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INTRODUCTION

The Defendants/Counter-Plaintiffs (The "Cristea's") in case assert their rights guaranteed by the Constitutions of the United States and the State of Michigan. This is a condemnation case concerning a storm drain which is controlled and operated by the City of the Village of Clarkston (the "City") but is located on the Cristea's private property. The Parties were unaware of the drain until 2003. As will be discussed later in this Summary, the facts of this case are unusual but not unprecedented.

The City's actions in this case constitute what is called an "early date of taking" – a principle embodied in the Uniform Condemnation Procedures Act (UCPA) and M Civ JI 90.14. In the year 2003, upon discovery of the drain, the lack of an easement, the drain's location close to the Cristea's foundation and the fact the drain was defective, the City was required to either quit operating the drain or to commence a

condemnation proceeding to secure an easement and pay just compensation to the Cristea's for the taking of the property.

Instead of instituting condemnation proceedings and/or repairing the drain in 2003, the City delayed the timing of the condemnation for years, allowing soil to migrate into the defective drain and weaken the soil under the foundation of the residence. Eventually the drain completely failed and collapsed, and the Cristea's foundation was extensively damaged. As a result, both Parties' appraisal experts have concluded that between 2003 and 2009, the Cristea's property value was reduced essentially to zero.

It is the Cristea's Constitutional right to be made whole – requiring a substantial case evaluation award including all the elements of recovery prescribed by law.

STATEMENT OF FACTS

The facts are undisputed. The Cristeas' 2,900 sq ft house is located at 42 W. Washington St in Clarkson, within a short walk to downtown Clarkston, an affluent Oakland County enclave. (*Exhibit 1*). In July of 2003, while City contractors were in the process of paving and extending watermains in the Washington Street right-of-way, the existence of a public storm drain was discovered running through the Cristea's property, passing within a few feet of the northeast corner of the Cristeas' house (*Exhibit 2*, Hubbell, Roth Clark design drawing showing drain location).

Neither the Cristea's nor any of the City's personnel had prior knowledge of the drain before 2003. There was no recorded easement for the drain, nor was the Drain Commission aware of any easement (*Exhibit 3*). The deed conveying the property to

the Cristea's includes no indication of the drain, nor would any visual inspection reveal its existence. The City has hypothesized that the former owners of the property must have informally given the City permission for the drain to run through the property.

When the drain was discovered in July of 2003 it was immediately recognized by those involved that the close proximity of the storm drain to the northeast corner of the foundation was a threat to the Cristea's home. The Cristea's were aware of some hairline cracking of their walls at the northeast corner, and realized that the drain could be causing a settlement problem, if the drain were breached below the foundation. The City had a camera crew video the drain on July 31, 2003, at which time it was confirmed containment was breached near the Cristea's foundation (**Exhibit 4**). The City has acknowledged "the drain was a threat to fail. Such failure would put not only the subject property at risk but also creates a significant health and environmental hazard given its proximity to the Mill Pond impoundment." (**Exhibit 14**, at Page 7).

The Cristea's objected to the drain being located near their foundation, and demanded the City address the defective drain and pay just compensation, including the cost to repair the damage to their house (**Exhibit 5**). Norm Cristea stated if the City did not act he would fill the drain with concrete to protect his home. The City retorted that Mr. Cristea was prohibited from altering the drain. The City attorney stated the City had a right to have the drain on the Cristea's property, despite their objections (**Exhibit 6**, also see **Exhibit 14** at Page 9).

In 2003, the City received a bid to repair the drain by relining it for just \$39,285.00. The City made promises it would fix the drain (**Exhibit 7**). Despite having

asserted control over the drain and promising to repair it, the City in fact did nothing to address the defect. For the next 5 years, the City continued to operate the drain on the Cristea's property but elected to forego any repairs. The City essentially waited for the drain to collapse, which it did in December 2008 (*Exhibit 8*).

Because of the delay by the City in addressing the defective drain, the Cristea's foundation suffered extensive damage (*Exhibit 9*). The cracks that have developed in the Cristea's house and foundation between 2003 and 2009 are both numerous and large, wide enough in many places to easily fit a #2 pencil within the open space (*Exhibit 10*). In January 2009, professional engineer John Lamb, P.E. inspected the house and reported a causal connection between the defective drain and the damaged house (*Exhibit 11*).

In January of 2009, the Cristea's provided John Lamb's report to the City and once again requested the City address the drain and pay to repair their house. The City offered \$892.10 (*Exhibit 12*). The Cristea's requested a meeting with the City to discuss a resolution but the City refused. Instead, in February of 2009, the City filed this condemnation action for an easement to relocate the drain upon the Cristea's property, along with an Emergency Motion based on John Lamb's engineering report. After waiting more than 5 1/2 years to condemn, the City filed its complaint and set its "Emergency Motion" for hearing on *less than two days* notice! This was an attempt to intimidate the Cristea's and coerce them into accepting the City's \$892.00 offer. At the hearing, the Parties stipulated to an order regarding the taking of an easement, but reserved all other issues, including just compensation and other damages (*Exhibit 13*).

EXPERT APPRAISALS

Both parties have had experts appraise the property. While the appraisers took different routes, the conclusions of both experts are basically the same: By 2009, the extensive damage to the house and foundation caused by the operation of the defective storm drain had reduced the value of this property to essentially *zero*.

The City's appraiser concluded that as of February 2009, "The direct comparisons indicate a range of value for the subject property from a liability of \$16,500.00 to a positive value of \$20,000.00." (*Exhibit 14*, at Page 37). The City's appraiser chose to use the high end of the range, placing the property value at \$20,000.00.

The Cristea's appraiser Norman Thomas (R.S. Thomas & Associates, Inc) determined that the loss in value to the residence as a result of the stigma attached to the extensive damage done to the foundation, even assuming the house and foundation would be fully repaired, is \$68,125. Using standard methodology, Mr. Thomas placed the value of the *fully-repaired* property at \$204,375.00 (*Exhibit 15*). However the cost to repair the property has been estimated at \$159,659.00 (*Exhibit 16*), plus \$40,000.00 in pack-out and storage costs during construction. In addition, the Cristea's have already spent \$4,000.00 on soils testing and structural engineering design services, bringing the total repair costs to \$203,659.00. Therefore, \$204,375.00 less \$203,659.00 in costs to repair leaves a net property value of just \$716.00...essentially zero.

LAW

"It is well settled that the goal of just compensation is to ensure the injured party is restored, at least financially, to the same position it would have been in if the taking had not occurred." *Department of Transportation v. Frankenlust Lutheran Congregation*, 269 Mich. App. 570, 587; 711 NW2d 453 (2006). It is this Panel's duty to identify a dollar figure that represents "just compensation." There is no dispute the Cristea's property value has been reduced to zero or near zero by 2009.

The main legal issue in this case revolves around the City's delay in initiating condemnation proceedings until February of 2009, 5 1/2 years after it was aware of the drain's existence and its damaged condition. The City wants the valuation date to be the date it initiated its condemnation suit in February 2009, at which time the property value was near zero. However, the UCPA explicitly provides for situations where a governmental agency delays condemnation to the detriment of a property owner.

MCL 213.71 provides that "A defendant [property owner] may assert as a counterclaim, any claim for damages based on conduct by an agency which constitutes a constructive or de facto taking of property." [Emphasis added] The Cristeas' asserted a counterclaim in this case to recover damages caused directly by the presence of the illegal drain.

M Civ JI 90.14 Date of Valuation: Early Date of Taking provide that:

The market value of the property is to be determined as of the date of taking which shall be decided by you.

In some situations, the government's actions with respect to a particular property have an impact which deprives an owner of the practical benefits of ownership of the property. In such a case, you may find that the

government's actions constitute a "taking" of the property at a date earlier than the date legal title is transferred to the government. This does not mean that the government has actually seized or confiscated the property, but merely that the impact of the government's actions on the property is such that the law treats the situation as though a taking has occurred.

The test to be applied in determining whether or not a taking has occurred is *whether the actions of the government substantially contributed to and accelerated the decline in value of the property.*

You should first determine whether or not such a taking in the legal sense occurred. Then you must determine the date that such taking occurred. Then you must determine the value of the property on that date.

This case provides a text book example of what an early date of taking is all about, and why the statutory provision is required to protect citizens. In July of 2003, the City recognized the problem with its drain but did nothing to remedy the situation. As a result of the delay by the City, the value of the Cristeas' residence has plummeted to nothing.

The City is fond of arguing that the Cristeas can only blame themselves for the damage because they should have filed their own lawsuit back in 2003. The City is plainly in violation of the statute at 213.52:

(2) If property is to be acquired by an agency through the exercise of its power of eminent domain, the agency shall commence a condemnation action for that purpose. *An agency shall not intentionally make it necessary for an owner of property to commence an action*, including an action for constructive taking or de facto taking, to prove the fact of the taking of the property. [Emphasis added]

The law rightfully prohibits the City from "gaming" the system in this manner by delaying condemnation, then taking advantage of the reduction in property value to pay the citizen lesser compensation. Obviously, the Constitution requires the compensation

must be "just," and compensation that is lower because the government deliberately delayed condemnation is not "just."

In 2003 when Mr. Cristea notified the City he intended to plug the drain to protect the foundation of the residence, the City of Clarkston informed the Cristeas the drain was under the City's jurisdiction and that the Cristeas were legally forbidden from making any necessary repairs and/or filling up the drain. At that time, the City should have initiated the drain relocation project and mitigated damages caused by the defective drain, but they did not do so. Nor did they proceed to condemnation. Instead, the City abused their authority, and *continued to operate the drain illegally* on the Cristea's property until the drain collapsed in 2008.

The City's "defense" of its behavior is almost beyond belief. In Craig Fuller's appraisal, he explains that:

The City of the Village of Clarkston was willing to offer this solution [of relining the drain] on the condition that Mr. Cristea granted an easement allowing the City of the Village of Clarkston contractor's legal access to reline this drain. According to Mr. Tressel, *the Cristeas' refused to grant an easement and as result the City of the Village of Clarkston did not implement the improvement.* According to Mr. Tressel, the cost to the City of the Village of Clarkston to structurally line the drain at that time was bid at \$39,285.00. (**Exhibit 14** at Page 7) [Emphasis added]

This explanation is flawed for 3 reasons. First, nothing in the UCPA provides that a governmental agency can simply request an easement for an existing structure, then continue to operate the facility on private property if the owner does not agree. In this case, the City continued to operate the public drain without an easement from 2003 to 2008, knowing full well it was illegal, defective and was damaging the Cristea's

property. The City clearly abused its powers.

Second, and perhaps more significantly, the City had a duty to condemn in 2003 to address what **the City defines as** "a significant health and environmental hazard." (**Exhibit 14** at Page 7). In 2003 the City repeatedly asserted that it had the right to have the drain there – a storm drain that was serving the public (See **Exhibit 6**). The City effectively took possession of the Cristea's private property in July 2003 but now argues it had no responsibility to address a "significant health and environmental hazard" under its control. The City's position cannot be supported under any analysis.

Third and finally, MCL 213.74 provides that:

In order to compel an agreement on the price to be paid for the property, an agency may not advance the time of condemnation, defer negotiations or condemnation, defer the deposit of funds for the use of the owner, nor take any other action coercive in nature.

The City is prohibited from "deferring condemnation" to compel a lower price but that is exactly what the City is trying to do. The City had no problem condemning for an easement in 2009 after the drain actually collapsed. The delay in fixing the drain directly caused the damages and reduction in value. The City's defense is untenable, and there is no precedent to support it.

CONTROLLING CASE LAW PRECEDENT

Under controlling case law precedents, the City's liability is clearly illustrated, and includes liability for both repair damages and diminution of value. The case of *Defnet v. City of Detroit*, 41 N.W.2d 539; 327 Mich. 254 (1950) is nearly identical to the instant case. In *Defnet*, Detroit homeowners discovered a city sewer running directly beneath

their house. There was no easement for the sewer. The city denied the sewer was active, but in fact the city was operating it and continued to do so for a number of years. The sewer had a break and was leaking. The homeowners suffered damages to their residence from settling due to the defective sewer line. The homeowners had the house repaired and the sewer partially repaired. The City then completed the sewer repairs and (Like in this case) sought compensation *from* the homeowners for the costs!

Of course, the *Defnet* Court held the presence of the city sewer on the homeowner's property was illegal. The trial court found a taking had occurred and allowed the homeowners to obtain "full redress in damages," including both costs to repair their residence and for the diminution of value. The appellate court upheld the trial court's judgment.

Fletcher Oil v. City of Bay City, 78 N.W.2d 205; 346 Mich. 411 (1956) is also factually very similar to the instant case. In *Fletcher*, property purchasers were unaware of the presence of a public watermain crossing their property. There was no easement. However the city claimed the former owners of the property had informally granted permission for the city to operate the watermain on the property. The city sought to enter upon the property to alter or repair the watermains and the owners objected. The trial court ruled:

"That the defendant, City of Bay City, shall within a reasonable time quit the premises of the plaintiff and remove from said premises the water main and any and all property located there, or in the alternative, the defendant, City of Bay City, shall within a reasonable time institute condemnation proceedings according to law to acquire a right-of-way for its water main and to pay plaintiff the value of said right-of-way as found in said proceedings." *Fletcher* at 207.

The decree of the *Fletcher* Court addresses the very issue we face in this case. Where the government is illegally operating a public utility on a citizen's property, the government must either quit operating the public utility or obtain an easement through proper procedures, and pay just compensation to the citizen. The City in this case did neither. It continued to operate the drain without an easement from 2003 through 2009, and allowed the Cristea's to suffer damages thereby. Compensation has never been paid. The City is liable to the Cristea's for just compensation since the date of taking in July of 2003. If there is a contest regarding the facts this is a question for the jury. When the jury hears the evidence and sees the damage caused to the Cristea's residence, there is little doubt with regard to the resolution of the issue of liability.

The Cristea's claim is Constitutionally-based. The claim is not a tort and there is no governmental immunity defense available:

An inverse condemnation action is not a tort action. Plaintiff claims that his property has been damaged by a public improvement; *** *Whether defendant was negligent with regard to the public improvement is not at issue. The issue is whether defendant's actions constituted a taking in violation of US Const, Am V; Const 1963, art 10, § 2.* It is well settled that a claim against a governmental agency based on constitutional rights is not subject to governmental immunity. See *Electro-Tech, Inc v H F Campbell Co*, 433 Mich 57, 91 n 38; 445 NW2d 61 (1989); *Hinojosa v Dep't of Natural Resources*, 263 Mich App 537, 546-547; 688 NW2d 550 (2004). *Allen v. City of Laingsburg*, No. 286031 (Mich. App., Feb. 16, 2010) at page 3, [Emphasis added]

Further, a storm sewer overflow or back-up onto real property, as occurred in this case, is expressly exempted from the protection of governmental immunity by MCL 691.1411-691.1418. *Linton v. Arenac County Road Commission*, 273 Mich.App. 107; 729 NW2d 883 (2006).

DAMAGES

The only issue in this case is the determination of compensation due as a result of the City's illegal conduct and misuse of its power. A de facto taking occurred in July of 2003. Under Michigan law, the date of the taking is the date of the valuation. Mr. Thomas performed an expert appraisal using standard methodology to determine the value in July 2003. That value was \$275,000.00. The damages suffered by the Cristea's are set forth here:

Value of the Property as of July 31, 2003, before taking, <i>Assuming no damage to residence whatsoever</i>	\$275,000.00
Diminution of Value after taking, <i>Assuming full repairs have been made and including the permanent easement</i>	(\$68,125.00)
Cost to repair <i>Per soils report and structural design drawings</i>	(\$203,659.00)
Remaining Value of property	\$716.00
ACTUAL DAMAGES <i>Difference in value before and after the taking</i>	\$274,284.00

Michigan's statute provides for mandatory additions to the amount of just compensation. In order for these citizens to be made whole as the Constitution requires, the following are required to be added to the amount of actual damages:

Actual Damages (See above):	\$274,284.00
Statutory interest from date of taking – <i>Mandatory</i> per MCL 213.65(2),(3) (Exhibit 17)	\$108,113.61
Reimbursable expert fees – <i>Mandatory</i> per MCL 213.66(1),(3) Norman Thomas & Associates	\$ 5,000.00
Reimbursable attorney fees – <i>Mandatory</i> per MCL 213.66(3)	\$128,835.17
Total All-Inclusive Award	\$516,232.80

CAVANAUGH & QUESADA, PLC

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By: _____
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