper to go forward with the condemnation on that property?

MR. LUBBEN: Yes, your Honor, I do.

First, let me first say there are no cases that I can find, nor that he cited where a landowner who prevailed in an eminent domain proceeding did not receive its

RECEIVED by MSC 12/20/2021 10:30:09 AM

attorney fees.

THE COURT: Right.

MR. LUBBEN: Not one.

THE COURT: Okay.

MR. LUBBEN: So, the question then is, well is it different when the condemning authority files an action that seeks property that the court ultimately determines was not necess--was not a public necessity for the condemning authority to accomplish its purpose.

And, I submit to the court, yes that is improper. In other words, when the condemning authority seeks to go beyond its--what is authorized to as property--necessity - when it goes beyond that it becomes an improper action. I submit to the court that the *Grosse Ile* case that we cited, actually the *Detroit Bridge Company* case, which is 279 Mich App - that was one where the bridge company lacked the--the cog--the authority to--to--

THE COURT: To condemn certain property.

MR. LUBBEN: --condemn the property. The court said, well so it's--we can't get attorney fees, because we're not subject to the statute, because we lack the authority. The court objected to that, and said that doesn't make any sense.

THE COURT: Yeah.

RECEIVED by MSC 12/20/2021 10:30:09 AM

MR. LUBBEN: If you're going beyond what you have the authority to do then you are under the statute - your action is improper. The landowner ought to receive it.

Then in the *Grosse Ile* case, which I have immediately acknowledge is an unpublished opinion, so it's not presidentially binding, but the Court of Appeals analysis is nonetheless, I think, persuasive because in that case actually what happened was the--the--the--the court--the lower court had held that the township lacked--took property that was not a public necessity.

THE COURT: Right.

MR. LUBBEN: The Court of Appeals reversed it and says, well because it was a public agency - you've got that permission of the statute that says the court is stuck with the ruling, so you can't challenge it. So, then the township said, well so we don't have to--. Well--but, then the Supreme Court then went on to say, nevertheless, the township was seeking property that was on--beyond the jurisdiction of the limits of the township.

THE COURT: Yeah.

MR. LUBBEN: And, the court said, so that's improper to seek property that you don't have authority over. I submit to the court that that is analogous to the situation where you're seeking to get property that is not

RECEIVED by MSC 12/20/2021 10:30:09 AM

a necessity. It's a little different distinction; I agree. It's--but, it is saying you're going beyond what is necessary--

THE COURT: Yeah.

MR. LUBBEN: --to acquire, and that makes it an improper action as they say. Then go back to the language of the statute and the court's finding about really the intent, and has to make sure a landowner is not harmed when there's an action like this.

So, I think when you put all of those together, your Honor, I think the proper analysis is that filing a condemnation action that seeks property that is not a public necessity to accomplish that purpose - as soon as you make that founding, you found that it is improper, and therefore the statutory/mandatory provision to award attorney fees kicks in.

THE COURT: Okay.

Thank you.

MR. WILSON: Your Honor, and our position is that that simply conflates both of those elements.

THE COURT: I understand.

MR. WILSON: Those are clearly two elements, and the *Escanaba* Court says they're two elements; they both have to be satisfied.

RECEIVED by MSC 12/20/2021 10:30:09 AM

THE COURT: Yep. Okay.

So, this matter is before the court on the motion of Mr. and Mrs. Storm for, well basically for attorney fees, but basically the cost of having to bring this matter to the court's attention based upon the condemnation process engaged in by--by plaintiffs.

There was a hearing in which the court made a determination that plaintiffs had demonstrated a--even as a private agency, and demonstrated that there was a necessity to condemn property in order to protection their soon to be upgraded transmission--power transmission lines, but that the plaintiffs had failed, in fact, the defendants had prevailed on the notion of whether their property in particular was needed for effectuation of the necessity as filed by the plaintiffs.

The court having made that ruling triggered the next matter, which is before me now, namely whether in fact the defendants are entitled, first of all, to a judgment and order dismissing the case. The court believes that proper--the proper order to be issued is an order of dismissal rather than a judgment of dismissal or a judgment, and with regard to that motion, the court will side with plaintiffs and require that whatever the court signs be, in fact, couched in terms of an order of

RECEIVED by MSC 12/20/2021 10:30:09 AM

dismissal.

With regard to the second matter, which is really the first matter raised, the court believes that the analysis, namely that the process used by the plaintiffs, namely declaration and then a matter seeking to condemn the defendants' property as part of that necessity. In and of itself, I guess from a--as far as that part--part of the process goes, the plaintiff, I believe, engaged in proper procedural actions.

However, with regard to the imposition as to this particular piece of property it is clear that the assertion of condemnation of this particular property was improper, and therefore subject to triggering the attorney fee provision of the statute.

It is in some ways a very thin line as a practical matter. But, from a legal standpoint, I think, it is very much a--an appropriate distinction to say, in this particular matter, specially given in light of the underlining policy regarding protection of the property owners' interest, and the legislatures belief that that should be protected by affording them attorney fees in those situations where there was improper attempt to condemn.

I believe that that is where this court needs to

RECEIVED by MSC 12/20/2021 10:30:09 AM

RECEIVED by MSC 12/20/2021 10:30:09 AM

come down with regards to the assessment of attorney fees; namely that trying to condemn property, which is not needed for the necessity, as filed by the plaintiff, goes beyond what should be allowed, what in fact be permitted, and defendants having to come into court to assert their position that their property is not needed in this project is analogous to requiring someone who has absolutely no connection to the--the--in this case the line of--of easement - requiring them to come in and therefore that is improper for purposes of--of the, I guess, analysis--analysis that is set forth in *Escanaba*.

So, bottom line is that the attempt to condemn property not needed for this necessity is improper, and therefore it does trigger the imposition of attorney fees. And, while Mr. Lubben has had to enjoy the court's pronunciation and recall the various arguments have gone today, I am not of mind that that is a cost that should be paid for by Consumers.

I will impose the cost and attorney fees as set forth in the motion of $13,917.50, and Mr. Lubben, you can prepare an order in that respect.

MR. LUBBEN: Will do, your Honor.

THE COURT: Thank you.

MR. WILSON: Thank you, your Honor.

THE COURT: Thank you.

(At 1:17:48 p.m., proceedings concluded)

STATE OF MICHIGAN)
)
COUNTY OF KALAMAZOO)

I certify that this transcript consisting of 21 pages, is a complete, true, and correct transcript of the DEFENDANT'S MOTION HEARING FOR ATTORNEY FEES to the best of my ability, of the proceedings held in this case on Wednesday, August 1, 2019, before the Honorable Alexander C. Lipsey.

September 1, 2019

Date

Rebecca Abbs-Kucks CER #7921
PO BOX 24
Vicksburg, MI 49097
269-352-9227

RECEIVED by MSC 12/20/2021 10:30:09 AM

RECEIVED by MSC 12/20/2021 10:30:09 AM

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF KALAMAZOO

CONSUMERS ENERGY COMPANY,

Plaintiff,

v.

BRIAN STORM, ERIN STORM, and LAKE MICHIGAN CREDIT UNION,

Defendants.

Case No. 2019-0160-CC

HONORABLE ALEXANDER C. LIPSEY

FILED
AUG 26 2019
9TH JUDICIAL CIRCUIT
COUNTY OF KALAMAZOO
KALAMAZOO, MICHIGAN

Nikole L. Canute (P68713)
Richard M. Wilson, Jr. (P29717)
MIKA MEYERS, PLC
Attorneys for Plaintiff
900 Monroe NW
Grand Rapids, Michigan 49503
Telephone: (616) 632-8000

Craig H. Lubben (P33154)
MILLER JOHNSON
Attorneys for Defendants
Brian Storm and Erin Storm
Radisson Plaza Hotel & Suites
100 West Michigan Avenue, Suite 200
Kalamazoo, Michigan 49007-3960
Telephone: (269) 226-2958

ORDER OF DISMISSAL AND AWARDING ATTORNEYS' FEES AND EXPENSES UNDER MCL 213.66

At a session of said Court held this 26th day of August 2019, in the Kalamazoo County Circuit Court, Kalamazoo, Michigan.

PRESENT: HONORABLE ALEXANDER C. LIPSEY

This matter first came before the Court on Defendants' Motion for Determination of Necessity. The Court conducted an evidentiary hearing on the Motion for Determination of Necessity on June 28, 2019. The Court issued an opinion from the bench at the conclusion of the evidentiary hearing. Defendants subsequently filed a Motion for Entry of Judgment and for

RECEIVED by MSC 12/20/2021 10:30:09 AM

Attorneys' Fees and Costs Under MCL 213.66. This Motion was brought on for hearing on August 21, 2019. The Court issued an opinion from the bench.

IT IS HEREBY ORDERED that for the reasons stated on the record on June 28, 2019, Defendants' Motion for Determination of Necessity is granted and the case is dismissed with prejudice;

IT IS FURTHER ORDERED that for the reasons stated on the record on August 21, 2019, Plaintiff shall pay Defendants $13,917.50 for their actual and reasonable attorneys' fees and $240.60 for the expenses incurred by Defendants in defending against Plaintiff's proposed condemnation under MCL 213.66(2).

This Order resolves the last pending claim and closes the case.

Honorable Alexander C. Lipsey
Circuit Court Judge

APPROVED AS TO FORM ONLY:

MIKA MEYERS, PLC
Attorneys for Plaintiff

By: _____
Richard M. Wilson, Jr. (P29717)

MILLER JOHNSON
Attorneys for Defendants

By: _____
Craig H. Lubben (P33154)

RECEIVED by MSC 12/20/2021 10:30:09 AM

Court of Appeals, State of Michigan

ORDER

Consumers Energy Company v Brian Storm

Docket No. **350617**

LC No. **2019-000160-CC**

Jane M. Beckering, Chief Judge Pro Tem, acting under MCR 7.211(E)(2), orders:

The motion to strike is GRANTED ONLY TO THE EXTENT that the July 7, 2020 affidavit of Samuel E. Chansler, which is attached as Exhibit 1 to appellant's July 8, 2020 reply brief, is STRICKEN.

A true copy entered and certified by Jerome W. Zimmer Jr., Chief Clerk, on

AUG - 4 2020
Date

Chief Clerk

RECEIVED by MSC 12/20/2021 10:30:09 AM

Court of Appeals, State of Michigan

ORDER

Consumers Energy Company v Brian Storm

Docket No. **350617**

LC No. **2019-000160-CC**

Jane M. Beckering, Chief Judge Pro Tem, acting under MCR 7.211(E)(2), orders:

The motion to file an amicus curiae brief on behalf of International Transmission Company and Michigan Electric Transmission Company LLC is DENIED. The amicus curiae brief that was received with the motion is not accepted for filing.

A true copy entered and certified by Jerome W. Zimmer Jr., Chief Clerk, on

JUL 28 2020
Date

Chief Clerk

If this opinion indicates that it is "FOR PUBLICATION," it is subject to revision until final publication in the Michigan Appeals Reports.

RECEIVED by MSC 12/20/2021 10:30:09 AM

STATE OF MICHIGAN

COURT OF APPEALS

CONSUMERS ENERGY COMPANY,

Plaintiff-Appellant,

v

BRIAN STORM and ERIN STORM,

Defendants-Appellees,

and

LAKE MICHIGAN CREDIT UNION,

Defendant.

FOR PUBLICATION
November 19, 2020
9:10 a.m.

No. 350617
Kalamazoo Circuit Court
LC No. 2019-000160-CC

Before: O'BRIEN, P.J., and BECKERING and CAMERON, JJ.

O'BRIEN, P.J.

In this takings case, plaintiff appeals as of right the trial court's order dismissing the case and awarding attorney fees to defendants.[1] For the reasons explained in this opinion, we dismiss plaintiff's appeal in part, and vacate that portion of the trial court's order awarding attorney fees to defendants.

I. BACKGROUND

Plaintiff, a provider of electric power in Michigan, owns a powerline running through property in front of defendants' property. There is about 10 feet between plaintiff's powerline and defendants' property. Plaintiff sought an easement on defendants' property that would stretch 80 feet from plaintiff's powerline onto defendants' property, and would allow plaintiff to enter

[1] For purposes of this opinion, "defendants" refers only to Brian and Erin Storm. The other defendant, Lake Michigan Credit Union, had a default judgment entered against it in the trial court, and it and has taken no part in this appeal.

RECEIVED by MSC 12/20/2021 10:30:09 AM

defendants' property as necessary to maintain the powerline and to manage vegetation on the property that could threaten the line.

Under MCL 486.252, plaintiff has authority "[t]o condemn all lands and any and all interests therein," including "easements," that "may be necessary to generate, transmit, and transform electric energy for public use in, upon, or across private property." After defendants rejected plaintiff's good-faith offer to purchase the easement, plaintiff, proceeding under MCL 486.252, filed in the trial court a complaint to condemn an easement interest in defendants' property. In response to plaintiff's complaint, defendants filed a motion challenging the necessity of the easement under MCL 213.56(1) of the Uniform Condemnation Procedures Act (UCPA), MCL 213.51a *et seq*. The trial court set the matter for a hearing, MCL 213.56(1), and because plaintiff was a private agency under MCL 213.51(h), the hearing proceeded under MCL 213.56(3). That statute provides in relevant part, "Except as otherwise provided in this section, with respect to an acquisition by a private agency, the court at the hearing shall determine the public necessity of the acquisition of the particular parcel." MCL 213.56(3). At the ensuing hearing, the trial court determined that plaintiff failed to establish the public necessity of acquiring an easement on defendants' property, and ruled in favor of defendants.

Defendants thereafter moved for attorney fees under MCL 213.66(2). Plaintiff contested the motion, arguing that attorney fees are appropriate under MCL 213.66(2) only if the court finds the proposed acquisition improper, which the court did not do in this case. The trial court disagreed, holding that, by ruling for defendants' in their challenge to plaintiff's acquisition, the court had necessarily found the proposed acquisition improper.

In accordance with its rulings, the trial court entered an order dismissing the case and awarding attorney fees to defendants. Plaintiff appeals that order as of right.

II. JURISDICTION

After plaintiff filed its appeal, defendants moved to dismiss the appeal for lack of jurisdiction, arguing that plaintiff was required by MCL 213.56(6) to appeal the trial court's public-necessity determination by leave granted. A panel of this Court denied the motion without prejudice for consideration by the case-call panel.[2] After reviewing the issue, we agree with defendants and therefore dismiss plaintiff's appellate challenge to the trial court's public-necessity determination for lack of jurisdiction.

A challenge to this Court's jurisdiction is a question of law reviewed de novo. *Chen v Wayne State Univ*, 284 Mich App 172, 191; 771 NW2d 820 (2009). Likewise, this Court reviews de novo the interpretation of the UCPA. *Bd of Co Rd Commissioners for Co of Washtenaw v Shankle*, 327 Mich App 407, 412; 934 NW2d 279 (2019).

As stated, after defendants challenged the necessity of plaintiff's proposed acquisition under MCL 213.56(1), the trial court proceeded under MCL 213.56(3) and determined that

[2] *Consumers Energy Company v Storm*, unpublished order of the Court of Appeals, entered July 23, 2020 (Docket No. 350617).

RECEIVED by MSC 12/20/2021 10:30:09 AM

plaintiff's acquisition of easement rights to defendants' property was unnecessary. That determination constituted a final judgment. MCL 213.56(5) ("The court's determination of a motion to review necessity is a final judgment."). While final judgments are generally appealable to this Court as a matter of right under MCL 600.309, MCL 213.56(6) states:

> Notwithstanding [MCL 600.309], *an order of the court* upholding or *determining public necessity* or upholding the validity of the condemnation proceeding *is appealable to the court of appeals only by leave of that court* pursuant to the general court rules. In the absence of a timely filed appeal of the order, an appeal shall not be granted and the order is not appealable as part of an appeal from a judgment as to just compensation. [Emphasis added.]

The question now before us is whether the trial court's determination that no public necessity justified plaintiff's acquisition of easement rights to defendant's property was "an order of the court upholding or determining public necessity" under MCL 213.56(6) such that the determination was only appealable by leave granted.

To properly interpret a statute, we must discern and give effect to the Legislature's intent. *Putkamer v Transamerica Ins Corp of America*, 454 Mich 626, 631; 563 NW2d 683 (1997). The most reliable evidence of the Legislature's intent is the language used in the statute itself. *Whitman v City of Burton*, 493 Mich 303, 311; 831 NW2d 223 (2013). "If the language of a statute is clear and unambiguous, the statute must be enforced as written and no further judicial construction is permitted." *Id*. When interpreting an undefined statutory term, the term "must be accorded its plain and ordinary meaning." *Brackett v Focus Hope, Inc*, 482 Mich 269, 276; 753 NW2d 207 (2008). "When considering the correct interpretation, the statute must be read as a whole." *Michigan Properties, LLC v Meridian Twp*, 491 Mich 518, 528; 817 NW2d 548 (2012).

We conclude that it is clear from the statutory text that the trial court's public-necessity determination in this case was only appealable by leave granted under MCL 213.56(6). To reach this conclusion, we begin by addressing the difference between an order "determining" public necessity and one "upholding" public necessity under MCL 213.56(6).

When a private agency such as plaintiff seeks to acquire property under MCL 213.56 and an owner contests the acquisition, the case proceeds under MCL 213.56(3). Absent exceptions not present here, the case goes to a hearing where the court must "determine the public necessity of the acquisition." MCL 213.56(3). The use of "determine" in MCL 213.56(3) clearly leaves a court discretion to decide that no public necessity justified the proposed acquisition. In contrast, when a public agency seeks to acquire property under MCL 213.56 and an owner contests the acquisition, the case proceeds under MCL 213.56(2), and at the ensuing hearing, "the [public agency's] determination of public necessity is binding on the court in the absence of a showing of fraud, error of law, or abuse of discretion." In other words, the trial court at the ensuing hearing does not have discretion to determine the public necessity of the acquisition, and is instead bound to uphold the public agency's determination of public necessity absent "a showing of fraud, error of law, or abuse of discretion." MCL 213.56(2). The court in those instances would not be "determining" public necessity like it would under MCL 213.56(3), but would be "upholding" a prior determination of public necessity.

RECEIVED by MSC 12/20/2021 10:30:09 AM

With this in mind, it is clear that MCL 213.56(6)'s language referring to "an order of the court upholding . . . public necessity" is referring to instances where a prior determination of public necessity is binding on the court, and the court is asked whether to uphold that determination.[3] And MCL 213.56(6)'s language referring to "an order of the court . . . determining public necessity" is referring to instances where the court is asked to determine public necessity, namely "with respect to an acquisition by a private agency" when the court must "determine the public necessity of the acquisition of the particular parcel" under MCL 213.56(3).

It follows that an order "determining" public necessity under MCL 213.56(6) refers to both an order determining that public necessity justified an acquisition *and* an order determining that no public necessity justified the acquisition. Again, an order "determining" public necessity under MCL 213.56(6) refers to the order that results after a trial court "determine[s] the public necessity of the acquisition" under MCL 213.56(3). As stated earlier, "determine" as used in MCL 213.56(3) clearly leaves a court discretion to decide that no public necessity justified the proposed acquisition. Under the consistent-usage canon, it is presumed that the Legislature intends for a word to bear the same meaning throughout a text. See *United States Fid & Guar Co v Michigan Catastrophic Claims Ass'n*, 484 Mich 1, 14; 795 NW2d 101 (2009) ("If the Legislature had intended the same meaning in both statutory provisions, it would have used the same word."); *Szydelko v Estate of Smith*, 259 Mich 519, 521; 244 NW 148 (1932) ("In arriving at the legislative intent, it is helpful to refer to other probate statutes where the same words are used; for, if in other statutes they are used in relation to general administration only, it is fair to assume that they were intended to have the same meaning in this statute."). Applying this canon to MCL 213.56, it is presumed that the Legislature intended for "determine" as used in MCL 213.56(3) to have the same meaning when used in subsection (6). That is, an order "determining public necessity" under MCL 213.56(6) encompasses both an order determining that public necessity was established and an order determining that it was not, similar to how a trial court under MCL 213.56(3) can determine public necessity was established or determine that it was not.

Plaintiff contends that MCL 213.56(6) "applies *only* to trial court orders that *reject* a property owner's motion to review necessity and confirm that necessity exists, thereby allowing the condemnation to proceed." Plaintiff contends that this is supported by the plain language of

[3] Our interpretation of the interaction between MCL 213.56(2) and MCL 213.56(6) is consistent with prior cases involving rulings against a public agency's proposed acquisition—a ruling *against* a public agency would not be an order "upholding" the agency's determination of public necessity, and therefore would be an appealable final order, MCL 213.56(5), not subject to MCL 213.56(6). See, e.g., *Village of Oxford v Nathan Grove Family LLC*, 270 Mich App 685, 686-687; 717 NW2d 400 (2006) (stating that the plaintiff, a public agency for purposes of MCL 213.56(2), was appealing as of right an order of the circuit court granting a property owner's challenge to the necessity of the plaintiff's proposed taking). We further note that an order "upholding" a determination of public necessity is not necessarily limited to cases where a public agency seeks to make the acquisition and the court proceeds under MCL 213.56(2). See, e.g., MCL 213.56(3) (stating that, "with respect to an acquisition by a private agency," "[t]he granting of a certificate of public convenience and necessity by the public service commission pursuant to the electric transmission line certification act, [MCL 460.561 to 460.575], is binding on the court.").

RECEIVED by MSC 12/20/2021 10:30:09 AM

MCL 213.56(6) because, looking to a dictionary, "determine" when used as a verb is defined as "to fix conclusively or authoritatively." *Merriam-Webster's Collegiate Dictionary* (11th ed). That definition, however, is clearly not an appropriate definition for "determine" as used in MCL 213.56. The example the dictionary gives for plaintiff's proposed definition of "determine" as a verb is "*determine* national policy." *Merriam-Webster's Collegiate Dictionary* (11th ed). When a trial court determines the public necessity of an acquisition, it is not determining public necessity the way a leader of a country "determines national policy."

The better definition of "determine" when used as a verb in MCL 213.56 is "to find out or come to a decision about by investigation, reasoning, or calculation," for example, "*determine* the answer to the problem." *Merriam-Webster's Collegiate Dictionary* (11th ed). This fits in the statute far better; when a trial court determines the public necessity of an acquisition, it is coming to a decision about the public necessity of the acquisition by reasoning, the way courts often do when rendering decisions. See *Consumers Power Co v Pub Serv Comm*, 460 Mich 148, 163 n 10; 596 NW2d 126 (1999) (observing that dictionaries "often contain multiple definitions," and using dictionaries as "interpretive aids" requires selecting the definition that gives the word the most appropriate meaning based on its "context or setting"). This definition of "determine" as a verb encompasses both a decision that the public necessity of the acquisition was established, and a decision that it was not, and therefore cuts against plaintiff's argument.

Plaintiff contends that this definition of "determine"—which is similar to the one cited by defendants in their motion to dismiss—cannot be correct because it undermines "the UCPA's 'overall statutory scheme' of allowing agencies to quickly acquire property for projects." This is incorrect for two reasons. First, the "overall statutory scheme" is not a reason to rewrite the Legislature's clear intent as evidenced by the language used in the statute itself. See *Perkovic v Zurich Am Ins Co*, 500 Mich 44, 53; 893 NW2d 322 (2017) ("The Court of Appeals' reliance on the perceived purpose of the statute runs counter to the rule of statutory construction directing us to discern legislative intent from plain statutory language."). Second, there is no reason to conclude that requiring a private agency to appeal an adverse determination of public necessity by leave granted would delay the agency any more than allowing it to appeal the determination by right. In fact, it seems that requiring an agency to appeal by leave granted will allow the agency to know sooner whether their appeal may have merit—if leave is denied, the agency knows that it must proceed without the property it sought to acquire.

Plaintiff also contends that the language used in the last sentence of MCL 213.56(6) makes clear that the subsection only applies to property owners when it states, "In the absence of a timely filed appeal of the order, an appeal shall not be granted and the order is not appealable as part of an appeal from a judgment as to just compensation." Plaintiff points out that if a trial court determines that there is no public necessity for a proposed acquisition, the case is dismissed and does not proceed to a ruling on just compensation. While plaintiff is correct in this respect, we read this sentence as providing guidance on what happens when leave to appeal is not timely filed. We do not read the sentence as limiting the application of MCL 213.56(6) to property owners.

In sum, the trial court's order determining that there was no public necessity for plaintiff's proposed acquisition was "an order of the court . . . determining public necessity" under MCL 213.56(6), and was therefore only appealable by leave granted.

RECEIVED by MSC 12/20/2021 10:30:09 AM

Plaintiff contends that even if it was required to appeal by leave granted, this Court can exercise its discretion to treat this appeal as of right as an appeal on leave granted. See, e.g., *Botsford Continuing Care Corp v Intelistaf Healthcare, Inc*, 292 Mich App 51, 61; 807 NW2d 354 (2011) (holding that, although the case was only appealable by leave granted and the defendant appealed by right, this Court would "exercise [its] discretion to treat [the defendant's] claim of appeal as a granted application for leave to appeal" for the sake of judicial economy). While generally true, this Court has no discretion to treat *this* appeal as on leave granted. MCL 213.56(6) states in relevant part, "In the absence of a timely filed appeal of the order, an appeal *shall not be granted* . . . ." (Emphasis added.) "The phrases 'shall' and 'shall not' are unambiguous and denote a mandatory, rather than discretionary action." *Roberts v Mecosta Co Gen Hosp*, 466 Mich 57, 65; 642 NW2d 663 (2002). Thus, unlike the normal course of an appeal, this Court does not have discretion to treat this appeal as on leave granted. Instead, the appeal "shall not be granted," MCL 213.56(6), and must therefore be dismissed.

This is supported by *City of Detroit v Lucas*, 180 Mich App 47; 446 NW2d 596 (1989). There, the appellants appealed an order determining public necessity by right instead by leave granted, as required by MCL 213.56(6). *Id*. at 49-50. This Court held that it was "without jurisdiction to review the circuit court order . . . because the application for leave to appeal was not timely filed." *Id*. at 51. While we are not strictly bound by *Lucas* because it was decided before November 1, 1990, see MCR 7.215(J)(1), we nonetheless find it persuasive and agree with its application of the clear and unequivocal language used by the Legislature in MCL 213.65(6). See also *Michigan Dept of Transp v Benson*, 443 Mich 870, 870 (1993) ("Leave to appeal from the Court of Appeals order dismissing the appellants' claim of appeal is DENIED, because the circuit court order 'upholding the validity of the condemnation is appealable to the Court of Appeals only by leave of that court pursuant to the general court rules.' MCL 213.56(6)."). Therefore, like in *Lucas*, we conclude that plaintiff's failure to properly appeal the trial court's order determining public necessity requires dismissal of that portion of its appeal.

III. ATTORNEY FEES

Plaintiff also challenges the trial court's award of attorney fees to defendants. MCL 213.56(6) says nothing about a trial court's order of attorney fees, and we interpret that statute as being limited to "an order of the court upholding or determining public necessity or upholding the validity of the condemnation proceeding . . . ." MCL 213.56(6). Thus, despite dismissing that portion of plaintiff's appeal challenging the trial court's determination of public necessity, we address plaintiff's challenge to the portion of the trial court's order awarding attorney fees to defendants.

Plaintiff does not contest the reasonableness of the awarded attorney fees, and instead argues that the trial court incorrectly applied MCL 213.66(2) to the facts of this case. We agree. While attorney fees are generally reviewed for an abuse of discretion, whether the trial court properly interpreted and applied the UCPA to an award of attorney fees is reviewed de novo. *Indiana Michigan Power Co v Cmty Mills Inc*, ___ Mich App ___, ___; ___ NW2d ___ (2020) (Docket No. 349671); slip op at p 2.

RECEIVED by MSC 12/20/2021 10:30:09 AM

After successfully challenging plaintiff's proposed acquisition of their property, defendants sought—and the trial court awarded defendants—attorney fees under MCL 213.66(2), which states:

> If the property owner, by motion to review necessity or otherwise, successfully challenges the agency's right to acquire the property, or the legal sufficiency of the proceedings, and the court finds the proposed acquisition improper, the court shall order the agency to reimburse the owner for actual reasonable attorney fees and other expenses incurred in defending against the improper acquisition.

In *Escanaba & Lake Superior R Co v Keweenaw Land Ass'n, Ltd*, 156 Mich App 804, 812; 402 NW2d 505 (1986), this Court acknowledged that a property owner requesting attorney fees under MCL 213.66(2) must satisfy two prongs: (1) the property owner must successfully challenge the agency's right to acquire the property or the legal sufficiency of the proceedings, and (2) the court must find the proposed acquisition improper.

In *Escanaba*, the property-owner defendants successfully challenged the legal sufficiency of the proceedings—satisfying the first prong of MCL 213.66(2)—but the trial court did not explicitly find that the proposed acquisition was improper. *Id*. at 807. On appeal, the plaintiff argued that absent such a finding by the trial court, the second prong necessary to recover attorney fees under MCL 213.66(2) was not satisfied. *Id*. at 812. This Court disagreed, holding "that a finding that the condemnation proceedings are procedurally defective is per se a finding that the proposed acquisition is improper, and that the trial court does not have to separately state on the record that it finds the acquisition 'improper.' " *Id*. at 812-813.

There is no question that defendants successfully challenged plaintiff's acquisition in this case, thereby satisfying the first prong of MCL 213.66(2). The dispute on appeal is whether the second prong was satisfied. *Escanaba* is not applicable because its holding was limited to instances in which the property owner prevails based on the legal insufficiency of the proceedings; it says nothing about cases like this one where the property owner successfully challenges the agency's right to acquire the property.

Nonetheless, the trial court concluded that, similar to this Court's ruling in *Escanaba*, a trial court's ruling in favor of a property owner challenging an agency's right to acquire the property is necessarily a finding by the court that the proposed acquisition was improper. We disagree and conclude that, in this case, the trial court's ruling against plaintiff on defendants' challenge to the necessity of plaintiff's proposed acquisition was not a per se finding that the proposed acquisition was improper.

When interpreting a statute, courts "must give effect to every word, phrase, and clause in a statute and avoid an interpretation that would render any part of the statute surplusage or nugatory." *Johnson v Recca*, 492 Mich 169, 177; 821 NW2d 520 (2012) (quotation marks and citation omitted). If every property owner's successful challenge to the legal sufficiency of condemnation proceedings is per se a finding by the court that the acquisition was improper (as this Court held in *Escanaba*) , *and* every property owner's successful challenge to the agency's right to acquire the property is a per se finding by the court that the acquisition was improper (as

RECEIVED by MSC 12/20/2021 10:30:09 AM

defendants argue and the trial court held), then MCL 213.66(2)'s requirement that "the court finds the proposed acquisition improper" is rendered completely nugatory. If such an interpretation were the Legislature's intent, then it would have simply left out MCL 213.66(2)'s requirement that "the court finds the proposed acquisition improper."

The circumstances of this case illustrate why granting a property owner's challenge to an acquisition is not a per se finding that the proposed acquisition was improper. At the hearing to determine the public necessity of the acquisition, the trial court placed the burden of proving the necessity of the acquisition on plaintiff,[4] stating that it did "not believe that plaintiff has established a basis on which a taking of this particular property for the easements that are being proposed has established a necessity." At the hearing on defendants' request for attorney fees, the court reiterated that, at the necessity hearing, plaintiff had the burden of proving that its proposed acquisition was necessary, stating that "plaintiff had failed" to demonstrate that "there was a necessity to condemn" defendants' property. Because the trial court placed the burden of proving the public necessity of the acquisition on plaintiff, its ruling in defendants' favor was a finding that plaintiff failed to carry its burden. That is, the trial court's ruling was not akin to a finding that *defendants proved* that plaintiff's proposed acquisition was not necessary, and thus the ruling could not be a per se finding that the acquisition was improper. The trial court's ruling in defendants' favor was a finding that plaintiff failed to carry its burden, nothing more.

This highlights the fundamental flaw in defendants' argument. Defendants contend that by successfully challenging plaintiff's attempted acquisition, "the trial court found that there was no necessity for the condemnation." As explained, this is inaccurate; what the trial court found was that plaintiff failed to establish that its acquisition of defendants' property was necessary. That finding is distinct from a finding that the acquisition was improper.[5]

---

[4] The parties contest who should have borne the burden of proving public necessity at the necessity hearing—defendants contend that the burden was always on plaintiff, while plaintiff contends that its declaration of taking established a prima facie case that its proposed taking was necessary. We do not resolve that dispute in this case because we do not have jurisdiction to review the trial court's determination of public necessity. Moreover, even if we did have jurisdiction, the issue was not properly presented for our review, having been first raised by plaintiff in its reply brief on appeal. See *Kinder Morgan Michigan, LLC v City of Jackson*, 277 Mich App 159, 174; 744 NW2d 184 (2007) (declining to address issues first raised in a reply brief because "[r]eply briefs must be confined to rebuttal, and a party may not raise new or additional arguments in its reply brief"). Because the issue is not properly before us, we merely observe that the trial court placed the burden of proving necessity on plaintiff at all times, and we offer no opinion whether it was proper for the court to do so.

[5] We offer no opinion on whether a property owner's successful challenge to a public agency's right to acquire the property is a per se finding that the proposed acquisition was improper. In such a case, the agency's determination of public necessity is binding on the court absent a showing of fraud, error of law, or abuse of discretion, MCL 213.56(2), which appears to place the burden on property owners to show that the taking was improper.

RECEIVED by MSC 12/20/2021 10:30:09 AM

This is not to say that *Escanaba* was wrongly decided. To the contrary, *Escanaba*'s holding comports with our reasoning. In *Escanaba*, the defendants moved for summary disposition challenging the legal sufficiency of the proceedings on grounds that the plaintiff failed to make a good-faith offer to purchase the property as required by the UCPA. *Escanaba*, 156 Mich App at 809. In granting the motion, the trial court held that there was no question of fact that the plaintiff failed to make a good-faith offer to purchase the property, so the proceedings were legally insufficient, and the defendants were entitled to judgment as a matter of law. *Id*. Thus, the trial court in *Escanaba* held that the defendants established that the proceedings were legally insufficient, thereby affirmatively establishing that the proposed acquisition was improper. Here, in contrast, defendants did not establish that acquisition of their property was *not* a necessity; rather, plaintiff failed to carry its burden of establishing the necessity of its proposed acquisition.

Defendants argue that our interpretation is "entirely inconsistent with the purpose for fee-shifting in the first place." This Court recently reiterated that "[t]he rationale behind MCL 213.66(2) is that property owners may not be forced to suffer because of an action that they did not initiate and that endangered, through condemnation proceedings, their right to private property." *Indiana Michigan Power*, ___ Mich App at ___; slip op at 3 (quotation marks and citation omitted). And in *Escanaba*, this Court stated that "[t]he legislative intent behind the [UCPA] is to place the owner of the property in as good a position as was occupied before the taking." *Escanaba*, 156 Mich App at 815. Thus, defendants are correct to the extent that not awarding them attorney fees seems to run contrary to the purpose behind the statute. Yet MCL 213.66(2) clearly requires that "the court find[] the proposed acquisition improper" before awarding attorney fees. So, while our interpretation of MCL 213.66(2) may be "inconsistent with the purpose of the fee-shifting" statute as defendants suggest, it is nonetheless consistent with the plain statutory language. The plain language of a statute is not trumped by "the perceived purpose of the statute." *Perkovic*, 500 Mich at 53 ("The Court of Appeals' reliance on the perceived purpose of the statute runs counter to the rule of statutory construction directing us to discern legislative intent from plain statutory language.").

IV. CONCLUSION

For the reasons explained in this opinion, we dismiss plaintiff's appeal in part, and vacate that portion of the trial court's order awarding attorney fees to defendants.

Dismissed in part, vacated in part. No taxable costs, neither party having prevailed in full.

/s/ Colleen A. O'Brien
/s/ Jane M. Beckering
/s/ Thomas C. Cameron

RECEIVED by MSC 12/20/2021 10:30:09 AM

1999 WL 33435465
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Court of Appeals of Michigan.

DETROIT/WAYNE COUNTY STADIUM AUTHORITY, Plaintiff-Appellant,
v.
Nadia AUBREY and Kallil Aubrey, Deceased, Defendants-Appellees.

No. 208679.
|
Sept. 28, 1999.

Before: COLLINS, P.J., and SAWYER and CAVANAGH, JJ.

Opinion

PER CURIAM.

***1** In this condemnation case filed by plaintiff pursuant to the Uniform Condemnation Procedures Act (UCPA), M.C.L. § 213.51 *et seq.;* MSA 8.265(1) *et seq.,* plaintiff appeals as of right from an order awarding defendant Nadia Aubrey (hereafter "defendant") attorney fees and expenses of $21,517.66, after the trial court dismissed plaintiff's complaint for failure to conform to the requirements of the UCPA. The trial court also ordered plaintiff to pay interest on the attorney fee award if it was not paid within twenty-one days. We affirm.

Plaintiff first argues that the trial court's findings of fact were inadequate and do not justify the amount awarded. We disagree. Plaintiff's argument fails to account for the second supplemental affidavit filed by defendant's attorney in November 1997, wherein reimbursement was sought for 75.25 hours, which, when added to the additional five hours requested at the final hearing, results in a total of 80.25 hours. Although the trial court allowed the requested hours, it resolved plaintiff's challenge to the reasonableness of the hourly rate by awarding the lesser amount of $250, rather than the requested amount of $300, which results in a total attorney fee award of $20,062.50. The actual order awarded only $20,000, but the difference of $62.50 favors plaintiff. In light of this record, plaintiff has not demonstrated any deficiency in the trial court's findings warranting relief. See *Michigan Nat'l Bank v Metro Institutional Food Service, Inc,* 198 Mich.App 236, 241; 497 NW2d 225 (1993); *Howard v. Canteen Corp,* 192 Mich.App 427, 437-438; 481 NW2d 718 (1991).

Plaintiff's argument that defendant failed to account for nineteen hours likewise fails to consider the additional hours reflected in the second supplemental affidavit and, therefore, is without merit.

Plaintiff next claims that the trial court awarded attorney fees in excess of those allowed by statute by allowing attorney fees incurred in litigating the fee dispute. We find that plaintiff has effectively abandoned this because it has not cited any relevant legal authority in support of its position. *Schellenberg v Rochester, Michigan, Lodge No 2225,* 228 Mich.App 20; 577 NW2d 163 (1998). The case relied on by plaintiff, *In re Condemnation of Private Property for Hwy Purposes (Dep't of Transportation v D & T Const Co),* 209 Mich.App 336, 341-342; 530 NW2d 183 (1995), is not relevant because it involved a different provision of the statute, M.C.L. § 213.66(3); MSA 8.265(16)(3), and is cited only for the general proposition that defendant had the burden of proof to show reasonableness.

In any event, we note that this Court has not construed the phrase "incurred in defending against the improper acquisition" in M.C.L. § 213.66(2); MSA 8.265(16)(2) as being limited to expenses directly incurred. *Escanaba & Lake Superior R Co v Keweenaw Land Ass'n, Ltd,* 156 Mich.App 804, 819; 402 NW2d 505 (1986). It is sufficient that the attorney fees were incurred in continuing to defend a judgment (e.g., preserving benefits won). *Id.* at 819. Hence, an award for attorney fees incurred on appeal from an order awarding attorney fees and expenses has been upheld under M.C.L. § 213.66(2); MSA 8.265(2). *Id.* at 819. Accordingly, we hold that attorney fees incurred while litigating an attorney fee dispute are reimbursable if they meet the requirement of reasonableness. To hold otherwise would contravene the legislative intent that a property owner shall not be made to suffer from the condemnation proceedings on the taking of private property. *Id.* at 814-815.

***2** Relying on *Detroit v. J Cusmano & Son, Inc,* 184 Mich.App 507; 459 NW2d 3 (1989), plaintiff next contends that the trial court erred by awarding interest on the attorney fees. We disagree. Plaintiff's reliance on *Detroit* is misplaced because M.C.L. § 213.65; MSA 8.265(15) does not govern

 © 2021 Thomson Reuters. No claim to original U.S. Government Works.

RECEIVED by MSC 12/20/2021 10:30:09 AM

interest on attorney fees awarded under M.C.L. § 213.66(2); MSA 8.265(16)(2), *Escanaba & Lake Superior R Co, supra* at 820, and the applicable interest statute, M.C.L. § 600.6013; MSA 27A.6013, as amended by 1993 PA 78, plainly authorizes interest on an award of attorney fees. See *Lansing v. Edward Rose Realty, Inc,* 450 Mich. 851; 538 NW2d 677 (1995); *Escanaba & Lake Superior R Co, supra.* See also *Schellenberg, supra* at 50.

Plaintiff next claims that the trial court's award of costs is not supported by the record. We again reject plaintiff's argument because it fails to consider the second supplemental affidavit filed by defendant's attorney. Examining plaintiff's argument in the context of this deficiency and the disputed issues presented to the trial court before it made its ruling, we conclude that plaintiff has not demonstrated that the trial court abused its discretion in awarding the requested expenses. *Howard, supra.*

Finally, pursuant to *Escanaba & Lake Superior R Co, supra,* we conclude that defendant is entitled to an award of reasonable appellate attorney fees and expenses under M.C.L. § 213.66(2); MSA 9.265(16)(2). Hence, we remand to the trial court for a determination of reasonable appellate attorney fees and expenses.

Affirmed. Remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

All Citations

Not Reported in N.W.2d, 1999 WL 33435465

End of Document

© 2021 Thomson Reuters. No claim to original U.S. Government Works.

RECEIVED by MSC 12/20/2021 10:30:09 AM

2010 WL 3767578
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

UNPUBLISHED
Court of Appeals of Michigan.

GROSSE ILE TOWNSHIP,
Plaintiff-Appellant/Cross-Appellee,
v.
GROSSE ILE BRIDGE COMPANY,
Defendant-Appellee/Cross-Appellant.

Docket No. 291255.
|
Sept. 28, 2010.

Wayne Circuit Court; LC No. 03-325491-CC.

Before: FITZGERALD, P.J., and MARKEY and BECKERING, JJ.

Opinion

PER CURIAM.

***1** In this case, plaintiff unsuccessfully sought to condemn defendant's toll bridge pursuant to the Uniform Condemnation Procedures Act (UCPA), MCL 213.51 *et seq.* The trial court dismissed plaintiff's condemnation action, ruling that plaintiff had abused its discretion in finding public necessity. In *Grosse Ile Twp v. Grosse Ile Bridge Co,* unpublished opinion of the Court of Appeals, issued April 4, 2006 (Docket No. 255759), this Court affirmed. Our Supreme Court, however, held that MCL 213.56(1) did not permit judicial review of the public purposes stated in the complaint. *Grosse Ile Twp. v. Grosse Ile Bridge Co.,* 477 Mich. 890, 891, 722 N.W.2d 220 (2006). Nevertheless, the Court affirmed this Court and the trial court because plaintiff's power to condemn private property does not extend beyond its jurisdictional limits, and the subject toll bridge is situated partly outside plaintiff's boundaries. *Id.* Plaintiff now appeals by right the trial court's postjudgment order awarding defendant its "actual reasonable attorney fees and other expenses incurred in defending against the improper acquisition." MCL 213.66(2). Defendant cross-appeals the trial court's denial of prejudgment interest. We affirm.

I. LIMITATIONS ON APPEAL BY RIGHT

We first note that plaintiff includes as an issue in its brief on appeal a claim that the trial court and the chief judge pro tem erred by denying plaintiff's motion to disqualify the trial judge. Judge William J. Giovan entered an order on November 29, 2007, denying plaintiff's motion to disqualify Judge Susan D. Borman. After Judge Giovan's order was entered, additional proceedings were conducted on defendant's motion for reimbursement of attorney fees and costs, including proceedings before a special master and an evidentiary hearing before the trial court. The trial court heard arguments of counsel over two days before entering its order regarding attorney fees and costs on March 6, 2009. That order may be appealed by right pursuant to MCR 7.203(A)(1), which provides this Court "has jurisdiction of an appeal of right filed by an aggrieved party from ... [a] final judgment or final order of the circuit court ... as defined in MCR 7.202(6)...." MCR 7 .202(6)(iv) defines "final judgment" as "a postjudgment order awarding or denying attorney fees and costs under MCR 2.403, 2.405, 2.625 or other law or court rule." Thus, plaintiff may appeal the trial court's March 6, 2009, order by right. But, "[a]n appeal from an order described in MCR 7.202(6)(a)(iii)-(v) is limited to the portion of the order with respect to which there is an appeal of right." MCR 7.203(A)(1). Here, Judge Giovan's order denying plaintiff's motion to disqualify the trial judge is not included in the trial court's order regarding attorney fees and costs. Consequently, this Court lacks jurisdiction to consider plaintiff's claims regarding judicial disqualification within the ambit of plaintiff's appeal by right of the trial court's March 6, 2009, order. See *Pierce v. City of Lansing,* 265 Mich.App. 174, 182, 694 N.W.2d 65 (2005). Although we could consider this issue as on leave granted, *id.* at 182-183, 694 N.W.2d 65, plaintiff did not timely seek leave to appeal the November 29, 2007 order, and the parties continued to expend considerable time and effort on the merits of defendant's motion for attorney fees and costs. We decline to consider plaintiff's judicial disqualification claims.

II. STANDARD OF REVIEW

***2** This Court reviews for an abuse of discretion the trial court's decision whether to award attorney fees and costs under the UCPA and also the court's determination of reasonableness of the fees. *Detroit v. Detroit Plaza Ltd. Partnership,* 273 Mich.App. 260, 292, 730 N.W.2d 523

RECEIVED by MSC 12/20/2021 10:30:09 AM

(2006). The trial court abuses its discretion when its decision is outside the range of reasonable and principled outcomes. *Smith v. Khouri,* 481 Mich. 519, 526, 751 N.W.2d 472 (2008). In other words, the trial court must provide a " 'reasoned basis' " for its decision." *Detroit Plaza Ltd.,* 273 Mich.App. at 294, 730 N.W.2d 523, quoting *Dep't of Transportation v. Randolph,* 461 Mich. 757, 768, 610 N.W.2d 893 (2000). We review for clear error the court's findings of fact underlying an award of attorney fees. MCR 2.613(C); *Dep't of Transportation v. Robinson,* 193 Mich.App. 638, 646, 484 N.W.2d 777 (1992). A finding is clearly erroneous when, although there is evidence to support it, the reviewing court on the entire record is left with a definite and firm conviction that a mistake was made. *Univ Rehab. Alliance, Inc. v. Farm Bureau General Ins. Co.,* 279 Mich.App. 691, 693, 760 N.W.2d 574 (2008). Finally, part of plaintiff's appeal presents issues of statutory interpretation, which are questions of law reviewed de novo. *Detroit Int'l Bridge Co. v. Commodities Export Co.,* 279 Mich.App. 662, 666, 760 N.W.2d 565 (2008).

III. THE STATUTE

The controlling statute is § 16(2) of the UCPA, MCL 213.66(2), which provides:

> If the property owner, by motion to review necessity or otherwise, successfully challenges the agency's right to acquire the property, or the legal sufficiency of the proceedings, and the court finds the proposed acquisition improper, the court shall order the agency to reimburse the owner for actual reasonable attorney fees and other expenses incurred in defending against the improper acquisition.

In the trial court and on appeal, plaintiff asserts on the basis of its interpretation of the § 16(2) and § 16(6) of the UCPA, MCL 213.66(6), that under the circumstances of this case defendant is not entitled to its actual reasonable attorney fees and other expenses. First, plaintiff argues that the plain meaning of the words "incurred", "actual", and "reimburse" as used in § 16(2) require that defendant establish that it actually paid its attorneys, Ackerman and Ackerman, P.C., for services defending against the condemnation action before plaintiff can be ordered to reimburse defendant for the those actual fees. It is undisputed that here defendant did not pay its attorneys for services rendered in this case, at least through the hearings on the motion for attorney fees and costs. Indeed, in one of the two letters stating the terms of defendant's agreement with its attorneys, Alan J. Ackerman, defendant's lead attorney, wrote to Paul J. Smoke, defendant's president, the following:

> On the attorney fees, if I challenge the condemnation, I will await the Order for reimbursement of a reasonable fee as determined by the Court. The timing of the payment will have no effect on you, and will be ordered by the Court at the time of dismissal, if there is a dismissal. If there is no dismissal, I will not receive a fee. This contemplates a reasonable basis for a challenge to necessity. I do not, and will not, challenge necessity if there is no basis for challenge whatsoever. However, a precise review of a public use is an issue of concern in this specific situation. I would suggest to you that, as set forth more fully in my earlier letter, there are a number of issues which deserve further review before allowing a government to take your property.
>
> ***3** If we move forward to just compensation, I would seek reimbursement of your fees. There is no guarantee, but I have been successful in the past. [Ex 12, Evidentiary Hearing 09/15/2008.]

The trial court ruled that plaintiff's interpretation of the statute was tortured and that nothing in the statute required a property owner that successfully challenges a government agency's condemnation action to pay its attorneys before it can obtain reimbursement of its reasonable attorney fees from the agency. In its August 22, 2007 order appointing a special master pursuant to the parties' consent to review the reasonableness of the number of hours claimed by the Ackerman firm, the trial court denied plaintiff's challenge to attorney fees and costs on the basis that defendant had not previously been paid by defendant.

Like the trial court, we reject plaintiff's tortured interpretation of the statute. A statute must be applied according to the plain, ordinary meaning of its terms unless some contrary intent is clearly manifested. *Randolph,* 461 Mich. at 765, 610 N.W.2d 893 (where statutory language is clear and unambiguous, it must be applied as written); *Detroit Plaza Ltd. Partnership,* 273 Mich.App. at 276, 730 N.W.2d 523 ("When interpreting

RECEIVED by MSC 12/20/2021 10:30:09 AM

a statute, this Court's goal is to ascertain and give effect to the intent of the Legislature by enforcing plain language as it is written."). It is axiomatic that nothing will be read into a clear statute that is not within the manifest intention of the Legislature as derived from the language of the statute itself. *Booker v. Shannon,* 285 Mich.App. 573, 578, 776 N.W.2d 411 (2009). Furthermore, once the intention of the Legislature is discovered, it must prevail regardless of any conflicting rule of statutory construction. *Thompson v. Thompson,* 261 Mich.App. 353, 361 n. 2, 683 N.W.2d 250 (2004). In that regard, this Court has long held that the Legislature's primary purpose in the attorney fee provisions of the UCPA is that property owners "not be forced to suffer because of an action that they did not initiate and that endangered, through condemnation proceedings, their right to private property[,]" *Detroit Int'l Bridge Co.,* 279 Mich.App. at 675, 760 N.W.2d 565, or stated otherwise, that the property owner be placed in as good a position as that occupied before the taking, *Detroit Plaza Ltd. Partnership,* 273 Mich.App. at 294, 730 N.W.2d 523. See also *Escanaba & Lake Superior R Co. v. Keweenaw Land Ass'n, Ltd.,* 156 Mich.App. 804, 815, 402 N.W.2d 505 (1986).

Upon a property owner's successful challenge to an agency's condemnation action, the plain language of § 16(2) requires that the court "*shall* order the agency to reimburse the owner for *actual reasonable* attorney fees and other expenses *incurred* in defending against the improper acquisition." The word "shall" renders the entry of such an order mandatory. See *Macomb Co. Rd. Comm. v. Fisher,* 170 Mich.App. 697, 700, 428 N.W.2d 744 (1988). The word "actual" clearly modifies "attorney fees," meaning that the focus of the statute is on the attorney fees actually "incurred" by the owner, rather than a reasonable attorney fee in the abstract. See *Randolph,* 461 Mich. at 765-766, 610 N.W.2d 893 ("the focus of the reasonableness determination clearly is on the *owner's* attorney fees"); *Village of Lexington v. Harbor Dev,* unpublished opinion per curiam issued June 3, 2008 (Docket No. 273770). Although *Randolph* addressed reimbursement of a property owner's attorney fees and costs under § 16(3) of the UCPA-when just compensation is determined to be greater than the agency's good faith offer-we agree with the *Lexington* panel that *Randolph's* analytical framework also applies to § 16(2) because the two provisions share the same purpose and use similar language. See *Lexington,* unpub op at 5. Under this framework, a property owner is entitled to recover its actual attorney fees incurred "defending against [an] improper acquisition," provided the actual fee does not exceed the outer limit of a reasonable fee in light of the factors listed in MRPC 1.5(a). *Randolph,* 461 Mich. at 766, 610 N.W.2d 893. But unlike an award of attorney fees under § 16(3), the trial court does not have additional discretion under § 16(2) to award a property owner less than its actual reasonable attorney fee. See *Randolph,* 461 Mich. at 767, 610 N.W.2d 893.

***4** Contrary to plaintiff's argument, the words "incurred" and "reimburse" in § 16(2) do not require a property owner to have actually paid its attorney before the property owner's right to recover from the government agency its "actual reasonable attorney fees and other expenses incurred" arises. The Random House Webster's College Dictionary (2007) defines "incur" as "to become liable for" and "reimburse as "to make repayment to for expense or loss incurred." A dictionary may be consulted regarding the ordinary meaning of undefined statutory words. *Haynes v. Neshewat,* 477 Mich. 29, 36, 729 N.W.2d 488 (2007). Additionally, both this Court and our Supreme Court have employed similar definitions in other contexts. See *Macomb Co. Taxpayers Ass'n v. L' Anse Creuse Pub. Schs,* 455 Mich. 1, 6, 564 N.W.2d 457 (1997) (incur attorney fees); *Hiltz v. Phil's Quality Market,* 417 Mich. 335, 346, 337 N.W.2d 237 (1983) (reimburse workers compensation benefits); and *Williams v. AAA Michigan,* 250 Mich.App. 249, 268-269, 646 N.W.2d 476 (2002) (incur medical expenses). Particularly apropos, in the context of Headlee Amendment litigation, our Supreme Court held in *Macomb Co. Taxpayers,* 455 Mich. at 12, 564 N.W.2d 457, that in the absence of a specific agreement to the contrary an attorney becomes entitled to reasonable remuneration, and the client has incurred attorney fees upon the rendering of legal services on behalf of the client. Consequently, when we apply the plain meaning of the terms "incurred" and "reimburse" in the context of the purpose of the UCPA and give effect to every phrase, clause, and word in the statute, *Sun Valley Foods Co. v. Ward,* 460 Mich. 230, 237, 596 N.W.2d 119 (1999), we must reject plaintiff's interpretation of § 16(2).

Plaintiff also argues that defendant is not legally obligated to pay the Ackerman firm because the retainer letter Smoke signed after the letter quoted above did not specifically detail compensation in the event that the condemnation action were dismissed. We disagree as a matter of fact and as a matter of law. In a letter dated July 7, 2003, defendant entered into a contingency fee agreement to pay Ackerman one-third of any increase in just compensation over plaintiff's good faith offer. The July 7, 2003, letter also stated:

> If the services rendered by Ackerman & Ackerman, P.C. result in a non-cash benefit to the property, Ackerman & Ackerman, P.C. shall be paid the quantum meruit value of

 © 2021 Thomson Reuters. No claim to original U.S. Government Works.

RECEIVED by MSC 12/20/2021 10:30:09 AM

> its services. Quantum meruit is a legal term that means "the value of the services rendered." [1] One example of a non-cash benefit to the property that occurred as a result of services rendered by Ackerman & Ackerman, P.C. is a change in construction plans that reduce[ ] the amount your property is damaged. This is not the exclusive definition of a non-cash benefit.

We conclude that the dismissal of plaintiff's condemnation action that Ackerman's firm obtained conferred a "non-cash benefit to the property" within the meaning of the retainer agreement. Therefore, as provided in the retainer agreement, defendant "incurred" or became liable to the Ackerman firm for the market value for their legal services-"the value of the services rendered"-bounded by the trial court's determination regarding reasonableness as stated in the prior letter. Moreover, even in the absence of the retainer agreement, defendant incurred attorney fees due to the Ackerman firm under an implied contract theory. See *Macomb Co. Taxpayers,* 455 Mich. at 11-12, 564 N.W.2d 457, and *Detroit v. Goodwill Community Chapel,* 190 Mich.App. 297, 299, 475 N.W.2d 379 (1991) (property owner's attorney retained under contingent fee agreement entitled to compensation after obtaining dismissal of the condemnation action under a theory of implied contract or quasi contract).

***5** Plaintiff also argues that defendant did not incur attorney fees with respect to other counsel Ackerman retained to assist in specific aspects of the litigation, the appeal of the dismissal and the post appeal efforts to collect "actual reasonable attorney fees and other expenses incurred in defending against the improper acquisition" under § 16(2) of the UCPA. Plaintiff contends because Ackerman hired the other counsel, there was no contractual relationship with defendant; therefore, defendant was not liable for their services. But under the July 7, 2003, retainer agreement, defendant accorded the Ackerman firm the "full and complete discretion to act on [defendant's] behalf in this matter...." Thus, Ackerman was acting on behalf of defendant when retaining co-counsel to perform specific tasks during the litigation. We therefore reject plaintiff's claim that defendant did not incur attorney fees with respect to other counsel.

Plaintiff's final legal challenge to the award of "actual reasonable attorney fees" relies on § 16(6) of the UCPA, which at the time pertinent to these proceedings provided: "An agency shall not be required to reimburse attorney or expert witness fees that are attributable to an unsuccessful challenge to necessity or to the validity of the proceedings." MCL 213.66(6).[2] Plaintiff argues that because our Supreme Court ultimately affirmed the trial court's dismissal of its condemnation action on grounds other than necessity, defendant's challenge to necessity was unsuccessful. Therefore, plaintiff argues, it is not liable for defendant's attorney or expert witness fees. We agree with the trial court that plaintiff's interpretation of § 16(6) ignores its last phrase, "or to the validity of the proceedings." Plaintiff's reading of § 16(6) also fails in light of the clear and unambiguous provisions of § 16(2), because defendant "by motion to review necessity or otherwise, successfully challenge[d] the agency's right to acquire the property, or the legal sufficiency of the proceedings...." In short, plaintiff's reading of § 16(6) fails to give effect to every phrase, clause, and word in the statute, *Sun Valley Foods,* 460 Mich. at 237, 596 N.W.2d 119, so as to produce a harmonious whole in light of the purposes of the statute, *Macomb Co. Pros. Attorney v. Murphy,* 464 Mich. 149, 159, 627 N.W.2d 247 (2001). We conclude that defendant's argument regarding § 16(6) must fail because defendant successfully challenged the validity of plaintiff's condemnation action and because the provisions of § 16(2) clearly apply under these facts and circumstances. Indeed, we find plaintiff's interpretation so contrary to the purpose of the statute as to be absurd. See *Detroit Int'l Bridge Co.,* 279 Mich.App. at 675, 760 N.W.2d 565.

IV. THE TRIAL COURT'S DISCRETIONARY RULINGS

Plaintiff first argues that the trial court abused its discretion by awarding the Ackerman firm as an "actual reasonable attorney fee" a "blended" hourly rate of $550 an hour for the reasonable number of hours Ackerman and his partner, Darius Dynkowski, expended on the case. Plaintiff asserts that the court erred by focusing on an average hourly rate of what the Ackerman firm had been awarded in other condemnation cases or were paid by clients, rather that focusing on "the fee customarily charged in the locality for similar legal services," MRPC 1.5(a)(3), as required by *Smith,* 481 Mich. at 522, 530, 751 N.W.2d 472. Additionally, plaintiff argues that the trial court failed to fully consider all the other factors of MRPC 1.5(a) in determining a reasonable attorney fee. Finally, plaintiff argues no authority exists for the trial court's use of a blended rate for the two Ackerman firm attorneys, and likewise, no authority exists for the methodology the trial court employed. We disagree.

***6** First, the analytical framework that our Supreme Court held was required by the plain language of § 16(3) of the

RECEIVED by MSC 12/20/2021 10:30:09 AM

UCPA, *Randolph,* 461 Mich. at 765-766, 610 N.W.2d 893, is equally required by the plain language of § 16(2) of the UCPA. In awarding "actual reasonable attorney fees" under § 16(2), the trial court must first focus on the owner's actual attorney fees and determine whether those fees are reasonable in light of all the factors listed in MRPC 1.5(a). *Randolph,* 461 Mich. at 766, 610 N.W.2d 893. The *Smith* Court's approach to determining a reasonable attorney fee in the abstract on the basis of MRPC 1.5(a), with a preeminent focus on subsection 3, *Smith,* 481 Mich. at 522, 530-531, 751 N.W.2d 472, simply does not apply to a determination of "actual reasonable attorney fees" under § 16(2). Although *Smith* was decided after *Randolph,* the Court specifically noted that its decision in *Smith* "does not contradict, undermine, or overrule *Randolph.*" *Smith,* 481 Mich. at 537, 751 N.W.2d 472. While an abstract reasonable attorney fee "may differ from the *actual* fee charged or the highest rate the attorney might otherwise command," *id.* at 528, § 16(2) commands that the government agency reimburse the owner's actual attorney fee even if it is the highest rate the attorney might otherwise command, provided the actual attorney fee is not unreasonable in light of all the factors listed in MRPC 1.5(a). Only if the trial court first determines the owner's actual attorney fees are unreasonable may the trial court determine, in the exercise of its discretion, a reasonable attorney fee in the abstract. *Randolph,* 461 Mich. at 768, 610 N.W.2d 893.

The trial court conducted a unitary analysis regarding defendant's actual attorney fees and their reasonableness in light of the eight factors stated in MRPC 1.5(a). In considering MRPC 1.5(a)(3), "the fee customarily charged in the locality for similar legal services," the trial court determined that reasons existed why fees charged by attorneys representing government agencies in condemnation cases might be lower. The court further reasoned that the "only and the best way" to apply this factor to the Ackerman firm "was to look at the awards that [the Ackerman firm] has gotten in other cases." The court reasoned, "[t]here really wasn't anything else comparable." The trial court, after reviewing the evidence submitted at the evidentiary hearing and discussing all the MRPC 1.5(a) factors, concluded:

> So the rate to be awarded in this case after consideration of all the factors here and including the fact that the majority of the work was being done in the years 2003 to 2004 which is not the present and the fact that it's a blended rate. And the average, and I took into account also the average when we look to the other awards of attorney fees from Mr. Ackerman' office, the rate to be awarded will be $550 per hour.

As discussed above, defendant agreed to pay the Ackerman firm the "quantum meruit value of its services" or "the value of the services rendered." In other words, defendant agreed to pay the Ackerman firm what they were worth, which would be the rate that the Ackerman firm might otherwise command for their services. Consequently, although the trial court did not explicitly state that it was doing so, by focusing on what the Ackerman firm had been awarded or earned for their services in the past, the trial court was, in essence, focusing on the actual attorney fee that defendant had agreed to pay. The trial court's reasoned analysis that this approach provided the best evidence of the value of the Ackerman firm's legal services in a condemnation case was sound. The court's approach focused on the "quantum meruit value of [the Ackerman firm's] services" or "the value of the services rendered"-the owner's actual attorney fee. The fact that with respect to one of the surveyed prior awards to Ackerman, the trial court estimated an hourly rate from a lump sum attorney fee settlement does not diminish the analytical soundness of the court's reasoning. We hold that the trial court's analysis was consistent with the requirement of § 16(2) to first determine the actual attorney fees that the property owner incurred and then determine whether they are reasonable. *Randolph,* 461 Mich. at 765-766, 610 N.W.2d 893; *Lexington,* unpub op at 5-6.

***7** Contrary to plaintiff's argument, the trial court thoroughly reviewed all the MRPC 1.5(a) factors in making its reasonableness determination. The trial court heard expert testimony that Ackerman is the preeminent attorney specializing in condemnation law in the state of Michigan. The testimony also showed that the Dynkowski's expertise in condemnation law was second only to Ackerman. In addition, expert testimony supported finding that the quantum meruit fee agreement that Ackerman entered with defendant was typical in condemnation cases. The testimony further supported the reasonableness of using a "blended" hourly rate, at a rate even greater than the one the court determined primarily on the basis of averaging past attorney fee awards and earned fees. Because the trial court provided a well-reasoned basis for its decision that the evidence supported, the trial court did not abuse its discretion setting rate of

RECEIVED by MSC 12/20/2021 10:30:09 AM

$550 an hour to award defendant as its "actual reasonable attorney fees ... incurred in defending against the improper acquisition." MCL 213.66(2); *Randolph,* 461 Mich. at 768, 610 N.W.2d 893; *Detroit Plaza Ltd.,* 273 Mich.App. at 294, 730 N.W.2d 523. In the current lexicon regarding a trial court's discretionary decisions, the result was within the range of reasonable and principled outcomes. *Smith,* 481 Mich. at 526, 751 N.W.2d 472.

Next, plaintiff argues that the trial court abused its discretion or clearly erred finding the Ackerman firm was entitled to be paid for 350 hours during the period of time between the completion of briefing and the decision of this Court in Docket No. 255759. We disagree.

The parties agreed to the entry of an order appointing a special master to review the reasonableness of the hours the Ackerman firm claimed it was entitled to reimbursement under § 16(2). Under the stipulated order, the parties were required to provide the special master with all written contracts and records of time spent on the case since its inception through July 31, 2007. The special master was ordered to submit a report regarding the reasonableness of the hours claimed, broken down by various time periods. The parties submitted documents, briefs, and appeared for a hearing before the special master. The special master issued its report on July 16, 2008, which recommended that of the 2469.9 hours the Ackerman firm claimed, 2016.6 should be found by the court to be reasonably necessary to defending against the condemnation action. Regarding the category at issue, between September 16, 2004 and April 4, 2006, the special master recommended that of the 557.3 hours claimed, 360[3] were reasonably necessary.

At a hearing held in the trial court on August 15, 2008, at which the parties sought to narrow the issues that would require testimony at an evidentiary hearing, the trial court initially expressed skepticism that the hours the Ackerman firm claimed were reasonable, considering that the parties were presumably simply waiting for this Court's decision. At the evidentiary hearing, Ackerman testified in support of the hours claimed and produced a document showing what services were performed for 521.9 hours during the time period in question. Defense counsel argued below and again on appeal that although plaintiff's counsel argued that the hours claimed were unreasonable, plaintiff presented no evidence to contradict Ackerman's testimony regarding this issue at the evidentiary hearing. In reviewing the trial court's reasons for its ruling on this issue, it is obvious that the court generally credited Mr. Ackerman's testimony. The trial court found that "Mr. Ackerman was leaving no stone unturned in preparing the case on behalf of his client.... And I don't find that [the hours] were unreasonable at all." The trial court also considered the fact that the special master had reviewed the issue and found that 350 of the claimed hours were reasonably necessary. Plaintiff's argument ignores that the trial court's ruling significantly reduced the number of hours that the Ackerman firm claimed for this time period. Given the deference this Court must accord to the trial court's superior fact-finding ability, MCR 2.613(C), we are not left with a definite and firm conviction that a mistake was made. *Univ Rehab. Alliance,* 279 Mich.App. at 693, 760 N.W.2d 574.

***8** Plaintiff next argues that the trial court's award of attorney fees to the Ackerman firm was contrary to an agreement the parties placed on the record at the issue-narrowing hearing held on August 15, 2008. Plaintiff contends the agreement was reached in relation to plaintiff agreeing not to contest the hours of co-counsel in the collection proceedings-Carson Fisher, P.L.C. Timothy E. Galligan on behalf of plaintiff and Robert M. Carson on behalf of defendant appeared at the hearing. Mr. Galligan, apparently speaking to Mr. Carson, stated that plaintiff would not challenge the reasonableness of the Carson Fisher hours: "Our position is the time incurred by your office will not be subject to challenge for reasonableness." After the parties noted the only disputed area of the special master's report regarding reasonable hours was the period of time awaiting this Court's decision, the following colloquy occurred:

> THE COURT: So really you've agreed on the reasonableness of the hours except for the time on appeal after Briefs were submitted, correct?
>
> MR. GALLIGAN: Yes, Your Honor.
>
> THE COURT: Correct?
>
> MR. CARSON: Correct.
>
> THE COURT: Okay, so I'm not even going to look at those things.
>
> MR. CARSON: That's right. It is as submitted by-so there's no misunderstanding on the record, it is submitted by the Special Master subject to the Plaintiff's claim on the hours that you just identified.
>
> THE COURT: Yes.

RECEIVED by MSC 12/20/2021 10:30:09 AM

> MR. CARSON: But increased by the hours for collection costs as he's identified.
>
> MR. GALLIGAN: Correct, yes.
>
> MR. CARSON: Okay, then-
>
> THE COURT: But he's not objecting to your-
>
> MR. CARSON: No, I just want the record to be clear as to what's going on. That's the issue on hours, on reasonableness on hours. [Hearing 08/15/2008, pp 9-10.]

A stipulation is an agreement, admission, or concession made in a judicial proceeding by the parties and is generally binding on the parties if made in open court. MCR 2.507(G); *Ypsilanti Twp. v. Kircher,* 281 Mich.App. 251, 270, 761 N.W.2d 761 (2008); *Eaton Co. Rd. Comm'rs v. Schultz,* 205 Mich.App. 371, 378, 521 N.W.2d 847 (1994). " 'Stipulations differ in character, some being mere admissions of fact relieving a party from the inconvenience of making proof, while others embody all the essential characteristics of a contract.' " *Id.* at 379, 521 N.W.2d 847, quoting 73 Am Jur 2d, Stipulations, § 1, p 536. A stipulation to settle a lawsuit, or in this case, part of a lawsuit, is a contract, "governed by the legal principles applicable to the construction and interpretation of contracts." *Eaton Co. Rd. Comm'rs,* 205 Mich.App. at 379, 521 N.W.2d 847. "It is hornbook law that a valid contract requires a 'meeting of the minds' on all the essential terms." *Kamalnath v. Mercy Memorial Hosp. Corp.,* 194 Mich.App. 543, 548, 487 N.W.2d 499 (1992). There can be no contract if there is no meeting of the minds between the parties. *46th Circuit Trial Court v. Crawford Co.,* 476 Mich. 131, 158-159, 719 N.W.2d 553 (2006).

***9** Here, from our review of the colloquy above, we glean no meeting of the minds to waive the Ackerman firm's claim to hours spent on the § 16(2) proceedings. We discern the discussion on the record simply clarified that the only dispute over the special master's report on the reasonableness of the number of attorney's hours defendant claimed was the time period previously discussed. Further, viewed in light of the discussion between the court and Mr. Carson immediately before the quoted colloquy, the record indicates there existed no dispute that the special master's report would be supplemented by all defense attorney time spent in the attorney fee collection proceedings. Mr. Carson stated: "And [Mr. Galligan] agrees that the time for collection which was not part of [the special master's report] can be brought forward and subject only to the hourly rate." To this the trial court responded, essentially, that the law permitted billing for the collection costs. We conclude that while it might have been in Mr. Galligan's mind to attempt to exclude Ackerman's collection time by his comments referring to "your office," we do not discern any intent on Mr. Carson's part to exclude the Ackerman firm's collection time from defendant's claim for its "actual reasonable attorney fees and other expenses incurred in defending against the improper acquisition." MCL 213.66(2). One party's unilateral intent cannot form a contract; and, plaintiff bears the burden of proving that a contract existed. *Kamalnath,* 194 Mich.App. at 549, 487 N.W.2d 499. Plaintiff has failed to establish there was a meeting of the minds regarding the alleged stipulation; consequently, there can be no enforceable stipulation. *Id.* at 548-549, 487 N.W.2d 499; *46th Circuit Trial Court,* 476 Mich. at 159, 719 N.W.2d 553.

Next, plaintiff argues that the trial court abused its discretion by awarding an unreasonably high hourly rate of $525 for attorney Robert Carson. We disagree. Plaintiff repeats arguments it asserted regarding the hourly rate for the Ackerman firm that we have already rejected. Specifically, plaintiff argues that no contract existed between Carson Fisher and defendant;[4] therefore, plaintiff argues, the trial court was required to determine a reasonable hourly attorney fee rate in the abstract under the framework of *Smith v. Khouri,* 481 Mich. 519, 751 N.W.2d 472. This approach stresses as its key determinant, "a fee similar to that customarily charged in the locality for similar legal services, which, of course, may differ from the *actual* fee charged or the highest rate the attorney might otherwise command." *Id.* at 528, 751 N.W.2d 472 (emphasis in original). On the other hand, in determining a property owner's "actual reasonable attorney fee," MCL 213.66(2), the plain language of the statute requires that the focus of the reasonableness determination clearly is on the *owner's* attorney fees." *Randolph,* 461 Mich. at 766, 610 N.W.2d 893; see also *Lexington,* unpub op at 5. Only if the trial court determines the owner's actual attorney fee is unreasonable in light of the eight factors listed in MRPC 1.5(a) may the court proceed to determine a reasonable attorney fee in the abstract. Thus, under the UCPA, the focus is on the "fee actually charged to defendants" and whether it is unreasonable. *Randolph,* 461 Mich. at 768, 610 N.W.2d 893.

***10** Evidence presented to the trial court established that Carson's usual hourly rate was $525 an hour. Further, an expert testified this hourly rate for Carson was reasonable, if not low. No evidence was presented to establish that

RECEIVED by MSC 12/20/2021 10:30:09 AM

Carson's fee was unreasonable. During closing arguments on this issue, the parties argued the eight factors listed in MRPC 1.5(a). The only additional argument plaintiff presented was that the attorney fee proceedings could have been handled by a less senior litigator. The trial court rejected this claim, noting that the proceedings were not simple, involved a great deal of money, and defendant wanted the best possible representation. After considering all the factors listed in MRPC 1.5(a), the trial court ruled that Carson's hourly rate of $525 was reasonable. We conclude that the trial court provided a well-reasoned basis for its decision supported by the evidence. The trial court did not abuse its discretion determining that Carson's rate of $525 an hour to award defendant as its "actual reasonable attorney fee." MCL 213.66(2); *Detroit Plaza Ltd.,* 273 Mich.App. at 294, 730 N.W.2d 523.

The last claim on appeal that plaintiff asserts, and we consider, is whether the trial court abused its discretion ordering reimbursement for the expense of certain experts.

An award of reasonable expert witness fees under § 16(1) and § 16(5) of the UCPA is mandatory. *Detroit Plaza Ltd.,* 273 Mich.App. at 295-296, 730 N.W.2d 523. Before the effective date of 2006 PA 370, the statute provided:

> (1) Except as provided in this section, an ordinary or expert witness in a proceeding under this act shall receive from the agency the reasonable fees and compensation provided by law for similar services in ordinary civil actions in circuit court, including the reasonable expenses for preparation and trial.
>
> * * *
>
> (5) Expert witness fees provided for in subsection (1) and this subsection shall be allowed with respect to an expert whose services were reasonably necessary to allow the owner to prepare for trial. For the purpose of subsection (1) and this subsection, for each element of compensation, each party is limited to 1 expert witness to testify on that element of compensation unless, upon showing of good cause, the court permits additional experts. The agency's liability for expert witness fees shall not be diminished or affected by the failure of the owner to call an expert as a witness if the failure is caused by settlement or other disposition of the case or issue with which the expert is concerned. [MCL 213.66; See *Detroit Plaza Ltd.,* 273 Mich.App. at 295-296, 730 N.W.2d 523.]

The § 16(2) proceedings at issue in this appeal began in 2007, after the December 23, 2006, effective date of 2006 PA 370. The amendment did not change subsection 1 of section 16 but eliminated reference to subsection 1 in subsection 5, which as amended now reads:

> (5) Expert witness fees provided for in this section shall be allowed with respect to an expert whose services were reasonably necessary to allow the owner to prepare for trial. For the purpose of this section, for each element of compensation, each party is limited to 1 expert witness to testify on that element of compensation unless, upon showing of good cause, the court permits additional experts. The agency's liability for expert witness fees shall not be diminished or affected by the failure of the owner to call an expert as a witness if the failure is caused by settlement or other disposition of the case or issue with which the expert is concerned. [MCL 213.66(5), as amended by 2006 PA 370.]

***11** We find no abuse of discretion in the trial court's awarding defendant the expense of two valuation experts used to prepare for trial of the underlying action. The plain language of subsection 5 permits more than one expert for trial preparation where each witness would testify to a different "element of compensation." Furthermore, the trial court is also plainly accorded the discretion to permit additional experts. Here, the trial court based its ruling on the fact that plaintiff retained at least two valuation experts and that more than one element of valuation was at issue in the underlying action. We conclude that the trial court's decision was within the range of reasonable and principled outcomes, and therefore, not an abuse of discretion. *Univ Rehab. Alliance,* 279 Mich.App. at 698, 760 N.W.2d 574.

Plaintiff also argues that the trial court erred by ordering reimbursement of defendant's expert witness fees for the so-called collection proceedings under § 16(2) of the UCPA. Plaintiff asserts defendant did not formally request reimbursement of these expenses and that they were

precluded by § 16(5), which limits experts to those reasonably necessary for trial preparation. The second argument lacks merit because on the basis of the 2006 amendment, expert witness fees for the § 16(2) proceedings are governed by § 16(1). Subsection 1 applies to any proceeding under the UCPA, and on the basis of the 2006 amendment, is not limited by subsection 5. This Court has held that the plain language of subsection 1 requires an award to defendant for expert witness fees, subject only to review for reasonableness. *Macomb Co. Rd. Comm.,* 170 Mich.App. at 700, 428 N.W.2d 744. Because plaintiff does not assert that the expert fees were unreasonable, plaintiff's complaint about formality is also without merit. The trial court's decision regarding the § 16(2) expert witness fees was within the range of reasonable and principled outcomes, and therefore, not an abuse of discretion. *Univ Rehab. Alliance,* 279 Mich.App. at 698, 760 N.W.2d 574.

IV. PREJUDGMENT INTEREST

Defendant cross-appeals, arguing the trial court erred by denying an award of prejudgment interest under the general interest statute, MCL 600.6013. Defendant contends that this issue is controlled by *Escanaba & Lake Superior R Co.,* 156 Mich.App. at 820-821, 402 N.W.2d 505, which held that in a § 16(2) proceeding, the property owner may recover prejudgment interest under MCL 600.6013 on its award of actual reasonable attorney fees and costs. Here, the trial court denied interest, believing it must follow the subsequent case of *Flint v. Patel,* 198 Mich.App. 153, 160-161, 497 N.W.2d 542 (1993), which held that interest may not be recovered on a § 16(3) attorney fee awarded because (1) the UCPA prevailed over the general interest statute and (2) the UCPA did not provide for interest on attorney fees awarded under § 16(3). We agree and are also bound to apply the rule of law established by *Patel.* MCR 7.215(J)(1). Because the pertinent rule of law *Patel* establishes is that the UCPA prevails over the general interest statute, defendant's effort to distinguish that case on the basis that these proceedings were under § 16(2) is unavailing. Under the UCPA, an award of prejudgment interest is not applicable to a § 16(2) award of actual reasonable attorney fees and costs. *Escanaba & Lake Superior R Co.,* 156 Mich.App. at 820-821, 402 N.W.2d 505. "If the UCPA interest statute were applied in the instant case, defendants would receive no interest, since they were never ousted from their property." *Id.* at 821, 402 N.W.2d 505.

***12** Moreover, even if we were not bound by *Patel,* we would hold that the general interest statute, MCL 600.6013, does not apply to a post-judgment order for reimbursement of attorney fees and costs. The statute provides: "Interest is allowed on a money judgment recovered in a civil action, as provided in this section." MCL 600 .6013(1). But § 6013 repeatedly refers to "complaint" or "complaints," which limit its scope. See *In re Forfeiture of $176,598,* 465 Mich. 382, 387-388, 633 N.W.2d 367 (2001). In that case, the Court held an owner obtaining an order for the return of seized money had not obtained money judgment in a civil action within the meaning of MCL 600.6013(1). *In re Forfeiture of $176,598,* 465 Mich. at 383, 633 N.W.2d 367. The Court reasoned that the property owner "did not file [a] complaint ... [and] rather than being the prevailing claimant in a civil action, ... was merely the owner of property that the prosecutor unsuccessfully sought to seize in a forfeiture action initiated by the latter." *Id.* at 388, 633 N.W.2d 367. An unsuccessful forfeiture action is closely analogous to the unsuccessful condemnation action in this case. Here, defendant did not file a complaint for the purpose of seeking money damages but rather filed a post-judgment motion for attorney fees and costs after successfully defending against the government agency's effort to seize its property, albeit for just compensation. Indeed, this Court has applied the rational of *In re Forfeiture of $176,598, supra,* in other contexts. See *Olson v. Olson,* 273 Mich.App. 347, 729 N.W.2d 908 (2006) (denying interest under § 6013 on an attorney fee award in a divorce case). "A party, despite prevailing in the underlying action, has not obtained 'a money judgment recovered in a civil action' if that party has not filed a complaint in the proceeding." *Olson,* 273 Mich.App 353. Consequently, even without *Patel,* we would not follow *Escanaba* with respect to its ruling regarding § 6013; we would hold that the order awarding defendant attorney fees and costs pursuant to MCL 213.66(3) was not a "money judgment recovered in a civil action" within the meaning of MCL 600.6013(1).

We affirm.

All Citations

Not Reported in N.W.2d, 2010 WL 3767578

RECEIVED by MSC 12/20/2021 10:30:09 AM

RECEIVED by MSC 12/20/2021 10:30:09 AM

Footnotes

1 This Court has stated that "quantum meruit" means " 'as much as deserved.' " *Keywell & Rosenfeld v. Bithell,* 254 Mich.App. 300, 359, 657 N.W.2d 759 (2002), quoting Black's Law Dictionary (6th ed, 1990), p 1243.

2 2006 PA 370 amended subsection 6 to subject it to an added subsection 7, which is not pertinent to this case. The 2006 amendment also modified the wording subsection 6 slightly but did not affect its substance.

3 The 360 hours included 10 hours by the firm of Plunckett & Cooney, which are not disputed.

4 As previously discussed, Mr. Ackerman possessed complete authority under his retainer agreement to retain co-counsel. During closing arguments on this issue, Mr. Carson advised the court that defendant's corporate counsel also approved his retention at his usual rate ($525/hour).

End of Document © 2021 Thomson Reuters. No claim to original U.S. Government Works.

RECEIVED by MSC 12/20/2021 10:30:09 AM

1996 WL 33347677
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Court of Appeals of Michigan.

In re: HAHN DRAINAGE DISTRICT. DRAVES BRANCH OF THE HAHN DRAIN, Plaintiff-Appellee,
v.
Joe C. BOGEL, Defendant-Appellant.

No. 173316.
|
Dec. 20, 1996.

Before: WHITE, P.J., and MARKEY and R.M. PAJTAS, * JJ.

[UNPUBLISHED]

PER CURIAM.

***1** Defendant appeals the circuit court's order awarding him $1,870 in attorney fees and $20.40 in costs in this action brought under the Uniform Condemnation Procedures Act (UCPA), M.C.L. § 213.51 *et seq.;* MSA 8.265(1) *et seq.* We affirm.

I

Plaintiff filed its complaint on May 20, 1992, alleging that it was necessary to secure defendant's property for public drainage purposes in order to improve and maintain the Draves Branch of the Hahn Drain. The complaint named only defendant and alleged that plaintiff had made a good-faith written offer to purchase the property, that plaintiff "has been unable to agree with all of the persons interested in said parcels of property for the purchase of said interest," and that plaintiff had deposited an amount estimated to be just compensation with the Midland County Treasurer. A Statement of Necessity and a Declaration of Taking were attached to plaintiff's complaint, the latter stating that the estimated just compensation for a permanent easement on defendant's property is $666, and for a second, temporary easement, $100.

Defendant filed an answer to plaintiff's complaint and a motion to review necessity on June 24, 1992. Defendant's answer denied that plaintiff's offer was a good-faith offer, denied that plaintiff had extended an offer to all parties holding an ownership interest in the subject property, and denied that the proposed drain extension was necessary. Defendant's motion to review necessity argued in pertinent part that plaintiff had failed to join all the owners of the subject property and that plaintiff's offer to defendant was insufficient to constitute a good-faith written offer, and requested that the court determine there was no necessity for the acquisition and award defendant costs and actual attorney fees.

Six days later, defendant filed a motion for summary disposition, arguing that the circuit court lacked jurisdiction over the necessary persons and property because plaintiff did not name both defendant and his wife, Barbara Bogel, who owned the property as tenants by the entireties. Defendant's motion further argued that the circuit court lacked subject matter jurisdiction because a good-faith written offer was not made to the owner prior to the filing of plaintiff's complaint as required by the UCPA, i.e., the only offer presented was solely to defendant and was grossly inadequate, and no offer at all had been made to the tenants by the entireties. Finally, defendant argued that plaintiff's complaint failed to state a claim on which relief could be granted because the complaint failed to include and name the owners of the property, which were known to plaintiff. Defendant sought actual attorney fees and "other expenses" under the UCPA.

Plaintiff's answer to defendant's motion for summary disposition admitted that Barbara Bogel was "inadvertently omitted" from the pleadings. Plaintiff then moved to amend its complaint to add Barbara Bogel as a party.

***2** Defendant's answer to plaintiff's motion to amend its complaint argued that plaintiff's complaint should be dismissed without prejudice and its motion to amend denied. Defendant again argued that the circuit court lacked subject matter jurisdiction to consider plaintiff's motion and that plaintiff's motion failed to state a claim on which relief can be granted. Defendant further argued that on December 12, 1990, the date the hearing had been held to determine the necessity of the proposed drain, the township tax assessment roll showed "Bogel, Joe C. et ux" as owners of the land at issue; that Barbara Bogel was entitled to notice and had the right to

 © 2021 Thomson Reuters. No claim to original U.S. Government Works.

RECEIVED by MSC 12/20/2021 10:30:09 AM

be heard at such hearing, and that plaintiff's failure to provide her with notice of the hearing denied her and defendant due process and equal protection. Defendant's answer also argued that plaintiff's complaint and attempt to amend its complaint were void for plaintiff's failure to provide Barbara Bogel the required notice of the prior hearing. Defendant sought expenses and "actual reasonable attorney fees" under the UCPA.

At a hearing on October 2, 1992, the circuit court ruled that it would dismiss the action without prejudice, stating the following:
THE COURT: All right.

It's my opinion based upon conference that we had in chambers, which was very procedurally academic, um, the parties agree and the Court agrees that this matter should be re-filed in Circuit Court, and that's with the understanding that there is an additional defendant that should be added.

I'm uncertain-I don't have the name, but in any event, it's the wife of Joe C. Bogel. And the present matter will need to be dismissed.

And then there are various things that, once again, will have to be raised by the Defendant.

We're not deciding at this time whether the determination as to necessity was procedurally proper. None of those are being decided at this point in time, because I don't have jurisdiction to decide it.

But undoubtedly, those issues will come up.

Now, does that fairly state it?

MR. SCHNEIDER [*counsel for defendant*]: Only thing I would add is it is dismissed without prejudice so that he may re-file, your Honor.

THE COURT: Definitely without prejudice. Thanks.

MR. SCHNEIDER: As you have stated the reason on the record. I'm going to try to write it in an order, your Honor.

THE COURT: It's not necessary.

MR. SCHNEIDER: And I want to inform the Court I will file an additional petition concerning costs and attorney fees where I can give him the itemization of that and then you can decide it at another hearing.

THE COURT: Yeah, we can visit that at a later time if it's necessary.

MR. BROWN: Thank you, your Honor.

THE COURT: Thank you. You're welcome.

The circuit court's October 14, 1992 order dismissing plaintiff's complaint recited its determination that it lacked subject matter jurisdiction:
... after hearing arguments of counsel in chambers, the Court determining it lacked subject matter jurisdiction, and the parties agreeing that the above-entitled matter may be dismissed without prejudice,

***3** IT IS ORDERED AND ADJUDGED that the above entitled matter is dismissed without prejudice,

IT IS FURTHER ORDERED that Defendant's request for expenses and actual reasonable attorney fees pursuant to [UCPA] M.S.A. § 8.265(16)(2) shall be considered by the Court at a further hearing upon Defendant filing his petition itemizing such request.

Defendant filed a motion for attorney fees and expenses, with interest, under the UCPA. Defendant's motion argued that plaintiff commenced the instant action without including defendant's wife, that defendant had successfully challenged the legal sufficiency of the proceedings and plaintiff's right to acquire the property, and that the court had dismissed said action. Defendant argued he had incurred attorney fees and the expense of an expert witness, for which the UCPA mandates that the court order plaintiff to reimburse defendant.

Defendant's brief in support of his motion argued that plaintiff did not acknowledge to the court until the time of the summary disposition hearing that due to its admitted error in not naming Barbara Bogel, the circuit court may not have subject matter jurisdiction, and that this "forced Defendant to be prepared to prove each of his grounds for Summary Disposition" and to subpoena and require that his expert witness be prepared up to the time of the scheduled hearing. Defendant argued that the UCPA makes mandatory that the

court order plaintiff to pay defendant actual attorney fees and expenses for his expert witness which the court finds reasonable. Defendant attached to his motion an itemized statement, which set forth the dates, times, and subject matter of defense counsel's preparation through October 2, 1992, totaling 30.3 hours at $110 an hour, or $3,333.00. The statement also set forth expenses of $38.80. On the following day, October 23, 1992, defendant filed an amended itemized statement reflecting time expended through October 19, 1992, and estimating time for attendance at the subsequent hearing. [1] The amended itemized statement set forth hourly charges of $4,103.00 for 37.3 hours at $100 an hour, and expenses of $38.80.

At a hearing on November 25, 1992, the circuit court responded to argument from defendant's counsel:
THE COURT: You're going to have to defend Joe [sic] Joe Bogel in any event. The work that you have done, with the exception of having to do certain things because the wife wasn't joined, you were going to have to do any way [sic]. He was served properly. I mean, he was given-what is that preliminary thing they have to give them, a good faith offer?

MR. BROWN: Good faith offer.

THE COURT: And, um, the, so those are things that if you had, if-if they don't prevail ultimately then you can have those expenses, those attorney fees. But that's something that you have just done preliminary, if you will, I mean whether you do it in the lawsuit or whether you do it in the next one, you know, if you didn't start another lawsuit you cover everything. But I don't think it's really fair when you've done all the research for the second lawsuit to just compensate you for it because you got it dismissed. That-I have trouble with that.

***4** MR. SCHNEIDER: Well-

THE COURT: I have no difficulty with giving you the money for coming here for that summary disposition and for the research you had to do on that issue because they made a mistake. They'll say maybe differently. I don't know what they'll say. But as far as I'm concerned, they had made a mistake in not joining Mrs. Bogel.

So for that, you should receive compensation. But not for the whole thing. I'm just not going to let that fly.

... I'm holding it in abeyance. I am just not going to award it at this time.

... And I'm not going to get into all of it, because if they do it properly the next time, then you've already paid for it. And if they lose, meaning the Plaintiffs, then you can be compensated. But not at this point in time.

If they said, well, we're not evening [sic] be going to be starting it again, then you would have a right for everything at this point in time. But that would be like saying, okay, now I'm going go to pay him his attorney fees and all of his expenses and they go ahead and win in this second suit. That is not the intent here of this law.

MR. SCHNEIDER: But the way it was handled, we were sandbagged in because they never acknowledged until in your chambers the day at trial that we didn't have to do that-all that other work, your Honor.

THE COURT: That's why I'm going to give you the money that you wasted because they sandbagged you. And that's just going to the issue of the wife. You wouldn't have had to be here that today [sic]

The circuit court entered an order for adjournment sine die on November 25, 1992, which stated in pertinent part:
IT IS ORDERED that Defendant's attorney fees and expenses are allowed subject to further review by the Court as to their reasonableness. Defendant's attorney shall file an affidavit itemizing such fees and expenses that were in regard to said issues.

IT IS FURTHER ORDERED that this shall not be the final order of the Court on Defendant's Motion, and that a further hearing thereon is adjourned sine die, to be rescheduled by either party after Plaintiff files a similar action versus Defendant and his wife as represented by Plaintiff. [Emphasis added.]

Plaintiff filed a second suit in December 1992, naming both defendant and Barbara Bogel. [2] The circuit court denied defendant's motions to review necessity and dismiss the complaint on grounds of inadequacy of plaintiff's offer to purchase and lack of notice to Barbara Bogel of the hearing

RECEIVED by MSC 12/20/2021 10:30:09 AM

RECEIVED by MSC 12/20/2021 10:30:09 AM

held to determine necessity. Following denial of defendant's motions, defendant requested that the circuit court decide his motion for entry of order for payment of attorney fees. On May 13, 1993, the circuit court entered an order temporarily denying defendant's motion "consistent with the continuing previous ruling of the Court that Defendant may hereafter, by Motion accompanied with Affidavit, seek an Order for payment of certain attorney fees in this cause after the final resolution of Plaintiff's Complaint in the matter of said Plaintiff v Joe C. Bogel and Barbara M. Bogel, Defendants, File No. 92-001709-CC-B, for the acquisition of property or property rights."

***5** The second action settled on the day trial was to commence, and was dismissed with prejudice. The transcripts before us state that the settlement figure in the second action included attorney fees pertinent to that action.

Defendant filed a third motion for determination and order for payment of attorney fees, requesting $3,892.40. Defendant also requested interest. The motion attached two affidavits, one setting forth total attorney fees and costs in the first action of $5,262.00, and the second itemizing attorney fees and costs requested pursuant to the court's ruling permitting attorney fees and costs only related to the non-joinder of Barbara Bogel and the lack of subject matter jurisdiction. The second affidavit included fees and costs totaling $3,892.40, 35.2 hours at $110 an hour, ($3,872.00) plus $20.40 for costs.

The following colloquy transpired at the October 15, 1993 hearing:
[*Defense counsel*]: ... But just to kind of refresh your memory. And what you had said before when we appeared you were going to limit the attorney fees, although the statute made it mandatory, you were going to limit those to the work that I did on those issues which involved the dismissal of the first suit.

And I'm saying that involved two things. No subject matter jurisdiction, because they didn't make any offer to Mrs. Bogel; and two, they didn't include her as a party even in the lawsuit.

And what you asked me to do before, which I've done, is to break those out in the form of affidavit. So what I've done, to refresh your memory, I've got two affidavits. One is to the entire work that I've done on this case, and the other one is to limit it to what, at least in my opinion, I necessarily had to do to bring those issues before the Court which you did decide the dismissal on.

And if you're consistent, of course, with your prior opinion, what I would be asking you to do is to grant those on that one affidavit, that's the smaller amount. Of course, Mr. Bogel here would prefer the whole amount. That is evident. But I am being candid with you. That is what at least your prior decision was.

And so that's why we're back and we're asking that we get an order for payment of those fees.

THE COURT: Well, Mr. Schneider, before we have Mr. Brown talk, are you saying that I made a determination that there was not subject matter jurisdiction and to [sic] they had to start it over because of that?

MR. SCHNEIDER: Yes, your Honor.

THE COURT: Because of the failure to make an offer? Wasn't it just an offer on the wife though because the wife hadn't been included?

MR. SCHNEIDER: Yeah, that's what that-

THE COURT: So that is all included in it.

MR. SCHNEIDER: See that's what the Escanaba case, [sic] said.

THE COURT: Okay.

MR. SCHNEIDER: That the condemnation statute requires the good faith offer to be made before you even start your suit. Well, there were [sic] no offer at all to Mrs. Bogel. That was the basic defect.

***6** THE COURT: I'm sorry we have to go through this route, Mr. Schneider, but I find your fee to be exceptionally high for what I think should have been done, and that's why I'm going to have to ask you these questions.

MR. SCHNEIDER: Okay.

THE COURT: What was your total attorney fee in this case?

MR. SCHNEIDER: That's on the other affidavit. $5,262. Well, that's with some witness fees and costs and things. The fees itself, $5,203 with cost expended $5,262.

And I have it all itemized for you on that affidavit.

RECEIVED by MSC 12/20/2021 10:30:09 AM

THE COURT: Okay. And I saw that affidavit.

MR. SCHNEIDER: Now the second affidavit-

THE COURT: How much is that?

MR. SCHNEIDER: $3,892.40 including, there's about $20.40 costs on that one.

THE COURT: So-

MR. SCHNEIDER: Filing fees and copy.

THE COURT: Just to correct a procedural problem and to bring that to the Court's attention, you want almost two thirds of your total attorney fees paid for by the Defendant?

MR. SCHNEIDER: Yes.

THE COURT: Excuse me, the Plaintiff. It sounds a little bit out of proportion.

MR. SCHNEIDER: Well, what I really wanted was the whole thing. But what you decided was I should limit it to the work that was necessary to do those two things, yeah ...

Plaintiff's counsel argued that defendant's requested fees were excessive and asked the court to allow only 9.1 hours, for a total of $1,001.

The court questioned counsel about the settlement in the second action. Counsel responded that plaintiff had offered defendant and his wife $600 and the matter settled for $2,750.
THE COURT: $2,750?

MR. SCHNEIDER: Uh-huh.

For the easement and-

THE COURT: These are always interesting to me.

$10,000 worth of attorney fees over a $2,700 deal. That's how we get our bad name, gentlemen.

The court took the matter under advisement, and on November 16, 1993, issued a written opinion awarding defendant $1,870 (seventeen hours at $110 an hour) plus costs of $20.40, and interest. The court relied on *Escanaba & LSR Co v. Keweenaw,* 156 Mich.App 804; 402 NW2d 505 (1986), and its opinion states in pertinent part:
Mr. Schneider undertook extensive preparation in defense. The original action was summarily dismissed by this Court because Draves had failed to join Mrs. Barbara M. Bogel as a party and the Court found it to be procedurally deficient. Subsequently, Draves refiled and eventually settled.

... this Court determined that Mr. Bogel was entitled to attorney fees and expenses pursuant to M.C.L. § 213.66 ...

In the *Escanaba* case, the trial court found that the Plaintiff had failed to make a good faith offer. The appellate court held that "a finding that the condemnation proceedings are procedurally defective is per se a finding that the proposed acquisition is improper, and that the trial court does not have to separately state on the record that it finds the acquisition improper. To hold otherwise, under the instant circumstances, places form over substance." This Court determined that the original condemnation proceedings were defective due to Draves' failure to join Mrs. Bogel. The court is bound to follow the direction of the appellate court in *Escanaba* [sic] supra, and hold that the procedural defect creates a per se determination that the acquisition was improper.

***7** ... Mr. Bogel received compensation under subsection (3) in the second suit in this action as part of his settlement. It is the Court's opinion that the Defendant, Mr. Bogel is entitled to actual reasonable attorney fees and other expenses incurred in defending against the improper acquisition in the first suit pursuant to subsection (2). Relying on subsection (2) of the Act, the Court determined that Mr. Bogel was only entitled to those attorney fees and expenses incurred that were directly related to the issue of non-joinder of Mrs. Bogel. The Court reasoned that any preparation undertaken in the first action for the other issues were applied to the second action, were compensated for under subsection (3) in the settlement, and were not actual reasonable attorney fees and other expenses incurred in defending against the improper acquisition. Granting Mr. Bogel relief under subsection (2) of the act for those efforts related directly to the non-joinder issue in the first suit, combined with the relief granted under

RECEIVED by MSC 12/20/2021 10:30:09 AM

subsection (3) in the second suit, would meet the objective of the Act and make Mr. Bogel whole.

Mr. Schneider submitted two affidavits in the second motion for attorney fees and expenses. The first affidavit itemized all of the preparation and the total bill for Mr. Schneider's efforts in the first suit. The second affidavit itemized those preparations undertaken by Mr. Schneider for two issues: first the non-joinder issue; and second, the inadequate offer issue. Mr. Schneider's second affidavit equaled approximately 60% of the total bill. Apposing [sic] counsel offered to pay for 9.2 hours.

Since this Court has determined that Mr. Bogel is only entitled to attorney fees and expenses related to the issue of non-joinder, it is this Court's opinion that Mr. Bogel should be reimbursed by the Plaintiff for attorney fees in the amount of $1,870 (17 hours at $110/hr) plus costs of $20.40.

Interest is allowed pursuant to M.C.L. § 213.65 ...

... The interest rate shall be applied to the settlement amount including the award of reasonable attorney fees and expenses ... The parties will be required to determine the period of interest, if any, plus the interest amount as the Court does not have the facts to make these determinations.

On December 21, 1993, the circuit court entered a Judgment for Attorney Fees and Expenses, awarding defendant "$1,870 of his attorney fees and $20.40 of his costs, which relate to the issue of non-joinder, and reimbursement for the remainder of the fees reported in the first and second affidavits of Mr. Schneider for other issues is denied." The court further ordered that interest on the award "is determined pursuant to the [UCPA] M.C.L. § 213.65, which provides that interest is waived until Plaintiff takes possession of the premises awarded to Plaintiff."

Defendant filed a motion to amend findings and order for attorney fees, arguing that under the court's previous order he was entitled to fees and costs on both the issues of non-joinder and subject matter jurisdiction, and that the applicable judgment interest statute was M.C.L. § 600.6013; MSA 27A.6013. The circuit court denied defendant's motion and assessed sanctions against defendant of $700 based on its determination that the motion constituted a frivolous action under MCR 2.625 and M.C.L. § 600.2591; MSA 27A.2591. The court ordered that defendant reimburse plaintiff $700, allowing plaintiff to deduct that amount from the $1870 award. This appeal ensued.

II

***8** On appeal, defendant argues that the policy of the UPCA is to place the property owner in as good a position as before the taking, and that the property owner shall not be made to suffer for a proceeding he did not initiate for the taking of his private property. Defendant argues that the court was disinclined to grant fees, and that it erred in limiting the fees to those related to non-joinder of defendant's wife, where other work was reasonably and legitimately done in preparation for the hearing and in obtaining the order for attorney fees. Defendant also asserts that the court employed improper criteria in determining the reasonableness of the fee.

We review the circuit court's award of attorney fees under the UCPA for abuse of discretion. *Dep't of Transportation v. Robinson,* 193 Mich.App 638, 643, 646-647; 484 NW2d 777 (1992). Section 16 of the UCPA provides in pertinent part:

(2) If the property owner, by motion to review necessity or otherwise, successfully challenges the agency's right to acquire the property, or the legal sufficiency of the proceedings, and the court finds the proposed acquisition improper, the court shall order the agency to reimburse the owner for actual reasonable attorney fees and other expenses incurred in defending against the improper acquisition.

(3) If the amount finally determined to be just compensation for the property acquired exceeds the amount of the written offer as defined in section 5, the court shall order reimbursement in whole or in part to the owner by the agency of the owner's reasonable attorney's fees, but not in excess of 1/3 of the amount by which the ultimate award exceeds the agency's written offer as defined by section 5. The reasonableness of the owner's attorney's fees shall be determined by the court. [MCL § 213.66; MSA 8.265(16).]

We conclude that the court arrived at a reasonable formula when it limited the attorney fee award in the first action to the issues of non-joinder and subject matter of jurisdiction. The court's bifurcated approach to the two actions was reasonable, as was the court's determination that because the substantive matters were settled in the second suit, in which defendant received a separate attorney fee under the statute, limiting

RECEIVED by MSC 12/20/2021 10:30:09 AM

defendant's compensation in the first action to fees relating to the technical issues rendering plaintiff's first suit deficient would adequately make defendant whole.

We recognize the circuit court's discretion in determining both a "reasonable" attorney fee and sanction award and find no abuse of discretion here. MCL 213.66(2); MSA 8.265(16); *Escanaba,* 156 Mich.App at 813-815.

III

Lastly, we reject defendant's argument, based on *Escanaba,* that the circuit court erred in not awarding interest under M.C.L. § 600.2913; MSA 27A.2913. *Flint v. Patel,* 198 Mich.App 153, 161; 497 NW2d 542 (1993).

Affirmed. We do not retain jurisdiction.

WHITE, J. (concurring in part and dissenting in part).

WHITE, J.

***9** I concur in the majority's conclusion that the court arrived at a reasonable formula when it limited the attorney-fee award in the first action to the issues of non-joinder and subject matter jurisdiction, and in the majority's rejection of defendant's interest argument based on *Escanaba.* I dissent, however, from the affirmance of the $1,870 fee award to defendants and the $700 sanction award to plaintiff. I would vacate the sanctions award and remand for further proceedings regarding the attorney fee.

The record before us contains no explanation of how the circuit court reached the $1,870 figure awarded. Further, the circuit court's ruling appears to have diverged from its order of November 25, 1992, for reasons that are also unclear. [1]

I would remand for redetermination of actual reasonable attorney fees incurred in the first action for work not duplicated in the second action. The circuit court should be required to consider each of the factors articulated in *Wood v. DAIIE,* 413 Mich. 573, 588; 321 NW2d 653 (1982), in determining the reasonableness of an attorney fee award. *In Re Condemnation of Property,* 209 Mich.App 336, 341-342; 530 NW2d 183 (1995). I recognize the circuit court's discretion in determining what is a "reasonable" attorney fee, but also note that the policy is to allow full compensation of all actual reasonable attorney fees. [2] MCL 213.66(2); MSA 8.265(16); *Escanaba,* 156 Mich.App at 813-815. There are times when the reasonable fee for services may exceed the amount in dispute.

I would vacate the circuit court's award of $700 in sanctions to plaintiff. In light of the wording of the court's November 25, 1992 order, defendant's motion was not frivolous.

All Citations

Not Reported in N.W.2d, 1996 WL 33347677

Footnotes

* Circuit judge, sitting on the Court of Appeals by assignment.

1 The itemized statement mistakenly states the date of the subsequent hearing as October 22, 1992. The hearing was held on November 25, 1992.

2 The record of this second action is not before us. The parties refer to it in their briefs, and it is from the briefs and transcripts in the first action that we glean this information.

1 The November 25, 1992 order allowed attorney fees and expenses "in regard to the admission [sic] of Defendant's wife as a necessary party and lack of subject matter jurisdiction due to Plaintiff's failure to make a good faith written offer prior to commencement of the action." The court's November 16, 1993 opinion, however, allowed attorney fees and expenses only as "directly related to the issue of non-joinder of Mrs. Bogel."

 © 2021 Thomson Reuters. No claim to original U.S. Government Works.

2 I understand the circuit court's consternation with the time spent in determining attorney fees where so little money was involved. Nevertheless, remand is necessary for explanation of how the figure awarded was reached. *Wood, supra.*

End of Document

© 2021 Thomson Reuters. No claim to original U.S. Government Works.

RECEIVED by MSC 12/20/2021 10:30:09 AM

RECEIVED by MSC 12/20/2021 10:30:09 AM

2007 WL 490951
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Court of Appeals of Michigan.

S & M MACHINERY, INC., Plaintiff-Appellant,
v.
PARAVIS INDUSTRIES, INC., Defendant-Appellee,
and
Dynamic Machine of Detroit, Inc., Defendant.

Docket No. 266316.
|
Feb. 15, 2007.

Oakland Circuit Court; LC No.2002-007894-AV.

Before: KELLY, P.J., and DAVIS and SERVITTO, JJ.

Opinion

PER CURIAM.

***1** Following an order of remand from our Supreme Court in docket no. 258309, [1] plaintiff appeals as on leave granted from the district court's orders granting summary disposition in favor of defendant and imposing sanctions on plaintiff and the circuit court's order dismissing its claims of appeal from orders. Because summary disposition was appropriate in defendant's favor and the circuit court did not clearly err in dismissing plaintiff's appeals, we affirm.

This case arises out of the alleged breach of an oral contract concerning the sale of a wire electric discharge machine (EDM). In January 2002, plaintiff learned that Lunar Industries was in need of an EDM. Plaintiff, a used machinery dealer, knew of an available EDM owned by defendant. According to Mark Conway, a salesperson for plaintiff, defendant was willing to sell the EDM for $95,000, and any amount plaintiff obtained above that price from a buyer would go to plaintiff. Plaintiff claims that it offered the EDM to Lunar Industries for $110,000 and, following an inspection, Lunar Industries indicated they were very interested in the machine, but wanted to have a weekend to deliberate. According to Conway, defendant agreed to hold the machine over the weekend. However, defendant actually sold the machine to another dealer on the same day it allegedly agreed to the hold. That dealer then completed the sale to Lunar Industries.

Plaintiff brought a breach of contract action against defendant claiming that defendant had violated an option contract to hold the machine for the weekend. The district court concluded that there was no evidence of a valid contract other than Conway's "self serving statement" and granted defendant's motion for summary disposition. The district court also granted a motion for sanctions brought against plaintiff. Plaintiff thereafter appealed the district court's rulings to the circuit court. The circuit court issued an opinion concluding that it did not have subject matter jurisdiction to hear plaintiff's appeals because they were not timely filed. The circuit court also noted that it could treat the untimely claim of appeal as an application for leave to appeal, but declined to do so "because of the Plaintiff's unexplained dilatory and procedurally improper handling of this entire appeal." On reconsideration, the circuit court determined that plaintiff's appeal from the district court's award of sanctions was timely filed. However, the circuit court concluded that plaintiff's claim(s) of appeal were still properly dismissed because of other procedural defects.

As directed by our Supreme Court, we begin by addressing plaintiff's underlying claims of error at the district court level. Defendant moved for summary disposition pursuant to both MCR 2.116(C)(8) and (10), and the district court did not specify under which provision it was ruling. However, because the district court looked at evidence outside of the pleading to reach its conclusion that dismissal was warranted, we will treat the motion as granted under MCR 2.116(C)(10). See *Gibson v. Neelis,* 227 Mich.App 187, 190; 575 NW2d 313 (1998).

***2** In ruling on a motion for summary disposition under MCR 2.116(C)(10), "a court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence submitted in the light most favorable to the non-moving party." *Scalise v. Boy Scouts of America,* 265 Mich.App 1, 10; 692 NW2d 858 (2005). Summary disposition is appropriate under MCR 2.116(C)(10) when "[e]xcept as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law." This Court reviews de novo a trial court's ruling on a motion for summary disposition made pursuant to MCR 2.116(C)(10). *Scalise, supra* at 10.

 © 2021 Thomson Reuters. No claim to original U.S. Government Works.

RECEIVED by MSC 12/20/2021 10:30:09 AM

An option is a continuing offer by which the owner of property agrees with another that the latter may buy the property at a fixed price within a specified period, securing the privilege to buy. *Bil-Gel Co v. Thoma,* 345 Mich. 698, 708; 77 NW2d 89 (1956). An option is composed of two elements: (1) the offer to sell, and (2) the completed contract to leave the offer open for a time certain. *Id.* Consideration supporting the option must be distinguished from consideration for the sale in the event of acceptance. *Sulzberger v. Steinhauer,* 235 Mich. 253, 257; 209 NW 68 (1926). [2]

In *Gen Motors Corp v. Dep't of Treasury,* 466 Mich. 231, 238-239; 644 NW2d 734 (2002), our Supreme Court stated: To have consideration there must be a bargained-for exchange. *Higgins v. Monroe Evening News,* 404 Mich. 1, 20-21; 272 NW2d 537 (1978). There must be ' "a benefit on one side, or a detriment suffered, or a service done on the other.' " *Plastray Corp v. Cole,* 324 Mich. 433, 440; 37 NW2d 162 (1949).

In this case, plaintiff failed to present any evidence that there was consideration supporting defendant's alleged promise to leave the offer open over the weekend. In fact, plaintiff's counsel admitted "[i]nitially there was no consideration." Accordingly, if such a promise to hold the offer open was made, it was a *nudum pactum, i.e.,* an unenforceable voluntary promise. *Bailey v. Grover,* 237 Mich. 548, 554; 213 NW 137 (1927). Thus, the fact that Conway and defendant may have disagreed about whether the promise to hold open was actually made is not a material dispute. Even if a promise to hold the offer open was made, the offer was not legally binding because plaintiff exchanged nothing for the offer.

Plaintiff asserts that the district court impermissibly evaluated Conway's credibility in granting summary disposition in favor of defendant. However, even if this were true, this Court will not reverse where the correct result was reached, even if for the wrong reason. *Lane v. KinderCare Learning Centers, Inc,* 231 Mich.App 689, 697; 588 NW2d 715 (1998). Plaintiff has failed to show that the district court erred in concluding that defendant was entitled to summary disposition as a matter of law where there is no evidence the alleged option contract was supported by consideration.

***3** Plaintiff also asserts that the district court erred by sanctioning it. On appeal, a trial court's finding "that an action is frivolous is reviewed for clear error." *Kitchen v. Kitchen,* 465 Mich. 654, 661; 641 NW2d 245 (2002). MCR 2.625(A)(2) provides in relevant part that "if the court finds on motion of a party that an action or defense was frivolous, costs shall be awarded as provided by MCL 600.2591." MCL 600.2591 states as follows:

(1) Upon motion of any party, if a court finds that a civil action or defense to a civil action was frivolous, the court that conducts the civil action shall award to the prevailing party the costs and fees incurred by that party in connection with the civil action by assessing the costs and fees against the nonprevailing party and their attorney.

(2) The amount of costs and fees awarded under this section shall include all reasonable costs actually incurred by the prevailing party and any costs allowed by law or by court rule, including court costs and reasonable attorney fees.

(3) As used in this section:

(a) "Frivolous" means that at least 1 of the following conditions is met:

(i) The party's primary purpose in initiating the action or asserting the defense was to harass, embarrass, or injure the prevailing party.

(ii) The party had no reasonable basis to believe that the facts underlying that party's legal position were in fact true.

(iii) The party's legal position was devoid of arguable legal merit.

(b) "Prevailing party" means a party who wins on the entire record.

A determination of frivolousness must be assessed based on the circumstances at the time the claim was made. *Jerico Constr, Inc v. Quadrants, Inc,* 257 Mich.App 22, 36; 666 NW2d 310 (2003). "The frivolous claims provisions impose an affirmative duty on each attorney to conduct a reasonable inquiry into the factual and legal viability of a pleading before it is signed." *Attorney General v. Harkins,* 257 Mich.App 564, 576; 669 NW2d 296 (2003).

A quick review of the law of option contracts would have revealed to plaintiff's counsel the necessity of consideration to support the option. *Bailey, supra* at 554. Plaintiff's counsel admitted that there was no consideration for the option. Accordingly, he should have known that his claim of breach of contract was devoid of arguable legal merit.

RECEIVED by MSC 12/20/2021 10:30:09 AM

MCL 600.2591(3)(a)(iii). Further, the fact that some evidence was presented suggesting that plaintiff may have been more willing to bring an illegitimate claim because of the relationship between plaintiff's president and plaintiff's counsel further supports the district court's conclusion. Considering the foregoing, the district court's decision finding this action frivolous was not clear error. *Kitchen, supra* at 661.

As to the circuit court's dismissal of his appeal, plaintiff does not dispute that one of its appeals from the district court was not timely filed, but instead argues that its claim of appeal from this ruling should have been treated as an application for leave to appeal pursuant to MCR 7.103 under the circumstances. A circuit court's decision on an application for leave to appeal is a discretionary ruling. MCR 7.103(A).

***4** While plaintiff claims that it had good cause for not timely filing its claim of appeal, we observe that even if plaintiff was belatedly served with notice of entry of the district court's summary disposition order, plaintiff should have known that the order had been entered long before plaintiff filed its claim of appeal. Notably, plaintiff's counsel was present at the October 28, 2002 summary disposition hearing when the district court ruled against plaintiff. The order was entered eleven days later on November 8, 2002, after plaintiff failed to respond to a request for stipulation and then failed to object to entry of the order pursuant to MCR 2.602. Had plaintiff been concerned about preserving its appellate rights, it might also have inquired about entry of the order at the motion hearing on costs held on November 25, 2002. However, plaintiff failed to inquire until December 4, 2002, and did not file its claim of appeal from the ruling until December 20, 2002.

In addition, although plaintiff may have been relying on defendant's stipulation to toll the time available to appeal, plaintiff should have known that the circuit court would not have subject matter jurisdiction over an untimely claim of appeal, *Krohn v. Saginaw,* 175 Mich.App 193, 196; 437 NW2d 260 (1988), and that subject matter jurisdiction cannot be conferred by stipulation, *In re AMB,* 248 Mich.App 144, 166; 640 NW2d 262 (2001). Considering the foregoing facts, the circuit court could have concluded that the reason for the delay did not justify granting leave, especially in light of the lack of merit in the claim of appeal as discussed above. MCR 7.103(B)(5), (6). Thus, the circuit court did not abuse its discretion by refusing to consider defendant's claim of appeal from the district court's summary disposition ruling as a meritorious application for leave to appeal.

Plaintiff further argues that the circuit court erred in dismissing its timely claim of appeal from the district court's award of sanctions on the basis of allegedly minor procedural irregularities. We disagree.

In dismissing plaintiff's claim of appeal from the district court's award of costs, the circuit court first looked to the fact that plaintiff had failed to request a full transcript in accord with MCR 7.101(C)(2)(d) without seeking leave to order a lesser portion. The circuit court also observed that plaintiff had apparently failed to file the claim of appeal, the transcripts, or a reporter's certificate with the district court in accord with MCR 7.101(C)(2)(a) and (F)(1), because as of the date the court decided the motion for reconsideration (nearly a year after the initial claim of appeal was filed) it had still not received the district court record. Plaintiff asserts that although the district court failed to provide the record to the circuit court, plaintiff cannot be faulted because the relevant documents were provided to the district court in accord with MCR 7.101(F).

***5** In any event, the circuit court also noted that plaintiff's briefs failed to contain specific references to the record in accord with MCR 7.101(I)(1) and MCR 7.212(C)(6), and that plaintiff's initial circuit court appellate brief did not contain copies of the unpublished opinions to which it cited in accord with MCR 7.215(C)(1). Plaintiff argued that "there was no record to which Plaintiff could cite." However, this statement is clearly belied by the existence of the district court transcripts that were cited by defendant in its brief to the circuit court. Moreover, the record includes any pleadings, MCR 7.212(C)(6), such as the complaint plaintiff has cited in its appeal to this Court.

Plaintiff finally makes an unpreserved argument that even if these procedural errors could justify dismissal, under MCR 7.101(G) dismissal can only be after seven days notice, and dismissal can only be granted by the trial court, i.e., the district court in this case. However, the circuit court's decision was not based on MCR 7.101(G). Rather, the circuit court cited MCR 7.101(P)(1)(b) in dismissing plaintiff's claim of appeal. MCR 7.101(P)(1) provides that a circuit court may dismiss an appeal

when it determines that an appeal or any of the proceedings in an appeal was vexatious because

RECEIVED by MSC 12/20/2021 10:30:09 AM

(a) the appeal was taken for purposes of hindrance or delay or without any reasonable basis for belief that there was a meritorious issue to be determined on appeal; or

(b) a pleading, motion, argument, brief, document, or record filed in the case or any testimony presented in the case was grossly lacking in the requirements of propriety, violated court rules, or grossly disregarded the requirements of a fair presentation of the issues to the court.

Here, plaintiff's circuit court appellate brief violated court rules. While the violations were not egregious, MCR 7.101(P)(1)(b) does not specifically require that violations of court rules be egregious in order for an appeal to be considered vexatious. And the violations at issue would have affected the circuit court's ability to review plaintiff's allegations of error. Moreover, while the circuit court relied on MCR 7. 101(P)(1)(b), we note that plaintiff's claim of appeal at least arguably violated MCR 7.101(P)(1)(a), where plaintiff's underlying suit was frivolous as discussed further herein. Accordingly, the circuit court did not clearly err by determining that the appeal was vexatious and could be dismissed pursuant to MCR 7.101(P). *Davenport v. Grosse Pointe Farms Bd of Zoning Appeals,* 210 Mich.App 400, 408; 534 NW2d 143 (1995).

Affirmed.

All Citations

Not Reported in N.W.2d, 2007 WL 490951

Footnotes

1 *S & M Machinery, Inc v. Paravis Industries, Inc,* 474 Mich. 912; 705 NW2d 352 (2005).

2 See also *Bailey v. Grover,* 237 Mich. 548, 554; 213 NW 137 (1927) (concluding that an option was an unenforceable *nudum pactum* because it was unsupported by consideration); *Mastaw v. Naiukow,* 105 Mich.App 25, 30; 306 NW2d 378 (1981) (noting that the parties could have entered into an option contract supported by consideration to settle a tort claim but failed to do so); *Bd of Control of Eastern Michigan Univ v. Burgess,* 45 Mich.App 183, 185; 206 NW2d 256 (1973) (noting that option contracts for the purchase of land must be supported by valid consideration).

End of Document © 2021 Thomson Reuters. No claim to original U.S. Government Works.