STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF GRAND TRAVERSE

WILLIAM M. HOVEY,

Plaintiff,

v

File No. 2013029896AA
HON. PHILIP E. RODGERS, JR.

PENINSULA TOWNSHIP and PENINSULA TOWNSHIP ZONING BOARD OF APPEALS,

Defendants.
_____/

Mark A. Hullman (P15254)
Attorney for Plaintiff

Bryan Graham (P35708)
Attorney for Defendants

DECISION AND ORDER GRANTING
DEFENDANTS' MOTION FOR SUMMARY DISPOSITION

I. FACTUAL AND PROCEDURAL HISTORY

This case pertains to real property located in Peninsula Township, Grand Traverse County, Michigan. The factual and procedural history is as follows. On November 12, 1991, the Peninsula Township Board adopted Amendment 88, which supplemented language in Section 3.2 of the Peninsula Township Zoning Ordinance (hereinafter the "Ordinance") and added Section 7.10. The relevant portions of Section 3.2 read:

> Road – Access by Easement – Easement Access: A right-of-way or commons area including a frontage road which provides access to a lot or parcel in lieu of access from a public or private road.
> Road – County Standards: The Standards and Specifications for Subdivision Streets as adopted by the Grand Traverse County Road Commission.
> Road – Cul-de-sac: A local road of short length having one end terminated by a vehicular turn-around.
> Road – Frontage is a private road approved by the Township Zoning Administrator as meeting the published standards of Peninsula Township to serve as a lot frontage road for Zoning purposes, and may include approved roads in a

Condominium Project, but does not include alleys, easements, driveways, or the like unless they have been approved by the Township as frontage roads.
Road – Highway A right-of-way along with related improvements which provides for vehicular and pedestrian access to abutting properties.
Road – Local Access: Local access roads provide access to homes, farms and other low intensity land uses. Traffic desires are local in nature and these roads do not require continuity for an extended length.
Road – Local: a public or private road designated a local road by the Grand Traverse County Road Commission which is intended primarily for access to abutting properties.
Road – Marginal Access: A local road which is parallel and adjacent to arterial roads and which provides access to abutting properties and protection from through traffic and not carrying through traffic.
Road – Primary: Those roads of considerable continuity which are designated as primary roads by the Grand Traverse County Road Commission.
Road – Private Subdivision is a private road in a subdivision approved by the Grand Traverse County Road Commission pursuant to the Plat Act (Act 288, P.A. of 1967 as amended).
Road – State Highway: State or federal numbered highway.
Road – Sight Distance: The unobstructed vision on a horizontal plane along a road centerline from a driver-eye height of 3.75 feet and an object height of 6 inches.

Article VII of the Ordinance pertains to supplementary regulations and applies equally to all zoning districts in the township according to the terms of the various regulations. Section 7.10, added to the Ordinance by Amendment 88, addresses Road Standards. More specifically, Section 7.10.1(1) states:

> No parcel of land or lot created after the adoption of this amendment shall be issued a land use permit without having the required lot width or frontage width along a public road a private road or an approved frontage road.

Section 7.10.4, regarding rights-of-way, temporary grading easement and utility easements states:

> The following right-of-way, temporary grading easements and utility easements are required for all private roads:
>
> Right-of-Way or Easement Access Minimum Width of 33 feet.
> The frontage road including shoulders and ditches shall be located within the Right of Way or Easement Access.

Section 7.10.6, regarding road layouts, states:

> (1) The road layout shall conform to any adopted road plan of Peninsula Township and shall also conform to the pattern established by adjacent roads.
> (2) All existing roads that terminate at the boundaries of a proposed development shall be connected with the road system of the proposed development.
> (3) Suitable access from an isolated parcel previously dependent on this property for sole access to existing public roads must be provided such access by easement or dedication.
> (4) The layout of roads shall provide as much as possible for a continuous circuit for travel. In special cases where the lands to be divided are limited in area or are subject to a natural barrier, the Township Board or Zoning Administrator may approve a dedication which provides access to another road at one end only if a cul-de-sac of forty (40) foot minimum roadbed radius with sixty (60) foot radius right-of-way is provided at the terminus of the road to permit turning in a continuous circuit. No more than five driveways will be permitted to enter the cul-de-sac beyond the point of curvature at the beginning of the cul-de-sac. A cul-de-sac shall not be allowed where it is reasonable to connect to adjacent properties.

Plaintiff/Appellant owns a parcel of property with the temporary address of 7710 Peninsula Drive (hereinafter the "Subject Parcel"). In addition, Plaintiff was previously granted a 20-foot wide easement for a driveway for ingress and egress over the contiguous real property commonly known as 277 Peninsula Ridge (hereinafter "Peninsula Ridge Property").[1] Plaintiff desires to construct a single-family dwelling on the Subject Parcel, which is zoned R-1B under the Ordinance. The Subject Parcel is landlocked and does not have access to the existing, nonconforming private road system that services the four existing residences in the area.[2] In order to provide access to the Subject Parcel from the existing, nonconforming private road system, the Plaintiff proposed installation of a new private road.[3] The proposed road did not comply with the requirements for a new private road under Section 7.10 of the zoning ordinance and the Plaintiff filed an application on November 14, 2012, requesting nine dimensional

[1] Easement Agreement, recorded February 29, 2012 with the Grand Traverse County Register of Deed at 2012R-03435. Plaintiff previously owned the Peninsula Ridge Property and in 2007, he was conditionally granted a land use permit to build a home on the combined, contiguous parcels. The condition for the permit was that Plaintiff not split the two parcels after the home was constructed. According to Plaintiff, the home would have been constructed primarily on the Subject Parcel and would have been accessed by proposed driveway that would have originated on the private road abutting the south side of the Peninsula Ridge Property. However, in early 2010 the mortgagor-bank foreclosed on the property and Freddie Mac purchased the property on May 5, 2010.

[2] The private road system that services the four existing residences in the area was developed prior to the enactment of the Township private road regulations and therefore constitutes a nonconforming use under the zoning ordinance.

[3] According to Plaintiff, he would not be issued a land use permit to construct a house on the Subject Parcel until the Subject Parcel was made accessible by a private road conforming to the standards set forth in Section 7.10 of the Zoning Ordinance. Plaintiff states that the new private road would be installed in the exact location of the previously proposed driveway. See FN 1.

variances from the zoning ordinance. In January 2013, Plaintiff's application was heard by the Peninsula Township Zoning Board of Appeals (hereinafter "ZBA").[4] Ultimately, the ZBA denied eight of the Plaintiff's requested variances.

On July 29, 2013, Plaintiff filed his initial complaint in this case and on August 19, 2013 he filed his First Amended Complaint, which contained two counts. Plaintiff appealed the ZBA's decision, pursuant to MCL § 125.3607, in Count I, and in Count II, requested a declaratory judgment finding the private road standards of the Peninsula Township Ordinance violate statutory and constitutional law.

On October 15, 2013, the Court issued an Order Dismissing Appeal as to Count I of Plaintiff's First Amended Complaint. Subsequently, on March 27, 2014, the Defendants filed a Motion for Summary Disposition of the remaining count and the Court heard oral arguments on April 28, 2014. In consideration of the parties' arguments and after reviewing the evidence submitted, the Court now issues this written decision and order.

II. STANDARD OF REVIEW

A motion filed under MCR 2.116(C)(10) tests the factual support for a claim and should be granted when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.[5] Under MCR 2.116(C)(10), a party may move for dismissal of a claim on the ground that "there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law." A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ.[6] The moving party must specifically identify the undisputed factual issues and support its position with documentary evidence.[7] The nonmovant then has the burden of showing that a genuine issue of disputed fact exists and producing admissible evidence to establish those disputed facts.[8] Conjecture, speculation, conclusions, mere allegations or denials, and inadmissible hearsay are not sufficient to create a

[4] The hearing was continued on February 14, 2013 and concluded on June 13, 2013.
[5] *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003); *Miller v Purcell*, 246 Mich App 244, 246; 631 NW2d 760 (2001).
[6] *West v Gen Motors Corp*, 469 Mich 177; 665 NW2d 468 (2003).
[7] MCR 2.116(G)(3)(b); *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999).
[8] *Meagher v Wayne State Univ*, 222 Mich App 700, 719; 565 NW2d 401 (1997); *Neubacher v Globe Furniture Rentals*, 205 Mich App 418, 420; 522 NW2d 335 (1994).

question of fact for the jury.[9] The trial court must consider all the documentary evidence in the light most favorable to the nonmoving party.[10] If the opposing party fails to present documentary evidence establishing the existence of a material factual dispute, the motion is properly granted.[11] Trial courts are not permitted to assess credibility or to determine facts on a motion for summary disposition.

III. ARGUMENTS

With regard to his last remaining count, Plaintiff claims: that the zoning applied to his land constitutes a taking of his property without just compensation; that the zoning, as applied to his property, amounts to a taking by eminent domain without due process of law; that the zoning regulation is arbitrary and capricious in that it does not bear a substantial relation to the public health, safety, morals or general welfare; and that the facts of the case support a due process taking claim, a substantive due process claim and an equal protection claims.

Conversely, Defendants argue that there are no genuine issues as to any material fact and summary disposition should be granted in their favor. Specifically, Defendants contend that the Ordinance requirement that a parcel have frontage on a public road, private road or an approved frontage road advances a variety of legitimate government interests. Requiring the frontage guarantees that the parcel is accessible by emergency vehicles, allows for the provision of public utilities, and ensures sufficient area for separation of sewer systems and water wells. Defendants maintain that the Ordinance is applied uniformly to all zoning districts in the township and there cannot be, as a matter of law, a violation of the uniformity requirement of MCL § 125.3201(2).

IV. ANALYSIS

Municipalities have the authority to regulate land use through zoning pursuant to the Michigan Zoning Enabling Act.[12] The Zoning Enabling Act provides that a local unit of government may provide by zoning ordinance for the regulation of land development and the establishment of one or more districts, which regulate the use of land and structures to meet the needs of the state's citizens for food, fiber, energy, and other natural resources, places of

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[9] *LaMothe v Auto Club Ins Ass'n*, 214 Mich App 577, 586; 543 NW2d 42 (1995); *Cloverleaf Car Co v Phillips Petroleum Co*, 213 Mich App 186, 192-193; 540 NW2d 297 (1995); *Neubacher, supra* at 420; *SSC Assoc Ltd Partnership v Detroit Gen Retirement Sys*, 192 Mich App 360, 364; 480 NW2d 275 (1991).
[10] MCR 2.116(G)(4); *Maiden, supra* at 120.
[11] *McCormic v Auto Club Ins Ass'n*, 202 Mich App 233, 237; 507 NW2d 741 (1993).
[12] MCL § 125.3101 *et seq*.

residence, recreation, industry, trade, service, and other public facilities and facilitate adequate and efficient provision for transportation systems, sewage disposal, water, energy, education, recreation and other public service and facility and to promote public health, safety and welfare.[13] The Act also provides that regulations shall be uniform for each class of land or buildings, dwellings, and structures within a district.[14]

The Michigan and United States Constitutions both provide provisions that guarantee equal protection of the law.[15] Equal protection mandates that persons in similar circumstances between treated similarly.[16] When a party is not a member of a protected class and does not allege a violation of a fundamental right, the challenged regulatory scheme will survive equal protection analysis if it is rationally related to a legitimate government interest.[17] A party raising an equal protection challenge has the burden of proving that the challenged law is arbitrary and thus, irrational.[18] Further, a landowner who seeks to challenge a municipal zoning ordinance on constitutional grounds must prove affirmatively that the ordinance is an arbitrary and unreasonable restriction on the owner's use of his property.[19]

Furthermore, both the federal and state constitutions prohibit the taking of private property for public purposes without due process and just compensation.[20] A "taking" may occur when a governmental entity exercises its power of eminent domain through formal condemnation proceedings or where the governmental entity exercises its police power through regulation which restricts use of property.[21] However, land-use regulations are generally upheld where they promote the health, safety, morals, or general welfare, even though the regulation

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[13] *Id.*
[14] *Id.*
[15] *Maple BPA, Inc. v Bloomfield Charter Twp*, 302 Mich App 505, 519; 838 NW2d 915 (2013).
[16] *Neal v Oakwood Hosp Corp*., 226 Mich App 701, 716; 575 NW2d 68 (1997).
[17] *Maple BPA, supra*.
[18] *Id.*
[19] *Ed Zaagman, Inc. v City of Kentwood*, 406 Mich 137; 277 NW2d 475 (1979). *Dowerk, supra*. [Plaintiff asserting a regulatory taking claim carries the burden of proving that the value of her land has been destroyed by the regulation or that she is precluded from making use of the property, which typically requires proof that the land is unsuitable or unmarketable as zone. Mere disparity in value between potential uses for property does not meet the threshold necessary to establish a taking.]
[20] *Dowerk v Charter Twp of Oxford*, 233 Mich App 62; 592 NW2d 724 (1998).
[21] *Bevan v Brandon Twp*, 439 Mich 1202; 475 NW2d 37 (1991). *Risko v Grand Haven Charter Twp Zoning Bd of Appeals*, 284 Mich App 453, 463; 773 NW2d 730 (2009). [Fundamental uses or rights attendant to the land are statutorily subject to regulation. Substantial property rights may include the right to possess, use, and enjoy the valuable and important aspects of one's land, but subject to land use regulations that advance legitimate governmental interests.]

may adversely affect recognized property interests.[22] Land-use regulation does not effect "taking" if it substantially advances legitimate state interests and does not deny a land owner economically viable use of his or her land.[23]

The question whether a zoning regulation denies the owner economically viable use of his land requires at least a comparison of the value removed with the value that remains.[24] Whether a zoning ordinance deprives an owner of economically viable use of his property requires consideration of such factors as the economic effect of the regulation and the extent of its interference with reasonable investment-backed expectations.[25] The United States Supreme Court has ruled that a mere diminution in property value which results from regulation does not amount to a taking and that a property owner must prove that the value of his land has been destroyed by the regulation or that he is precluded from using the land as zoned.[26] An aggrieved property owner must show that if the ordinance is enforced the consequent restrictions on his property preclude its use for any purpose to which it is reasonably adapted.[27] The owner must show that the property is either unsuitable for use as zoned or unmarketable as zoned.[28] There is no "taking" merely because an owner's best or most profitable use of property has been denied.[29]

In *Dowerk v Charter Twp of Oxford*, Dowerk, an owner of a landlocked parcel of real property, sought building permits from the township.[30] Dowerk owned a 10-acre parcel of land zoned for single-family residences.[31] The only access to this landlocked property was by an

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[22] *Id*. at 390.
[23] *Id*.
[24] *Id*. at 391 citing *Keystone Bituminous Coal Ass'n v DeBenedictis*, 480 US 470; 107 S Ct 1232; 94 L Ed 2d 472 (1987).
[25] *Id*.
[26] *Id*. at 402-403. Federal and state courts have recognized in a variety of contexts that government may execute laws or programs that adversely affect recognized economic values.
[27] *Kropf v City of Sterling Heights*, 391 Mich 139, 162-163; 215 NW2d 179 (1974).
[28] *Kirk v Tyrone Twp*, 398 Mich 429, 444; 247 NW2d 848 (1976). [The court here did not find the property unmarketable after an unsuccessful attempt to sell the property to the Department of Natural Resources. The court noted that no evidence was provided, and no factual findings were made, concerning the extent of the effort or methods used in attempting to sell the property. The record did not reflect the price at which the property was offered or the value of comparable lands, or any other evidence that would justify a conclusion that the property as zoned was unmarketable.]
[29] *Hamilton Bank of Johnson City v Williamson Co Regional Planning Comm*, 729 F2d 402 (1984). *Penn Central Trans Co v New York City*, 438 US 104; 98 S Ct 2646; 57 L Ed 2d 631 (1978). [The submission that appellants may establish a taking simply by showing that they have been denied the ability to exploit a property interest that they heretofore believed was available for development is quite simply untenable.]
[30] *Dowerk*, *supra* at 65-66.
[31] *Id*.

existing private road called Kimberly Drive, which connected to the public highway.[32] The township had an ordinance indicating that construction permits would not be issued unless the potential building site had frontage on either a public road or a private road meeting specific local standards.[33] Dowerk received conditional permission from the township to subdivide the landlocked parcel, so long as Kimberly Road was brought up to the required standards.[34] When the requested permits were denied, Dowerk brought an action alleging unconstitutional restrictions on the use of her property and sought to compel the township to issue the building permits.[35]

First, the Court held that the township imposed no regulatory taking of the owner's property because the stated purpose for the relevant ordinance was to ensure access to residential properties by emergency vehicles and the Court found that public safety is a legitimate governmental interest.[36] Second, the Court held there was no lack of due process attendant to the township's decisions concerning the owner's requests for building permits and variances because the record indicates the township reviewed Dowerk's requests, discussed them at length at several meetings and its decisions were supported by competent, material and substantial evidence.[37] Finally, the Court held the township did not violate the owner's equal protection rights because Dowerk alleged no disparate treatment infringing a fundamental right or implicating a protected classification.[38]

Here, the fact pattern varies slightly, but the results are the same. In 2007, the Township agreed to issue the Plaintiff a land use permit for the construction of a home to be built primarily on the Subject Parcel, but partially located the Peninsula Ridge Property. The Peninsula Ridge Property had, and continues to have, direct frontage on a private road. Thus, at the time the Township agreed to issue a land use permit, Plaintiff met the criteria, pursuant to the Ordinance, that required "lot width or frontage width along a public road a private road or an approved

[32] *Id.*
[33] *Id.*
[34] *Id.*
[35] *Id.*
[36] *Id.* at 67-69.
[37] *Id.* at 70-72.
[38] *Id.*

frontage road."[39] However, after the Peninsula Ridge Property was sold to Freddie Mac, the Subject Parcel essentially became landlocked and no longer met the frontage criteria required for issuance of a land use permit.[40]

Plaintiff suggests the value of the Subject Parcel stems from its location as a potential home-site and argues that enforcement of the Ordinance prevents construction on the Subject Parcel, which restricts the use of and destroys the value of the property and results in a "taking." However, when Plaintiff purchased the Peninsula Ridge Property and the Subject Parcel, both in 2006, the Ordinance was in effect.[41] Furthermore, when Bank of America foreclosed on the Peninsula Ridge Property and during the redemption period the Ordinance was in effect. Plaintiff has been subject to the frontage requirements established under the Ordinance the entire time he has owned real property in Peninsula Township. Therefore, Plaintiff had sufficient notice and should have known that in order to receive a land use permit, he would need to have property with frontage on a public or private road and the restricted use of the Subject Parcel and its current value, due to its landlocked status, are ultimately the result of the Plaintiff's own actions and inactions. This Court believes that a "taking" should not be attributed to the Defendants when the loss of use and/or property value are the fault of the Plaintiff himself.

Nevertheless, the Court also considers whether enforcement of the Ordinance will impact the Plaintiff's property rights to the extent that he is denied all economically viable use of his land. Plaintiff claims that the economic effect of the Ordinance and the extent of its interference with his reasonable investment-backed expectations amounts to a "taking," but this Court disagrees. A mere diminution in property value does not amount to a taking and Plaintiff has not demonstrated that the Subject Parcel is unmarketable as zoned.[42] As noted above, there is no

[39] The Court also notes that the land use permit was conditioned on the Plaintiff's agreement not split the contiguous parcels after building. This 'condition' suggests there was a desire by the Township that a single home be located on the contiguous properties, possible due to the fact the property was accessible only by a private road which did not conform to the current Ordinance requirements. The Court hypothesizes that a single dwelling, even if located primarily on the Subject Parcel, would still be accessible by fire trucks/emergency vehicles using the private road. However, a second dwelling, presumptively built/located on the Peninsula Ridge Property would essentially block and/or significantly limit access to a dwelling located on the northern, Subject Parcel.

[40] Plaintiff does however retain a 20 foot wide easement for ingress/egress purposes.

[41] Based on the pleadings, the Plaintiff purchased the separate parcels with the intention of "combining" them and constructing a home on the combined properties. Furthermore, the order of purchase suggests that Plaintiff intended to access both of the properties via the private road.

[42] See FN 28. Plaintiff's valuation of the property as a home-site is merely speculative and he has failed to provide any evidence that would justify a conclusion that the property as zoned is unmarketable.

"taking" merely because an owner's best or most profitable use of property has been denied.[43] Plaintiff has not shown that the property has lost all economic viability under the Ordinance and for these reasons, the Court does not find that a "taking" has occurred.

In addition, Plaintiff claims that the zoning regulation is arbitrary and capricious in that it does not bear a substantial relation to the public health, safety, morals or general welfare as applied to his property.[44] The Court, on the contrary, finds that the purpose of the Ordinance, to ensure access to residential properties by emergency vehicles, is rationally related to public safety and a legitimate government interest. While Plaintiff claims that there is no reasonable governmental interest being advanced by the road standards as applied to his property, the Township Fire Chief states:

> It is my opinion that the current driveway system has created a very bad situation for the existing four homes occupant's health, safety and welfare. In its current configuration, the driveway layout does not allow us to provide the residents with an adequate response to a fire or medical emergency. **By allowing another home to be built using the current driveway system…would be making a bad situation even worse** knowing that the current driveway system does not provide adequate access for fire and medical response to the four existing homes.[45]

The four homes currently served by the non conforming private road, were built prior to enactment of the Ordinance and the road standards are not applicable. Plaintiff states "there is no difference between the property in 2007 and the property in 2012 that justifies this disparate treatment." The real property itself may be unchanged, but the number of homes served by the private road, were Plaintiff permitted to construct a home on the Subject Parcel, would increase from four to five. The occupants of the fifth home would similarly lack "an adequate response to a fire or medical emergency." Finally, Plaintiff lost the frontage he had in 2007 due to a foreclosure. For these reasons, there is clearly a legitimate governmental interest in applying the road standards to the Subject Parcel.

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[43] See FN 29.

[44] *Bruley v City of Birmingham*, 259 Mich App 619; 675 NW2d 910 (2003); *Hendee v Putnam Twp*, 486 Mich 556; 786 NW2d 521 (2010). [A facial due process challenge to an ordinance alleges that the mere existence and threatened enforcement of the ordinance materially and adversely affects values and curtails opportunities of all property regulated in the market. An as-applied challenge to an ordinance alleges a present infringement or denial of a specific constitutional right or of a particular injury in process of actual execution. A challenge to the validity of a zoning ordinance "as applied," whether analyzed under §1983 as a denial of equal protection, as a deprivation of due process under the Fourteenth Amendment, or as a taking under the Just Compensation Clause of the Fifth Amendment, is subject to the rule of finality.]

[45] Emphasis added.

In *Dowerk*, the court held there was no lack of due process attendant to the township's decisions concerning the owner's requests for building permits and variances because the record indicated the township reviewed Dowerk's requests, discussed them at length at several meetings and its decisions were supported by competent, material and substantial evidence. The facts in this case also indicate that the ZBA reviewed Plaintiff's requests, discussed them at length at several meetings and its decisions were supported by competent, material and substantive evidence, including information provided by the Peninsula Township Fire Chief and the Township Zoning Administrator. This Court finds there was no violation of due process in declining to grant the requested variances.

Finally, Plaintiff has failed to establish that the classifications, Frontage Owner and Non Frontage Owner, created by the Ordinance are arbitrary and not rationally related to a legitimate government interest. This Court does not find the Ordinance to violate the Plaintiff's equal protection rights, as Plaintiff has alleged no disparate treatment infringing on his fundamental rights or implicating a protected class.

V. CONCLUSION

The Court finds that the road frontage required by the Ordinance promotes public health, safety and welfare and advances a legitimate government interest. Further, Plaintiff has failed to overcome the presumption that the ordinance is constitutional and Defendants are entitled to summary disposition pursuant to MCR 2.116(C)(10). For the reasons stated herein, whether considered as a facial challenge or as an as-applied challenge, the Defendants' Motion for Summary Disposition is granted and Count II of the Plaintiff's First Amended Complaint is dismissed with prejudice. This Decision and Order resolves the final remaining issue and closes the case.

IT IS SO ORDERED.

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HONORABLE PHILIP E. RODGERS, JR.
Circuit Court Judge