

**TO:** Mayor and Members of the Troy City Council  
**FROM:** Lori Grigg Bluhm, City Attorney  
 Susan M. Lancaster, Assistant City Attorney  
**DATE:** February 6, 2006  
**SUBJECT:** Troy v. Premium Construction, L.L.C. (Section 36 Park)

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Enclosed please find a copy of the Order and Opinion Following Bench Trial from Oakland County Circuit Court Judge Mark Goldsmith in the matter of Troy v. Premium Construction, L.L.C. (John Pavone and Mukesh Mangala). In June 2001, City Council authorized the condemnation of this 15.28 acre parcel of property for a park in Section 36 (Maple and John R. Road). Based on the value given by our independent appraiser (Mary Jane Anderson), we have already paid \$1,783,000 as just compensation for the property. However, the Court has determined that the property has a fair market value of \$3,920,000. This is less than the appraisal of Premium's assessor David Burgoyne, who opined that the property was actually worth an amount in excess of \$4,500,000.

The City's appraisal and Premium's appraisal were primarily distinguished by the calculation of the amount of developable land. The City argued that a substantial portion of the property was wetlands, and therefore not developable. Premium argued that all of the property was appropriate for multiple-family residential. In his 25- page opinion, Judge Goldsmith details how he disagrees with the City's position, and how he reached his calculation of the value of the property. Primarily, in 1991, the MDEQ (Michigan Department of Environmental Quality) issued a permit for the American House to be developed on land directly adjacent to the property, which contained the same wetlands as the Premium piece. Since the MDEQ allowed development in 1991, there was a reasonable possibility that the MDEQ would also permit any development on the adjacent Premium property. The MDEQ Supervisor (Mary Vanderlaan) did not directly contradict this possibility in her trial testimony.

Judge Goldsmith concluded that the front  $\frac{1}{4}$  of the parcel would have reasonably been rezoned to R-1T (medium density). The rear  $\frac{1}{4}$  would likely have been rezoned to high density, based on the surrounding uses of property (which was supported by the Planning Director in a memo in February 2000). Based on this probable re-zoning, the parcel could accommodate 112 residential units. Both the City's appraiser and the Premium appraiser concluded that each unit price would be approximately \$35,000 per unit, which was multiplied by 112 units to reach \$3,920,000.

The City must decide whether to appeal this decision to the Michigan Court of Appeals, which should be filed on or before February 24, 2006. As such, we request a closed session to discuss the strengths and weaknesses of each of Council's options on this case. Council can resolve to convene a closed session to discuss this item at a convenient time during the meeting (in the Council Boardroom). Council could then reconvene after the closed session to provide formal direction, and finish any remaining agenda items. The call of the closed session would be as follows:

RESOLVED, that the Troy City Council shall meet in a closed session, as permitted by MCL 15.268 (e) (*Troy v. Premium Construction*) and MCL 15.268 (h) (*MCL 15.243*).

As always, if you have any questions concerning the above, please let us know.

## STATE OF MICHIGAN

## IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

CITY OF TROY,

Plaintiff,

Case No: 2001-035191-CC

v.

Hon. Mark A. Goldsmith

PREMIUM CONSTRUCTION, LLC, a  
Michigan Limited Liability Company,

Defendant.

**OPINION AND ORDER  
FOLLOWING BENCH TRIAL**

This matter is before the Court on a bench trial that took place over several months in 2005. The Court has considered the testimony, the exhibits admitted, and the post-trial submissions of the parties. Based on the foregoing, the Court issues this Opinion and Order as its findings of fact and conclusions of law pursuant to MCR 2.517.

**I. Background Facts**

In April 1998, Defendant Premium Construction, LLC, entered into a purchase agreement to buy a mostly vacant 15.28 acre parcel of property near the intersection of Maple and John R Roads ("the property"), within the city limits of Plaintiff City of Troy, for a price of \$450,000. It is a narrow (approximately 243 feet wide) strip of land that is divided in half by the Barnard drain.<sup>1</sup> The property consists of four subunits, Parcels A through D,

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<sup>1</sup> There was confusion in the documentary evidence between the Barnard drain and the Spencer drain. At trial, it was clarified that the existing drain bisecting the property is the Barnard drain, and the Spencer drain was the former drain, now a defunct channel, along the wetland in the southern portion of the property. Unless otherwise indicated, all references in this Opinion and Order to "the drain" are to the Barnard Drain.

each of which comprises approximately one-quarter of the total acreage.<sup>2</sup> Parcel A adjoins Maple Road, the northern boundary of the property; Parcel B is immediately south of Parcel A and immediately north of the Barnard drain; Parcel C is immediately south of the drain; and Parcel D is south of Parcel C.

On July 13, 1999, Plaintiff amended its future land use map (also known as the master land use plan) to designate the Maple Road frontage as medium density residential development (five to ten units per acre). The central portion of the property is designated on the map as low density residential (1.6 to 4.2 units per acre), and the southern portion of the property is designated high density residential (up to 12 units per acre).<sup>3</sup> At the time Defendant closed on its purchase of the property in November 1999, Parcels A, B, and C were zoned R-1E (single family detached residential) and Parcel D was zoned RM-1 (multiple family residential).

Early in 2000, Defendant submitted a request to Plaintiff's city planner asking that Parcel A be rezoned to R-1T (one family attached residential) and Parcel C be rezoned to RM-1. At a February 8, 2000 meeting of Plaintiff's planning commission, Plaintiff's city planner Mark Miller recommended approval of the rezoning. After several homeowners expressed fervent opposition to rezoning, the commission voted to recommend to Plaintiff's city council that Defendant's rezoning request be denied and that the council consider acquiring the property for a city park. At an April 17, 2000 meeting, the council denied

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<sup>2</sup> According to Defendant's calculations, Parcel A has approximately 3.08 acres, Parcel B has approximately 4.27 acres, Parcel C has approximately 4.22 acres, and Parcel D has approximately 3.71 acres.

<sup>3</sup> The future land use map provides a general plan of permissible uses for regions of the city. The map does not necessarily follow property lines or easily defined borders.

Defendant's request to rezone Parcels A and C and also directed Plaintiff's city manager to investigate acquisition of the property for a city park.

Plaintiff subsequently proceeded with its plan to acquire the property for park use. In anticipation of Plaintiff's efforts, Defendant retained Brooks Williamson to perform a wetland inspection and delineation of the property. On May 1, 2000, Williamson conducted his inspection of the property and prepared a report. Williamson found three wetland areas on the property: (i) an isolated wet meadow north of the drain; (ii) a narrow strip adjacent to the drain; and (iii) a large forested area south of the drain. Plaintiff hired Eugene Jaworski to perform a wetland inspection in June 2000. Jaworski's report found a relatively small (approximately 0.28 acre) wetland adjacent to the drain and a larger (approximately 4.6 acre) wetland south of the drain. Excluding the wetland areas, Jaworski estimated that less than 10 acres of the property would be available for development as non-wetland.

At a June 2001 meeting, Plaintiff's council authorized Plaintiff to offer Defendant \$1,030,000.00 for the property. The council also authorized Plaintiff's city attorney to institute condemnation proceedings. On October 4, 2001, Plaintiff filed this complaint for condemnation of the property for park purposes. An order was entered on November 7, 2001, directing Plaintiff to pay Defendant estimated compensation in the amount authorized by Plaintiff's council, minus any unpaid taxes or assessments.

## II. Analysis and Determination of Defendant's Compensation

The case was tried on the sole question of how much additional compensation Defendant is entitled to receive as a result of Plaintiff's acquisition of the property. An owner of private property is entitled to just compensation when the government takes the

owner's property for public use. US Const, Am V; Const 1963, art 6, § 2. Just compensation must put the original owner in the same position he would have been in had the taking not occurred. State Highway Commissioner v Eilender, 362 Mich 697, 699; 108 NW2d 755 (1961). "It should neither enrich the individual at the expense of the public nor the public at the expense of the individual." Id.

Defendant's compensation should be based on the market value of the property as of the date of the taking, which the parties agree is October 4, 2001. Eilender, supra at 699; M Civ JI 90.06. The term "market value" has been variously defined, including the following definition that is particularly applicable here:

The market value of land or real estate is the highest price estimated in terms of money that the land will bring if exposed for sale in the open market with a reasonable time allowed to find a purchaser buying with knowledge of all of the uses and purposes to which it is adapted and for which it is capable of being used . . . [Consumers Power Co v Allegan State Bank, 20 Mich App 720, 744-745; 174 NW2d 578 (1970), quoting 55 CJS Market p 798]

There are no formulas or rules for determining value, and the determination should be based on the relevant facts presented at trial. Eilender, supra at 699. The award should be based on the "highest and best use" of the land, and the Court should consider every legitimate use. St Clair Shores v Conley, 350 Mich 458, 462; 86 NW2d 271 (1957).

The parties do not dispute that the "highest and best use" of the land, generally, would be residential development. What is at issue is the maximum density of residential development that was possible at the time of the taking. This determination hinges on two disputed issues: (i) whether a wetland on the property would be subject to regulation and

would preclude development of the wetland portion of the property; and (ii) given the zoning and conditions present at the property at the time of the taking, what was the total number of residential units that could be built on the property? The arguments and relevant evidence pertaining to these two issues are presented below.

A. Wetlands

Plaintiff claims that the value of the property is limited by the presence of a large wetland that would be subject to state regulation and would have precluded development of much of the southern portion of the property. Defendant admits to the existence of the wetland, but contests Plaintiff's assertion that wetland would be subject to regulation or would prevent development.

As an initial matter, Plaintiff asks this Court to reject Defendant's claim that the wetland is unregulated because Defendant did not timely inform Plaintiff of its intention to pursue this claim. Plaintiff asserts that its good faith offer was based on the assumption that approximately five acres of the property were regulated wetland, and this assumption was based on the 2000 assessments of both Plaintiff's and Defendant's wetland consultants. Plaintiff claims that Defendant was obligated to notify Plaintiff in writing of its intention to contend that the wetlands were not regulated, and that Defendant's failure to timely provide the notice precludes Defendant from now advancing this theory.

MCL 213.55(3) requires the owner to give written notice of the compensable property or damages for which he intends to seek compensation within ninety days after the governmental agency makes a good faith offer or sixty days after the agency files a complaint:

If an owner believes that the good faith written offer made under subsection (1) did not include or fully include 1 or more items of compensable property or damage for which the owner intends to claim a right to just compensation, the owner shall, for each item, file a written claim with the agency. The owner's written claim shall provide sufficient information and detail to enable the agency to evaluate the validity of the claim and to determine its value. The owner shall file all such claims within 90 days after the good faith written offer is made pursuant to section 5(1) or 60 days after the complaint is filed, whichever is later. [MCL 213.55(3)]

Plaintiff cites City of Novi v Woodson, 251 Mich App 614; 651 NW2d 448 (2002) in support of its claim that Defendant should have notified it of Defendant's intention to dispute the regulation of the wetlands. In Woodson, the plaintiff sought to acquire the defendants' property for expansion of a road and submitted a good faith offer on May 19, 1997, which the defendants rejected. The plaintiff filed its complaint on July 30, 1997. On August 25, 1997, the defendants' attorney wrote the plaintiff stating that the defendants would be seeking business interruption or going concern damages. The plaintiff sought to bar the defendants from seeking anything other than fair market value for the property, based on the argument that the August 1997 letter did not qualify as a written notice of the defendants' damages claims under MCL 213.55(3) and the limitation period for filing that claim had expired. The trial court rejected the plaintiff's argument, but the Court of Appeals reversed, agreeing that the letter did not constitute a written notice of a claim under the statute because it did not provide the plaintiff with sufficient information to evaluate the claim. Id at 624. The Court further found that claims not timely filed under the statute are barred. Id at 626.

The Court rejects Plaintiff's claim that MCL 213.55(3) or the Woodson opinion bars Defendant from asserting that the wetlands on the property are not regulated. The statute only requires the owner to notify the agency where the good faith offer does not include compensable property or damages. The obvious intent is to alert the agency to the existence of special damages that it may have not considered in its good faith offer, such as the business interruption claim in Woodson. Plaintiff's offer in this case did include compensation for the value of the property. The dispute over the existence of regulated wetlands is not a separate compensable property or type of damages about which Defendant would have to notify Plaintiff in writing. Rather, it is a factor in the parties' dispute over the fair market value of the property. The Court concludes that Defendant's assertion that the wetlands are not subject to regulation is not barred by the limitations period of MCL 213.55(3).

Having determined that Defendant is entitled to dispute the regulatory status of the property's wetland, the Court must next determine the effect of the presence of the wetland on the market value of the property at the time of the taking. There is no authority that provides specific guidance on how the Court should determine the impact of a wetland and the possible regulation of that wetland on the value of property subject to a taking. Defendant urges this Court to apply the same standard that is applied where a property owner asserts that the value of the property could be higher if the zoning were changed. The test for a zoning consideration in determining property value is whether there was a reasonable possibility that the zoning classification would have been changed. Eilender, supra at 699. This rezoning possibility impacts the value of the property to the extent that

it "would have affected the price which a willing buyer would have offered for the property just prior to the taking." Id. In other words, "the possibility of rezoning must be real enough to have caused a prudent prospective buyer to pay more for the property than he or she would otherwise pay." M Civ JI 90.10.

Plaintiff argues that the Court should not adopt the "reasonable possibility" standard because there is no authority supporting Defendant's position. Plaintiff urges this Court, to decide as a matter of law and fact, that the wetland would be subject to regulation, arguing that the existence of a wetland that is, or could be, subject to regulation is a per se detriment to the value of the property. In essence, the parties agree that the regulatory status of this wetland should be considered – they simply disagree on how this Court should take this information into account.

In deciding the correct standard for evaluating the wetland evidence, the Court is guided by the definition of market value cited earlier: "the highest price estimated in terms of money that the land will bring if exposed for sale in the open market with a reasonable time allowed to find a purchaser buying with knowledge of all of the uses and purposes to which it is adapted and for which it is capable of being used." Consumer Power Co, supra at 744-745 (emphasis added). Given the presumption that the value is determined based on a buyer who knows all of the possible purposes for the land, the Court finds that the standard for evaluating possible changes in zoning provides an appropriate framework for how this disputed issue should be resolved. The impact of potential wetland regulation is not different, in principle, than regulation by zoning. The Court thus concludes that what is to be determined is whether there was a reasonable possibility that the wetland was not

subject to regulation in October 2001 such that a prospective buyer would be willing to pay more for the property.

This standard first requires that the Court determine the possibility of a determination that the property's wetland was subject to regulation. The Michigan Department of Environmental Quality (MDEQ) is the state agency charged with identifying and regulating protected wetlands. Not all wetland is subject to regulation. MCL 324.30301 provides the criteria for a wetland to fall within the agency's purview:

As used in this part . . .

(p) "Wetland" means land characterized by the presence of water at a frequency and duration sufficient to support, and that under normal circumstances does support, wetland vegetation or aquatic life, and is commonly referred to as a bog, swamp, or marsh and which is any of the following:

(i) Contiguous to the Great Lakes or Lake St. Clair, an inland lake or pond, or a river or stream.

(ii) Not contiguous to the Great Lakes, an inland lake or pond, or a river or stream; and more than 5 acres in size; except this subparagraph shall not be of effect, except for the purpose of inventorying, in counties of less than 100,000 population until the department certifies to the commission it has substantially completed its inventory of wetlands in that county.

(iii) Not contiguous to the Great Lakes, an inland lake or pond, or a river or stream; and 5 acres or less in size if the department determines that protection of the area is essential to the preservation of the natural resources of the state from pollution, impairment, or destruction and the department has so notified the owner; except this subparagraph may be utilized regardless of wetland size in a county in which subparagraph (ii) is of no effect; except for the purpose of inventorying, at the time. [MCL 324.30301(p)]

MDEQ administrative rules provide a definition of the key term "contiguous":

(b) "Contiguous" means any of the following:

(i) A permanent surface water connection or other direct physical contact with an inland lake or pond, a river or stream, one of the Great Lakes, or Lake St. Clair.

(ii) A seasonal or intermittent direct surface water connection to an inland lake or pond, a river or stream, one of the Great Lakes, or Lake St. Clair.

(iii) A wetland is partially or entirely located within 500 feet of the ordinary high watermark of an inland lake or pond or a river or stream or is within 1,000 feet of the ordinary high watermark of one of the Great Lakes or Lake St. Clair, unless it is determined by the department, pursuant to R. 281.924(4), that there is no surface water or groundwater connection to these waters.

(iv) Two or more areas of wetland separated only by barriers, such as dikes, roads, berms, or other similar features, but with any of the wetland areas contiguous under the criteria described in paragraph (i), (ii), or (iii) of this subdivision. The connecting waters of the Great Lakes, including the St. Marys, St. Clair, and Detroit rivers, shall be considered part of the Great Lakes for purposes of this definition. [1988 MR 6, R281.921(1)(b)]

If a wetland is subject to MDEQ regulation, the property owner cannot engage in certain activities that would alter the wetland without first obtaining a permit from the MDEQ:

Except as otherwise provided in this part or by a permit issued by the department under sections 30306 to 30314 and pursuant to part 13, a person shall not do any of the following:

- (a) Deposit or permit the placing of fill material in a wetland.
- (b) Dredge, remove, or permit the removal of soil or minerals from a wetland.
- (c) Construct, operate, or maintain any use or development in a wetland.
- (d) Drain surface water from a wetland. [MCL 324.30304]

Thus, if the wetland on the property is subject to MDEQ regulations, the ability to develop the wetland portion of the property would be strictly limited by the agency's permit process, if not entirely proscribed.

Plaintiff's theory of regulation was two-fold: (i) the MDEQ had, at one time, determined the status of the property's wetland and found that it was subject to regulation; and (ii) the conditions of the property demonstrate that had the MDEQ assessed it in October 2001, the agency would have once again determined that it was regulated. The first part of that theory was premised on a July 14, 1989 letter in which the agency (f/k/a Michigan Department of Natural Resources or MDNR) determined that the wetland was protected. Mary Vanderlaan, District Supervisor of the Geological and Land Management Division of the MDEQ, testified that she located the letter at the request of Plaintiff's wetland expert Jaworski. Vanderlaan could not explain the basis for the 1989 determination because she was not with the agency at that time, but she testified that she was unable to locate any subsequent determinations rescinding the 1989 finding.

The second part of Plaintiff's theory was based on the third definition of "contiguous" in the MDEQ's rule R281.921 providing that a wetland is subject to regulation if it is located within 500 feet of and has a surface or groundwater connection to a "stream." In their initial May and June 2000 opinions, the parties' experts both concluded that the wetland's proximity to the Barnard drain would bring it within the MDEQ's jurisdiction. Jaworski testified that when he and Defendant's expert, Williamson, performed their assessments in May and June 2000, they both concluded, independently, that the wetland was regulated because it was within 500 feet of the Barnard drain, which they both agreed would qualify

as a stream.<sup>4</sup> Neither expert engaged in any assessment of the necessary surface or groundwater connection between the wetland and the drain in making their determination.

Williamson later questioned this determination in a May 2003 letter in which he opined that the wetland was not regulated. Williamson acknowledged that he initially found that the wetland fit the criteria for being regulated based solely on its proximity to the Barnard drain. But Williamson revised his opinion after conducting a review of MDEQ files regarding a development on an adjacent parcel, known as American House. Based on his review of the documents and his involvement in a floodplain permitting process for American House, wherein the MDEQ acknowledged that the wetland on that property was not regulated, he reconsidered his earlier position that the wetland would have been regulated in October 2001.

Ms. Vanderlaan confirmed that the MDEQ determined that a wetland on the adjoining American House property – originally part of the same wetland on the condemned property – was not subject to regulation. The evidence demonstrated that, in 1991, the MDEQ initially exercised jurisdiction over a wetland on the American House property. But Defendant produced evidence and elicited testimony from Ms. Vanderlaan that soon after this determination, the agency reconsidered its position and ultimately concluded that the American House wetland was not connected to the Barnard Drain and was not regulated. Plaintiff questioned the veracity of this determination because no

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<sup>4</sup> Jaworski also testified that he had assessed the wetland on the property for a prior owner, the Uhelskis, in 1997 and had similarly concluded that it was a regulated wetland. But Ms. Vanderlaan acknowledged that the MDEQ promulgated new guidelines for determining regulatory status in 2001, prior to the taking. For this reason, the Court will not consider Jaworski's 1997 determination.

official letter or other notice had been sent to the owner of the adjoining property overruling the earlier determination. But Defendant introduced an attachment to the 1997 floodplain permit issued on the American House property indicating that the property contained unregulated wetlands. Ms. Vanderlaan also testified that the standard practices of the agency in 1991 did not require MDEQ to utilize a letter or other written statement when it made a determination of regulatory status.

Defendant also retained a hydrogeological expert, John Lamb of McDowell & Associates, who placed monitoring wells between the wetland and the Barnard drain in April 2004. Mr. Lamb concluded, based on data from the wells, that groundwater did not flow from the wetland to the drain. To the contrary, groundwater flowed away from the drain. Lamb further concluded that the water in the wetland was perched or trapped. Defendant claims that this groundwater testing demonstrated that the wetland cannot be considered contiguous with the Barnard drain.

Although Plaintiff did not concede the lack of a groundwater connection between the wetland and the Barnard drain, it refocused its contiguity theory on a connection between the wetland and the Spencer drain. Although the Spencer drain no longer drained water through the property, Plaintiff posited that surface water from the wetland flowed into a culvert on the eastern edge of the property and eventually connected to a still active portion of the Spencer drain on adjoining property. After receiving Williamson's May 2003 letter, Plaintiff asked its expert Jaworski to perform an additional assessment of the property's wetland. Jaworski went to the property on July 10, 2004, with Jennifer Lawson, an environmental specialist employed by Plaintiff. During that second assessment,

Jaworski and Lawson discovered a storm sewer culvert on the eastern edge of the property near an adjoining subdivision along Milverton Road. Jaworski speculated that this culvert could be a connection between the wetland and a drain further east of the property. After further investigation, Lawson concluded that this culvert connected to an open ditch east of Milverton Road that eventually connected to the Spencer drain, which used to flow through the southern portion of the property before the construction of the Barnard drain. Lawson testified that the Spencer drain connected to the Henry/Graham drain, which connected to the Red Run drain, which is a tributary of the Clinton River.

Plaintiff contacted Testing Engineers and Consultants, Inc. (TEC) in July 2004 to perform a dye test to confirm whether this surface water connection existed. During the test, employees of Plaintiff's department of public works ran a hose from a hydrant on Milverton to the wetland on the property to flood it.<sup>5</sup> Duncan Mein, an engineer from TEC, put a fluorescent green dye in the flooded wetland and observed the dyed water flow into the culvert and then into the open ditch east of Milverton Road. Based on this test, TEC concluded that a surface water connection existed between the property's wetland and the Henry/Graham drain. But Mein admitted that he could not confirm where the water flowed after it entered the ditch.

Defendant disputed Plaintiff's existing regulation theory by claiming that subsequent events on an adjoining parcel effectively rescinded the MDEQ's 1989 determination. As

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<sup>5</sup> Plaintiff claimed that the water was added to simulate a flow, which did not exist at the time of the testing due to unseasonably dry conditions.

noted above, Defendant's expert Williamson ultimately concluded that the wetland was unregulated based on his review of MDEQ files pertaining to an adjoining parcel.

Defendant also disputed Plaintiff's theory of a connection between this wetland and anything that would qualify as a stream. Defendant relies on its groundwater well data as proof that no groundwater connection existed between the wetland and the Barnard drain.<sup>6</sup> Ms. Vanderlaan confirmed that under the standards for determining a groundwater connection in 2001, placement of such wells would provide evidence for the determination. Defendant also contended that Plaintiff's theory of a surface water connection to the Spencer drain was too tenuous to demonstrate the necessary contiguity to a stream. Williamson testified that he does not believe there is a surface water connection between the wetland and the Spencer Drain because the culvert is outside the wetland. He opined that the approximate two miles of piping, ditch, and drain that Plaintiff was relying on for its contiguity argument – i.e., the culvert to the open ditch to the Spencer Drain to the Henry/Graham Drain – was too distant to establish the necessary connection.<sup>7</sup> Ms Vanderlaan described Plaintiff's series of connecting culvert, ditch, and drain as "convoluted" and admitted that, in her experience, she had never seen the MDEQ find a surface water connection in similar circumstances.

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<sup>6</sup> It is undisputed that there is no surface water connection between the wetland and the Barnard drain.

<sup>7</sup> Williamson testified that he reviewed two administrative law judge opinions regarding wetland determination that found no connection under similar circumstances involving piping and ditches. The Court likewise reviewed these decisions, which were attached to Defendant's brief. Although the opinions are factually similar, the Court declines to base its decision on those opinions because both of them were issued before the MDEQ's current definition of "contiguous" in R281.921 was promulgated.

The Court rejects Plaintiff's claim that the wetland on the property is already subject to regulation. While there is evidence that the MDEQ made such a determination in 1989, Ms. Vanderlaan could not say with any degree of certainty that a similar determination would have been made in October 2001. In fact, she refused to express an opinion on the property's current wetland status without the benefit of a current assessment. The continued viability of the 1989 decision is also undermined by the fact that the 1989 letter does not provide a delineation of where the regulated wetland was located on the property and does not specifically state why it found that the wetland was regulated. As Ms. Vanderlaan's testimony demonstrates, the agency's criteria for making determinations has been altered frequently in the past. For instance, though the statute does not define contiguous, the agency's rules incorporate wetlands within 500 feet of a stream, but provide an exception where there is no a surface or groundwater connection to the stream. Ms. Vanderlaan admitted that there was no bright line rule for determining this connection, and that decisions were made based on oral or written internal guidelines, the evidence presented to the agency, and discussions among MDEQ staff.

The Court finds that there is a reasonable possibility that the MDEQ would have determined in October 2001 that the wetland was not subject to regulation. Although the wetland is within 500 feet of the Barnard drain, there is no evidence of a surface or groundwater connection between the wetland and the drain. Under the MDEQ's rules, proximity to a stream is insufficient to bring the wetland within the agency's jurisdiction. The Court also agrees with Ms. Vanderlaan that Plaintiff's theory of a surface water connection between the drain and the Henry/Graham drain is convoluted and finds it

unlikely that the MDEQ would agree with Plaintiff's connection theory. The MDEQ's finding of an unregulated wetland on an adjoining property -- regarding a wetland that at one time was connected to the wetland at issue here -- further supports the likelihood that the MDEQ would similarly find this wetland to be unregulated. Based on these factors, the Court finds that the possibility of an MDEQ finding of an unregulated wetland was sufficiently likely that a prospective buyer in October 2001 would have valued the property based on the assumption that the wetland portion of the property was open for development.

B. Development Density

Having addressed the wetlands issue, the Court now turns to the matter of placing a specific value on the property. Although the parties' appraisers reached two very different conclusions regarding the property's fair market value, the parties stipulated that the base value per residential unit in any development on the property would be \$35,000.<sup>9</sup> The gap between the two appraisals is thus based on a difference in opinion as to how many units could be developed on the property.

As an initial matter, Defendant argues that there is a reasonable possibility that, but for Plaintiff's decision to take the property for public use, its request for rezoning would have been granted. Plaintiff responds that Defendant is precluded from arguing this point because the request for rezoning was denied before Plaintiff condemned the property. As

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<sup>9</sup> Although both parties presented evidence in an apparent attempt to undermine this stipulation, the parties' appraisers independently reached the same determination -- that the best price per unit is, more or less, \$35,000. Further, the Court rejects Defendant's attempt to add a premium of \$5,000 per unit for so-called development costs because Defendant failed to present sufficient evidence that it incurred these costs or that any such costs would have added \$5,000 to the per unit value.

noted above, the test for determining this is whether, absent the condemnation, there is a reasonable possibility that the zoning would have been changed.

Plaintiff's claim that Defendant's rezoning request was denied before Plaintiff began the process of acquiring this property is not entirely accurate. Although the request for rezoning was denied in April 2000 and the actual condemnation proceedings did not occur until October 2001, Plaintiff's council announced its intention to "investigate" taking the property at the meeting in which it denied the rezoning request. Thus, Plaintiff's decision to deny rezoning is suspect and indisputably linked to its decision that the property should be used for park land. "Zoning may not be used as a method to depress property values so that at a future date property may be acquired for public purposes." Michaels v Village of Franklin, 58 Mich App 665, 674; 230 NW2d 273 (1975). Because the rezoning denial cannot be separated from Plaintiff's initiative to acquire the property, the Court will not consider the denial in determining whether there was a reasonable possibility, absent the threat of condemnation, that the rezoning request would have been granted.

What Defendant requested was that Parcel A be rezoned from R-1E (single family detached residential) to R-1T (one family attached residential) and that Parcel C be rezoned from R-1E to RM-1 (multiple family residential). The evidence demonstrates that Plaintiff's own city planner recommended that this rezoning request be granted in February 2000. Mr. Miller indicated that requests for rezoning from single family to multi-family is encouraged and is generally granted, provided it fits within Plaintiff's master use plan. Further, there is evidence that an adjoining parcel, the American House property, is zoned RM-2 (high rise residential), which allows a much higher density than any of the parcels

of this property. Based on this evidence, the Court finds that there is a reasonable possibility that, but for the condemnation, Plaintiff would have granted Defendant's rezoning request.

Plaintiff's expert appraiser, Mary Jane Anderson, opined that the property's fair market value in October 2001 was \$1,783,000. In arriving at this decision, Ms. Anderson applied the market data approach because the property was vacant land and the other alternative approaches (cost approach, income approach) are not applicable to property that has not been developed. Ms. Anderson based her decision on several factors, including multiple site inspections, research of comparable residential developments in the vicinity, and the physical characteristics of the site. But she also took into consideration the 2000 wetland assessments of Jaworski and Williamson. Anderson also relied on the assessment of city planner Miller regarding the maximum density of the parcels on the property. In fact, Ron Figland of Plaintiff's planning department, under the direction and approval of Miller, prepared a drawing that Anderson incorporated into her appraisal. In that drawing, Plaintiff's planners estimated that Parcel A would support only 18 units, Parcel B would support 14 units, and the northerly portion of Parcel C would allow 20 units. Anderson did not engage in specific calculations of her own, but adopted Plaintiff's planners' conclusion that the property's maximum density was 52 units and that the wetland would preclude development of the southern end of Parcel C and all of Parcel D.

As an alternative to the per parcel assessment, Anderson also calculated the value of the property based on its price per acre by considering comparable properties. She compared this property with eight similar properties within Plaintiff's city limits. In comparing

similar properties, Anderson concluded that the range of price per acre would be \$86,000 to \$127,000 per acre, resulting in an appraised price of \$1,316,500 to \$1,943,800. Anderson acknowledged that this type of property is generally valued based on a price per residential unit.

Anderson's appraisal also took into account what was "legally permissible" in terms of the maximum development of the property. Anderson testified that this appraiser term of art refers to the highest and best use or most profitable and advantageous use of the land. In contrast to her ultimate conclusion that the property would only support 52 residential units, Anderson acknowledged in her appraisal that, under current zoning classifications, the property could be legally developed to a maximum density of 91 units. This is based on a maximum density of 4.2 units per acre for Parcels A, B and C, which are zoned R-1E and which comprise approximately 11.57 acres, and a maximum density of 12 units per acre for Parcel D, which is zoned RM-1 and contains approximately 3.71 acres.

Anderson also explored the effect of a zoning change for the 3.08 acres of Parcel A, based on the fact that Plaintiff's land use plan would allow for a higher density than the current R-1E zoning would allow. According to Anderson, the land use plan would allow for a maximum density of 6.2 units per acre for Parcel A, although R-1E zoning would only allow 4.2 units per acre. Anderson concluded that a zoning change in Parcels B and C would not impact their maximum density because she believed that both parcels were within a low density section of the master plan and were thus limited to 4.2 units per acre.

Based on the assumption of Plaintiff's zoning change occurring, Anderson estimated that the property could support 97 units for an overall density of 6.35 units per acre, including the entirety of Parcels C and D. Ultimately, Anderson's appraisal discounts these figures based on what she believed was physically possible on the site, given the assumption that the wetland was regulated, the bisecting drain and its easement, the current zoning, and various physical characteristics of the property. But Anderson does not offer a quantifiable explanation for how application of these factors allowed her to arrive at her ultimate conclusion of 52 units.

Defendant's expert appraiser, David Burgoyne, presented a vastly different portrait of the highest and best use of the property, concluding that the property could support at least 112 residential units and was worth \$4,500,000.<sup>9</sup> Mr. Burgoyne's appraisal is premised on the assumptions that the wetlands would not be regulated and that the zoning could be altered to comport with the maximum densities for the property in Plaintiff's land use plan.

Burgoyne testified that the best use of this property would be a medium density condominium development with an average density of 7.3 units per acre, much higher than that projected by Anderson. In arriving at this conclusion, Burgoyne utilized comparables similar to Anderson, and also based his estimates on the current zoning and a zoning change compatible with Plaintiff's land use plan. But Burgoyne also researched Plaintiff's

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<sup>9</sup> Although Burgoyne agreed that the base value per unit was \$35,000, he added \$5,000 to his calculation for "development costs." This resulted in a figure of \$4,480,000 (112 units x \$40,000), which he "rounded up" to \$4,500,000. As noted above, the Court concludes that the parties stipulated to \$35,000 per unit price, and rejects any attempt by Defendant to inflate this with costs that have no basis in the evidence presented at trial.

zoning history and development trends, which he believes encourage development of attached condominiums over single family detached housing.

Based on the current zoning, Burgoyne estimates that the property would support development of 93 to 122 units. He agrees with Anderson that Parcels A, B, and C, under their current zoning of R-1E, would only allow a maximum density of 4.2 units per acre. But his estimate of the number of units available on Parcel D (assuming no regulated wetland) would range from 12 to 20 units per acre. If the rezoning of Parcel A was approved as originally requested, Burgoyne agrees with Anderson that its density would increase to 6.2 units per acre. But Burgoyne is much more optimistic about the effect of rezoning on Parcel C, based on his assumption that Plaintiff's land use plan classifies it as high-density residential. He estimates that the density of Parcel C could increase to as much as 20 units per acre. Although Burgoyne speculated that with zoning compatible with the land use plan the property could support as many 130 to 192 units, he ultimately projected a more conservative range of 93 units (the minimum legally possible with no zoning change) to 130 units (the minimum legally possible with a zoning change). Burgoyne then settled on the median figure of 112.

Burgoyne testified that he did not consider price per acre in his appraisal of the property because, in his experience, developers do not care about the per acre price and focus exclusively on the per unit price. Anderson calculated that if Burgoyne's \$4,500,000 estimate of the total value of the property is divided by the approximate 15.28 acres, his price per acre would be approximately \$295,000. Anderson testified that she was not aware of any comparable residential property in the City of Troy that had sold for \$295,000

per acre. Burgoyne disputed this, pointing to a condominium development on Big Beaver Road that he claims sold for \$550,000 per acre. According to Burgoyne, this price was reasonable because it was a high-density development with 14 units per acre and a per unit cost of only \$40,000.

Given the parties' stipulation regarding the value per unit, the only real dispute is the number of residential units the property will support. It is apparent that Plaintiff underestimates the property's development potential based on its assumption regarding the regulatory status of the wetland and its assumption that the zoning scheme would not change. Because the Court has found that there is a reasonable possibility that the wetland would be unregulated and the zoning would be changed, these two assumptions are invalid.

Beyond the obvious differences regarding zoning and the wetland, the other key difference appears to lie in the appraisers' disagreement regarding the development potential of Parcel C.<sup>10</sup> Anderson believes that Parcel C is within a low density portion of Plaintiff's land use plan, which would allow only 4.2 units per acre, and a change to a higher density zoning would not impact the maximum number of units that could be developed in Parcel C because a developer would still be obligated to comply with the dictates of the land use plan. By contrast, Burgoyne opined that Parcel C falls within a

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<sup>10</sup> Defendant also argued for an increase in the maximum density of Parcel B, based on Burgoyne's belief that Parcel B could be rezoned. But Burgoyne admitted that Plaintiff's land use plan designates Parcel B as low density and that designation only allows 4.2 units per acre. The Court thus rejects Defendant's claim that rezoning of Parcel B would result in a higher density for the parcel.

high density district of Plaintiff's land use plan and thus concludes that a change in zoning for Parcel C would result in the ability to place as many as 20 units per acre on the parcel.

Considering the testimony of the two appraisers, the Court credits Burgoyne's testimony in this regard. Although Anderson testified both on direct and cross-examination that Parcel C was within the low density designation on the land use plan, Plaintiff states in its pre-trial proposed findings of fact that its land use plan designates Parcel C as high density residential with a maximum density of 12 units per acre. In fact, Plaintiff's own planners concluded that Parcel C is designated high density on the land use plan when they evaluated Defendant's zoning request in February 2000. Further, the sketch relied on by Anderson and prepared by Plaintiff's planning department shows a high-rise development on Parcel C, which also supports the conclusion that Parcel C would allow for high-density development. The Court thus finds that Anderson's claim that Parcel C falls within a low-density zone is not credible and that a zoning change of Parcel C, as requested by Defendant, would allow high-density development.

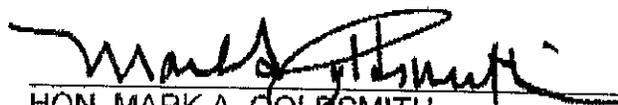
The Court thus finds that Burgoyne's opinion that the property would support development of 112 units is a reasonable assessment of the highest and best use of the land. Multiplying this figure by the agreed on per unit price of \$35,000, the Court finds that the fair market value for the property is \$3,920,000.

### III. Conclusion

The Court finds that there is a reasonable possibility that on October 4, 2001, the wetland on the property was not subject to regulation and a prospective buyer would value the property on the assumption that the wetland portion could be developed. The Court

further finds that there is a reasonable possibility that, but for this condemnation, the property would have been rezoned as requested by Defendant in February 2000. Based on these findings and the evidence presented at trial, the Court also finds that the property would support a residential development with a maximum of 112 units and that this figure yields a fair market value of \$3,920,000. Because Plaintiff has already paid Defendant \$1,030,000.00 pursuant to its good faith offer, the Court concludes that Defendant is entitled to a judgment in the amount of \$2,890,000. The Court directs the parties to submit a judgment in that amount, approved as to form, within seven days of the date of this opinion. If the parties are unable to agree on the form of a judgment, each party shall submit a proposed judgment within seven days and notice the matter for hearing.

IT IS SO ORDERED.



HON. MARK A. GOLDSMITH  
CIRCUIT COURT JUDGE

FEB 03 2006

Dated: \_\_\_\_\_