

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF GRAND TRAVERSE

JACQUELINE J. KAFKA, GARY BURK and
RACHELLE BURK, husband and wife, and
LARRY EVERTS and YVONNE EVERTS,
husband and wife,

Plaintiffs,

v

File No. 00-21058-AW
HON. PHILIP E. RODGERS, JR.

UNION TOWNSHIP SUPERVISOR,
ROBERT L. VAN DYKE and JANET M.
VAN DYKE, husband and wife,

Defendants.

William M. Schlecte (P19991)
Attorneys for Plaintiffs

James G. Young (P22645)
Attorney for Union Township

Gary M. Ford (P29979)
Attorney for Defendants VanDyke

COURT'S OWN MOTION AND
ORDER DISMISSING THE CASE

The Michigan Opening of Private Roads and Temporary Highways Act (the "Act"), being MCL 229.1, et seq; MSA 9.281, et seq, establishes a right and procedure for persons to apply to township supervisors for permission to have private roads laid out across another's property. MCL 229.1; MSA 9.281. Upon application, the township supervisor shall convene a jury to determine whether the road is necessary. MCL 229.2; MSA 9.282. If the jury determines that the road is necessary, it must appraise the damages of the landowner. MCL 229.4; MSA 9.284. Pursuant to the Act, the applicant pays the determined damages and expenses incurred in the proceedings to the

supervisor, who in turn reimburses the landowner for the appropriate damages. MCL 229.5; MSA 9.285. The supervisor is then authorized to open the private road for the applicant's use. MCL 229.5; MSA 9.285 and MCL 229.6; MSA 9.286.

The Defendants Robert and Janet VanDyke ("VanDykes") petitioned the Defendant Union Township Supervisor ("Supervisor") to open a private road invoking the procedures set forth in the Act. Before the Supervisor could convene a jury, however, the Plaintiffs filed this action. The Plaintiffs seek to enjoin the Supervisor from conducting such proceedings. They seek a declaration that there is no necessity, as a matter of law, for the private road sought by the VanDykes. They seek a declaration that the application filed by the VanDykes was deficient because it failed to properly identify the affected property owners. Alternatively, the Plaintiffs request that the Court require that a separate proceeding be had as to each property across which the VanDykes propose to lay the private road; that the Court adopt and enforce rules of procedure for conducting such proceedings; that the Court decide all issues of law; and that the Court exercise supervisory control of the proceedings to ensure substantive and procedural due process to all parties.

In Answer to the Complaint, the VanDykes request that the Court deny the Plaintiffs' request for injunctive relief; decide, as a matter of law, that there is a necessity for the private road; and declare that their application meets the intent and purpose of the Act and properly identifies the affected properties and parties.

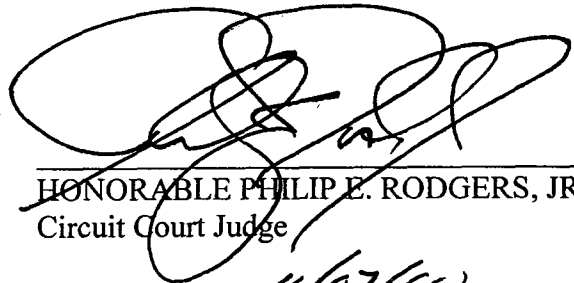
The Michigan Opening of Private Roads and Temporary Highways Act was enacted in 1881. It was deemed unconstitutional in *White Pine Hunting Club v Schalkofski*, 65 Mich App 147; 237 NW2d 223 (1975) as a violation of Const 1963, art 10 § 2, the Michigan constitutional provision against taking private property under the power of eminent domain for any but public purposes. In *Bieker v Suttons Bay Twp Supervisor*, 197 Mich App 628; 496 NW2d 398 (1992), one panel of the Court of Appeals upheld the Act as constitutional. *Bieker* conflicted, however, with an earlier vacated opinion by another panel of the Court of Appeals reported at *McKeigan v Grass Lake Twp Supervisor*, 229 Mich App 801; 587 NW2d 505 (1998). Pursuant to MCR 7.215(H), a special panel was convened to resolve this conflict. In *McKeigan v Grass Lake Twp Supervisor*, 234 Mich App 194; 593 NW2d 605 (1999), the special panel of the Court of Appeals held that the Act neither

implicates nor offends the takings clause of the state constitution and the private roads act satisfies due process requirements of both the state and federal constitutions.

The special panel's decision is binding precedent upon this Court. In light of that decision, the Plaintiffs' Complaint is premature. The VanDykes have not had an opportunity to pursue their petition for the opening of a private road with the Defendant Supervisor and, thus, exhaust their administrative remedies. The Defendant Supervisor has not had an opportunity to conduct proceedings pursuant to the Act. Once such proceedings have been conducted, any party in interest may appeal the determination to this Court. MCL 229.11; MSA 9.2811.

For the reasons stated herein, this case should be and hereby is dismissed without prejudice.
IT IS SO ORDERED.

This Order disposes of all claims and closes the case.



HONORABLE PHILIP E. RODGERS, JR.
Circuit Court Judge

Dated: 11/07/00