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MONAGHAN, LoPRETE, McDONALD, YAKIMA, GRENKE & McCARTHY
A PROFESSIONAL CORPORATION
ATTORNEYS AND COUNSELORS
40700 WOODWARD AVENUE, SUITE A
BLOOMFIELD HILLS, MICHIGAN 48304-5110

TELEPHONE (248) 642-5770
FACSIMILE (248) 642-9460
www.monaghanpc.com

JAMES H. LOPRETE
PATRICK A. McDONALD*
BORIS K. YAKIMA
JOHN E. GRENKE
THOMAS J. McCARTHY
BARTHOLOMEW A. SEYMOUR III
CHRISDON F. ROSSI
MARY M. LYNEIS
JESSICA A. TROTTER**

ALSO ADMITTED TO PRACTICE IN CO*, DC* AND OR**

PETER J. MONAGHAN (1881-1942)
GEORGE F. MONAGHAN (1876-1920)
JOSEPH N. MONAGHAN (1911-1979)
PETER J. MONAGHAN, JR. (1909-1982)

BRIGHTON OFFICE
10524 E. GRAND RIVER
TOWER OFFICE CENTER
BRIGHTON, MICHIGAN 48116
(810) 220-3444

February 11, 2004

Via Hand Delivery

Clerk of the Court
Michigan Court of Appeals, Detroit Office
3020 West Grand Boulevard, Suite 14-300
Detroit, Michigan 48202

Re: City of Kalamazoo v. KTS Industries, et al.
Michigan Court of Appeals No. 251199
Kalamazoo County Circuit Court Case No. C 03-000251-CC

Dear Clerk:

~~Enclosed for filing in the above~~ referenced matter are five (5) copies of the Michigan Municipal League's Brief Amicus Curiae and Proof of Service.

Thank you for your assistance and attention to this matter.

Yours very truly,

MONAGHAN, LoPRETE, McDONALD,
YAKIMA, GRENKE & McCARTHY

Boris K. Yakima

TJM/jaa
Enclosures
cc: Randall S. Schau, Esq.
Craig H. Lubben, Esq.
William C. Mathewson, Esq.

STATE OF MICHIGAN

IN THE COURT OF APPEALS

CITY OF KALAMAZOO, a
Michigan municipal corporation,

Plaintiff-Appellant

v.

KTS INDUSTRIES, INC., RIVERSIDE
FOUNDRY AND GALZANIZING
COMPANY, and RIVERSIDE
FOUNDRY COMPANY,

Defendants-Appellees

Court of Appeals No. 251199

Kalamazoo County Circuit Court
Case No. C 03-000251-CC

/

Office of the City Attorney
ROBERT H. CINABRO (P23409)
RANDALL S. SCHAU (P33043)
Attorneys for Plaintiff-Appellant
Kalamazoo City Hall, 3rd Floor
Kalamazoo, Michigan 49007
269-337-8185

CRAIG H. LUBBEN (P33154)
Attorney for Defendants-Appellees
MILLER, JOHNSON, SNELL & CUMMISKEY
Rose Street Market Building, Suite 600
303 North Rose Street
Kalamazoo, Michigan 49007-3850
269-226-2958

/

MICHIGAN MUNICIPAL LEAGUE'S BRIEF *AMICUS CURIAE*

PROOF OF SERVICE

INTRODUCTION

The sole issue presented in this appeal is whether a property owner in a condemnation action is entitled to a jury determination of the necessity of taking the owner's property. Plaintiff-Appellant City of Kalamazoo filed this condemnation case pursuant to the Uniform Condemnation Procedures Act (1980 PA 87; MCL 213.51 *et seq*)("UCPA") to acquire private property owned by Defendants-Appellees. In the course of those proceedings, the Kalamazoo County Circuit Court held that the provisions of 1911 PA 149 (specifically MCL 213.25) entitled the property owner to a jury trial on the issue of the necessity of the taking, notwithstanding the provisions of the UCPA.

Amicus Curiae Michigan Municipal League believes the trial court erred in concluding a property owner had the right to a jury determination of the necessity of taking the property. Under former Michigan Constitutions and statutes, a property owner had the right to a jury determination of the necessity of taking the owner's property. However, by adoption of the Michigan Constitution of 1963, which deleted the jury language of former constitutions, the property owner's constitutional right to a jury (as to both necessity and compensation) in condemnation proceedings was eliminated.

Further, by enactment of the UCPA in 1980, the property owner's right to a jury determination of necessity as preserved in former statutes, such as MCL 213.25 at issue here, was implicitly repealed. The UCPA provides that necessity determinations will be made by the court (i.e., a judge). By enactment of the UCPA, the Legislature intended that all condemnation actions in Michigan be prosecuted pursuant to the UCPA and provisions in pre-existing statutes for jury determinations of necessity are irreconcilably at odds with the later-enacted provisions of the UCPA.

Amicus Curiae Michigan Municipal League believes that, after enactment of the UCPA, a property owner no longer has the right to a jury determination of necessity in condemnation proceedings. In support thereof, the following brief is submitted for the Court's consideration.

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STATEMENT OF THE QUESTION INVOLVED

I. DOES A PROPERTY OWNER HAVE THE RIGHT TO A JURY DETERMINATION OF THE NECESSITY OF TAKING THE OWNER'S PROPERTY IN A CONDEMNATION CASE ?

Amicus Curiae Michigan Municipal League answers "no".

Plaintiff-Appellant answers "no".

Defendants-Appellees answer "yes".

The trial court answered "yes".

INTEREST OF *AMICUS CURIAE* MICHIGAN MUNICIPAL LEAGUE

Amicus Curiae MICHIGAN MUNICIPAL LEAGUE is a non-profit Michigan corporation whose purpose is the improvement of municipal government and administration through cooperative effort. Its membership is comprised of 511 Michigan cities and villages of which 430 are also members of the Michigan Municipal League Legal Defense Fund. The Michigan Municipal League operates the Legal Defense Fund through a board of directors. The purpose of the Legal Defense Fund is to represent the member cities and villages in litigation of statewide significance.

This brief *amicus curiae* is authorized by the Legal Defense Fund's board of directors whose membership includes: the president and executive director of the Michigan Municipal League and the officers and directors of the Michigan Association of Municipal Attorneys: William B. Beach, city attorney, Rockwood; John E. Beras, city attorney, Southfield; Randall L. Brown, city attorney, Portage; Ruth Carter, corporation counsel, Detroit; Andrew J. Mulder, city attorney, Holland; Clyde Robinson, city attorney, Battle Creek; Debra A. Walling, corporation counsel, Dearborn; Eric D. Williams, city attorney, Big Rapids; Bonnie Hoff, city attorney, Marquette; Peter Doren, city attorney, Traverse City; and William C. Mathewson, general counsel, Michigan Municipal League.

On January 15, 2004, pursuant to MCR 7.212(H), the Michigan Municipal League filed its Motion for Leave to File a Brief *Amicus Curiae* in Support of Plaintiff-Appellant City of Kalamazoo. By Order dated January 28, 2004, this court granted leave to file a brief *amicus curiae* and ordered that the brief be filed with the court within 14 days thereof. Accordingly, the Michigan Municipal League hereby submits its brief *amicus curiae* in support of Plaintiff-Appellant City of Kalamazoo.

ARGUMENT

Does a property owner have the right to a jury determination of necessity in Michigan condemnation proceedings? Under prior Michigan constitutions and statutes, a property owner in condemnation proceedings had the right, *inter alia*, to a jury determination of the necessity of taking of the owner's property. That right, however, has long since been repealed by the Michigan Constitution of 1963 and the Uniform Condemnation Procedures Act (1980 PA 87).

The 1963 Constitution deleted language from prior constitutions mandating that a jury (or a panel of commissioners) determine the necessity for the taking.[1] The 1963 Constitution further changed the nature of condemnation proceedings from inquisitorial to purely judicial. Further, the Uniform Condemnation Procedures Act, enacted in 1980, expressly superceded all other statutes relating to condemnation procedure and does not provide for jury determinations of necessity. Thus, the Uniform Condemnation Procedures Act repealed any procedural right to a jury determination of necessity that may have existed under prior condemnation statutes.

Accordingly, after adoption of the 1963 Constitution, there is no independent substantive right to a jury determination of necessity. Moreover, the procedural provisions of 1911 PA 149 (MCL 213.25) predicated upon rights no longer contained in the Constitution, and upon which the lower court relied, have been implicitly repealed by the Uniform Condemnation Procedures Act. *Amicus* believes the Kalamazoo County Circuit Court's holding that the property owner was entitled to a jury trial on the issue of necessity is erroneous and should be reversed. In the interest of avoiding future dispute over this issue, *Amicus* further requests that this court find and hold that the jury provisions MCL 213.25 has been repealed by the Uniform Condemnation Procedures Act.

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[1] *See* Const. 1963, art 10, § 2; and *compare* Const. 1850, art 18, § 2, §14; and Const. 1908, art 13, § 2.

I. THERE IS NO RIGHT TO A JURY DETERMINATION OF THE NECESSITY OF TAKING PROPERTY IN MICHIGAN CONDEMNATION PROCEEDINGS.

Michigan has not recognized a fundamental right to a jury trial (as to necessity or compensation) in condemnation proceedings absent a specific constitutional or statutory provision.[2] When viewed in the context of the evolution of Michigan condemnation proceedings, it becomes apparent that the procedure for summoning and impaneling juries to determine the necessity of making a public improvement and the necessity of taking private property for such improvement (such as MCL 213.25 at issue here) is premised upon substantive rights that have been subsequently deleted from the former Michigan constitutions.[3] The Michigan Constitution of 1963 completely eliminated the constitutional right to a jury trial in condemnation proceedings and further changed the essential nature of condemnation actions from inquisitorial to judicial proceedings. However, the statutory procedures enacted pursuant to the requirements of the former constitutions remained.

Beginning as early as 1968, in view of the radical change in the nature of condemnation proceedings and the myriad condemnation statutes then existing each with their different attendant procedures, the Legislature sought to establish a new uniform procedure governing all condemnation actions in the state and that as closely as possible resembled other civil actions. In establishing a new uniform procedure for all condemnation actions, the Legislature further sought to incorporate

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[2] Right to a jury trial in condemnation action is granted by statute, not by federal or state constitution. *Great Lakes Gas Transmission v. Markel*, 226 Mich App 127; 573 NW2d 61 (1997). *See also Hill v. State*, 382 Mich 398, 405-406; 170 NW2d 18 (1969). In the absence of a special constitutional or statutory provision, there is no right to trial by jury in condemnation proceedings. *City of Dearborn v. Michigan Turnpike Authority*, 344 Mich 37, 64; 73 NW2d 544 (1955); quoting *Fitzsimons & Galvin Inc v. Rogers*, 243 Mich 649; 220 NW 881 (1928). Additionally, the general constitutional provision relating to a right to a jury trial in civil actions does not apply to condemnation proceedings. *See* Const. 1963, art 1, § 14 and *Chamberlain v. Detroit Edison Co*, 14 Mich App 565; 165 NW2d 845 (1969).

[3] *See* Const. 1963, art 10, § 2. Even the right created in the 1850 and 1908 Constitutions was not absolute. Both the 1850 and 1908 Constitutions provided that necessity determinations could be made by either a jury or a panel of commissioners appointed by a court. Further, both constitutions also expressly exempted the state and highway commissioners from the requirement to submit determinations of necessity to a jury or commissioners. *See* Const. 1850, art 18, § 2; and Const. 1908, art 13, § 2.

the best portions of existing laws, correcting recognized deficiencies, and create a new procedure reflecting the best possible law that will then apply to all condemning authorities in the state.[4]

These efforts came to fruition in 1980 with the enactment of the Uniform Condemnation Procedures Act ("UCPA") on April 8, 1980. Consistent with the Legislature's purposes, the UCPA completely changed and unified condemnation procedures. Much of the UCPA was adopted from the provisions of 1966 PA 295 (MCL 213.361, *et seq.*)(the "Highway Condemnation Act"), including the provisions relating to review of the necessity for the taking of the property (compare MCL 213.56 and former MCL 213.368). The UCPA expressly declared that the act governed all condemnation actions in Michigan and further expressly provided for the repeal of numerous condemnation procedural statutes contained in 1911 PA 149 (the "State Agencies Act"), 1966 PA 295 (the Highway Condemnation Act), and 1923 PA 238 (the "Public Utilities Act"). *See* MCL 213.75 and former MCL 213.76 and 213.77. However, in the UCPA, the Legislature did not expressly repeal the provision of 1911 PA 149 describing the procedure for summoning and impaneling a jury to determine questions of necessity. See MCL 213.25.

Notwithstanding, by virtue of the Legislature's clear intent that UCPA would replace all other condemnation statute procedures, and as expressed in MCL 213.75, the Uniform Condemnation Procedures Act implicitly repealed all other condemnation procedures, including the procedural provisions of MCL 213.25 relied upon by the trial court in the case *sub judice*. Moreover, because the provisions of the UCPA relating to the review of necessity and the provisions of MCL 213.25 providing for a jury determination of necessity are wholly different and incompatible procedures, the later enacted and more specific provisions of the UCPA implicitly repeal and control over the conflicting provisions of MCL 213.25.

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[4] *See* House Legislative Analysis, HB 4652, June 19, 1980, p 3.

In short, the provisions of MCL 213.25 (enacted in 1911) describe a procedure for instituting condemnation actions premised upon rights and practice that have long since been abandoned. As discussed more fully *infra*, *Amicus* believes the trial court's reliance upon MCL 213.25 in this case was misplaced and should be reversed.

A. HISTORICAL OVERVIEW OF THE NATURE OF CONDEMNATION PROCEEDINGS AND THE ROLE OF JURORS IN MICHIGAN.

Historically, Michigan condemnation proceedings have undergone numerous substantial changes and, in years past, were of an entirely different character than the formal judicial proceedings we are familiar with today. Condemnation proceedings have evolved from informal, non-judicial appraisal proceedings thru constitutionally created inquisitorial tribunals to the now formalized judicial proceedings similar to other civil actions at law. Amicus believes the court's consideration of the evolution of Michigan condemnation proceedings will provide the court with the context for reviewing the statutes now at issue and assist the court in understanding the intent and purposes of the Uniform Condemnation Procedures Act, as well as provisions of MCL 213.25.

1. Nature of Condemnation Proceedings and the Role of Jurors Prior to the 1850 Constitution.

The Constitution of 1835 made no special provision respecting condemnation procedure and, accordingly, the mode and manner of acquiring private property (and the necessity thereof) were left solely to the legislative discretion.[5] The prerogative of taking property on their own estimate of its necessity was exercised by legislatures or those persons or corporations whom they allowed to act in the matter. *Paul v. City of Detroit*, 32 Mich 108 (1875). Neither the jury nor commissioners had any duty to perform except assessing damages. *Id.* Questions of necessity did not act as a limitation

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[5] *See* Const. 1835, art 1, § 19. *C.f.* Ordinance for the Government of the Northwest Territory (1787), Article II ("No man shall be deprived of his liberty or property, but by the judgment of his peers, or the law of the land; and should the public exigencies make it necessary for the common preservation , to take any person's property, or to demand his particular services, full compensation shall be made for the same").

upon the exercise of the power of eminent domain and necessity determinations were a matter of legislative discretion. *See Henderschott v. Rogers*, 237 Mich 338, 341-342; 211 NW 905 (1927).

2. Nature of Condemnation Proceedings and the Role of Jurors Under the 1850 and 1908 Constitutions.

Under the 1850 Constitution, however, important changes were made to the constitutional provisions relating to necessity determinations. *See Henderschott, supra* at 342. The determination of the necessity of the proposed use and the necessity of taking the property for that use were removed from the province of the condemnor and reposed in a jury (or commissioners).[6] *See Paul, supra; see also Toledo Ry Co v. Dunlap*, 47 Mich 456, 462; 11 NW 271 (1882). Juries were empaneled as a special tribunal and were the judges of both fact and law.[7] And the jury (or commissioners) was called upon to decide the necessity of taking the property for the use or benefit of the public, and to determine the compensation therefore. *See, e.g., Paul, supra.* And the case was much the same after adoption of the 1908 Constitution.[8] Necessity involved resolution of two questions, one being the necessity for the proposed use, and the other the necessity for taking the property for such use. *See Mansfield C&LM R Co v. Clark,* 23 Mich 519 (1871); and *State Highway Commissioner v. Vanderkloot*, 392 Mich 159, 174-175; 220 NW2d 416 (1974), and cases cited.

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[6] Except in the case of condemnations by the state or actions by the commissioners of highways. Const. 1850, art 18, § 2; and Const. 1908, art 13, § 2.

[7] *See, e.g., McDuffee v. Fellows*, 157 Mich 664; 122 NW 276 (1909) and cases cited.

[8] *See* Const. 1908, art 13, § 1 and § 2. *See, e.g., City of Detroit v. Salloum*, 335 Mich 582, 591; 56 NW2d 387 (1953)("In a condemnation case the jury are judges of both facts and law and after it is impaneled, the presiding judge acts only in an advisory capacity and cannot give binding instructions. 'Proceedings to condemn land are special and summary in character and, while subject to judicial review and supervision for certain purposes, are not judicial proceedings.' quoting *In re Huron-Clinton Metropolitan Authority's Petition*, 306 Mich 373; 10 NW2d 920 (1943). *See also In re Widening Bagley Avenue*, 248 Mich 1, 3-4; 226 NW 688 (1929)("Necessity for taking and the ascertainment of the just compensation to be made may be determined and fixed either by a jury of freeholders of the vicinage or by commissioners. Such jury impaneled in proceedings of this kind is a constitutional tribunal, a jury of special inquest. The Constitution does not vest the power in a court or in a judge and jury, but in a jury of 12 freeholders of the vicinage. The proceedings are not according to the course of the common law – not in the nature of a lawsuit. They [the jury] are not to be interfered with or dictated to by the judge. The jury are judges both of the law and facts").

In contrast to the procedures adopted under the 1835 Constitution, under the 1850 and 1908 Constitutions, the necessity for taking the property was not a legislative decision, but rather a judicial question to be decided by the constitutional tribunal of jurors or commissioners. *See, e.g., Rosen v. City of Detroit*, 242 Mich 690, 691; 219 NW 726 (1928); and *Henderschott, supra.* Under these Constitutions, the property owner, thus, had the substantive, constitutionally protected right to a jury determination of necessity questions. *See, e.g., Port Huron & N Ry v. Callinan,* 61 Mich 12; 27 NW 717 (1886); *Ayers v. Richards*, 38 Mich 214 (1878)[holding a condemnation statute unconstitutional for failure to provide for a jury]; and *City of Detroit v. Beecher*, 75 Mich 454; 42 NW 986 (1889)[holding condemnation act satisfied requirement of jury determination of necessity issues].

3. Nature of Condemnation Proceedings and the Role of Jurors Under the 1963 Constitution.

The 1963 Constitution, however, changed the very nature of condemnation proceedings and, in particular, necessity determinations. Const. 1963, art 10, § 2, eliminated the matter of treating condemnation and eminent domain as an inquisitorial matter. *Mackie v. Jones*, 4 Mich App 420; 145 NW2d 231 (1966). This section required that condemnation proceedings be held in a "court of record"; thereby treating condemnation actions similar to other civil actions. In *Chamberlain v. Detroit Edison Co*, 14 Mich App 565, 573-574; `65 NW2d 845 (1969), the Michigan Court of Appeals, reviewed the provisions and intent of the new Constitution and found:

> ... one of the reasons for adding the second sentence containing the court of record requirement to the 1963 constitutional provision concerning eminent domain was to do away with the kind of jury trial provided for in the 1850 and 1908 constitutions. No longer were the jurors to be the judge of the law and the facts. No longer was the inquiry to be inquisitional. Henceforth, the inquiry was to be in a court of record and not by the kind of jury provided for in the 1850 and 1908 constitutions.

The *Chamberlain* court, however, went on to hold that the provisions of the public utility statutes relating to condemnation proceedings and necessity determinations enacted under the procedures of the former constitutions were not unconstitutional under the 1963 Constitution. The court found that the Michigan Supreme Court's adoption of the 1963 General Court Rules (GCR 1963, 516.5) providing for a judge to preside over condemnation proceedings satisfied the "court of record" requirement of the Constitution.

Importantly, by deleting the language of the 1850 and 1908 Constitutions relating to jury determinations of necessity, the 1963 Constitution removed "necessity" as a limitation upon the exercise of the power of eminent domain and returned necessity issues back to matters of legislative discretion.[9] Notwithstanding, the procedural right to a jury determination of the necessity of taking the owner's property pursuant to MCL 213.21, *et seq.*, continued to be recognized after adoption of the 1963 Constitution. *See, e.g., Chamberlain, supra;* and *Van Zanen v. Keydel*, 89 Mich App 377, 385-386; 280 NW2d 535 (1979); *Western Michigan University Board of Trustees v. Slavin*, 381 Mich 23; 158 NW2d 884 (1968); and *State Highway Commission v. Drouillard*, 6 Mich App 605, 610; 149 NW2d 903 (1967). However, in accordance with the mandate of the 1963 Constitution, such proceedings were now required to proceed in a court of record in which a judge presided over the proceedings, determined the admissibility of evidence, and charged the jury as to matters of law. *See, e.g., Chamberlain, supra*; and *Slavin, supra.*

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[9] *See* Const. 1963, art. 10, § 2; and *see Vanderkloot, supra.*

B. ANY PRE-EXISTING RIGHT TO A JURY DETERMINATION OF NECESSITY WAS IMPLICITLY REPEALED BY THE UNIFORM CONDEMNATION PROCEDURES ACT

The whole landscape of Michigan condemnation proceedings changed in 1980 with the enactment of the Uniform Condemnation Procedures Act. As the title of the act itself indicated, the Legislature manifestly intended that the UCPA would create a new uniform procedure that would apply to all condemning authorities and would govern all condemnation actions. The Legislature also clearly expressed its intent that the UCPA would become the sole procedure utilized for all condemnation actions in the plain language of MCL 213.75, as well as the repealer provisions of former MCL 213.76 and 213.77. Based upon this clear Legislative intent for the UCPA to occupy the entire field of condemnation procedure, the UCPA implicitly repealed all other condemnation statute procedures, including the procedural provisions of MCL 213.25. Moreover, as the plain language of the statutes reflect, the procedures provided MCL 213.25 and the related provision of the UCPA (MCL 213.56) describe two wholly, fundamentally different procedures that cannot reasonably be reconciled into a single cohesive procedure. Accordingly, the more specific and later enacted provisions of the UCPA contained in MCL 213.56 implicitly repealed the general procedural provisions of MCL 213.25 relating to resolution of necessity issues. The procedure described in the UCPA controls and does not provide for a jury to determine necessity issues.

1. Standard of Review and Relevant Law.

Resolution of this issue turns on principles of statutory construction. *See Oakland Hills Development Corp v. Leuders Drain District*, 212 Mich App 284; 537 NW2d 258 (1995). It is a fundamental rule of statutory construction that the courts must ascertain and give effect to the intent of the Legislature and the purpose of enacting a statute. *Id.* Two statutes covering the same subject matter must be construed together to give meaning to both, if at all possible. *Id.* Effect should be

given to each of two acts upon the same subject matter, if, by reasonable construction, it may be so done." *In re Gallagher Avenue*, 300 Mich 309, 313; 1 NW2d 553 (1942). Where two statutes conflict, that which is more specific prevails. *Leuders Drainage, supra.*

Further, earlier and later statutes concerning the same subject matter, where possible, are construed together as in pari materia, unless there is such repugnancy that both cannot operate, in which the last expression of the legislature must control, and the earlier statute is deemed repealed by implication. *In re Complaint of City of Southfield*, 235 Mich App 523; 599 NW2d 760 (1999). Whether a statute is to be regarded as repealed by a subsequent enactment relating to the same subject matter is dependent upon legislative intent, the presumption being against a repeal by implication. *Jackson v. Michigan Corrections Com'n*, 313 Mich 352; 21 NW2d 159 (1946). A subsequent affirmative statute is a repeal by implication of a former one made concerning the same matter if it introduces a new rule on the subject, and be evidently intended as a substitute for the former law, although it contains no express words repealing it. *Brophy v. Schindler*, 126 Mich 341; 85 NW 114 (1901). Repeals by implication are not favored; there is no presumption of an intention on the part of the legislature to repeal a law where no reference is made to it in a later act, unless the intent is clear. *In re Gallagher Avenu, supra*, at 312. A repeal of a statute may be inferred in two instances: (1) where it is clear that a subsequent legislative act conflicts with a prior act; or (2) when a subsequent act of the Legislature clearly is intended to occupy the entire field covered by a prior enactment. *Donajkowski v. Alpena Power Co*, 460 Mich 243; 596 NW2d 574 (1999).

2. The Legislature Clearly Intended the UCPA to Occupy the Entire Fleld of Condemnation Procedure in Michigan.

By its plain language, the provision of MCL 213.25 relating to summoning and impaneling a jury to determine necessity issues is strictly procedural.[10] However, the legislative intent of the UCPA is to provide the sole and exclusive procedure governing all condemnation actions in Michigan. This intent is clearly expressed by the plain language of Sec. 25 of the UCPA (MCL 213.75). This statute provides, in pertinent part, that "**All** actions for the acquisition of property by an agency under the power of eminent domain **shall** be commenced pursuant to and be governed by this act." [emphasis supplied]. The highlighted imperative language leaves no room for doubt or ambiguity.[11] *See also* MCL 213.52.

The House Legislative Analysis relating to the enactment of the UCPA further clearly evidences the Legislatures intent that the UCPA would provide for a single uniform procedure for all condemnation actions in Michigan.[12]

> THE APPARENT PROBLEM: Michigan has a number of condemnation statutes which authorize various public agencies and private agencies such as power companies, phone companies, and railroads, to acquire private property for public use. The procedures in these statutes are not uniform. The bill would create a single condemnation procedures act for use by both public and private agencies in acquiring property under the power of eminent domain.

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[10] MCL 213.25, in pertinent part, provides: "**The petition shall ask** that a jury be summoned and impaneled to ascertain and determine whether it is necessary ...". [emphasis supplied]. This language describes manner of filing the agency's petition, i.e., a procedural matter. This is further supported by consideration of the fact that, when this statute was enacted in 1911, the "substantive" right to a jury was contained in the 1908 Constitution. This statute then merely describes the "procedure" to be employed to enforce the right.

[11] This intent if further supported by language of MCL 213.75 prior to the 1996 Amendment to the UCPA (1996 PA 474) in which the statute set forth a "grace period" by which certain other statutes (including 1911 PA 149) could continue to be utilized for a certain time, but that after expiration of that time, all actions were required to be instituted under the UCPA. After 1985, this time period expired for all of these statutes. Accordingly, the 1996 Amendment to the UCPA deleted the "grace period" provisions of MCL 213.75, as well as the repealer provisions of former MCL 213.76 and 213.77, because such provisions were no longer applicable.

[12] *See* House Legislative Analysis, HB 4652, June 19, 1980.

It would replace all other condemnation statute procedures on April 2, 1980.

THE CONTENT OF THE BILL: The bill would create a single condemnation procedures act for use by both public and private agencies in acquiring property under the power of eminent domain where the agency has been granted that power by another statute.

Under the bill, the determination of public necessity, if challenged, could only be decided by the court, while just compensation would be decided by a jury at the demand of either the owner or the agency.

ARGUMENTS: For: The bill constitutes a much needed reform and consolidation of Michigan condemnation procedures.

RESPONSE: Every effort has been made in this bill to treat condemnation proceedings as ordinary civil lawsuits.

RESPONSE: There is some predictable resistance to the institution of new ways of doing things. Public Act 295 of 1966 is adequate for those agencies which can use it, as is Public Act 149 of 1911, but the problem of lack of uniformity remains. It is an obvious practical step to take the best portions of existing laws, correct their deficiencies and come up with the best possible law to apply to ALL agencies. Of course any new law must do without the benefit of interpretation of the courts at first. This bill would permit a three-year overlap (five years in the case of water and power companies) of the uniform act with existing laws so that the new law can be tested without fear that there will be no other means to take land should the law be crippled by court decisions. By the time existing statutes are repealed in 1983 the new law should have undergone whatever refining may be necessary in the courts.

Moreover, the Senate Bill Analysis relating to the 1996 Amendment to the UCPA reaffirms the Legislature's understanding and intent that the UCPA be the sole means of procedure to acquire private property by eminent domain.[13]

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[13] *See* Senate Fiscal Agency Bill Analysis, SB 778, January 22, 1996.

> Overview of current law. The Act prescribes the procedures that must be followed when property is acquired by a public or private agency (authorized by law to condemn property), and requires an agency to commence a condemnation action when acquiring property through the exercise of eminent domain.
>
> The bill would repeal two sections of the Act (MCL 213.76 and 213.77) that repealed other laws on April 1, 1983, and April 1, 1985, respectively.
>
> RATIONALE. In Michigan, when property is acquired by an agency (a public body or a private entity authorized by law to condemn property), the agency must comply with the Uniform Condemnation Procedures Act.

In a condemnation case brought in 1977 under 1966 PA 295 but still pending in the trial court after enactment of the UCPA in 1980, the Michigan Court of Appeals, in *State Highway Commission v. Biltmore Investment Co*, 156 Mich App 768; 401 NW2d 922 (1987), considered conflicting provisions between the highway condemnation act and the UCPA relating to reimbursement of attorney fees. The court rejected the plaintiffs argument that the UCPA did not govern actions commenced prior to the effective dates of the UCPA because such an interpretation was contrary to the plain language of the UCPA because it would make the term "all actions" mean something less than "all". *Id.* at 773. The court went on to consider the legislative intent behind the UCPA by reference to the House Legislative Analysis of the bill that would become the UCPA (as discussed herein supra). *Id.* at 775. The *Biltmore* court found that the clear and apparent purpose of the UCPA was to "create a single condemnation act which *'would replace all other condemnation statute procedures on April 2, 1980*". *Id.* at 776 [emphasis in original]. The court therefore held that the attorney fee provisions of the UCPA controlled over the provisions of the highway condemnation act (which the court also found had been expressly repealed by the UCPA), stating:

> **Given the clear legislative intent** that the new procedures [UCPA] "replace all other condemnation statute procedures", we do not hesitate to apply the changes in attorney fee provisions of [the UCPA] to the suite commenced under [the highway condemnation act]. *Id.* at 778. [emphasis supplied].

Similarly, in *Oakland Hills Development Corp v. Leuders Drain District*, 212 Mich App 284; 537 NW2d 258 (1995), the Michigan Court of Appeals subsequently considered conflicting provisions of the Drain Code and those of the UCPA relating to precondemnation negotiations. Relying upon rules of statutory construction, the court held that because the provisions of the UCPA were more specific than conflicting general provisions in the Drain Code, the more specific provisions of the UCPA controlled. Importantly, the court stated that its conclusion was supported by the intent of the Legislature in the UCPA to create uniform procedures for condemnation:

> This conclusion is consistent with the apparent intent of the Legislature of creating, through the UCPA, uniform procedures for condemnation by state and private agencies. *Id.* at 291.

In reaching this conclusion, the *Leuders* court cited to an Opinion of the Attorney General addressing a similar question and reaching a similar conclusion. *See* OAG, 1986, No 6336 (January 17, 1986). Review of this Opinion is instructive and material to the issue in the case *sub judice.*

In this Opinion, the Attorney General (Frank Kelley) stated the question reviewed was "*Does the Uniform Condemnation Procedures Act control the procedures for the condemnation of rights-of-way for drain purposes or may such condemnation proceedings be also brought under the Drain Code of 1956*?" In addressing the question, the Attorney General initially noted that, as originally enacted, the UCPA contained two repealing statutes (formerly MCL 213.76 and 213.77) that, collectively, repealed certain sections of 1911 PA 149 (condemnation by state agencies and public corporations act), 1966 PA 295 (highway condemnation act), and 1923 PA 238 (public utilities act), but did not expressly repeal the condemnation procedures of any other act (such as the Drain Code).

The Attorney General, however, stated that the *"failure of the [UCPA] to contain an express provision for the repeal of the procedural provisions of the Drain Code ... is not determinative of [the] question"*. In consideration of the provisions of MCL 213.75, 213.76 and 213.77, and after reviewing the House Legislative Analysis relating to the UCPA, the Attorney General found *"The legislative intent is manifest that the Legislature intended by enactment of the Uniform Condemnation Procedures Act that effective May 1, 1980, proceedings for the condemnation of rights-of-way for drain purposes be instituted under the Uniform Condemnation Procedures Act"*.[14] The Attorney General then concluded that *"Because the Uniform Condemnation Procedures Act is a complete act in itself and does not confuse or mislead,* ***it repeals by implication*** *the condemnation procedures of the Drain Code ... [and] ... proceedings for condemnation of rights-of-way for drain purposes must be conducted in accordance with the provisions of the* [UCPA]". [emphasis supplied].

And in *In re Gallagher Avenue*, 300 Mich 309, 1 NW2d 553 (1942), the Michigan Supreme Court analyzed the relationship between the provisions of 1911 PA 149 (providing for condemnation of private property for public purposes) and 1925 PA 352 (providing for the condemnation of private property for highway purposes). The Court found that the latter statute (1925 PA 352) did not implicitly repeal 1911 PA 149 because, in large part, "the acts are not inconsistent" and "[1925 PA 352] does not set forth an exclusive procedure ... in condemnation for highway purposes". *Id.* at 312. By contrast, however, the provisions of the UCPA are wholly inconsistent with the jury procedure set forth in MCL 213.25 and, unlike 1925 PA 352, it is evident that the legislature intended that the UCPA provide the exclusive procedure for all condemnation actions in Michigan.

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[14] Although not directly stated in the Opinion, this conclusion is based upon the plain language of the UCPA in MCL 213.75 mandating that "all" condemnation actions be brought under the UCPA. *See also State Highway Commissioner v. Biltmore Investment Co, supra.*[i.e., "all" means "all"].

Since the enactment of the UCPA, it has been uniformly understood by condemnation practitioners in Michigan that the UCPA constituted a wholesale change in condemnation law and that the UCPA eliminated all other procedures for prosecuting and defending condemnation actions. Illustrative of this understanding, the treatise *Michigan Municipal Law*, Chapter 13, Eminent Domain, specifically cautions practitioners on the changes to condemnation law effected by the UCPA.[15] In § 13.12 Necessity as a Judicial Question, the author states "*The procedural provisions of all statutes that govern expropriation actions have been repealed by the Uniform Condemnation Procedures Act ... Effective May 1, 1980, all ... expropriation actions are required to be commenced pursuant to and governed by the provisions of the UCPA ... There is no jury review of necessity under any circumstances in actions governed by the UCPA*". In § 13.13 Constitution and Statutes, the author states "*See the Uniform Condemnation Procedures Act, which has superseded the procedural provisions of all other acts which both authorize eminent domain actions and prescribe the procedure for their conduct*". With specific regard to the effect of the UCPA on the provisions of 1911 PA 149 (the "State Agencies Act"), the author states: "*The procedural provisions of the State Agencies Act ... have been replaced by the Uniform Condemnation Procedures Act ... This results in four major changes peculiar to actions under this act: 2.* ***Necessity is no longer a jury issue***". [emphasis supplied]. And in subchapter F. The Uniform Condemnation Procedures Act [new section], § 13.23A Uniformity, the author states: "*The Uniform Condemnation Procedures Act ... directly repeals or otherwise supersedes all procedural provisions of other expropriation statutes with a uniform procedure.*"

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[15] Institute for Continuing Legal Education, *Michigan Municipal Law*, Volume II, 1987 Supplement (Ann Arbor, 1987). This chapter was written by Bert Burgoyne. During his lifetime and since, Bert Burgoyne was widely regarded as the preeminent condemnation attorney in Michigan. Mr. Burgoyne was also a member of the committee that drafted the Uniform Condemnation Procedures Act.

The legislative intent of the UCPA to completely occupy the field of condemnation procedure has been clearly expressed and fully understood. Research has failed to disclose any reported case in Michigan after 1985 wherein a different condemnation procedure has been employed or where a jury has been impaneled to determine the necessity of taking the owner's property. Accordingly, the UCPA implicitly repealed the general procedural provisions of MCL 213.25.

3. The Provisions of the UCPA Relating to Necessity Determinations Are Irreconcilable with Provisions of Pre-existing Statutes Providing for a Jury Determination of Necessity.

The procedure for determinations of necessity under UCPA is wholly distinct and irreconcilable with the former procedures enacted pursuant to the language of the 1850 and 1908 Constitutions, and, in particular, directly conflicts with the procedure described in MCL 213.25. In fact, under the UCPA there is no "determination" of necessity to be made at all. Rather, the UCPA prescribes a "challenge" to the necessity determination already made by the condemning agency. The determination of necessity made by the condemning agency is binding upon the court and can only be challenged by motion filed within the prescribed time. MCL 213.56. If such a motion is not filed, any question as to the necessity of the taking is waived. MCL 213.56. Further, the court is only permitted to disturb the agency's determination of necessity upon a finding of fraud, error of law, or abuse of discretion. Accordingly, the court is not permitted, under the UCPA, to make an independent determination of necessity, but rather is only permitted to conduct a very limited review of the agency's decision. *See Vanderkloot, supra; City of Troy v. Barnard*, 183 Mich App 565, 569; 455 NW2d 378 (1990); and *Nelson Drainage District v. Filippis*, 174 Mich App 400, 404; 436 NW2d 682 (1989). Additionally, under the UCPA, and in view of the language of the 1963 Constitution, the court is no longer permitted to review the necessity of making the proposed improvement. *See Vanderkloot, supra; Barnard, supra; Nelson Drainage, supra.*

The UCPA does not permit a jury trial on the issue of necessity. MCL 213.56 and *see City of Detroit v. Williams*, unpublished opinion *per curiam* of the Michigan Court of Appeals decided Apr. 25, 1997 (Docket No. 188458), p 2 ("... unlike other civil actions, the amount of damages is the only issue upon which the parties are entitled to a jury trial. MCL 213.56; MCL 213.62"). (Ex. A).

The language of MCL 213.25 essentially tracks language of 1850 and 1908 Constitutions and, accordingly, merely provides the procedure for enforcing the substantive right set forth in the constitutions. *See State Highway Commission v. Drouillard*, 6 Mich App 605, 607-608; 149 NW2d 903 (1967)("Although the condemnation statute [MCL 213.25] in question never directly borrows this explicit 1908 constitutional mandate, the statute provides that a jury should determine necessity and just compensation. It is clear that the general tenor of this law presupposes the existence of a right to a jury trial"). This procedure is wholly inconsistent with the judicial proceedings required by the 1963 Constitution and the specific provisions of the UCPA.

The House Legislative Analysis of the UCPA provides further guidance:

> Under the bill, the determination of public necessity, if challenged, could only be decided by the court, while just compensation would be decided by a jury at the demand of either the owner or the agency. House Legislative Analysis, HB 4652, June 19, 1980.

The word "court" as used in the Analysis, and as used in MCL 213.56 means judge. The UCPA expressly distinguishes between the words "court" and "jury". *See* MCL 213.62. Furthermore, the plain language of MCL 213.56 describes a strictly judicial process not amenable to proceedings involving the summoning and impaneling of a jury. The statute provides that a challenge to the necessity must be brought by a motion and that a "hearing" (i.e., not a jury trial) would be held within 30 days, and further that the "court" would render its decision within 60 days of the "hearing" (i.e., not jury trial). Additionally, MCL 213.56 requires that the agency's determination of necessity is binding upon the court and can only be disturbed upon a finding of fraud, error of law, or abuse

of discretion. These considerations are consistent with the strictly judicial review of legislative discretion, and are not appropriate determinations for a jury. Lastly, MCL 213.56 was adopted from the former MCL 213.368 contained in the Highway Condemnation Act, under which a jury was not permitted to review or make necessity determinations. Therefore, the substantially similar language and procedure in MCL 213.56 cannot be understood as permitting a jury to hear the property owner's challenge to the necessity of the taking.

Finally, *Amicus* acknowledges that certain parenthetical language in Michigan Civil Jury Instruction 90.01 (M Civ JI 90.01) suggests that necessity determinations may still be presented to the jury. However, despite the language of the instruction, *Amicus* does not believe this instruction supports a conclusion that the right to a jury determination of necessity exists after enactment of the UCPA. M Civ JI 90.01, in pertinent part, states:

> By your verdict, you will decide the disputed [issue / issues] of fact, which in this case [concerns / concern] ***(the necessity for the project and)** the just compensation to be paid to the [owner / owners] of the property taken. [emphasis supplied].

The "Notes on Use" accompanying the jury instruction provides that "the phrase in parentheses should be read to the jury only if necessity for the taking is an issue in the case".

Strikingly, the parenthetical language of this instruction does not address the seminal issue; that being the "necessity for the **taking**" as opposed to the "necessity for the **project**". Additionally, the language of the instruction (i.e., resolving issues over the "necessity of the project") does not appear to be applicable in view of the Michigan appellate courts' holdings barring review of the necessity of the project. See *Vanderkloot, supra; Barnard, supra*; and *Nelson Drainage, supra.*

Notwithstanding, as discussed *supra*, the provisions of the UCPA clearly contradict the propriety of instructing and submitting necessity issues to the jury.[16] MCL 213.56 provides only for "challenges" to the necessity and does not permit the court (either judge or jury) to independently make necessity "determinations". MCL 213.56 provides that necessity determinations are binding upon the court absent fraud, error of law or abuse of discretion and, accordingly, the language of this instruction is inapplicable. MCL 213.56 also provides that necessity challenges must be resolved within 60 days of the court's hearing on the property owner's motion, i.e., long before any jury trial as to just compensation would be held at which such an instruction would be given.

Moreover, this jury instruction was added on February 1, 1981. The UCPA was enacted and ordered to take immediate effect on April 8, 1980 (less than a year prior). However, the provisions of MCL 213.75 prior to the 1996 Amendment permitted a "grace period" until 1983 in which condemnation actions could still be filed pursuant 1911 PA 149. Therefore, until 1983, it was permissible to submit necessity questions to the jury in actions brought under 1911 PA 149. This jury instruction, therefore, would have still been applicable and accurate to those proceedings until 1983. Accordingly, the jury instruction, when adopted, may have accurately reflected the substantive law. However, after expiration of the "grace period" under the former MCL 213.75 and under the plain language of the current MCL 213.75, this instruction is no longer applicable.

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[16] *See, e.g, Javis v. Board of Ed of School District of Ypsilanti*, 393 Mich 689, 703n5; 227 NW2d 543 (1974)[court does not use its rule making power to adopt the substantive law in standard jury instructions; the court speaks to the accuracy and continued validity of an aspect of the substantive law through actual cases in controversy). *See also Moskalik v. Dunn*, 392 Mich 583, 599n5; 221 NW2d 313 (1974)[the mere existence of a standard jury instruction does not mean that the substantive law encapsulated therein is necessarily accurate nor that it is no longer open to change or attack].

CONCLUSION

The importance of this issue to Michigan condemnation jurisprudence and the ability of public agencies to efficiently prosecute condemnation actions to acquire property necessary for the public benefit cannot be understated. The Legislature has long since abandoned the procedure of jury determinations of necessity in condemnation proceedings such as that described in MCL 213.25 and upheld by the trial court in this case. As is evident by its language, the procedure described in MCL 213.25 (enacted in 1911) was for the purpose of carrying into effect the constitutional mandate of jury determinations of necessity as contained in the former 1850 and 1908 Constitutions. However, the 1963 Constitution eliminated the requirement for juries to determine necessity issues and, concomitantly, reposed in the legislature the responsibility for providing the mode and method of deciding the necessity for taking private property for the public use. Notwithstanding, with the aid of the 1963 General Court Rules for judicial control and supervision of condemnation proceedings, juries continued to decide necessity issues where prescribed by statute.

However, in 1980, in order to create a unified procedure for condemnation actions in Michigan, the Legislature enacted the Uniform Condemnation Procedures Act, which it intended to take the place of all other condemnation procedure statutes then in existence. In the UCPA, the Legislature substantially adopted the provisions relating to necessity determinations from the pre-existing Highway Condemnation Act (1966 PA 295; formerly MCL 213.368). This procedure, as is now found in MCL 213.56, provides that the determination of necessity for taking property is to be made by the agency in the exercise of its discretion and is thereafter binding upon the court. A property owner, however, may challenge such a determination and ask that the agency's decision be reviewed by the court for fraud, error of law, or abuse of discretion.

In adopting this particular process, the Legislature plainly intended that such review would be conducted by a judge alone – not a jury. The reason is twofold: First, the acts of highway commissioners were not subject to the jury provisions of the 1850 and 1908 Constitutions and, thus, it could not be understood that the "court" would include a jury. Second, the Legislature deemed it essential to adopt a process that would permit agencies to more quickly and efficiently obtain title and possession to property the agency determined necessary for its projects/public works. Allowing other agencies in addition to the highway commissioners to have the advantage of this so-called "quick-take" provision was an important aspect and intent in enacting the UCPA.[17] As was known from experience, the process of summoning and impaneling juries to try and determine both necessity and compensation (which could take years) often frustrated the agency's ability to plan and implement public improvements and projects. The Legislature adopted a procedure in the UCPA, which had already been tried and tested, that streamlined the resolution of questions that could affect the agency's ability to acquire title and possession of the property by having such issues reviewed expeditiously by the court, while the property owner still maintained the right to proceed with a full jury trial as to the amount of just compensation. And, consistent with the fundamental purposes of the UCPA, the Legislature did not intend that any other procedure for resolution of necessity issues should continue in effect.

While there may be some ambiguity and uncertainty over why the Legislature did not expressly repeal MCL 213.25 at the time it enacted the UCPA, there is no ambiguity or uncertainty over the plain language and intent of the UCPA. The UCPA was enacted for the primary and overarching purpose of creating a single, uniform procedure for all condemnation actions in

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[17] *See* House Legislative Analysis, HB 4652, June 19, 1980; and Senate Fiscal Agency Bill Analysis, SB 778, January 22, 1996.

Michigan. This intent is manifest in the plain language of MCL 213.75 requiring that "all" condemnation actions be brought pursuant to and governed by the UCPA.

Accordingly, the UCPA implicitly repealed all other statutory procedures for resolution of necessity issues because the Legislature clearly intended that the UCPA should occupy the entire field of condemnation procedure in Michigan. Further, the UCPA implicitly repealed the general procedural provisions of MCL 213.25 because the provisions of the UCPA are irreconcilable with the provision of MCL 213.25 for jury determinations of necessity, and the UCPA is both more specific and was enacted after MCL 213.25.

WHEREFORE, *Amicus Curiae* Michigan Municipal League respectfully requests that this court find and hold that:

A. The provisions of MCL 213.25 relating to a jury determination of necessity were repealed by the Uniform Condemnation Procedures Act; and

B. The Uniform Condemnation Procedures Act sets forth the exclusive procedures governing all condemnation actions in Michigan; and

C. The Uniform Condemnation Procedures Act provides that challenges to the necessity of taking the owner's property are to be heard and decided by judge alone and not a jury.

Respectfully submitted,

MONGHAN, LoPRETE, McDONALD,
YAKIMA, GRENKE & McCARTHY

By: _____

BORIS K. YAKIMA (P22607)
Attorney for the Michigan Municipal League
40700 Woodward Avenue, Suite A
Bloomfield Hills, Michigan 48304
248-642-5770

Dated: February 11, 2004.

STATE OF MICHIGAN

IN THE COURT OF APPEALS

CITY OF KALAMAZOO, a
Michigan municipal corporation,

Plaintiff-Appellant

v.

KTS INDUSTRIES, INC., RIVERSIDE FOUNDRY AND GALZANIZING COMPANY, and RIVERSIDE FOUNDRY COMPANY,

Defendants-Appellees

Court of Appeals No. 251199

Kalamazoo County Circuit Court
Case No. C 03-000251-CC

/

Office of the City Attorney
ROBERT H. CINABRO (P23409)
RANDALL S. SCHAU (P33043)
Attorneys for Plaintiff-Appellant
Kalamazoo City Hall, 3rd Floor
Kalamazoo, Michigan 49007
269-337-8185

CRAIG H. LUBBEN (P33154)
Attorney for Defendants-Appellees
MILLER, JOHNSON, SNELL & CUMMISKEY
Rose Street Market Building, Suite 600
303 North Rose Street
Kalamazoo, Michigan 49007-3850
269-226-2958

/

PROOF OF SERVICE

STATE OF MICHIGAN }
COUNTY OF OAKLAND } SS.

JEFFREY A. ALCORN, being first duly sworn, deposes and says that on the 11th day of February, 2004, a copy of the Michigan Municipal League's Brief Amicus Curiae and this Proof of Service, were served on counsel for Plaintiff-Appellant and Defendants-Appellees via first class mail, postage pre-paid.

Further deponent sayeth not.

Jeffrey A. Alcorn

Subscribed and sworn to before me this
11th day of February, 2004.

BAN QASAWA, Notary Public
State of Michigan, County of _____
My Commission Expires: _____

BAN QASAWA
NOTARY PUBLIC OAKLAND CO., MI
MY COMMISSION EXPIRES Jan 7, 2007

Not Reported in N.W.2d
(Cite as: 1997 WL 33352832 (Mich.App.))

Court of Appeals of Michigan.

CITY OF DETROIT, Plaintiff-Appellee,
v.
Trigg WILLIAMS, Defendant,
and
GREGORY J. REED & ASSOCIATES, P.C., New National Publishing, G.J.R Scholarship Foundation Ltd., Reed Production Co., and Equestrian Estates Limited Partnership, Defendants-Appellants.

No. 188458.

April 25, 1997.

Before: SAWYER, P.J., and MURPHY and CAVANAGH, JJ.

[UNPUBLISHED]

PER CURIAM.

*1 In this condemnation action, defendants appeal by right from a judgment in favor of defendant Gregory J. Reed & Associates on defendants' claims for just compensation under state law and relocation expenses under the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970(URA), 42 USC 4601 *et seq.* We reverse.

This action arises out of the condemnation of property for purposes of the Mid-City Rehabilitation Project. The project involved the construction of a hospital by the Department of Veterans Affairs (VA). Plaintiff, the City of Detroit, was the VA's agent for purposes of acquiring the necessary property and coordinating a relocation assistance program. The property at issue in this case was a Victorian mansion owned by Gregory and Verladia Reed, and purportedly occupied by, among others, Gregory J. Reed & Associates, P.C.; New National Publishing; Gregory J. Reed Scholarship, Ltd.; Reed Production Co.; and Equestrian Estates Limited Partnership.

Title to the property vested in plaintiff by operation of law pursuant to the trial court order entered on June 5, 1991. The remaining issues involved relocation assistance under the URA and just compensation. [FN1] On December 10, 1993, the trial court entered a default against defendants because of Gregory Reed's repeated failure to attend his own deposition. The court subsequently decided the disputed issues of just compensation and relocation expenses in a nonjury hearing. The court treated all of defendants as one entity, and after subtracting prior payments made by plaintiff, awarded $69,522 to defendant Gregory J. Reed & Associates.

FN1. Another panel of this Court reversed the trial court's order of partial payment of defendants' relocation expenses under the URA because defendants failed to exhaust their administrative remedies before seeking judicial relief. See *Detroit v. Reed,* unpublished opinion per curiam of the Court of Appeals, issued March 30, 1995 (Docket No. 167546).

Defendants initially contend that the trial court abused its discretion in entering a default judgment against them for Reed's failure to comply with discovery requests. We disagree. A trial court's decision to enter a default judgment against a party for the failure to comply with discovery requests is reviewed for an abuse of discretion. *Mink v. Masters,* 204 Mich.App 242, 244; 514 NW2d 235 (1994).If a party, or an officer, director, or managing agent of a party, fails to appear for his deposition after being served with a proper notice, the court may order such sanctions as are just, including rendering a judgment by default against the disobedient party. MCR 2.313(B)(2)(c); MCR 2.313(D)(1)(a). However, a default judgment is a drastic sanction that should be used with caution. *Mink, supra.*

In the present case, Reed either failed to attend or canceled five scheduled depositions over a period of eighteen months and did not timely respond to plaintiff's requests that he identify a date upon which he would be available for his deposition.

Prior to entering the default, the trial court intervened in the discovery dispute and twice scheduled dates for the deposition. Given Reed's repeated failure to attend his deposition when scheduled by notice and order of the court, the trial court did not abuse its discretion in entering a default because Reed intentionally refused to facilitate discovery. Cf. *Chrysler Corp v. Home Ins Co,* 213 Mich.App 610, 612; 540 NW2d 485 (1995) .

***2** Defendants argue that even if entry of a default were proper, only Reed should have been defaulted. Again, we disagree. Under MCR 2.313(D)(1), sanctions may be imposed against a disobedient party for the failure of the party or an "officer, director, or managing agent of [the] party" to attend his own deposition. Here, the trial court did not exceed its authority in entering the default because Reed is either an officer or managing agent of every defendant.

Next, defendants contend that they were denied their right to a jury trial on the issue of damages when, after entering the default, the trial court determined the amount of just compensation in a nonjury hearing. The right to a jury trial in a condemnation proceeding is granted by statute, M.C.L. § 213.62(1); MSA 8.265(12)(1), not the Constitution of 1963. *Hill v. State Hwy Comm,* 382 Mich. 398, 406; 170 NW2d 18 (1969). Nevertheless, a default does not constitute a waiver of a party's properly preserved right to a jury trial. *Wood v. DAIIE,* 413 Mich. 573, 583; 321 NW2d 653 (1982). When a hearing is necessary on the question of damages, the trial court must accord the defaulted party his properly preserved demand for a jury trial. *Id.* at 585; see MCR 2.603(B)(3)(b).

A defaulted party's right to a jury trial on the issue of damages is not an equitable matter, but rather is secured by the Constitution and the court rules. The *Wood* Court's holding that a party's right to jury trial survived a default stemmed from its interpretation of Const 1963, art 1, § 14, and the applicable court rule, GCR 520, now MCR 2.603(B)(3)(b). The Court noted that the language of the court rule securing a party's right to a jury trial as "required by the Constitution" is but a circular reference because the constitutional provision dictates that the right is waived unless demanded in the manner prescribed by law, that is, the court rules. *Wood, supra.*

Plaintiff correctly notes that the application of the court rules to condemnation proceedings leads to a seemingly inconsistent result because, unlike other civil actions, the amount of damages is the only issue upon which the parties are entitled to a jury trial. MCL 213.56; MSA 8.265(6); MCL 213.62; MSA 8.265(12). However, in providing for a jury trial on the issue of damages after entry of a default, the court rules do not distinguish between types of actions. As such, a defaulted party in a condemnation action must be accorded his properly preserved demand for a jury trial when further proceedings are necessary to determine the amount of just compensation.

In this case, defendants preserved their demand for a jury trial by providing notice of it in the caption of their counter-complaint. See MCR 2.508(B)(1). Absent an express waiver, the trial court was obligated to honor defendants' right to a jury trial on the issue of damages. See *Mink, supra* at 247. A demand for trial by jury may not be withdrawn without the consent, expressed in writing or on the record, of the parties or their attorneys. MCR 2.508(D)(3). Upon review of the record, we find no express waiver of defendant's demand for a jury trial. Accordingly, we vacate the judgment and remand for a jury trial on the issue of just compensation. [FN2]

> FN2. In light of our determination that this matter must be retried before a jury, we do not consider defendants' other challenges to the trial court's award of just compensation.

***3** In addition, we direct that on remand the trial court shall dismiss defendants' URA claims because the circuit court does not have jurisdiction over them. We raise this issue sua sponte because the court must recognize its lack of jurisdiction no matter the stage of the proceeding. See *Fox v Bd of Regents of the University of Michigan,* 375 Mich. 238, 242; 134 NW2d 146 (1965). An aggrieved party's right to judicial review of an agency's payment of relocation assistance is in the federal court under the Administrative Procedure Act (APA), 5 USC 551 *et seq. Ackerley Communications of Florida, Inc v Henderson,* 881 F.2d 990, 991-993 (CA 11, 1989). The federal court's review under the APA is the exclusive

remedy for alleged violations of the URA. *Id.* at 993. Defendants' URA claims must therefore be dismissed. See *Fox, supra* at 242.

Reversed and remanded for a jury trial on the issue of just compensation and the dismissal of defendants' URA claims. We do not retain jurisdiction. No taxable costs pursuant to MCR 7.219, neither party having prevailed in full.

1997 WL 33352832 (Mich.App.)

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