STATE OF MICHIGAN
IN THE SUPREME COURT

RENEE B. LAFAVE, SHIRLEY ZIMMER, RONALD J. PROCTOR and JOANN M. PROCTOR,
Plaintiffs/Appellees

v.

SALLY N. COOK, EUGENE DROSTE, MICHELLE DROSTE, JOHANA PARSHALL, PATRICIA M. LIPPINOTT as trustee of PATRICIA M. LIPPINCOTT TRUST, DAWN ALDRICH, JODIE ZIMMER, DANIEL ZIMMER, TRACY ANTHONY, ROBERT ZIMMER, MEDFORD BAILEY, ALICIA BETZ, LEON A. PLATTE as trustee of LEON A. PLATTE TRUST, JAMES A. KOST, MOLLY E. KANDLE-KOST, ROGER KONENSK, DAWN KONENSKI, LAWRENCE MCCALEB, JANET GAMBLE, LONNIE R. REYNOLDS, SHELLEY R. REYNOLDS, JOHN G. BAKER, JOHN J. HARRIS, ROSE M. MANNING, WILLIAM THOMA, CHARLES L. BABCOCK as LYONS TOWNSHIP SUPERVISOR, JOHN M. BUSH as IONIA COUNTY DRAIN COMMISSIONER, FREDERICK A. CHAPMAN as CHAIRMAN OF IONIA COUNTY ROAD COMMISSION, RODNEY STOKES as DIRECTOR OF DEPARTMENT OF NATURAL RESOURCES AND ENVIRONMENT, AT&T, HOMEWORKS TRI-COUNTY ELECTRIC COOPERATIVE, and CONSUMERS ENERGY,
Defendants/Appellees
_____/

SALLY N. COOK,
Counter-Plaintiff/Appellee

v.

RENEE B. LAFAVE, SHIRLEY ZIMMER, RONALD J. PROCTOR and JOANN M. PROCTOR,
Counter-Defendants/Appellees
_____/

Supreme Court Case No.:
_____

COA Case No.:
315439

Lower Court Case No.:
10-27799-CH-K

JAMES A. KOST and MOLLY E. KANDLE-KOST,
Counter-Plaintiffs /Cross-Plaintiffs/
Third Party Plaintiffs/Appellants,

v.

IONIA COUNTY ROAD COMMISSION,
TOWNSHIP OF LYONS, and
STEVEN HILFINGER as DIRECTOR OF
DEPARTMENT OF LICENSING AND
REGULATORY AFFAIRS as successor to the
DEPARTMENT OF LABOR AND ECONOMIC
GROWTH
Third-Party Defendants/Appellees,

and

RENEE B. LAFAVE, SHIRLEY ZIMMER, RONALD J. PROCTOR and JOANN M. PROCTOR,
Counter-Defendants/Appellees,

and

SALLY N. COOK, EUGENE DROSTE, MICHELLE DROSTE, JOHANA PARSHALL, PATRICIA M. LIPPINOTT as trustee of PATRICIA M. LIPPINCOTT TRUST, DAWN ALDRICH, JODIE ZIMMER, DANIEL ZIMMER, TRACY ANTHONY, ROBERT ZIMMER, MEDFORD BAILEY, ALICIA BETZ, ROGER KONENSK, DAWN KONENSKI, LAWRENCE MCCALEB, JANET GAMBLE, LONNIE R. REYNOLDS, SHELLEY R. REYNOLDS, JOHN J. HARRIS, ROSE M. MANNING, WILLIAM THOMA, JOHN M. BUSH as IONIA COUNTY DRAIN COMMISSIONER, FREDERICK A. CHAPMAN as CHAIRMAN OF IONIA COUNTY ROAD COMMISSION, AT&T, HOMEWORKS TRI-COUNTY ELECTRIC COOPERATIVE, and CONSUMERS ENERGY,
Cross-Defendants/Appellees
_____/

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STATEMENT OF JURISDICTION

This Court has jurisdiction to hear and adjudicate this matter pursuant to MCR 7.301(A)(2) from the Michigan Court of Appeals. The Michigan Court of Appeals had jurisdiction to entertain and adjudicate an appeal by right pursuant to MCR 7.203(A)(1). The Ionia County Circuit Court entered its *Order of Final Judgment* on March 27, 2013. A copy of Court of Appeals' unpublished decision/order and a copy of the trial court order are attached hereto as required by MCR 7.302(A)(1)(f), (g).

STATEMENT OF QUESTIONS PRESENTED

I. Did the Court of Appeals error in sua sponte deeming the Kosts' private easement right abandoned despite the Kosts using and protecting the same?

APPELLANTS: **YES**

II. Whether the Circuit Court committed an unconstitutional taking by its judgment?

APPELLANTS: **YES**

KEY ABBREVIATIONS USED IN THE BRIEF

TT Trial Transcript

OO Order and Opinion of the Court issued on December 11, 2012

ROA Register of Actions

STATEMENT OF FACTS / PROCEDURAL BACKGROUND

This case involves the abandonment and vacation of certain portions of three platted streets styled as Weberta Drive, Evelyn Drive, and Shore Drive within the Plat of Electric Park Subdivision in the Township of Lyons, County of Ionia, State of Michigan. Each of these 'Drives' were, prior to this case, undisputedly dedicated to the public. (Kost Defendants' Trial Exhibit A; TT 52, 192). The Kost Defendants are the owners of Lots 453, 464, 465, 466, 467, 468, 469, 470, 481, and 482, as highlighted in yellow. (See Kost Defendants' Trial Exhibit B, copy attached). Plaintiff Renee LaFave is the owner of Lots 432, 433, 440, 441, 454, 455, 456, 461, 462, 463, 471, 480, 483, and 484, as highlighted in red. *Id.* Despite a long winding history in the lower courts, trial on this matter was actually limited to only a few issues, only a fraction of which were challenged on appeal.

The entire procedural history is too tortuous to recount and is largely irrelevant to the issues resolved at trial. When the trial date arrived, the parties had only two pending issues before the trial court: 1.) a request for judicial recognition of a continued private easement along that portion of Weberta Drive sought to be vacated by Plaintiffs and by extension a denial to Plaintiffs' LAND DIVISION ACT claim for Weberta Drive and 2.) respective requests to revise a portion of the Electric Park Subdivision Plat pursuant to the LAND DIVISION ACT, MCL 560.226 and 560.229, to reflect the current property ownership of what use to be Weberta, Evelyn, and Shore Drives.

By a previous order of the Circuit Court entered on June 7, 2012, the Circuit Court entered a stipulated judgment between the Kost Defendants and the Ionia County Road Commission finding a common-law abandonment of the public's rights on the disputed portion of Evelyn Drive and the dispute portion of Shore Drive pursuant to *Ambs v Kalamazoo Cty Road Comm'n*, 255 Mich App 637; 662 NW2d 424 (2003). (Stipulated Judgment Between James Kost, Molly Kandle-Kost and the Ionia County Road Commission, entered June 7, 2013). As to a separate section of Shore Drive sought to be vacated by Plaintiffs, the Kost Defendants offered no objection and essentially consented to this relief. (TT 28). The parties went to trial to provide the opportunity for any other landowner within three hundred feet of either abandoned portions to come forward with a reasonable objection before the Circuit Court was to order the correction of the Electric Park Subdivision Plat to reflect the Kost Defendants' new ownership rights based upon the June 7, 2012 judgment. The same procedure was undertaken to permit any landowner within three hundred feet of Weberta Drive and the separate portion of Shore Drive sought by Plaintiffs to provide an objection. No one objected to the proposed vacation or correction to the Electric Park Subdivision Plat as to Evelyn Drive and either portion of Shore Drive. (Final Judgment, ¶¶2, 3, 6; TT 105). This is undisputed and unchallenged in this appeal.

However, the trial was essentially focused on the objection by the Kost Defendants to the proposed vacation of that portion of Weberta Drive as requested by Plaintiffs. Weberta Drive exists as a sixteen feet (16ft) wide strip of land between

Lots 483-486 and Lots 476-482. See Kost Defendants' Trial Exhibit B. The sub-portion of Weberta Drive sought to be vacated by Plaintiffs exists been Lots 480-482 and Lots 483-484 and colorized as light blue in Kost Defendants' Trial Exhibit B as attached. The Kost Defendants sought to continue to retain their private rights to use all of Weberta Drive despite the common law abandonment of the public's rights by the Ionia County Road Commission. (TT 28-29). In other words, Kost Defendants objected to the vacation of any of their *private* rights to Weberta Drive because the Kost Defendants sought to continue to keep Weberta Drive for private ingress and egress to their home while still respecting the abandonment of the public's usage rights by the Road Commission. As argued in the opening statement, "What we're seeking here, for the Court to recognize that an easement exists for the Kost's (sic) to continue to use Weberta Drive as they always have and want to continue to use into the future." (TT 32). Counsel was extremely clear—this was not a request for an easement by necessity. (TT 32). Rather, it was recognition that a valuable private property right was already existing for the Kosts on Weberta Drive which the Kost Defendants did not wish to give up to the Plaintiffs "because the owner of a property that abuts a road was has the continued right of ingress and egress to the public road…" (TT 32-33). In other words, the trial should have been limited to whether a private property right exists on Weberta Drive despite the Road Commission's abandonment of the public's usage rights—a question of law.

The trial lasted for a single day. (ROA). The Kost Defendants presented undisputed testimony that they had built their home to utilize their private rights

by a second garage door facing onto Weberta Drive because Weberta Drive "a pretty straight shot up to Park Street." (TT 48, 51, 63). This second garage door facing Weberta Drive to utilize Weberta Drive existed in the Kost Defendants' previous home before it was destroyed by fire, and existed in the new home built by the Kosts after the fire. (TT 63-64). Defendant Molly Kandle-Kost testified she wanted the court not to vacate her private rights to Weberta Drive because she "had access to it for 20 years and I want to continue to have access to it" and used Weberta Drive regularly to access her property. (TT 54, 57, 61). The Kost Defendants also sought to be able to improve Weberta Drive for their own continued access. (TT 54, 89).

Defendant James Kost also testified. He testified he and his wife use Weberta Drive for vehicle access (TT 99), repair vehicles usage (TT 99), home and property maintenance (TT 100), boat transport (TT 100-101), and general ingress and egress (TT 102). Specifically, he testified he, as a lot owner, would like to have ingress and egress rights into the future. (TT 102). Also important to Defendant Kost is the use of Weberta Drive as secondary access to the home in case of another fire. (TT 103-104). As he stated so clearly, "After watching my house burn down, yes, we need it." (TT 108). He further stated, after a line of irrelevant questions, "I'd like to able to access my property down the legal road that exists." (TT 127). Plaintiffs' own witnesses testified that they have seen the Kosts and others use Weberta Drive (TT 145-146, 184-185) and that others who own property should have access (TT 146-147). They also testified they had no issues with the Kosts. (TT 148, 157).

When the Kost Defendants were cross-examined, Defendants' counsel objected numerous times as to facts being inquired into by Plaintiffs' counsel as being irrelevant to the legal issue of Weberta Drive or the question of any objections to the vacation of Evelyn or Shores Drives, the substantive issues before the Circuit Court. (TT 57-58, 74, 80-81, 112, 159, 161). The Circuit Court overruled the objections finding it would help with "historical perspective" and for the "element of goodwill and overall neighborly dynamic." (TT 58, 74, 81, 112, 159). Neither of these proffered justifications are legally relevant to the issues before the Circuit Court: the existence of a legal easement on Weberta and any objections to the vacation of the plat for Evelyn Drive. Issues inquired into by Plaintiffs' counsel included replacement lawns (TT 67), trash cans on Park Street and Evelyn Drive (TT 92-93, 125, 158-161), placement of a water well (TT 125), previous +10 year old legal disputes over Evelyn Drive (TT 59112-113), signs, cables, and gates on Evelyn Drive (TT 59-61, 117), fences (TT 68), septic tanks (TT 71-73), the placement of a canoe (TT 63, 118), scope sighting and shooting with no showing of illegal use (TT 121-123), and photographing (TT 67, 124). None of this is or was relevant.

When the time came to place Plaintiffs' proofs on the record, the truth finally came forth—Plaintiff LaFave sought to vacate Weberta Drive so that she could build a new house on it. Plaintiff LaFave needed "four contiguous lots" in order to build a new home. (TT 174). Her property near Weberta Drive, had only two on each side of Weberta Drive—not enough under local county building requirements. (TT 174). But if Plaintiff LaFave could take away the legal rights of Defendants and

others as provided by the Electric Park Subdivision Plat for Weberta Drive lands existing between Lots 480 and 484, she could build her new proposed home by combining Lots 471, 480, 483, and 484.[1] (TT 174; see also TT 224 and Kost Defendants' Trial Exhibit B). Yet, despite this goal, Plaintiff LaFave did not understand before the purchase of the property that the plat provides legal rights to all individuals who live within the subdivision.[2] (TT 186-187). Plaintiff Renee LaFave also testified that she never researched the property rights provided by the plat and never questioned the seller regarding the same. (TT 171). Instead, she later came to the trial court seeking to have the court to take away the legal rights of the Kosts and give them to her for the ability to "provide a home that they [her and her guests] could comfortably be in" given that "[o]ur [current] home is uncomfortable…." (TT 196; see also TT 201).

Realizing that the law was going to preclude the claims brought, Plaintiffs' trial strategy changed and was nothing short of character assassination of the Kosts. First, Plaintiff LaFave attempted to introduce hearsay evidence as to what purported previous owners had to say about the Kosts. The Circuit Court precluded this evidence on hearsay grounds. (TT 178). Plaintiff LaFave claimed to have been

[1] It went unexplained at trial why Plaintiff LaFave could not have built a new home on the many other four contiguous lots configurations she owns in the Electric Park Subdivision Plat. (See Kost Defendants' Trial Exhibit B). Plaintiff LaFave additionally owns a block of six contiguous lots consisting of Lots 454, 455, 456, 461, 462, and 463 and a block of four contiguous lots consisting of Lots 432, 433, 440, and 441. (See *id.* with TT 41, 43, 267-268).

[2] It is black letter law, where a plat is recorded the purchasers receive not only the interest as described in their deed, but also whatever rights as are indicated in the plat. *Kirchen v Remenga*, 291 Mich 94, 102-110; 288 NW 344 (1939); *Fry v Kaiser*, 60 Mich App 574, 577; 232 NW2d 673 (1975).

threatened (TT 179) and intimidated by photo-taking (TT 181), despite herself having a high definition video recording system and offering no video evidence of any alleged wrongful actions by the Kost Defendants. (See TT 199-200). She also characterized the Kosts as "not a stable family" which was objected to by Defendants' counsel and the Circuit Court did not make a ruling. (TT 181-182). Then, Plaintiff LaFave falsely testified about witnessing Defendant without clothing, taking photographs, making a hand-gesture and saying "bang." (TT 179-181, 204-210). Defendants hotly and bitterly dispute this false testimony, but purposely choose not to rebut it (i.e. dignify it with a response) at the trial level because it is irrelevant to a legal property question. When the similar disputed potential testimony was raised during the testimony of DJ Freeman, Plaintiff LaFave's life partner, counsel again objected to the relevancy and again the objection was implicitly overruled. (TT 217). Ms. Freeman also testified that she also did not undertake research into the viability to rebuild a house on Plaintiff LaFave's property before purchasing the property. (TT 223-224).

Following closing arguments, the Circuit Court took the matter under advisement. On December 11, 2012, the Circuit Court issued its *Opinion and Order*. The Circuit Court agreed that no reasonable objections were offered to preclude the plat correction as to Evelyn Drive and the two portions of Shore Drive. This was accurately reflected in the resulting *Order of Final Judgment* as Paragraphs 2, 3, and 6. This part of the case is correct and was not appealed.

However, the Circuit Court spent a considerable amount the *Opinion and Order* detailing whether the Kost Defendants' easement would be judicially recognized. The Circuit Court held "[t]his dispute involves Weberta Drive, an undeveloped although platted road that the parties agree should be vacated. (OO 2). The Circuit Court correctly recited that—

> In the case at bar, although the parties agree that Weberta Drive should be vacated and title to the property should revert to the abutting land owners, the point of contention is that the Defendant Kosts would like to retain an easement across platted Weberta Drive property for their use with vehicles, boats and for walking, maintenance etc. (OO 3 emphasis added).

The Circuit Court continued to frame the issue as—

> By the vacating of Weberta Drive without reservation of an easement to Defendant Kosts, Plaintiff LaFave will have the requisite number of contiguous lots to build a home on her property thus rectifying the nonconforming use concerns as to her property. (OO 4).

Finally, before undertaking an incorrect analysis, the Circuit Court opined that—

> The central dispute in this case is whether the [Circuit] Court in vacating Weberta Drive must reserve for Defendant Kosts an easement in Weberta Drive due to their private interest in the road that was platted for public use but never used as such by the public. (OO 4).

From this point forward, the Kost Defendants contend the Circuit Court undertook an incorrect legal analysis on various fronts. Rather than applying applicable Michigan property law, the Circuit Court undertook a balancing of the equities to determine who was essentially 'more worthy' of Weberta Drive. The Circuit Court held that "it need not reserve for them [Kosts] an easement in Weberta Drive nor is that requested relief warranted given their unclean hands." (OO 4). By this statement, the Circuit Court took away the Kosts' property rights

because it believed, wrongly, the Kost Defendants did not 'deserve' to retain their own property rights. It is clear the trial court believed (rightly or wrongfully) the Kost Defendants to be bad actors, but property rights are not determined by or extinguished based upon a popularity contest. The Circuit Court also rejected Kost Defendants' citation to *2000 Baum Family Trust v Babel* finding "[t]he facts of this case are distinguished from the facts in the *Baum* opinion because in the case at bar, Weberta Drive was never developed as a public road." (OO 5). This conclusion is in error given the holding of *Nelson* and *Minerva Partners*, *infra*. A judgment reflecting the Circuit Court's *Opinion and Order* was entered on March 27, 2013 by motion.

The Kosts appealed by right to the Court of Appeals. By the issues raised on appeal, the Kosts asserted that they already held a property right under the "third right" in *2000 Baum Family Trust* in the form of an private easement on that disputed portion of Weberta Drive because such a private easement continues to exist even after the public abandoned its roadway rights, via the Road Commission, on Weberta Drive. The Court of Appeals' majority and dissent both *agreed* with this conclusion, which was opposite of the trial court's conclusion (noted above). The majority concluded that "rights conferred upon lot owners by a plat including their property are private and independent of whatever rights the public may or may not have" citing *Nelson v Roscommon Co Road Comm*, 117 Mich App 125, 132; 323 NW2d 621 (1982). *LaFave v Ionia County Road Comm'n*, unpublished decision of

the Court of Appeals, Jan 27, 2015 (Docket No. 315439), slip maj opn, at *3. The dissent also agreed—

> I also agree that owners of lots in a plat enjoy a right to use a roadway, which is separate and independent from the public's right to use that roadway and the abutting property owners' rights. *2000 Baum Family Trust v Babel*, 488 Mich 136, 152; 793 NW2d 633 (2010); *Petition of Engelhart*, 368 Mich 399; 118 NW2d 242 (1962); *Kirchen v Rumenga*, 291 Mich 94, 108; 288 NW 344 (1939); see also 2 Restatement Property, 3d, § 2.13, p 172.

Id, slip dissenting opn, at *2. The majority then concluded, despite the issue not being raised by any party, that the Kosts had *abandoned* their right to Weberta Drive. *Id.*, slip maj opn, at *3. Despite a trial record of actual use by the Kosts, the majority *sua sponte* concluded that "sufficiently lengthy nonuse may constitute part of the requisite manifestation of intent to abandon." *Id.*, slip maj opn, at *4. This is where the majority erred, both legally and factually. As the dissent points out, "the trial court did not make any express findings regarding the Kosts' intention to abandon any rights they had remaining in Weberta Drive."

> Despite the trial court's failure to address the Kosts' intent, the majority nevertheless concludes that the Kosts' nonuse, "coupled with their apparent desire to prevent anyone else from using the easement rather than any genuine desire to use it themselves, [3] constitutes an overt act manifesting an intent that the easement be abandoned." I respectfully disagree. The Kosts testified that they built their garage to utilize both Evelyn Drive and Weberta Drive, and LaFave's partner testified that, despite the fence erected by LaFave's predecessor, which prevented the Kosts from driving on Weberta Drive, James Kost warned her that the Kosts still intended to use Weberta Drive as a road. Moreover, the evidence showed that the Kosts subsequently filed suit to have the fence removed, and that after the fence was removed by court order, plaintiffs observed the Kosts driving on Weberta Drive. In my judgment, all of this evidence precluded the trial court from finding that the

[3] Assuming the majority is correct in this assertion, property rights in Michigan specifically *include* the right to *exclude* others—a long recognized "ancient" property right. *Holton v Ward*, 303 Mich App 718, 727; 847 NW2d 1 (2014). As such, exclusion is the assertion of property rights.

> Kosts' nonuse of Weberta Drive as a road showed they also intended to abandon their rights, as lot owners in the plat, to use Weberta Drive as a road.

Id, slip dissenting opn, at *2.

This application now follows because the Court of Appeals' majority decision is clearly erroneous as being contrary to the long standing law of abandonment and has caused material injustice to the Kosts in the actual loss of formally acknowledged property rights recognized by the both the majority and the dissent, yet taken away by a conclusion of abandonment by the majority contrary to law and fact. MCR 7.302(B)(5). This Court is requested to take action to correct this error.

ARGUMENT

I. The Court of Appeals erred in sua sponte raising (and then deciding) an issue not raised by the Kosts on appeal and reached a conclusion contrary to the law and facts of the case.

A. Property law is the highest form of precedence required to remain stable and constant.

Society's interest in being able to rely on established precedent is at its apex with regards to judicial precedents that exposit property rights. See *Oregon ex rel State Land Bd v Corvallis Sand & Gravel Co*, 429 US 363, 381 (1977). Legal questions affecting ownership of land and land-based interests, once answered, "should be considered no longer doubtful or subject to change." *United States v Title Ins & Trust Co*, 265 US 472, 486-87 (1924). "Such decisions become rules of property, and many titles may be injuriously affected by their change." *Id.* at 486.

B. Kosts have a continued private easement to use Weberta Drive despite the public's abandonment of certain rights provided under the plat.

The question present to the Circuit Court and later the Court of Appeals by the Kost Defendants was whether the Kosts already have a continued private easement to use Weberta Drive despite the public's abandonment of certain rights provided under the plat. When the Circuit Court seemingly said no, the Court of Appeals was called upon to answer this question. Its answer was yes (by both the majority and dissent), contrary to the Circuit Court.

This Court has explained that the owner of property abutting upon a public roadway "sustains a threefold relation to the street:"

1. As one of the general public.
2. As owner of the reversionary interest to the center of the street.
3. As owner of a lot, possessed of the right of ingress and egress to and from the street.

2000 Baum Family Trust v Babel, 488 Mich 136, 152; 793 NW2d 633 (2010).[4] Each adjacent property owner then receives title to the property upon abandonment as "the reversionary interest to the center of the street." *2000 Baum Family Trust, supra* at 152. This includes the Kosts receiving eight feet of property along the south side of Weberta Drive by Lots 481, 482, and 468. (See Kost Defendants' Trial Exhibit B; Final Judgment, ¶9(d)). The north side of Weberta Drive adjacent to Lot

[4] The Circuit Court treated this Court's decision in *2000 Baum Family Trust* as dicta. The Court of Appeals held this to be in error. "We are not so inclined to agree with the trial court's opinion that the relevant portion of *2000 Baum Family Trust* was non-binding dicta…. [O]ur Supreme Court explained that this third right is derived from *private* rights conferred as between grantors and grantees of property by deeds referring to plats." *LaFave, supra*, slip maj opn at *3.

483 would then be owned by Plaintiff LaFave. (See Kost Defendants' Trial Exhibit B; Final Judgment, ¶9(c)). However, the dispute between the parties came into play as to the last 'threefold relation' (or referred to by the majority as the 'third right')—the Kosts' private easement on "private Weberta Drive" to reach access on Park Street, the main public road. Michigan law recognizes this "right of access" as a "private right" that flows from a deed that refers to a plat, and is distinct from the public's rights in a road. *2000 Baum Family Trust, supra* at 157. "A grantee of property in a platted subdivision acquires a private right entitling him 'to the use of the streets and ways laid down on the plat, regardless of whether there was a sufficient dedication and acceptance to create public rights.'"[5] *Nelson v Roscommon Co Rd Comm*, 117 Mich App 125, 132; 323 NW2d 621 (1982). "[I[f the platted streets in a subdivision are abandoned for public use, the lot owners still retain a separate, private right to use the streets in that subdivision." *Minerva Partners, Ltd v First Passage, LLC*, 274 Mich App 207, 298; 731 NW2d 472 (2007)(emphasis added). "Essentially, the lot owners retain an independent easement over the streets formerly dedicated for public use, which is unaffected by the road commission's abandonment of these streets."[6] *Id.* The majority and dissent agreed with this legal

[5] To the extent the Circuit Court took into consideration or made a finding that Weberta Drive was never used by the public is legally irrelevant in light of *Minerva Partners*. (See OO 4 "The central dispute in this case is whether the Court in vacating Weberta Drive must reserve for Defendant Kosts an easement in Weberta Drive due to their private interest in the road that was platted for public use but never used as such by the public." emphasis added). To the extent the Circuit Court utilized a finding of a lack of regular actual use of Weberta Drive to equate to abandonment by Kost Defendants (see OO 6), nonuse by itself is insufficient to show abandonment of a right. *Sparling Plastic Indus, Inc v Sparling*, 229 Mich App 704, 718; 583 NW2d 232 (1998).

[6] To remove any remaining potential private right of other lot owners, a plat vacation is required. *Martin v Beldean*, 469 Mich 541; 677 NW2d 312 (2004)("exclusive means available when

conclusion on this issue of law. *LaFave, supra*, slip maj opn, at *3; slip dissenting opn, at *2. However, the majority did not stop there.

C. The majority acted sua sponte on an unraised issue and reached the wrong conclusion.

In light of this error of the Circuit Court to the contrary, the panel should have remanded the case back to the Circuit Court for further consideration in light of the error committed by the Circuit Court.[7] As noted in the motion for reconsideration, the Kosts argued "it would materially unfair to legally fault the Kosts for not arguing precisely in opposition to something which was never raised, framed, or contested by an opposing party before the trial court." Motion for Reconsideration, dated Feb 5, 2015, p. 5. The same applies at the Court of Appeals. Instead, the majority held that despite "[t]he Kosts accurately point[ing] out that the mere nonuser of an easement created by a grant is insufficient to extinguish that easement," the majority then erroneously counter-concluded "sufficiently lengthy nonuse may constitute part of the requisite manifestation of intent to abandon." *LaFave, supra*, slip maj opn at *4. The majority went on to explain that

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seeking to vacate, correct, or revise a dedication in a recorded plat is a lawsuit filed pursuant to MCL 560.221 through 560.229."). This Court in *In re Gondek*, 69 Mich App 73, 75; 244 NW2d 361 (1976) adopted the "reasonable objection" standard from the predecessor statute which requires that a party opposing a petition to vacate a portion of a plat has the burden to establish a reasonable objection to the proposed vacation. *Id.* at 74. A reasonable objection has been offered by the Kost Defendants. Access to one's property as it existed under a recorded plat at the time of purchase forms the basis of a reasonable objection to impairment of that access by vacation. *Vander Meer v Ottawa County*, 12 Mich App 494, 497; 163 NW2d 227, 229 (1968) (citing *Westveer v Ainsworth*, 279 Mich 580, 585; 273 NW 275 (1937)).

[7] The claim or issue of abandonment of the Kost private easement by nonuse was not raised by any party in the trial court, or before Court of Appeals. Below, Appellee LaFave argued that the Kosts had no property rights at all because the Kosts failed *to establish* property rights *by prescription*—a completely different theory that the one actually utilized by the lead opinion. Appellee LaFave did *not* argue that the Kosts abandoned its property easement rights *by non-use*.

> To be clear, we do not hold that the Kosts abandoned the easement through nonuse, but rather that their nonuse combined with other circumstances of the situation[8] explains their actions as manifesting an intent to abandon. Such nonuse "is an important fact to be considered in connection with [their] other acts in determining [their] intention."

LaFave, supra, slip maj opn at *5 fn2. This legal analysis or such a conclusion was never undertaken or made by the Circuit Court at trial or raised by the parties in the Court of Appeals. Notwithstanding, the majority's conclusion is erroneous because it is black-letter law that nonuse by itself is insufficient to show abandonment of a right. *Sparling Plastic Indus, Inc v Sparling*, 229 Mich App 704, 718; 583 NW2d 232 (1998). This court has specifically stated so. *Mich Dep't of Natural Resources v Carmody-Lahti Real Estate, Inc*, 472 Mich 359, 385; 699 NW2d 272 (2005)(citing *Ludington & Northern Railway v Epworth Assembly*, 188 Mich App 25; 468 NW2d 884 (1991)). The dissent correctly noted the error committed by the majority when Judge Wilder opined—

> I respectfully dissent from the majority's determination that, on the basis of the trial court's finding of nonuse, Molly Kandle-Kost and James Kost (the Kosts) abandoned any rights they had remaining in Weberta Drive as lot owners in the plat. Abandonment requires nonuse *coupled* with intent to abandon. See *Ludington & Northern R v Epworth Assembly*, 188 Mich App 25, 33; 468 NW2d 884 (1991). Although the trial court found credible testimony to the effect that Weberta Drive had not been regularly used by anyone, **the trial court did not make any express findings regarding the Kosts' intention to abandon any rights they had remaining in Weberta Drive.** Despite the trial court's failure to address the Kosts' intent, the majority nevertheless concludes that the Kosts' nonuse, "coupled with their apparent desire to prevent anyone else from using the easement rather than any genuine desire to use it themselves, constitutes an overt act manifesting an intent that the easement be abandoned." I respectfully disagree. **The Kosts testified that they built their garage to utilize both Evelyn Drive and**

[8] It is unclear from the majority decision what these 'other circumstances' are to warrant the drastic decision of extinguishing the Kosts' property rights.

> **Weberta Drive, and LaFave's partner testified that, despite the fence erected by LaFave's predecessor, which prevented the Kosts from driving on Weberta Drive, James Kost warned her that the Kosts still intended to use Weberta Drive as a road. Moreover, the evidence showed that the Kosts subsequently filed suit to have the fence removed, and that after the fence was removed by court order, plaintiffs observed the Kosts driving on Weberta Drive.** In my judgment, all of this evidence precluded the trial court from finding that the Kosts' nonuse of Weberta Drive as a road showed they also intended to abandon their rights, as lot owners in the plat, to use Weberta Drive as a road.

LaFave, supra, slip dissenting opn at *2.

D. Kosts assert, by this application, that the dissent is correct, both in law and in fact, and the majority opinion erred causing material injustice to the Kosts.

Both this Court in *Carmody-Lahti* and the dissent cite the applicable Michigan standard via *Ludington*: abandonment requires nonuse coupled with intent to abandon. The dissent is correct that the court record is replete with direct evidence where the Kosts used Weberta Drive and intended to keep it (else why fight in the courts for the same). See *supra*, pp. 3-5; see also *LaFave, supra*, slip dissenting opn at *2. In the record, both Defendant James Kost and Defendant Molly Kandle-Kost explicitly intended and desired to retain their easement afforded by law into the future. See *supra*, pp. 3-5; see also TT 28-29. Defendant Molly Kandle-Kost testified she wanted the court not to vacate her private rights to Weberta Drive because she "had access to it for 20 years and I want to continue to have access to it" and used Weberta Drive regularly to access her property. (TT 57, 61). Defendant James Kost testified he, as a lot owner, would like to have ingress and egress rights into the future. (TT 102). Because the easement was not abandoned, the continued desire to keep private rights defeats a vacation action

under the LAND DIVISION ACT. Access to one's property as it existed under a recorded plat at the time of purchase forms the basis of a reasonable objection to impairment of that access by a proposed vacation action. *Vander Meer v Ottawa County*, 12 Mich App 494, 497; 163 NW2d 227, 229 (1968) (citing *Westveer v Ainsworth*, 279 Mich 580, 585; 273 NW 275 (1937)). Moreover, "[i]t is [also a] reasonable objection to vacation of the plat that it is proposed to take from the lot owners the conditions they prize as advantages and for which they have paid." *Vander Meer, supra*.

E. Absent correction by this Court, the Court of Appeals committed a judicial taking by its majority decision.

Given the error of the Court of Appeals and absent action by this Court, the Court of Appeals has taken the Kosts' recognized property right of a private easement upon the disputed portion of Weberta Drive. Moreover, absent correction by this Court, such a drastic change in Michigan property law affecting the Kosts' title would constitute a taking without just compensation. If "a court declares that what was once an established right of private property no longer exists, it has taken that property." *Stop the Beach Renourishment, Inc v Florida Dep't of Environmental Protection*, 130 S Ct 2592, 2602 (2010); see also *Smith v United States*, 709 F3d 1114, 1116-17 (2013). Or perhaps the same is an unconstitutional violation of substantive due process. *Stop the Beach, supra*, at 2615 (Kennedy, J., concurring in part and concurring in the judgment)("The Court would be on strong footing in ruling that a judicial decision that eliminates or substantially changes established property rights" violates the Due Process Clause.).

To avoid the subsequent constitutional action for the property deprivation, the Kosts advocate that the appropriate remedy to resolving issues not directly argued, framed, or decided in the Court of Appeals would have been to remand the case with instructions to resolve the issue in the first instance, allowing the parties to present their arguments and evidence with the issue properly framed, as to whether the Kosts has the intent to abandon their private easement right under *Carmody-Lahti* and *Ludington*. This Court is requested to order the same to avoid the material injustice to the Kosts and the unconstitutional actions of the Court of Appeals' majority decision.

II. The Circuit Court's judgment effectuated an unconstitutional taking by a governmental actor—the judiciary.

A. Standard of Review

Whether a government actor committed a taking is a constitutional issue, which is reviewed de novo. *People v Nutt*, 469 Mich 565, 573; 677 NW2d 1 (2004); see also *Mahaffey v Attorney General*, 222 Mich App 325, 334; 564 NW2d 104 (1997). The question whether a proposed taking is constitutional is also reviewed de novo. *City of Novi v Robert Adell Children's Funded Trust*, 473 Mich 242; 701 NW2d 144 (2005). This issue was preserved for appeal in the lower court. (TT 241; see also OO 5).

B. The Circuit Court committed a temporary taking which requires just compensation under constitutional jurisprudence.

Both the Michigan and Federal Constitutions prohibit the taking of private property for public use without just compensation. U.S. Constitution, Am. V; Const.

1963, art. 10, § 2. It is an unconstitutional taking if the government takes private property from one and gives it to another for a private purpose. *Tolksdorf v Griffith*, 464 Mich 1; 626 NW2d 163 (2001). Contrary to the Circuit Court's declaration that no taking has been initiated[9] (OO 5-6), the Circuit Court, by its judgment, took property from one set of private parties, the Kosts, and gave it to another, LaFave, without just compensation because it seemed the Kosts unworthy of their property rights. This is an unconstitutional taking by the judiciary—a government actor. See *Stop the Beach, supra* (recognizing the judiciary can be the taking entity). Despite specifically raising this issue on appeal, the Court of Appeals never even addressed or hinted at the challenge raised by the Kosts by the Circuit Court denying the same. See *LaFave, supra*. This was in error.

At minimum, Michigan courts overturn and reverse orders which result in an unconstitutional taking. *Mumaugh v McCarley*, 219 Mich App 641, 647; 558 NW2d 433 (1996)("This order constituted a taking of Phelps' property in violation of the United States and Michigan Constitutions. Accordingly, we reverse the trial court's order and remand this case to the trial court..."). Thus, unconstitutional governmental actions in the form of judgments and orders by the judiciary cannot stand. See *id*. Because it has happened, the Kost Defendants are also entitled compensation in the form of fair market value of its property during the period the

[9] The Circuit Court also opined that "Defendant Kosts will benefit in terms of the value of their land by eliminating the possibility of having the public or private neighbors traverse their property to and from the water's edge and Park Street." (OO 5). No evidence was submitted or provided by either party to the Circuit Court to permit the Circuit Court make this conclusion in any fashion.

taking has occurred. *First English Evangelical Lutheran Church v Los Angeles County*, 482 US 304 (1987); see also *K&K Const v Dep't of Natural Resources*, 217 Mich App 56; 551 NW2d 413 (1996)(same). *First English* holds that a temporary taking that has already denied an owner all use of its property requires just compensation for the period during which the taking was effective. *First English, supra,* at 321. Where the government's activities have already worked a taking of all use of property, no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective. *K&K supra* (citing *First English*, *supra* at 321). The typical compensation in cases of a temporary taking is fair market rental value. *Id.*; see also *Kimball Laundry Co v United States*, 338 US 1, 24 (1949). This Court is requested to remand this case back to the Circuit Court for an evidentiary hearing and a determination as to the amount the Court deems appropriate as the fair market rental value of the taking of the Kost Defendants' Weberta Drive easement since March 27, 2013 and order payment be made by the responsible party.

REQUESTED RELIEF

Based upon the arguments as presented, this Court is requested, pursuant to MCR 7.302(H)(1), to peremptory vacate the majority decision of the Court of Appeals and adopt the dissent's opinion resulting in the reversal of Paragraphs 7 and 8 of the *Order of Final Judgment* by finding that the Kost Defendants have a continued private legal easement to use Weberta Drive and that the Kost Defendants have proffered a reasonable objection to the complete vacation of

Weberta Drive based upon their desire to keep their private easement rights under *2000 Baum Family Trust* and *Nelson*.

The Court is also requested, pursuant to MCR 7.302(H)(1), to direct the Court of Appeals to undertake the question presented by the Kosts that the Circuit Court committed an unconstitutional taking without just compensation as required under *First English* and *K&K Const*.

In the alternative in the absence of peremptory action, this Court is requested to grant leave on all these issues presented pursuant to MCR 7.302(H)(1).

RESPECTFULLY SUBMITTED:

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Date: April 13, 2015