A MACKINAC CENTER REPORT

Michigan Department of Transportation v. Tomkins

An Amicus Curiae Brief to the Michigan Supreme Court

Patrick J. Wright

A Mackinac Center "friend of the court" filing to the Michigan Supreme Court in a case involving a partial taking of private land

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ABOUT THIS DOCUMENT:
A BRIEF OF AMICUS CURIAE

On November 16, 2007, the Mackinac Center for Public Policy filed a brief of amicus curiae* with the Michigan Supreme Court in the case of *Michigan Department of Transportation v Tomkins*. The legal dispute involves the amount of compensation a property owner should receive from state government when the state uses eminent domain to take part of the owner's property. Specifically, the Michigan Supreme Court asked whether a state law that limits the property owner's compensation to so-called "special-effect" damages violates the common understanding of the "just compensation" guaranteed in eminent domain cases by the Michigan Constitution.

The law in question is MCL 213.70(2), a 1996 amendment to the 1980 Uniform Condemnation Procedures Act. MCL 213.70(2) stipulates that in a taking, compensation should include "special effects" on the property owners, such as the loss of the property physically taken by the state, but not necessarily more "general effects," such as a loss in property value because a property now lies near a highway, drainage ditch, railroad, or other public project.

The *Tomkins* case arose from the M-6 highway project near Grand Rapids. A small portion of Rodney and Darcy Tomkins' property, valued alone at $3,800, was taken through eminent domain by the Michigan Department of Transportation (MDOT). The Tomkinses' appraiser indicated that the couple's property lost $48,200 in value due to "highway effects," such as increased dust, dirt, noise, vibration, and smell from the road. MDOT contends that under MCL 213.70(2), no one may ever recover such general-effects damages.

The trial court agreed with MDOT, but the Michigan Court of Appeals reversed, ruling that because part of the Tomkinses' property had been physically taken by the state, the Michigan Constitution's "just compensation" clause requires the state to pay for the Tomkinses' entire loss of property value.

* "Amicus curiae" means "friend of the court." Thus, the Mackinac Center is not a litigant in this case, but rather an interested observer supplying additional legal reasoning for the Michigan Supreme Court to consider.

The Michigan Supreme Court granted MDOT leave to appeal and specifically asked the parties and amici to address whether MCL 213.70(2) denies the "just compensation" guaranteed in the 1963 Michigan Constitution, given the constitutional ratifiers' common understanding of that term. In a brief submitted on behalf of the Mackinac Center for Public Policy, Senior Legal Analyst Patrick J. Wright argued that MCL 213.70(2) violates more than a century of established Michigan precedent regarding partial property takings, and that this legal tradition was embodied in the common understanding of just compensation in the 1963 state constitution. Wright therefore concluded that the relevant portion of MCL 213.70(2) should be struck down as unconstitutional, and that the Tomkinses should receive compensation for the entire loss in their property's value.

EXECUTIVE SUMMARY

The Center's brief focused on the common-understanding issues identified by the Michigan Supreme Court — specifically, what the ratifiers of the 1963 Michigan Constitution understood the meaning of "just compensation" to be in cases involving eminent domain. The brief examined numerous takings cases from the 19th century to the 1961-1962 Michigan Constitutional Convention and noted that when property owners lost part of their property to eminent domain, they almost universally received compensation that covered the entire loss in property value they suffered. Hence, damages included compensation for any diminution in the market value of the owner's remaining property due to the presence of the public project for which the land was taken.

The brief noted that where there was a diminution in property value due to a public use without a physical taking, the law was less consistent, but the property owners were typically not allowed compensation. For instance, in 1998's *Spiek v Department of Transportation*, the Michigan Supreme Court considered a case where no portion of the owner's land had been physically taken, but the plaintiff claimed that the construction of a highway near his home had diminished the home's value. The court held that a diminution in value alone would not constitute a taking and that the property owner could not be compensated for the "highway effects."

In the instant case, MDOT took a strip of the Tomkinses' property, meaning there was a partial physical taking. Thus, the owners were not seeking compensation for highway effects as a stand-alone claim; rather, they were seeking a consideration of highway effects as a measure of damages for the partial taking.

Such compensation has long been recognized in Michigan's jurisprudence. Justice Cooley, who has been called Michigan's "patron saint of constitutional interpretation," indicated in an 1875 case that an owner whose property is not physically taken cannot seek to receive "just compensation"

for a constitutional taking, but must rely on whatever tort or statutory remedies are available. But where there has been a partial taking, Cooley concluded, the owner is entitled to full compensation, which includes consideration of the use to which the taken property will be put. Over the next 80 to 90 years, the case law on this point was in almost universal agreement, despite rare cases to the contrary.

When the 1963 Constitution was being debated, this distinction was clearly recognized. For example, some delegates to the Michigan Constitutional Convention sought constitutional language to allow any person whose property was affected by the construction of a road to obtain compensation. Opponents of this language noted that only those whose property was actually taken, in whole or in part, could seek such relief, and these opponents defeated the proposal. The convention essentially chose to keep the status quo.

Thus, both Michigan case law and notes from the constitutional convention indicate that where there is a partial taking, just compensation requires that a property owner be allowed to seek full damages, including consideration of the effect the public project has on the property's value. If the project diminishes the value of the remainder of the owner's property, the owner is entitled to compensation for that loss, meaning that the Tomkinses' request for full compensation should be granted and that the relevant portion of MCL 213.70(2) should be declared unconstitutional.

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Amicus curiae does not contest jurisdiction.

STATEMENT OF QUESTION INVOLVED

Michigan has a long history of construing the state constitution's "just compensation" clause liberally to provide full compensation to a property owner for a diminution in value of the property remaining to him or her after a partial taking of his or her real property. Does this constitutional guarantee render MCL 213.70(2) unconstitutional?

Amicus curiae's answer: Yes

Plaintiff's answer: No

Defendants' answer: Yes

INTRODUCTION

The question presented in this case is whether this Court is prepared to abandon more than a century's worth of Michigan jurisprudence that liberally construes just compensation for a public taking and instead adopt a flawed interpretation that would have the effect of reducing state government costs when the state engages in a partial taking of property for a public project. In this case, a small portion of defendants' property, valued at $3,800, was taken in a condemnation proceeding by the government plaintiff, the Michigan Department of Transportation (MDOT). Defendants' appraiser indicated that defendants' property lost $48,200 in value due to "highway effects," such as increased dust, dirt, noise, vibration, and smell from the road. MDOT contends no one may ever recover such damage.

In *Spiek v Michigan Department of Transportation,* 456 Mich 331 (1998), this Court, without discussing the common-understanding doctrine, held that a homeowner who had no physical property taken could not recover where the only claimed damage was related to highway effects. This Court categorized the *Spiek* claim as an "inverse condemnation" claim. Some Michigan cases predating 1963, however, have allowed such claims.

In the instant case, which involves a partial taking, rather than an inverse condemnation, the Court of Appeals distinguished *Spiek* in large part because this Court has a long history of granting those who have suffered a partial taking of their land full compensation for the diminution in value of the remainder of the land caused by the taking. *Michigan Dep't of Transp v Tomkins*, 270 Mich App 153 (2006).

As will become apparent below, this Court has almost universally held that where there is a partial taking, the owner is entitled to be made whole by receiving compensation for the full diminution in value attributable to the taking. Further, before this Court considers extending *Spiek*, it should recognize that it has previously decided cases

wherein landowners who have not suffered a partial taking have nevertheless been compensated for losses in property value due to public projects. Thus, this Court should allow defendants' damages claim and consider re-examining the *Spiek* decision under the common-understanding doctrine when an appropriate case arises.

STATEMENT OF FACTS

The relevant facts of the case are that defendants Rodney and Darcy Tomkins owned a two-acre lot that abutted a county road that was perpendicular to the new M-6 highway. *Tomkins*, 270 Mich App at 154-55.

M-6 is an approximately twenty-mile highway that connects I-96 and I-196 south of Grand Rapids. According to MDOT, the plans for it were approved in the early 1990s, and construction began in 1997.[1] A portion of the project opened in 2001, and the project was completed in 2004. MDOT indicates that as of September 2005, 47,000 vehicles a day were recorded by a traffic counter on M-6.[2]

According to the United States Census Bureau, Michigan had just over 10,000,000 residents in July 2006.[3] According to the Michigan Department of Treasury, there were more than 4,400,000 personal income tax returns filed in Michigan in 2005.[4] MDOT indicated that the entire M-6 project cost $650,000,000.[5]

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[1] http://www.michigan.gov/documents/MDOT_M-6_opening_brochure_108685_7.pdf.

[2] http://michigan.gov/som/0,1607,7-192-29907_34764-130936--,00.html.

[3] http://www.census.gov/popest/states/tables/NST-EST2006-01.xls).

[4] http://www.michigan.gov/documents/treasury/IT_2005_206869_7.pdf.

[5] http://www.michigan.gov/mdot/0,1607,7-151-9620-104861--,00.html.

Defendants' lot does not touch M-6. *Id.* at 155. But MDOT condemned a forty-nine-foot by 120-foot strip of defendants' property to build a bridge over M-6. *Id.* Both the defendants' appraiser and MDOT's appraiser agreed that the value of this strip standing alone was $3,800. *Id.* But the defendants' appraiser further computed that the value of the property that the defendants retained (two acres minus the small strip condemned) had diminished $48,200 due to "highway effects," which included the "additional 'dust, dirt, noise, vibration, and smell'" from the new highway nearby. *Id.* (citation omitted).

Citing § 20(2) of the Uniform Condemnation Procedures Act, MCL 213.70(2), and *Spiek v Michigan Department of Transportation*, 456 Mich 331 (1998), which denied an inverse-condemnation claim for highway effects, MDOT filed a motion in limine with the trial court seeking to prevent the $48,200 figure from being introduced into evidence. The trial court granted that motion. The Court of Appeals noted that *Spiek* was an inverse-condemnation case and held that *Spiek* was not controlling in a partial-takings case.

On June 15, 2007, this Court granted leave to appeal and ordered the parties and interested amici to address the following questions: (1) what was the ratifiers' common understanding of the phrase "just compensation" when they ratified Const 1963, art 10, § 2, and was it commonly understood that "just compensation" in inverse condemnation cases was different than "just compensation" in direct partial-takings cases; and (2) whether § 20(2) of the Uniform Condemnation Procedures Act, MCL 213.70(2), impermissibly conflicts with this established meaning of "just compensation."

ARGUMENT

Michigan has a long history of construing the state constitution's "just compensation" clause liberally to provide full compensation to a property owner for a diminution in value of the property remaining to him or her after a partial taking of his or her real property. This constitutional guarantee renders MCL 213.70(2) unconstitutional.

A. Standard of review

This Court reviews constitutional issues de novo. *Co Rd Ass'n v Governor,* 474 Mich 11, 14 (2005).

B. Merits

1. Relevant law and constitutional provisions

The pertinent portion of the Uniform Condemnation Procedures Act, MCL 213.70(2), states:

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

The question presented here is whether that statute violates the Michigan Constitution when the statute is applied to prevent those who have suffered a partial taking from receiving compensation for the full diminution in value attributable to that taking. Specifically, since under *Spiek*

highway effects are improper when they are the sole damage claim, is it improper to consider highway effects when there is other damage, such as a partial taking?

All of Michigan's constitutions have required that compensation be paid for takings. The 1835 constitution stated, "The property of no person shall be taken for public use, without just compensation therefor." Const 1835, art 1, § 19. The 1850 constitution stated, "The property of no person shall be taken by any corporation for public use, without compensation being first made or secured, in such manner as may be prescribed by law." Const 1850, art 15, § 9. The 1908 constitution stated, "Private property shall not be taken by the public nor by any corporation for public use, without the necessity therefor being first determined and just compensation therefor being first made or secured in such manner as shall be prescribed by law." Const 1908, art 13, § 1. The 1963 constitution originally stated: "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." Const 1963, art 10, § 2 (prior to amendment through Proposal 4 of 2006). Art 10, § 2, was amended in 2006 via the enactment of Proposal 4. The pertinent portion of that section now reads:

> Private property shall not be taken for public use without just compensation therefore being first made or secured in a manner prescribed by law. If private property consisting of an individual's principal residence is taken for public use, the amount of compensation made and determined for that taking shall be not less than 125% of that property's fair market value, in addition to any other reimbursement allowed by law. Compensation shall be determined in proceedings in a court of record.

Const 1963, art 10, § 2.

2. The common-understanding doctrine and takings

There are three main issues regarding takings: (1) what constitutes a taking; (2) what constitutes a public use; and (3) what constitutes just compensation. The current members of this Court have discussed the public use question in *Wayne Co v Hathcock*, 471 Mich 445 (2004), and the just compensation question in *Silver Creek Drain District v Extrusions Division, Inc*, 468 Mich 367 (2003). In both of these cases, this Court looked to the common understanding of the disputed terms, whether "public use" or "just compensation." In both cases, this Court found that the terms were technical legal terms that should be interpreted in light of the meaning that those sophisticated in the law would have given those terms at the time of enactment. *Silver Creek*, 468 Mich at 376; *Hathcock*, 471 Mich at 470-71.

In *Hathcock*, this Court stated: "The primary objective in interpreting a constitutional provision is to determine the text's original meaning to the ratifiers, the people, at the time of ratification." 471 Mich at 468. This Court explained:

> This Court typically discerns the common understanding of constitutional text by applying each term's plain meaning at the time of ratification. But if the constitution employs technical or legal terms of art, "we are to construe those words in their technical, legal sense."

Id. at 468-69 (footnotes omitted, citing *Silver Creek*, 468 Mich at 375). This Court explained that the Michigan takings clause is highly technical: "[W]e have held that the *whole* of art 10, § 2, has a technical meaning that must be discerned by examining the 'purpose and history' of the power of eminent domain." *Hathcock*, 471 Mich at 471 (footnote omitted). Where there is a technical meaning related to the common understanding of a constitutional provision, the courts must "delv[e] into [the] body of case law." *Id*. In *Hathcock*, this Court did not hesitate to deviate from federal takings case

law interpreting the Fifth Amendment of the United States Constitution, which is similar to art 10, § 2. *Hathcock*, 471 Mich at 479-81.

3. *Spiek* and highway effects

In *Spiek*, a homeowner whose property abutted the service drive for I-696 sought damages for "highway effects," such as increased "noise, dust, vibration, and fumes" due to proximity to the highway. The suit was categorized as an inverse-condemnation action, which this Court defined as "one instituted by a landowner whose property has been taken for public use without the commencement of condemnation proceedings." 456 Mich at 334 n. 3 (internal quotes and citations omitted). The trial court dismissed the claim, but the Court of Appeals reversed, holding that citizens near a highway had been detrimentally affected to a greater degree than the general population. *Id.* at 336.

This Court reversed the Court of Appeals:

> We conclude that plaintiffs' complaint fails to state a claim on which the relief sought may be granted. Taking all plaintiffs' factual allegations as true, the complaint fails to allege an essential element of their cause of action: that the damage to their property is of a unique or peculiar character different from the effects experienced by all other similarly situated property owners. In other words, plaintiffs fail to allege an injury unlike that experienced by all who live in proximity to a highway. Thus, their case is barred by the well-accepted rule that property owners are not entitled to compensation for highway noise that is necessarily incident to proximity to a highway.

Id. at 338-39.

In particular, this Court indicated that the Court of Appeals erred by comparing those living near the highway to the citizenry at large. Citing *Richards v Washington*

Terminal Co, 233 US 546 (1914),[6] this Court held that those near a highway can recover damages only if they show they suffered a unique injury compared to others near a highway:

> The Court of Appeals incorrectly concluded that *Richards* supported the conclusion that the plaintiffs could recover if they could show they were harmed to a degree greater than the citizenry at large. The plaintiff in *Richards* prevailed, not merely on the basis of a difference in degree from the inconvenience experienced by the public at large, but because the harm he suffered was different in kind or character from that experienced by those similarly situated.

Spiek, 456 Mich at 342 (footnote omitted).

This Court indicated that its holding was supported by public policy considerations:

> To require the state to litigate every case in which a person owning land abutting a public highway feels aggrieved by changing traffic conditions would wreak havoc on the state's ability to provide and maintain public highways and place within the judicial realm that which is inappropriate for judicial remedy. Where harm is shared in common by many members of the public, the appropriate remedy lies with the legislative branch and the regulatory bodies created thereby, which participate extensively in the regulation of vibrations, pollution, noise, etc., associated with the operation of motor vehicles on public highways. Only where the harm is peculiar or unique in this context does the judicial remedy become appropriate.

Id. at 349.

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[6] This case will be discussed below.

Thus, to overcome the doctrine of *damnum absque injuria*,[7] landowners near a highway must show "harm of a [different] character from that suffered by all living in similar proximity to a highway." *Id*. at 350. This Court also consistently conditioned its opinion in *Spiek* on a significant caveat — the landowners did not allege there was a "physical invasion." *Id*. at 344.

4. The instant case at the Court of Appeals: partial takings

The Court of Appeals distinguished *Spiek* from the instant case primarily by observing that this case involved a physical invasion. The court then held that under Michigan law, whenever there is a physical taking, the landowner is entitled to full compensation for the portion taken and damage inflicted on the remaining estate. *Tomkins*, 270 Mich App at 158-59. In other words, the court argued that a landowner should receive full market value for his or her loss.

The Court of Appeals explained:

> In a partial taking case, considerations that will affect the price that a willing buyer would offer for the land include any changes in utility or desirability of what is left after the taking, which is logically dependent on the use intended for the property acquired by the government and the related effects of that use on the owner's remaining property. Stated in another way, in a partial taking case the only way to fulfill the objective of just compensation for reductions in the value of the remainder parcel is to determine the damages traceable to the creation of the project for which the land was condemned.

Id. at 166-67 (footnotes omitted).

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[7] Black's Law Dictionary defines this term as "Loss, hurt, or harm without injury in the legal sense." Black's Law Dictionary (6th ed abridged) at 273.

The Court of Appeals did note that the United States Supreme Court had held that generally no compensation is due under the federal Fifth Amendment for the diminution in value to the remaining estate in partial-takings cases. *Id.* at 167 (citing *Campbell v United States*, 266 US 368 (1924)). The Court of Appeals remanded this case to the trial court to resolve a factual issue that would determine whether this case presented an exception to the general rule that no compensation is due for a diminution of value. *Tomkins*, 270 Mich App at 170.

5. Common-understanding factors

a. Justice Cooley's scholarly writings

In *Hathcock*, this Court paid particular attention to the views expressed by Justice Cooley, who was described as Michigan's "patron saint of constitutional interpretation." 471 Mich at 469 n. 48.[8] Writing between the 1850 and 1908 constitutions, Justice Cooley discussed takings at length in his treatise Constitutional Limitations (5th ed 1998), a practitioner's guide seeking to harmonize federal and state constitutional law.[9]

Justice Cooley explained the rationale for requiring compensation when an owner's property interest is taken:

> Eminent domain differs from taxation in that, in the former case, the citizen is compelled to surrender to the public something beyond his due proportion for the public benefit. The public seize and appropriate his particular estate, because of a

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[8] It is not only the Michigan courts that admire Cooley's work: The United States Supreme Court has called him a "great constitutional scholar." *Plaut v Spendthrift Farm, Inc*, 514 US 211, 225 (1995).

[9] Justice Cooley wrote and edited five editions of "A Treatise on Constitutional Limitations." Other editors compiled an additional three editions. Thus, there are eight total editions of this work, but the last edition that Cooley himself edited was the fifth, which was published in 1888. The fifth edition was republished in 1998 by the Lawbook Exchange, and that edition is used by amicus curiae, since it is the edition not clouded by other authors' thoughts and analysis.

> special need for it, and not because it is right, as between him and the government, that he should surrender it. To him, therefore, the benefit and protection he receives from the government are not sufficient compensation; for those advantages are the equivalent for the taxes he pays, and the other public burdens he assumes in common with the community at large. And this compensation must be pecuniary in its character, because it is in the nature of a payment for a compulsory purchase.

Constitutional Limitations (5th ed 1998) at 693-94 (footnotes omitted).[10] This passage supports the payment of damages in both partial-takings cases and inverse-condemnation cases. Without compensation to both groups, the community at large would be able in essence to tax unjustly those living near a public project, such as a highway.

This point can be demonstrated. Recognizing, of course, that complexities in state tax law and highway finance make a precise figure difficult, an extremely rough estimate still demonstrates the point. Assume that the $650,000,000 M-6 construction figure is purely state dollars, that the state collects taxes only from individuals, and that the cost of the project is spread evenly among Michigan's personal income tax returns. Under these circumstances, the average cost per Michigan income tax return — usually representing one or two taxpayers — would have been around $148 for the M-6 project ($650,000,000/4,400,000 tax returns). But defendants have, according to their appraiser, paid another $48,200 due to loss of value from highway effects. One presumes that all residents who are within a certain distance of the highway have suffered similar monetary loss. Without all who have been damaged being compensated, the public at large gets something quite valuable at a relatively modest expense to them as individuals, but at a significant expense to a small subset of the population.

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[10] This excerpt is also found verbatim in the eighth edition. 2 Constitutional Limitations (8th ed) at 1201.

But Cooley clearly differentiated partial takings from inverse condemnation. In describing what constitutes a taking, Cooley stated:

> Any proper exercise of the powers of government, which does not directly encroach upon the property of an individual, or disturb him in its possession or enjoyment, will not entitle him to compensation, or give him a right of action. . . . So if by . . . a change in the grade of a city street the value of adjacent lots is diminished, — in these and similar cases the law affords no redress for the injury.

Id. at 671-73 (footnotes omitted). Cooley had lengthy footnotes for these two sentences, but cited no Michigan cases in support of the first sentence and a single Michigan case, *Pontiac v Carter*, 32 Mich 164 (1875), for the second.[11] Cooley continued:

> It must frequently occur that a party will find his rights seriously affected, though no property to which he has lawful claim is actually appropriated. As where a road is laid out along the line of a man's land without taking any portion of it. . . . [n]o property being taken in this case, the party has no relief unless the statute shall give it. The loss is *damnum absque injuria*. . . . So where a railroad company, in constructing their road in a proper manner on their own land, raised a high embankment near to and in front of the plaintiff's house, so as to prevent his passing to and from the same with the same convenience as before, this consequential injury was held to give no claim to compensation.

Constitutional Limitations (5th ed 1998) at 673-74 (footnotes omitted). In the footnote for the last sentence quoted above, Cooley cited *Grand Rapids & Indiana RR Co v Heisel*, 38 Mich 62 (1878).[12]

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[11] *Pontiac v Carter* will be discussed below.

[12] *Heisel* will be discussed below.

In its brief in this case, the Michigan Department of Transportation cited Cooley's *General Principles of Constitutional Law in the United States of America*, which was published in 1880. The section cited by MDOT states:

> The rule by which compensation shall be measured is not the same in all cases, but is largely affected by the circumstances. If what is taken is the whole of what the owner may have lying together, it is clear that he is entitled to its value, . . . and that this, except in extraordinary cases, must be the full measure of his injury. This rule will apply in all cases where the whole of any article or thing of value is taken, and not a part only, to the injury of what remains. But when less than the whole is taken, the question of just compensation becomes a question of damages merely; and in determining these the benefit to what is left may be offset against the damages, and the question to be determined will be to what extent the owner's interest in that a part of which is to be taken will be diminished thereby. If the taking is of some right in an easement, or exclusive franchise, or other intangible right, the question will also be one of damages merely. <u>But in any case mere incidental injuries or benefits, like those suffered and received by the community at large, — such as the greater facility in travel when the taking is for a railway, or the greater danger of fright to teams when making use of the highway, — are to be excluded altogether from the computation.</u>

General Principles of Constitutional Law at 341-42 (footnote omitted and emphasis added by amicus curiae). There were no citations to Michigan cases in that excerpt.

It should be noted that the passage MDOT cites is taken from a hornbook meant to introduce law students to important constitutional issues, and that this hornbook is far less

thorough than Constitutional Limitations.[13] Still, it is fair to note that Justice Cooley's scholarly writings are somewhat contradictory. He recognizes that the costs of societal improvements should be spread proportionally amongst its citizens, yet he requires a physical taking before a citizen can constitutionally demand redress, creating the possibility that a citizen may be "compelled to surrender to the public something beyond his due proportion for the public benefit."

Cooley's view on partial takings and *damnum absque injuria*, the type of damage obliquely referred to in the excerpt from *General Principles of Constitutional Law*, are more fully set out in Michigan case law. This case law deserves attention, since Cooley's views as a justice of the Michigan Supreme Court are more important here than his views as a scholar trying to harmonize takings decisions from the various state and federal courts.

b. Michigan case law

The case law from this Court relevant to the common-understanding question will be dealt with in chronological order. All of this case law was decided before 1963. There is a clear pattern that Michigan construes its just compensation provision liberally. Further, it has long been the case that where there is a partial taking, the owner is entitled to the full market difference between the value of the entire property before the taking and the market value of the remainder after the taking. This includes considerations of how the taken property will or might be used.

There are also some instances where a landowner received full market value damages where there was not at least a partial taking, implying that *Spiek* might need to be re-examined.

Justice Cooley authored *Pontiac v Carter*, 32 Mich 164 (1875). In this case, the grade to a street was altered. This

[13] For example, the eminent domain section in the 5th edition of Constitutional Limitations covers 59 pages, while the eminent domain section in *General Principles of Constitutional Law* covers 12 pages.

point is not entirely clear in the *Pontiac v Carter* opinion itself, but was discussed two years later in *Ashley v Port Huron*, 35 Mich 296 (1877), wherein this Court, in another opinion by Justice Cooley, described *Pontiac v Carter* as "a case of an incidental injury to property caused by the grading of a street." *Ashley*, 35 Mich at 297. This Court explained:

> The plaintiff's premises were in no way invaded, but they were rendered less valuable by the grading, and there was this peculiar hardship in the case, that the injury was mainly or wholly owing to the fact that the plaintiff's dwelling had been erected with reference to a grade previously established and now changed.

Id.

In *Pontiac v Carter*, Justice Cooley discussed damages. He clearly indicated that diminution in value is a proper claim when land is first taken:

> Highways, * * when rightfully laid out, are to be considered as purchased by the public of him who owned the soil, and by the purchase the right is acquired of doing everything with the soil over which the passage goes which may render it safe and convenient; and <u>he who sells may claim damages not only on account of the value of the land taken, but for the diminution of the value of the adjoining lots</u>, calculating upon the future probable reduction or elevation of the street or road; and all this is a proper subject for the inquiry of those who are authorized to lay out, or of a jury, if the parties should demand one.

Carter, 32 Mich at 166 (emphasis added). Thus, where land was taken for a road, Justice Cooley believed that diminution-in-value claims were proper not only for current uses, but potential future uses.

Justice Cooley also authored *Grand Rapids & Indiana RR Co v Heisel*, 38 Mich 62 (1878). In *Heisel*, the plaintiff landowner sought compensation where a street in front of her home was occupied by a railroad track. She claimed "special damages… for the discomfort occasioned by the smoke, dust, noise, etc., from the engines and carriages." *Id.* at 64. The landowner contended that the operation of the railroad made the "neighborhood unhealthy and unpleasant." *Id.* (emphasis added). She also claimed that "the market value of her premises was greatly decreased in consequence of the use of the street by the railroad company." *Id.* (emphasis added).

In deciding whether the landowner was entitled to damages, Justice Cooley considered it critical whether a portion of plaintiff's property had been taken. He stated that when an abutting owner does not have a property interest in the street, "the mere laying of the track in the street . . . is no wrong to [the owner] whatever." *Id.* at 69. Such an owner may bring a nuisance claim, but not a takings claim:

> But other principles must be applied when the abutting owner is not the owner of the soil in the street. In that case his freehold is not appropriated, and the mere laying of the track in the street — in the absence of any statute giving him redress therefore — is no wrong to him whatever. He is not wronged until the use of a street becomes a nuisance to him, or specially incommodes him in the enjoyment of the public easement. He is entitled to no assessment of damages, because none of his land is taken, and he has no action at the common law unless upon such grounds as would enable one land proprietor to sue an adjoining proprietor for failing to observe the maxim that every one must so use his own property as not unreasonably to incommode his neighbor.

Id. at 69-70. A diminution-in-value claim where no land is taken is *damnum absque injuria*. *Id.* at 71. Justice

Cooley concluded, "It is clear therefore, that the principles governing the recovery must be quite different when the plaintiff's freehold is appropriated and when it is not." *Id*. at 72. Because plaintiff's freehold did not extend to the street, her damages claim was reversed. Thus, Justice Cooley considered the *damnum-absque-injuria* concept limited to situations where there was no partial taking. But where a physical portion of an estate was taken, the landowner was entitled to diminution-in-value damages for the remainder of the estate. In determining those damages, the current use and potential future uses to which the taken property would have been put could be considered.

The *Heisel* taking came before this Court a second time. *Grand Rapids & Indiana RR Co v Heisel*, 47 Mich 393 (1882). On remand, the trial judge had been "instructed to give no damages for permanent diminution of value." *Id*. at 400. But because of the manner in which the railroad obtained the railway,[14] plaintiff was still allowed to bring suit on different grounds. In deciding the case, this Court, via Justice Campbell, discussed some general rules governing damages:

> It need hardly be said that nothing can be fairly termed compensation which does not put the party injured in as good a condition as he would have been in if the injury had not occurred. Nothing short of this is adequate compensation. In the case of land actually taken, it includes its value, or the amount to which the value of the property from which it is taken is depreciated.... In cases where damage is by injury aside from actual taking of property, the rule has been to make the party whole as nearly as practicable, and where it affected the rental value or enjoyment the same principle has been applied

[14] This Court indicated that the railroad may not have followed the proper procedures to occupy the street, and thus it allowed the damages award to stand as a remedy for some sort of tort.

> as in other cases. There is no reason and so far as we can discover no law which allows the wrong-doer to cast any portion of an actual and appreciable loss on the party whom he injures.

Id. at 398-99 (emphasis added).

In *Port Huron & South-Western Ry Co v Voorheis*, 50 Mich 506 (1883), this Court held that the commissioners[15] erred by considering only the damage caused by a taking to a portion of a landowner's property and not considering the effect on the remainder. The landowner owned six contiguous lots numbered 4, 5, 6, 13, 14, and 15. His home was situated on lots 4 and 5. *Id.* at 508-09. The land that was condemned was a forty-foot strip of lot 15. *Id.* at 509.

The railway contended, "[T]he compensation or damages to be awarded should be confined to the value of the land taken from, and injury to, that lot." *Id.* The landowner argued, "[T]he running of cars on the proposed right of way in so near proximity to his buildings would cause great, permanent and continually increasing injury and damage to the entire homestead." *Id.* According to this Court, he contended:

> [H]e is not limited in damages to that lot, but the land taken being part of his homestead, and used and occupied by him as such, he was entitled not only to compensation for the land taken but also for such other actual damages to his homestead as he sustained by reason of the taking, and necessarily arising from the use to be made of the parcel taken.

Id. at 509-10. This Court held that the landowner was entitled to compensation for the loss in value of the remainder of the homestead. *Id.* at 510. It is somewhat unclear whether this Court viewed this result as mandated by the Michigan

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[15] In some instances, it used to be proper to have court-appointed commissioners, rather than a jury, determine just compensation.

Constitution. There was a passing reference to a statute, *id*. at 510, but later language in the opinion, including a reference to "just compensation," implies a constitutional holding:

> We cannot avoid the conclusion that no compensation or damages were allowed the respondent by the commissioners for the injury done to any portion of this homestead, except to lot 15, and that the same was not considered by them in making their award. The respondent cannot be compelled to give up his property without full compensation for his injury, and we are satisfied, through a misapprehension of the law on the part of the commissioners just compensation for the land taken and damages to the owner has not been made.

Id. at 513.

In *Barnes v Michigan Air Line Ry*, 65 Mich 251 (1887), this Court was faced with a landowner who sought continuing compensation for injuries from modifications to a railroad built on property that had already been condemned. This Court denied that claim and noted, "[I]t is the business of the jury to compensate the owner for what his landed interest will suffer from the use proposed to be made of it by the railroad company." *Id*. at 253 (emphasis added). Once that compensation had been paid, no further compensation was possible. Nevertheless, this Court clearly indicated that when property is first taken, a jury could consider the uses to which land taken would be put in assessing damages to the owner's entire "landed interest."

In *Schneider v Detroit*, 72 Mich 240 (1888), the plaintiff had previously lost sixteen feet from two of his lots for a street. A bridge over a nearby railroad track was later built on this street, and that bridge obstructed the plaintiff's view.

The plaintiff sought damages related to the construction of the bridge. The trial court held that the plaintiff was

entitled to the diminution in value of his lots. This Court agreed and held, "[T]he city is liable to him for the injury for which he has complained in damages," even though construction of the bridge did not require the taking of any more of his lots. *Id*. at 248. Thus, in this case, this Court allowed a diminution-in-value claim where there was not even a partial taking. This case is contrary to *Spiek*.

In *Grand Rapids*, *Lansing & Detroit RR Co v Chesebro*, 74 Mich 466 (1889), this Court discussed damages in a partial-takings case. The property owner had forty acres, and a railroad sought a right-of-way over four of them. This Court held that mere payment for the value of the four acres was insufficient:

> An owner has a right to be indemnified for anything that he may have lost. . . . [A]nd the mere taking of four acres for a right of way could not be regarded, in any sensible point of view, as compensated by one-tenth of the value of the forty acres, taking acre for acre. The damages in such a case must be such as to fully make good all that results, directly or indirectly, to the injury of the owners in the whole premises and interests affected, and not merely the strip taken.

Id. at 474 (emphasis added).

In *Pearsall v Eaton Co Bd of Supervisors*, 74 Mich 558 (1889), a road bisecting the owner's property was vacated, leaving her without highway access. This Court discussed what constitutes a taking leading to damages and stated:

> [T]he term "taking" should not be used in an unreasonable or narrow sense. It should not be limited to the absolute conversion of property, and applied to land only; but it should include cases where the value is destroyed by the action of the government, or serious injury is inflicted to the property itself, or exclusion of the owner from

> its enjoyment, or from any of the appurtenances thereto.

Id. at 561. This implies that diminution-in-value claims should be allowed even when there is not a partial taking, which is contrary to *Spiek*.

In *Detroit v Moesta*, 91 Mich 149 (1892), this Court considered the proper damages where there was a partial taking for the widening of a boulevard. The trial court had instructed the jury that the plaintiffs "were entitled to compensation for the value of the land to be taken, for the diminution in value of the piece remaining, and [the trial court] was asked [and refused] to charge that [plaintiffs] were likewise entitled to recover for the loss of profits arising from the loss of business." *Id.* at 154. This Court held that the failure to instruct on business-interruption damages was grounds for reversal. But it did not find the diminution-in-value instruction to be erroneous.

In *Detroit v Chicago, Detroit & Canada Grand Trunk Junction RR Co,* 91 Mich 291 (1892), this Court held that a railroad was entitled to diminution-in-value damages when a portion of its property was taken for a crossing. In particular, the railroad claimed that a warehouse near the taken crossing lost value, and this Court held that question should have been submitted to the jury. *Id.* at 292-93.

In *Buhl v Fort Street Union Depot Co*, 98 Mich 596 (1894), the plaintiff sought compensation for the closing of a street. The plaintiff's property did not abut the portion of the street that was closed, and he still had ingress and egress to his property. This court indicated that it would allow some abutting owners a cause of action, but would not allow a cause of action for those whose property did not abut the vacated street:

> A distinction may well be held to exist between the injury which results to an abutting owner, or another so situated that the means of ingress and

> egress to and from his premises are cut off by a discontinuance of a street, and one owning land upon another street or on the same street at a distance from the part of the highway discontinued.

Id. at 604. The injury that the plaintiff suffered here "is one which he suffers in common with the general public, and damnum absque injuria." *Id*. at 607 (Latin phrase not italicized in original).

In *Phelps v Detroit*, 120 Mich 447 (1899), this Court held that a landowner could recover damages from the construction of a bridge over some railroad tracks, even though there was no partial taking: "and in such cases, where damage is by injury aside from actual taking of property, the rule is to make the party whole as far as practicable." *Id*. at 451. Thus, this case is contrary to this Court's later holding in *Spiek*.

In *Tomaszewski v Palmer Bee Co*, 223 Mich 565 (1923), plaintiffs sought to challenge the vacation of a street despite none of them owning property that abutted the street in question. This court clarified that the plaintiffs did not have a property interest at stake. *Id*. at 569. Where ingress and egress are not cut off, but only rendered less convenient, "[S]uch consequence is damnum absque injuria." *Id*. at 570 (Latin phrase not italicized in original).

In *In re Rogers*, 243 Mich 517 (1928), this Court indicated, "The landowner [in a takings case] must yield to public necessity, but is entitled to just compensation, and this means no sacrifice." *Id*. at 526 (emphasis added).

In *Fitzsimons & Galvin, Inc, v Rogers*, 243 Mich 649 (1928), this Court discussed the constitutional requirements of just compensation and stated: "Adequate compensation is such only as [it] puts the injured party in as good condition as he would have been in if the injury had not been inflicted. It includes the value of the land, or the amount to which the value of the property from which it is taken is depreciated. [*G R & I Ry Co v Heisel*, 47 Mich 393 (1882)]." 243 Mich at 664.

In *Johnstone v Detroit G H & M Ry Co*, 245 Mich 65 (1928), this Court allowed a takings claims from property owners whose lots did not abut property taken for a highway right-of-way and were at least sixty-six feet from the right-of-way. This right-of-way ran through a subdivision wherein the property owners all had mutual building restrictions limiting the manner in which the lots could be used. *Id*. at 69. This Court defined the question presented:

> The principal question is whether, because of the proposed violation of the restrictions, the state must pay compensation to the owners of other lots in the subdivision, whose land is not actually and physically taken, under our Constitution, art. 13, § 1, which prohibits the taking of private property for public use without just compensation therefor.

Id.

This Court indicated that ensuring proper damages for takings is necessary before individual citizens will confidently improve their property:

> Nor is there anything in our laws, system of government, or the spirit of our institutions which curtails the genius of a citizen in creating or enhancing values in his property in any lawful way, by physical improvement, psychological inducement, contract, or otherwise. His obligation to recognize the power of eminent domain and the possibility of its exercise in no wise restricts his right to legitimate profit. He may view the power in its constitutional entirety, with its comitant requisite of just compensation, and order his affairs within the law with assurance that, if the state takes his property it will pay him the value of what it takes, of whatever that value may consist, so it is measured by the market. Anything less is confiscation.

Id. at 74-75.

This Court then discussed the proper measure of damages:

> It is the rule that, where the whole of land is taken, the compensation to be made is the fair value of the land. Where only part of a parcel is taken, just compensation is not measured by proportionate acreage but by the amount to which the value of the property from which it is taken is diminished. *Grand Rapids & Indiana R Co v Heisel*, 47 Mich 393 (1882). The value of the part actually taken is allowed as direct compensation; but the decreased value of the residue of the parcel, on account of the use made of the land taken, is also allowable as compensation, even though it is strictly consequential damage in nature.

Id. at 81 (emphasis added). And this Court concluded:

> It is therefore held that owners of property in a subdivision in which, under a general plan, the property is restricted to specified uses, and in which the restrictions are valid, subsisting, and enforceable against the lands in the hands of private owners, are entitled to compensation upon the taking of any part of such subdivision for public use in violation of such restrictions; that, aside from nominal damages for destruction of the easement, the compensation is measured by the actual diminution in value of the premises of such owner as a result of the use to which the property taken is put, and that, in determining such diminution, the effect, by way of benefit as well as by way of injury, of such use is to be taken into account.

Id. at 84-85 (emphasis added). This case may be in tension with *Spiek*, since compensation was provided to the landowners even though no portion of their land was taken.

In *In re Bagley Avenue in City of Detroit*, 248 Mich 1 (1929), this Court discussed the proper measure of damages in the context of the widening of a road:

> In the case of land actually taken, just compensation awards its value, or the amount which the value of the property from which it is taken is depreciated. *Grand Rapids & Indiana RR Co v Heisel*, 47 Mich 393 (1882). Where the whole of a parcel of land is taken, the compensation to be made is the fair value of the land so taken. Where only part of a parcel is taken, just compensation is to be determined by the amount which the value of the parcel from which it is taken is diminished. The value of the part actually taken is allowed as direct compensation, but the decreased value of the residue or parcel on account of the use made of the land taken is also allowable as compensation. *Port Huron & South Western Ry Co v Voorheis*, 50 Mich 506 (1883); *Fitzsimmons & Galvin, Inc, v Rogers*, 243 Mich 649 (1928); *Johnstone v Detroit, G H & M Ry Co*, 245 Mich 65 (1928).

Id. at 5 (emphasis added).

In *Grand Rapids v Barth*, 248 Mich 13 (1929), Grand Rapids condemned a sixteen-foot-wide strip of land along a street to broaden the street. The trial court instructed the jury, "As regards the land taken, therefore . . . you will award to the owners the fair market value of the 16 feet proposed to be taken, and if the value of the remainder of the property is decreased by reason of cutting off the 16 feet, also whatever you may find to be the decrease in the value." *Id.* at 18. This Court held that the instruction was proper. It discussed the proper method of determining just compensation in partial-takings cases:

> The rule for compensation has been announced by this court as follows: 'Where only a part of a parcel is taken, just compensation is not measured by proportionate acreage but by the amount to which the value of the property from which it is taken is diminished.' *Johnstone v Detroit, etc, R Co*, 245

Mich 65 (1928).

> 'Adequate compensation is such only as puts the injured party in as good condition as he would have been in if the injury had not been inflicted. It includes the value of the land, or the amount to which the value of the land from which it is taken is depreciated.' *Fitzsimmons & Galvin Inc v Rogers*, 243 Mich 649 (1928).

Id. at 20.

In *In re Widening of Michigan Avenue*, 280 Mich 539 (1937), this Court discussed partial takings and indicated that diminution in value related to the use to which the taken property would be put is a proper measure of damages:

> Where only part of a parcel is taken, just compensation is to be determined by the amount which the value of the parcel from which it is taken is diminished. The value of the part actually taken is allowed as direct compensation, but the decreased value of the residue of the parcel on account of the use made of the land taken is also allowable as compensation. *Port Huron, etc, R Co v Voorheis*, 50 Mich 506 (1883); *Fitzsimons & Galvin, Inc, v Rogers*, 243 Mich 649 (1928); *Johnstone v Detroit, etc, R Co*, 245 Mich 65 (1928), 67 ALR 373; *In re Widening of Bagley Avenue*, 248 Mich 1 (1929).

Id. at 548 (emphasis added).

In *Case v Saginaw*, 291 Mich 130 (1939), the plaintiffs owned businesses on a street where a railroad viaduct over the Saginaw River was going to be built. They alleged that the construction of the viaduct would "substantially impair the value of their properties and result in great damage to them." *Id*. at 134. This Court held that because plaintiffs did not have a property interest in the street, the damage they suffered was not a taking.

In *In re Gratiot Avenue*, 294 Mich 569 (1940), this Court discussed its general interpretive rule regarding the just compensation clause: "This provision has been given a liberal interpretation in this state. 'Nothing can be fairly termed just compensation which does not put the party injured in as good a condition as he would have been if the injury had not occurred.'" *In re Gratiot Ave*, 294 Mich at 573 (citing *In re Bagley Ave*, 248 Mich 1 (1929), and emphasis added).

In *In re Ziegler*, 326 Mich 183 (1949), this Court departed from, but did not discuss, the longstanding precedent established in the cases discussed above. The state had acquired 1.15 acres of the Buschs' seventeen-acre farm to widen highway M-119, and 870 feet of the Busch farm fronted the eastern portion of the highway. *Id*. at 185. The landowners' home was in the southwest corner of their lot and just three feet from the state's pre-existing right-of-way. They maintained a shade tree and a lawn on that right-of-way.

The condemnation involved a 745-foot-by-67-foot strip of their lot. This strip was along M-119 north of their house. The Buschs' neighbor to the south also had some property taken for the highway. As a result, the Buschs' home was surrounded on three sides by state property.

Three court-appointed commissioners awarded the landowners $2,500 in damages. The Buschs had sought compensation for the strip taken, the shade tree and lawn, and the fact that their neighbors' land to the south was going to be taken. *Id*. at 186. After the trial, affidavits of the commissioners indicated that damages were given for all three reasons.

This Court first held that the landowners had no property right in the right-of-way and that the landowners were due no compensation for either the tree or the lawn. This Court also held that plaintiffs could not recover due to their neighbor's taking:

> The defendants had no property rights in the land adjoining their farm on the sough [sic]. The consequential damage inflicted by the taking of a portion of the neighbor's realty was clearly separable from that occasioned by the loss of the strip of their own tract. Had the road improvement project ended at the south boundary of defendants' farm, they could not have obtained redress for the depreciation in the value of their realty due to the proximity of the highway to the house. It was only for the taking of a part of their own land that they would be entitled to receive just compensation for the damage to the remainder, and the extent of recovery may not be thereby enlarged so as to include items otherwise not compensable. *Campbell v United States*, 266 US 368 (1924). The general rule applied when part of a parcel of land is condemned is that just compensation does not include the diminution in the value of the remainder caused by the acquisition of the adjoining lands of others for the same undertaking.

Id. at 188-89.

In *Ziegler*, this Court cited the federal case *Campbell v United States*, 266 US 368 (1924),[16] as support and did not discuss the long line of Michigan cases allowing for diminution-in-value damages where a partial taking occurred.

In *In re Slum Clearance*, 332 Mich 485 (1952), this Court considered the costs of moving an electrolytic-plating business from a neighborhood that had been condemned for blight. This business involved numerous chemicals that would have to be specially transported. The question presented was whether the condemning authority was going to have to pay to move "chemical solutions and molten metal." *Id*. at 490. This Court noted that the just-compensation

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[16] Again, *Campbell* will be discussed below.

clause has been given a "liberal interpretation in this state." *Id*. at 491 (citation omitted). But this Court noted a couple of recent decisions had denied "consequential damages" (which in other cases could include compensation for the full diminution in market value traceable to the taking):

> While so-called consequential damages are allowable under some circumstances, *In re Widening of Bagley Avenue*, 248 Mich 1 (1929); *In re Widening of Michigan Avenue*, 280 Mich 539 (1937); *In re Widening of Michigan Avenue*, 298 Mich 614 (1941), it does not necessarily follow that such damages are invariably allowable under all conditions in the taking of private property for public use. See *In re Petition of State Highway Commissioner*, 326 Mich 183 (1949); [*In re Slum Clearance*, 331 Mich 714 (1951)].

Id. at 492-93.

In *In re John C Lodge Highway*, 340 Mich 254 (1954), this Court held that a condemning authority must pay lessees the costs of removing trade fixtures from condemned property. This Court held that the term "just compensation" has been given a liberal construction in this state. *Id*. at 262. Further, this Court stated, "Nothing can be fairly termed just compensation which does not put the party injured in as good a condition as he would have been if the injury had not occurred." *Id*. (citing *In re Bagley Avenue*, 248 Mich 1, 5 (1929)).

In *In re Ziegler*, 357 Mich 20 (1959), MDOT condemned a strip of a five-acre property owned by a business. The company sought damages to the land and buildings, business-interruption damages, and the cost of relocating machinery and equipment. In discussing the damage to the land, this Court indicated that the diminution in value was the proper damages remedy and that the use to which the taken land would be put could be considered. *Id*. at 27. This Court indicated that it has consistently sought to make landowners whole:

> This Court has repeatedly construed what is meant by the words 'just compensation' and has steadfastly held to the holdings in [*In re Rogers*, 243 Mich 517 (1928)], that while, in condemnation proceedings, the landowner must yield to public necessity, he should receive just compensation and that this means at no sacrifice, and in [*In re Bagley Avenue*, 248 Mich 1 (1929)], 'Nothing can be fairly termed just compensation which does not put the party injured in as good a condition as he would have been if the injury had not occurred.'

Id. at 28. This Court also allowed the business-interruption and relocation claims, which is another indication of this Court's generally liberal construction of the just compensation provision.

There is a strong line of cases extending nearly a century before the adoption of art 10, § 2, indicating that just compensation is to be liberally construed. Particularly where a partial taking has occurred, an owner is entitled to the full diminution in property value, including losses due to the use to which the taken property will be put.

c. Constitutional convention activity

In *Studier v Michigan Public School Employees' Retirement Board*, 472 Mich 642 (2005), this Court discussed the role of constitutional convention delegate statements in the common-understanding analysis:

> [A]lthough this Court has continually recognized that constitutional convention debates are relevant to determining the meaning of a particular provision, *Lapeer Co Clerk v Lapeer Circuit Court*, 469 Mich 146, 156 (2003); *People v Nash*, 418 Mich 196, 209 (1983) (opinion by Brickley, J.), we take this opportunity to clarify that, when necessary, the proper objective in consulting constitutional convention debates

> is not to discern the intent of the framers in proposing or supporting a specific provision, but to determine the intent of the ratifiers in adopting the provision, [*People v Nutt*, 469 Mich 565, 574 (2004)].[13] We highlighted this distinction in *Univ of Michigan Regents v Michigan*, 395 Mich 52, 59-60 (1975), in which we stated:
>
> > The debates must be placed in perspective. They are individual expressions of concepts as the speakers perceive them (or make an effort to explain them). Although they are sometimes illuminating, affording a sense of direction, they are not decisive as to the intent of the general convention (or of the people) in adopting the measures.
>
> Therefore, we will turn to the committee debates only in the absence of guidance in the constitutional language . . . or when we find in the debates a recurring thread of explanation binding together the whole of a constitutional concept.
>
> [13] "Constitutional Convention debates and the Address to the People are certainly *relevant as aids in determining the intent of the ratifiers*." (Emphasis added.)

Id. at 655-56.

On April 18, 1962, at the constitutional convention, the committee in charge of eminent domain presented its proposed language governing takings. One change the committee suggested from the 1908 constitutional provision was language stating that "property shall not be taken or damaged" without just compensation, thereby indicating that compensation is due to parties who are damaged by a public project, even if no land was taken. 2 Official Record, Constitutional Convention 1961, at 2580-81. In response to this suggestion, the Stafseth substitute, which had been

drafted by municipal attorneys "for public utilities, for state agencies, cities, counties, highway departments and educational facilities," *id*. at 2582, sought, in part, to limit the claimants to those who had physical property taken.[17] Delegate Stafseth, the substitute's sponsor, explained:

> [The substitute] removes the 2 words referring to losses and damages. The reason for taking these out is that in the existing constitution the words "just compensation" has [sic] been construed by the supreme court as encompassing basically damages to the property taken. This is very important, because if you introduce these . . . words into a constitutional provision, it will be like saying to the public that anybody that may be damaged, whether it is their property taken or just by the inconvenience of the new project, they would have a right to damages, and you can see that in the amendment the committee has just made they give the right to intervene to anyone whose property is not taken, and this is the very problem that the public agencies that take property are concerned with.

Id. at 2582-83.

Delegate Stafseth admitted that where a partial taking occurs, the owner receives the full diminution in value:

> [T]his has been clearly established in our supreme court as to a definition of just compensation, that actually the way you evaluate this, you take the property at the time it is taken, how much it is worth that day and then you take and evaluate what the property is worth after you have taken away the part that the public agency shall use and then you compensate him for that amount so you leave the man whole.

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[17] The municipal substitute also sought to limit the role of juries in making necessity determinations and in setting damages. 2 Official Record, Constitutional Convention 1961, at 2582-83.

Id. at 2592. The municipal substitute passed 61 to 56. *Id*. at 2602.

On April 25, 1962, a motion for reconsideration of adoption of the municipal substitute was offered. There was some indication that negotiations were continuing between the opposing camps, and that there was a need to determine whether the committee proposal or the municipal substitute would be the starting point. *Id*. at 2837. The reconsideration motion failed 50 to 66. *Id*. at 2839.

The conflict regarding eminent domain continued, and Delegate Madar suggested "settling" it by just using vague language similar to that in the U.S. Constitution:

> Mr. Chairman and fellow delegates, I understand now that we have 6 or 7 amendments to go. And I just wonder whether it wouldn't be a good idea for some of the attorneys here to just write up something that is in the federal constitution and let's put it right in here. It will be enough.

Id. at 2842.

Two amendments to the municipal substitute failed. *Id*. at 2842, 2843. Neither had used the committee's language regarding compensation for property that was "damaged." Delegate Habermehl then sought to amend the municipal substitute by allowing compensation whenever a landowner is "directly damaged." *Id*. at 2843. The amendment to the municipal substitute failed 42 to 44. *Id*. at 2845.

After some other amendments not related to damages failed, Delegate Danhof then suggested a substitute that read, "Private property shall not be taken for public use without just compensation therefor being first made or secured in a manner prescribed by law." *Id*. at 2846. This amendment passed 78-17.[18]

[18] There is some indication that the amendment passed because many delegates were tired of dealing with the complex issues related to eminent domain and just wanted to go home. After Delegate

On May 1, 1962, the delegates again considered the topic of eminent domain. An amendment was put forth to compensate takings and "direct damage." *Id*. at 3035-36. This amendment lost 43 to 58. *Id*. at 3039.[19] The Official Records index does not indicate how art 10, § 2, picked up its last sentence, which reads, "Compensation shall be determined in proceedings in a court of record."

The Address to the People set out the language of art 10, § 2, and then stated:

> This is a revision of Sec. 1, Article XIII, of the present constitution which, in the judgment of the convention, is sufficient safeguard against taking of private property for public use. Further provisions relative to eminent domain and procedures

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Danhof introduced his substitute amendment, Delegate Hart sought agreement with the substitute so that the delegates could "go home for the evening." *Id*. at 2846. This comment was met with applause; it was around 11 p.m. *Id*. Two other speakers indicated that they were tired of dealing with eminent domain and sought adoption of the Danhof substitute; Delegate Beaman indicated he was "numb" from "many hours of debate" and that this was the first amendment that he understood, and thus he favored it. Delegate Bonisteel said "ditto" to Delegate Beaman's remarks. *Id*. Delegate Bledsoe chastised his fellow delegates for shirking their responsibilities:

> I think it's positively cowardly for us to run out on the people of Michigan whose property interests are being involved and who are looking to this convention for relief under our constitution. Is everybody sleepy, or do you want to go home and go to bed? I'll even join you there but I'd like to meet you here in the morning and let's carry on. This is a reprehensible state of affairs as far as I'm concerned.

2 Official Record, Constitutional Convention 1961, at 2847. The Danhof substitute amendment was adopted soon thereafter.

[19] Again there is some indication that the delegates were tired of dealing with eminent domain issues. For example, Delegate Mahinske stated, "We are taking this up when everybody is more interested in getting back to their own home than they are in protecting anybody else's home." 2 Official Record, Constitutional Convention 1961, at 3036.

> appearing in Sections 2, 3, 4 and 5, Article XIII, of the present constitution have been eliminated.
>
> This section clearly indicates that proper procedures for the acquisition of private property for public use are to be determined by the legislature and that compensation for such property must be determined in proceedings in a court of record.

Id. at 3403.

The constitutional convention debates do indicate that there was a clear concern about allowing those who had not suffered a partial taking to receive full recovery. But these same debates indicate that the delegates knew that Michigan construed its just compensation clause liberally and that where there was a partial taking, the landowners were entitled to full diminution-in-value damages.[20] There is nothing in the Address to the People that would suggest to the public that there was any attempt to change Michigan's history of liberally construing the just-compensation clause.

d. Federal case law

In *In re Ziegler*, 326 Mich 183 (1949), this Court cited *Campbell v United States*, and in the instant case, the Court of Appeals also cited *Campbell*. In *Campbell* the landowner had 1.81 acres taken so that the government could build a nitrate plant to aid the World War I war effort. The trial court found that the value of the land taken was $750 and that the value of the remaining estate was damaged by $2,250 due to the taking. *Campbell,* 266 US at 369. A third allegation of damages involved "uses to be made of lands acquired from others," and the trial court valued this at $5,000. The trial court allowed the first two items as damages and disallowed the third.

[20] If *Spiek* were subjected to a common-understanding analysis, those who supported that decision would likely base a good portion of their argument on these debates.

The United States Supreme Court held that the landowner was entitled to "the value of the land taken and the damages inflicted by the taking," but "he was not entitled to have more than that." *Id.* at 371. The court explained:

> Plaintiff had no right to prevent the taking and use of the lands of others; and the exertion by the United States of the power of eminent domain did not deprive him of any right in respect of such lands. And, if the land taken from plaintiff had belonged to another, or if it had not been deemed part and parcel of his estate, he would not have been entitled to anything on account of the diminution in value of his estate. It is only because of the taking of a part of his land that he became entitled to any damages resulting to the rest. In the absence of a taking, the provision of the Fifth Amendment giving just compensation does not apply; and there is no statute applicable in this case that enlarges the constitutional right. If the former private owners had devoted their lands to the identical uses for which they were acquired by the United States or to which they probably will be put, as found by the court, they would not have become liable for the resulting diminution in value of plaintiff's property. The liability of the United States is not greater than would be that of the private users.

Id. at 371-72. The court concluded, "The rule supported by better reason and the weight of authority is that the just compensation assured by the Fifth Amendment to an owner, a part of whose land is taken for public use, does not include the diminution in value of the remainder caused by the acquisition and use of adjoining lands of others for the same undertaking." *Id.* at 372.

The Supreme Court also noted that the land taken was not "indispensable to the construction of the nitrate plant." *Id.* at 371. The Court of Appeals in the instant case noted that under Fifth Amendment law some states had identified

an exception to the general *Campbell* rule of not allowing diminution-in-value claims. Basically where the land taken is indispensable to a project and there is a partial taking, the owner can seek to recover the full diminution in value. Thus, the Court of Appeals remanded the instant case to the trial court for a factual determination of whether the Tomkinses' land for the bridge was indispensable. This "indispensable" caveat makes little sense. If the land was not indispensable, then how would the government have been able to acquire it for a public use?

In *Spiek*, this Court cited *Richards v Washington Terminal Co*. *Richards* involved an owner whose property did not abut a railroad, but whose home was damaged because it was situated near a railway tunnel that funneled an inordinate amount of smoke and gas onto the home. The plaintiff had sought damages for the smoke and gas, as well as the noise and vibrations typical with the operation of a railroad. The United States Supreme Court found most of plaintiff's damages to be *damnum absque injuria*, but allowed claims related to the "special and peculiar damage" of smoke and gas being funneled from the railway tunnel. *Richards,* 233 US at 551, 557.

To the extent that *Campbell* and *Richards* differ from Michigan precedent, they are unpersuasive. In *Hathcock*, this Court discarded federal precedent regarding public use that was not in line with Michigan cases. The federal courts' interpretation of the Fifth Amendment serves as a floor for landowners' rights against governmental takings, not a ceiling. Michigan is allowed to provide — and historically has provided — more protections to property owners.

CONCLUSION

Under the common-understanding doctrine, it is clear that plaintiffs should be allowed to receive compensation for the diminution in the value of their property due to highway

effects. Consideration of the use to which the taken property is put is proper. The *Johnstone* case alone is almost directly controlling, but numerous other cases over many decades consistently support consideration of the total effect of a partial taking on a property's value.

Indeed, a few cases even indicate that just compensation for a taking should be liberally construed to include compensation to property owners in instances where no part of their land was physically condemned. As a consequence, *Spiek* certainly should not be extended; if anything, it should be reconsidered, given that there is prior case law that contradicts it and no common-understanding analysis was performed in regard to it. What is also clear is that the attempt in MCL 213.70(2) to limit the damages due to a person who suffers a partial taking is unconstitutional.

RELIEF REQUESTED

For the above reasons, this Court should hold that MCL 213.70(2) violates art 10, § 2.

Dated: November 16, 2007

Respectfully submitted,

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