

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF MANISTEE

CITY OF MANISTEE,

Plaintiff,

v

DEIDRE K. ROBISON, DAVID A. EDMONDSON, HILARY J EDMONDSON, WEST SHORE MORTGAGE COMPANY, a Michigan corporation, and WEST SHORE BANK a Michigan corporation,

Defendants,

File No. 16-15907-CC

Hon. David A. Thompson

George V. Saylor, III (P37146)  
MIKA MEYERS PLC  
Attorneys for Plaintiff  
414 Water Street  
Manistee, MI 49660  
(231) 723-8333

Robert W. O'Brien (P59127)  
Stephen J. Van Stempvoort (P79828)  
MILLER JOHNSON  
Attorneys for Defendants Robison and Edmondson  
45 Ottawa Avenue SW, Suite 1100  
P.O. Box 306  
Grand Rapids, MI 49501  
(616) 831-1700

**OPINION OF THE COURT REGARDING DEFENDANTS' MOTION TO REVIEW NECESSITY AND FOR SUMMARY DISPOSITION**

At a session of said Court, held in the Circuit Courtroom, Manistee County Courthouse, Manistee, Michigan, on the 27<sup>th</sup> day of July, 2016.

**I. OVERVIEW**

In August of 2015, the City of Manistee ("the City") filed a declaratory action (file no. 15-15685-CZ) in this Court to widen and improve Twelfth Street beyond its platted boundaries. In that file, the City claimed the north thirty-three (33) feet of the Defendants' property under alternative theories of highway-by-user and implied dedication. The City sought a judgment from

this Court declaring that Twelfth Street extended four rods or 66 feet in width. On November 29, 2015, the Court granted summary disposition in favor of the Defendants pursuant to MCR 2.116(C)(7).

Subsequently, in April of 2016, the City filed the present action pursuant to the Michigan Uniform Condemnation Procedures Act (MCL 213.51 et seq.) seeking acquisition of the property through the power of eminent domain. In response, the Defendants filed the instant motions claiming that the Doctrine of Res Judicata bars the City's present action, or in the alternative that no necessity exists because it is predicated on an error of law and constitutes an abuse of discretion.

## II. LEGAL STANDARD

An argument that summary disposition should be granted on the basis of res judicata is properly asserted under MCR 2.116(C)(7). *Alcona Co v Wolverine Environmental Prod. Inc.*, 233 Mich App 238, 246; 590 NW2d 586 (1998). Although not required to do so, a moving party may support the motion with affidavits, depositions, admissions, or other admissible documentary evidence. See MCR 2.116(G)(3); *Yono v Dep't of Transp (On Remand)*, 306 Mich App 671, 679; 858 NW2d 128 (2014).

"In reviewing the motion, a court must review all documentary evidence submitted by the parties, accepting as true the contents of the complaint unless affidavits or other appropriate documents specifically contradict them." *Id.* at 982-983. As with a motion under MCR 2.116(C)(10), the moving party bears the initial burden to show that he or she is entitled to summary disposition. If the moving party supports the motion with evidence that, if left un rebutted, would show that there is no genuine issue of material fact, the burden shifts to the nonmoving party to present evidence that establishes a question of fact. *Id.* at 679-680. If the court determines

that there is a question of fact as to whether the moving party is entitled to summary disposition, the motion must be denied. *Id.* at 680.

### III. EMINENT DOMAIN

“Eminent domain” or “condemnation” is the power of the government to take private property. The power arises from the sovereign power of the state and is of ancient provenance.<sup>6</sup> The federal government’s power in this regard is found in the Fifth Amendment of the United States Constitution, in which it is stated that the government may not take private property unless it is done for a public use and with just compensation. Every Michigan constitution has had a similar clause requiring just compensation in these circumstances.<sup>7</sup> Our current Constitution states that: “private property shall not be taken for public use without just compensation . . . .”<sup>8</sup>

[6] See *Magna Carta*, Grant 39 (1215): “No freeman shall be . . . disseised . . . unless by the lawful judgment of his peers, or by the law of the land.”

[7] See Const 1835, art 1, § 19; Const 1850, art 18, § 2; Const 1908, art 13, § 1.

[8] Const 1963, art 10, § 2.

*Silver Creek Drain Dist v Extrusions Div, Inc.*, 468 Mich 367, 373-374; 663 NW2d 436 (2003), cert denied, 540 US 1107 (2004). Further, the United States Supreme Court when discussing the power of eminent domain has emphasized its importance.

The taking of private property for public use upon just compensation is so often necessary for the proper performance of governmental functions that the power is deemed to be essential to the life of the State. It cannot be surrendered, and if attempted to be contracted away, it may be resumed at will. *Pennsylvania Hospital v. Philadelphia*, 245 U.S. 20, 38 Sup. Ct. 35, 62 L. Ed. 124; *Galveston Wharf Co. v. Galveston*, 260 U.S. 473, 43 Sup. Ct. 168, 67 L. Ed. 355. It is superior to property rights (*Kohl v. United States*, 91 U.S. 367, 371, 23 L. Ed. 449) and extends to all property within the jurisdiction of the State . . . . (*United States v Gettysburg Electric Ry.*, 160 U.S. 668, 685, 16 Sup. Ct. 427, 40 L. Ed. 576; *Adirondack Railway v New York State*, 176 U.S. 335, 346; 20 Sup. Ct. 460, 44 L. Ed. 492) [*Georgia v Chattanooga*, 264 U.S. 472; 44 S Ct 369 (1924)].

The Michigan Supreme Court has also recognized the importance of the power of eminent domain. See, *People ex rel Trombley v Humphrey*, 23 Mich 471 (1871); *Detroit Int’l Bridge Co v American Seed Co*, 249 Mich 289; 228 NW 791 (1930). In *Trombley*, the Michigan Supreme Court described eminent domain as “the rightful authority which exists in every sovereignty, to control and regulate those rights of a public nature which pertain to its citizens in common, and to

appropriate and control individual property for the public benefit, as the public safety, necessity, convenience and well-being may demand.”

However, the power of eminent domain, though inherent in our governmental system, is subject to close constitutional scrutiny. *Allen v Rogers*, 246 Mich 501; 224 NW 289 (1930). In fact, both the United States and Michigan Constitutions provide that private property may not be taken for public use without due process of law and just compensation.<sup>1</sup> *Silver Creek Drain Dist*, 468 Mich at 373-374.

Thus, the right to exercise the power of eminent domain is entirely within the Legislature’s control with the exception of those constitutional limitations. See, e.g., *Detroit Int’ Bridge Co*, 249 Mich 289; *Rogers*, 246 Mich 501; *Kader v City of Clawson*, 7 Mich App 380; 151 NW2d 844 (1967). Furthermore, the Michigan Legislature has authorized certain agencies to exercise the power of eminent domain. In this instance, the Legislature pursuant to MCL 213.361, has authorized the City of Manistee, as a public agency<sup>2</sup>, to acquire property for highways purposes through the exercise of eminent domain.

In furtherance of that power, the Legislature created the Michigan Uniform Condemnation Procedures Act (“UCPA”), found at MCL 213.51 et seq.. The UCPA “provides standards for the acquisition of property by an agency, the conduct of condemnation actions, and the determination of just compensation. MCL 213.52(1).

---

<sup>1</sup>The Fifth Amendment to the United States Constitution provides that “[n]o person shall . . . be deprived of . . . property, without due process of law; nor shall private property be taken for public use, without just compensation.” U.S. Const. amend V. Further, the Fifth Amendment is made applicable to the states through the Fourteenth Amendment. U.S. Const. amend. 14, § 1.

The Michigan Constitution also provides, “Private property shall not be taken for public use without just compensation therefor being first made or secured in a manner prescribed by law. Compensation shall be determined in proceedings in a court of record.” Mich Const 1963, art 10, § 2.

<sup>2</sup> MCL 213.51(c) defines “agency” as “a public agency or private agency.” Further, MCL 213.51(j) defines “public agency” as “a governmental unit, officer, or subdivision authorized by law to condemn property.”

#### IV. RES JUDICATA

The first issue before this Court is whether the City of Manistee's first lawsuit, wherein the City claimed the north thirty-three (33) feet of the Defendants' property under alternative theories of highway-by-user and implied dedication, bars the City's subsequent attempt to exercise its power of eminent domain.

##### A. Res Judicata Generally

The Doctrine of Res Judicata was judicially created to prevent the relitigation of claims that have already been litigated or that could have been litigated in a prior case, specifically to "relieve parties of the cost and vexation of multiple lawsuits, conserve judicial resources, and, by preventing inconsistent decisions, encourage reliance on adjudication." *Hackley v Hackley*, 426 Mich 582; 395 NW2d 906 (1986); see also, *Huggett v Department of Natural Resources*, 232 Mich App 188, 590 NW2d 747 (1998); *Wayne County v Detroit*, 233 Mich App 275, 590 NW2d 619 (1998). The Doctrine of Res Judicata "bars a second, subsequent action when (1) the prior action was decided on the merits, (2) both actions involve the same parties or their privies, and (3) the matter in the second case was, or could have been, resolved in the first." *Washington v Sinai Hosp*, 478 Mich 412; 733 NW2d 755 (2007) (citation omitted).

##### B. Application of Res Judicata to the City of Manistee's Condemnation Action

There is no dispute that the Complaint filed by the City in file 15-15685-CZ and the present condemnation action involve the same parties – the City of Manistee and Deidre K. Robison, David A. Edmondson, Hilary J. Edmondson, West Shore Mortgage Company, and West Shore Bank. Further, there is no dispute that the prior action was decided on the merits when this Court granted summary disposition in favor of the Defendants in its Opinion dated November 4, 2015. See MCR

2.504(B)(3); See also, *ABB Paint Finishing v. Nat'l Union Fire Ins. Co.*, 223 Mich. App. 559, 562, 567 N.W.2d 456, 458 (1997). The issue remaining is whether the present condemnation action could have been resolved in the prior action.

In Michigan, the Doctrine of Res Judicata is broadly applied. Michigan courts apply a transactional test to determine if a matter could have been resolved in the first case, "holding that it bars not only claims already litigated, but also every claim arising from the same transaction that the parties, exercising reasonable diligence, could have raised, but did not." *Washington*, 478 Mich at 418 (citing *Adair v State*, 470 Mich 105; 680 NW2d 386 (2004)). "[W]hether a factual grouping constitutes a "transaction" for purposes of res judicata is to be determined pragmatically, by considering whether the facts are related in time, space, or motivation, and whether they form a convenient trial unit." *Adair*, 470 Mich at 125 (citation omitted). Thus, the "transactional" test provides that different theories of relief may still constitute a single cause of action if a single group of operative facts give rise to that theory. *Id.* at 124.

When applying the transactional test in this matter, this Court finds that the facts underlying both actions are related in time, space and motivation. There is no dispute that the current condemnation action involves the same road, the same property, and the same parties at issue in 15-15685-CZ. Further, there is no dispute that both actions revolve around the City's desire to widen and improve Twelfth Street. However, even though the facts are related in time, space, and motivation, this Court finds that procedurally the two actions cannot co-exist.

Defendant asserts that the City of Manistee could have filed its condemnation action in circuit court at the same time it filed its highway-by-user and implied dedication claims, as made apparent by *City of Kentwood v Sommerdyke Estate*, 458 Mich 642; 581 NW2d 670 (1998).

The UCPA requires that a governmental agency must, along with a number of other pre-litigation steps, tender a good-faith offer to acquire private property (MCL 213.55(1)); which Michigan courts have ruled is a necessary condition precedent to invoking the jurisdiction of the circuit court in a condemnation action. See, e.g., *In re Acquisition of Land for the Central Industrial Park Project*, 177 Mich App 11, 17; 441 NW2d 27 (1989). The requirement of a good-faith offer is intended to encourage negotiated purchases of property needed for public purpose and, thereby, avoid condemnation litigation entirely. *DOT v. Frankenlust Lutheran Congregation*, 269 Mich. App. 570, 711 N.W.2d 453 (2006). Thus, absent a good-faith offer a trial court must dismiss a condemnation action for lack of subject matter jurisdiction. *In re Acquisition of Land for the Central Industrial Park Project*, 177 Mich App 11.

Accordingly, for the City to have brought the condemnation claim at the same time as the highway-by-user and implied dedication claim, the City would have been required to tender a good-faith offer to the Defendants. Such an offer would be contrary to the City's assertion that the property had become dedicated to public use pursuant to operation of law, and as such, the Defendants retain no interest for which they must be compensated. See *City of Kentwood*, 458 Mich at 646 (held "the highway-by-user statute is constitutional and does not create a 'taking' of property without just compensation."). By denying the City's claims in case no 15-15685-CZ, this Court effectively ruled that the City must resort to other methods if they wish to expand Twelfth Street, such as gift, purchase or condemnation. Now, only upon the Defendants' refusal of the City's good-faith offer to purchase the property may the City commence a condemnation proceeding pursuant to the UCPA. Accordingly, this Court finds that the City's condemnation action could not have been resolved in the prior action. It was this Court's ruling in 15-15685-CZ that made the City of Manistee's acquisition of the property by eminent domain necessary.

**C. Application of Res Judicata to City of Manistee's Condemnation Act Violates Separation of Powers**

Even if the elements of res judicata were satisfied, this Court finds that applying the Doctrine of Res Judicata to bar the exercise of eminent domain under these circumstances would violate Art. III, § 2 of the 1963 Michigan Constitution which provides:

The powers of government are divided into three branches: legislative, executive and judicial. No person exercising powers of one branch shall exercise powers properly belonging to another branch except as expressly provided in this constitution.

As discussed above, the power of eminent domain is a vital right, inherent in the sovereignty of the state. The decision whether to exercise such power is a matter entirely under the control of the legislature, limited only by the United States and Michigan Constitutions.

In this case, the City of Manistee is acting pursuant to the authority granted to it by the Michigan Legislature in the Acquisition of Property for Public Highways Act, 1966 PA 295, compiled in Chapter 213 of the Michigan Compiled Laws. That Act provides in part:

Cities, villages, townships, drainage districts, counties, boards of county road commissioners, and the state highway commission, referred to in this act as the petitioner, are authorized and empowered to secure the fee simple or lesser estate in real property and other property from the owners under the following conditions:

- (a) Property for the right of way for limited access highways and other highways to be laid out, altered, or widened, or for changing the direction or line of those highways.

...

- (h) All other property and property rights the board or commission having jurisdiction over a highway determines to be necessary for the proper construction, improvement, landscaping, or maintenance of the highway including the development, construction, and maintenance, adjacent to those highways, of roadside parks, parking spaces, rest areas, scenic areas, scenic lookouts, information lodges, and other purposes authorized by law in the interest of the beneficial use of the highways by the traveling public.  
[MCL 213.361]

Whether to exercise that authority is a legislative decision subject to limited judicial review as provided by the Constitution and the Legislature. The Michigan Supreme Court in *State Highway Commission v VanderKloot*, 392 Mich 159, 175; 220 NW2d 416 (1974), explained that under the 1850 and 1908 constitutions "the necessity of using such property" was reviewable; however, art 10, § 2 of the 1963 Constitution dropped any provision for review of necessity. The Court recognized however that the "Legislature in the highway condemnation act not only assured the property owner the right to judicial review of the determination of "just compensation," as the 1963 Constitution requires, but also granted the property owner the right of judicial review to "determine whether or not there has been either fraud or abuse of discretion" in the necessity of the taking . . . ." Although the Legislature has since unified all condemnation statutes under the UCPA, the scope of judicial review remains the same. Section 5 of the UCPA specifically provides that "[t]he complaint shall ask that the court ascertain and determine just compensation to be made for the acquisition of the described property." MCL 213.55(1). Further, section 6 allows a landowner to challenge the necessity of the taking; however, a determination of necessity by an agency is binding on the court in the absence of fraud, error of law, or abuse of discretion. MCL 213.56(2).

1. *The Uniform Condemnations Procedures Act*

Defendants argue that the language of the UCPA favors the application the Doctrine of Res Judicata. Specifically, that MCL 213.52(1) expressly states that "[a]ll laws and court rules applicable to civil actions shall apply to condemnation proceedings except as otherwise provided in this act." Defendants assert that res judicata is a rule of law and because the UCPA does not expressly exempt its application, it therefore applies. To support its position, the Defendants rely

on numerous out-of-state cases, which this Court finds, for reasons discussed later in this opinion, are distinguishable from the facts in this case.

First, this Court notes that the UCPA is a procedural act setting forth the exclusive manner in which to conduct condemnation proceedings. MCL 213.52(1)-(2)<sup>3</sup>. The UCPA in no way confers or restricts the power of eminent domain. *Id.* Further, MCL 213.55(1) provides that if an agreement for the purchase of the property cannot be secured, after making a good-faith written offer to purchase, the agency may file a complaint for the acquisition of the property in the circuit court in the county in which the property is located. The complaint must ask the court to ascertain and determine just compensation. *Id.* Lastly, MCL 213.57 specifically provides that title vests as of the date the complaint was filed unless the landowner files a motion to review necessity. MCL 213.57.<sup>4</sup>

---

<sup>3</sup> MCL 213.52 provides in part:

- (1) This act provides standards for acquisition of property by an agency, the conduct of condemnation actions, and the determination of just compensation. It does not confer the power of eminent domain, and does not prescribe or restrict the purposes for which or the persons by whom that power may be exercised. All laws and court rules applicable to civil actions shall apply to condemnation proceedings except as otherwise provided in this act.
- (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.

<sup>4</sup> MCL 213.57 provides in part:

- (1) If a motion to review necessity is not filed under section 6, the title to the property described in the petition shall vest in the agency as of the date on which the complaint was filed. The right to just compensation shall then vest in the persons entitled to the compensation and be secured as provided in this act. If the motion to review necessity is denied after a hearing and after any further right to appeal has terminated, title to the property shall also vest in the agency as of the date on which the complaint was filed or such other date as the court may set upon motion of the agency.
- (2) Vesting of title in the agency shall not be delayed or denied because of any of the following:
  - ...
  - (e) Any other reason except a challenge to the necessity of the acquisition under section 6.

Thus, this Court finds that MCL 213.56 provides the only defense that can be asserted by a landowner against an agency's exercise of eminent domain. If a review of necessity is not filed the only issue remaining is a determination of just compensation.

2. *The Authority Relied Upon By Defendant*

This Court finds the cases cited by the Defendants in favor of applying the Doctrine of Res Judicata distinguishable from the facts of this case. *Forest Preserve Dist of Will County v Marquette Nat Bank*, 208 Ill App 3d 823; 567 NE2d 635 (1991), involved two condemnation actions involving the same parties and the same property. In that case, the trial court dismissed the first action with prejudice pursuant to a stipulation by the parties. The reviewing court concluded that, "[t]he circumstances of the previous dismissal lead to a clear understanding and conclusion that res judicata applies . . . ."

In *Oakes Municipal Airport Authority v Wiese*, 265 NW2d 697 (1978), the trial court's dismissal was based upon the determination that the issues involved had been determined in a prior condemnation action. The reviewing court recognized that the North Dakota Legislature has entrusted the right to review a determination of the question of necessity in condemnation actions to the courts. The *Oakes* court further stated:

To clarify the court's role in the determination of the question of public necessity, we emphasize that the determination of a condemning authority to exercise the power of eminent domain for an authorized public use is solely a legislative or political question which is not subject to judicial review.

The court also held that a determination of necessity, that is not appealed, is conclusive and binding upon the parties with res judicata effect as to the issues determined therein. However, the court noted that the existing authorities have followed a general rule when applying res judicata to a determination of necessity. The general rule is as follows:

A prior unsuccessful attempt to acquire property for a public purpose should not bar the commencement of a subsequent action to acquire the same land providing the court is satisfied that the subsequent action was brought in good faith and that there has been a change of circumstances such that the action is not merely an attempt to re-litigate identical issues based upon identical factors for consideration.

The facts in *Erickson v Amoth*, 105 Idaho 798 (1979), and *City of Oklahoma v Cooper*, 420 P2d 508 (1966), are similar to the above cases relied upon by the Defendants. In *Erickson*, the court explained that res judicata does not apply to determinations of necessity where a material fact has changed. In *City of Oklahoma*, the court explained that res judicata applies to a court's determination of just compensation if unchallenged by the landowner.

This Court finds the above cases distinguishable from the circumstances in this case. First, unlike *Forest Preserve Dist and Oakes Municipal Airport Authority*, this case does not involve two consecutive condemnation actions. In this case, the first action brought by the City was a declaratory action based upon the highway-by-user statute and implied dedication. This Court also finds this case distinguishable from *Oakes Municipal Airport Authority*, *Erickson*, and *City of Oklahoma*, wherein the courts applied res judicata to either a determination of necessity or just compensation. In this case, no determination of necessity or just compensation has been made by this Court.

For the above reasons, this Court finds that it is beyond the power of this Court to review or prohibit, by application of the Doctrine of Res Judicata, the City of Manistee's decision to exercise the power of eminent domain.

#### V. JUDICIAL ESTOPPEL

Because of this Court's above finding, it is unnecessary to examine the issue of judicial estoppel at this time.

A prior unsuccessful attempt to acquire property for a public purpose should not bar the commencement of a subsequent action to acquire the same land providing the court is satisfied that the subsequent action was brought in good faith and that there has been a change of circumstances such that the action is not merely an attempt to re-litigate identical issues based upon identical factors for consideration.

The facts in *Erickson v Amoth*, 105 Idaho 798 (1979), and *City of Oklahoma v Cooper*, 420 P2d 508 (1966), are similar to the above cases relied upon by the Defendants. In *Erickson*, the court explained that res judicata does not apply to determinations of necessity where a material fact has changed. In *City of Oklahoma*, the court explained that res judicata applies to a court's determination of just compensation if unchallenged by the landowner.

This Court finds the above cases distinguishable from the circumstances in this case. First, unlike *Forest Preserve Dist* and *Oakes Municipal Airport Authority*, this case does not involve two consecutive condemnation actions. In this case, the first action brought by the City was a declaratory action based upon the highway-by-user statute and implied dedication. This Court also finds this case distinguishable from *Oakes Municipal Airport Authority*, *Erickson*, and *City of Oklahoma*, wherein the courts applied res judicata to either a determination of necessity or just compensation. In this case, no determination of necessity or just compensation has been made by this Court.

For the above reasons, this Court finds that it is beyond the power of this Court to review or prohibit, by application of the Doctrine of Res Judicata, the City of Manistee's decision to exercise the power of eminent domain.

#### V. JUDICIAL ESTOPPEL

Because of this Court's above finding, it is unnecessary to examine the issue of judicial estoppel at this time.

## VI. NECESSITY

In addition to the motion for summary disposition, Defendant also filed a motion for a review of necessity.

Michigan law prohibits a government agency from taking private property unless the exercise of eminent domain is "necessary" for public use. MCL 213.23(1). There is no dispute that the City of Manistee is a "public agency" as a Home Rule City formed pursuant to Act 279 of 1909. It is further undisputed that the City of Manistee has the authority to acquire property for public highways through the exercise of eminent domain. MCL 213.361.

However, the UCPA allows a property owner to challenge the necessity of an acquisition. MCL 213.56(1). Specifically, the landowner has the right to challenge "the necessity of acquisition of all or part of the property for the purposes stated in the complaint". *Id.* The Michigan Supreme Court has interpreted MCL 213.56(1) as providing judicial review of an agency's determination of what property should or should not be taken for public purpose, but not its decision to take property for a public purpose. *Vanderkloot*, 392 Mich at 175-76 (the Court stated, "[i]n reviewing whether a taking is necessary, the consideration is not the advantage to the public, but whether the project needs the property involved."). An 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. MCL 213.56(2).

The public purpose set forth in the City's Complaint is to "properly maintain Twelfth Street and keep it in a reasonably safe condition for public travel, construct a sidewalk for safe pedestrian travel, enlarge and extend Twelfth Street in order to meet Major Street Standards of the Michigan Department of Transportation, and to prevent undue burdens and expenses in connection with the routine snow plowing and other maintenance activities. . ." In addition, the City filed a Resolution of Necessity issued by the City Council, which is *prima facie* evidence that the proposed taking is

a public necessity; placing the burden of proof on the Defendant challenging necessity. MCL 213.56(3).

A. Error of Law

Defendant asserts that because the City is barred from even raising the claim, its attempted taking lacks “necessity” under the statute. The City in response cites *City of Novi v Robert Adell Children’s Funded Trust*, 473 Mich 242; 701 NW2d 144 (2005), wherein the Michigan Supreme Court determined that no error of law exists if the condemning authority has statutory authority to condemn. In this case, the City is acting pursuant to the authority delegated to it by the Legislature in 1966 PA 295. Based upon the holding in *City of Novi* and this Court’s previous finding that the Doctrine of Res Judicata does not apply in this matter, this Court finds that there is no error of law.

B. Abuse of Discretion

Defendants argue that the City of Manistee’s decision to draw out the process as long as possible and to bring a condemnation claim only after the homeowners have already fully defended a previous lawsuit amounts to an abuse of discretion. Further, Defendants, citing *County of Wayne v Hathcock*, 471 Mich 445, 466; 684 NW2d 765 (2004) and *Troy Benard*, 183 Mich App 565; 455 NW2d 378 (1990), argue that a condemnation action is an abuse of discretion where the need for the land is not “reasonably immediate” or otherwise speculative. Defendants argue that the letter from Ben Bifoss, the Interim City Manager at the time, makes it clear that the City’s proposed condemnation lacks any serious degree of immediacy. Defendant asserts that the letter indicates that the issue has been discussed for more than a decade, yet the City of Manistee chose not to pursue any remedy until 2015.

The Court in *City of Novi* provides guidance to trial courts when determining whether an abuse of discretion exists. The Court explained:

An abuse of discretion occurs when an unprejudiced person considering the facts upon which the decision was made would say that there was no justification or excuse for the decision. *Gilbert v DaimlerChrysler Corp*, 470 Mich. 749, 761-762; 685 N.W.2d 391 (2004). Discretion is abused when the decision results in "an outcome falling outside this principled range of outcomes." *People v Babcock*, 469 Mich. 247, 269; 666 N.W.2d 231 (2003). Here, defendants' objections to the necessity of taking their property for the proposed road are based on the assertion that the city never considered any alternatives and that reasonable alternative locations were available. Even if that were so, such facts would not remove the proposed road from the "principled range of outcomes." The city's decision-making process is not what we review; rather, we look at the resulting outcome. The city is not obligated to show that its plan is the best or only alternative, only that it is a reasonable one. [ . . . ] Because defendants have not shown that the proposed route of the public road is outside the zone of reasonable alternatives, we find plaintiff did not abuse its discretion in determining that the taking of defendants' property is necessary for the ring road project.

As discussed above, a decision whether to exercise the power of eminent domain is a matter entirely under the control of the legislature and its agency's limited only by the constitution. As such, this Court finds that such a decision is not reviewable by this Court, and to do so would violate the separation of powers as set forth in the U.S. Constitution and Michigan Constitution. For these reasons, this Court finds that the timing of the City of Manistee's decision to bring a condemnation claim is not an abuse of discretion.

Further, this Court finds that the City's decision is not outside the principled range of outcomes. The City asserts that Twelfth Street as it is currently constructed does not meet Major Street Standards which in turn does not permit the orderly and safe flow of traffic, the majority of which is going to and from Manistee Middle/High School. The City asserts that there is no sidewalk permitting pedestrian traffic on the south side of Twelfth Street causing a dangerous situation for students walking to and from school. The City further assert that it desires to fix these problems but cannot do so without first acquiring the property. As the Court stated in the *City of Novi*, the city is not obligated to show that its plan is the best or only alternative, only that it is a

reasonable one. Although this Court acknowledges the possibility that other alternatives may exist, this Court finds that the City's current plan is reasonable; and therefore, not an abuse of discretion.

For the above reasons, this Court denies Defendant's Motion for Summary Disposition pursuant to MCR 2.116(C)(7). Further, this Court finds that Defendants have not met their burden of showing that Plaintiff City's actions evidence a lack of public necessity by fraud, error of law, or abuse of discretion.

Plaintiff shall forthwith submit an order in accordance with this opinion.

7/27/16  
Date: \_\_\_\_\_

  
Hon. David A. Thompson  
Chief Judge, 19<sup>th</sup> Circuit

**PROOF OF SERVICE**

The undersigned certifies that the foregoing instrument was served upon all parties to the above cause to each of the attorneys of record herein at their respective addresses disclosed on the pleadings on July 27, 2016

By  U.S. Mail  FAX  
 Hand Delivered  Overnight Courier  
 Federal Express  Other: .  
Signature Marcus Davis