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STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

SANDSTONE ASSOCIATES LIMITED
PARTNERSHIP-A, a Michigan limited
partnership,

Plaintiff,

v.

CITY OF NOVI, a Michigan municipal
corporation, EDWARD F. KRIEWALL,
ANTHONY W. NOWICKI and LES
GIBSON, Jointly and Severally,

95-501532-CK



OAKLAND COUNTY JUDGE BARRY L. HOWARD
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OPINION AND ORDER

At a session of said Court, held in the above-
stated Court, in the city of Pontiac, state of
Michigan, on January 21, 1999.

PRESENT: Hon. Barry L. Howard
Circuit Court Judge

I. Factual Background

On July 1, 1991, a Planned Unit Development (PUD) Agreement was entered into by the developer, Plaintiff Sandstone Associates and the City of Novi. The PUD Agreement covers the area bounded on the north by Thirteen Mile Road, on the east by Meadowbrook Road, on the west by Novi (now Old Novi) Road and on the south by Twelve and One-Half Mile Road. The 1991 PUD Agreement¹ provided for the creation of Decker Road, the five lane road which was to connect to Thirteen Mile on the north and to Novi Road on the south at a point just north of where

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The 1991 PUD was an amendment of an earlier agreement with a predecessor developer. The 1991 PUD was amended again in 1995.

Novi Road intersects with Twelve and One-Half Mile Road. The planned road was designed to bisect the 296 acre, mixed-use development.

The PUD Agreement provided for phased development. Phase 1, known as the Vistas of Novi, was located at the southern end of the development near the planned intersection at Decker Road and Novi Road. Decker Road was to provide the sole means of access to Phase 1 of the development.

As part of the implementation of the PUD Agreement, the Developer and the City of Novi agreed to have a Special Assessment District (SAD) created which would provide a means of financing the construction of the road as well as the sewer and water systems. Under SAD 132C, the Developer agreed to fund the cost of the road project through tax assessments on the subject property. SAD 132C was approved by the Novi City Council on October 21, 1991.² That Agreement provides that the City Council approved "programs, plans [and] specifications," for the project. (Exhibit 9). The plans which were submitted to the Council at that time³ reflected the building of the road as outlined above and included intersections at both ends of Decker Road, one at Novi Road on the south, and the other at Thirteen Mile Road on the north. Decker Road was to have five lanes which tapered to two lanes at the intersections. (Exhibit 58).

Almost one year after approval of SAD 132C, the City of Novi approved the issuance of bonds to be sold to fund the immediate construction of the road. The bonds were to be repaid by the future assessments collected under SAD 132C. Thus, while the City was responsible for the

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SAD 132C was amended on October 26, 1992, to more accurately reflect the cost of the project.

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This Court flatly rejects Defendant Novi's assertion that the plans submitted to the Council were not "final" for purposes of binding the parties. The City Council, in passing SAD 132C, expressly approved of the plans for the project.

construction of Decker Road, the Developer would ultimately pay the total cost of the road construction.

In January 1993, a contract to build the road was awarded by the City of Novi to B & V Construction Company. Construction was to begin in April and be completed by the fall of 1993. The contract was approved by the City Council but was not submitted to the Developer for approval. It contained several unilateral deletions from the road project which had been agreed to in the PUD and SAD Agreements.⁴ First, the contract did not provide for any intersection to be constructed at Thirteen Mile and Decker Roads. Second, the contract contained an alternative road design which cut-off or stubbed Decker Road just before it connected to Novi Road. Once construction began on the road, the City of Novi issued two change orders. One invoked the alternative road design which effectively stubbed Decker Road, and the other deleted the traffic signal work which was to have taken place at the Novi and Decker Road intersection. (T IX, 42). Neither of these change orders were communicated to or approved by the Developer. (T IV, 16-17).

Almost immediately after the City Council had approved SAD 132C, the City began efforts to have the area of Novi Road south of the development, from Twelve Mile to Twelve and One-Half Mile, expanded into a five lane road. To fund this Project, the City of Novi applied for a grant from the Michigan Department of Transportation. The existence of the SAD funded Decker Road Project was seen as the key to getting the MDOT grant. (T IX, 102-104). The City hoped to use the SAD 132C money allotted for the Novi Road intersection as Novi's matching funds for the future MDOT/Novi Road Project. (T IX, 64-71). The deletion of the Novi Road intersection from the construction contract with B & V thus effectively transferred the construction

⁴ Exhibit 25.

of that intersection to the future MDOT/Novi Road Project. (T XI, 21). At the same time Novi was making preliminary plans for the MDOT/Novi Road Project, it also began to plan a future widening of Decker Road north of Thirteen Mile to Fourteen Mile Road. (T XIII, 84-85). That project required that the intersection at Thirteen Mile and Decker Roads be constructed as part of the Thirteen Mile to Fourteen Mile Road project instead of the SAD 132C Decker Road Project. (T IX, 17-22, 77).

In the spring of 1993, when construction of Decker Road commenced, neither of the ancillary projects were even in existence. When construction began on the road, site development of Phase 1 of Plaintiff's project was well underway. Plaintiff expended substantial sums of money and incurred debt. In the fall of 1993, B & V completed construction of the road as outlined in its contract with the City of Novi. In accordance with the contract, there was no outlet at Novi Road and no intersection at Thirteen Mile Road. A construction service drive existed at Novi Road but the City had it barricaded to prevent through traffic. The south side of Thirteen Mile at Decker Road had barricades bolted to the roadway to prohibit southbound access to Decker Road. As of October of 1993, Phase 1 of Plaintiff's development was effectively landlocked.

The expansion of Decker Road north of Thirteen Mile Road was not completed until December of 1994. Even after the intersection at Thirteen Mile and Decker Road was completed, the south side of the intersection leading into Plaintiff's development remained barricaded by the City. (T IX, 127). Decker Road also continued to be cut-short or stubbed just north of Novi Road as the future MDOT/Novi Road Project to the south had not yet officially come into existence.⁵ On April 10, 1995, the City Council executed the second amendment of the PUD Agreement. The

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The Project was not formally approved by the City Council until May 1996 and the project was completed in the Fall of that year.

amendment, which had been approved almost a year earlier, primarily involved modifications to the architectural plans for the development. It did not modify the existing Decker Road or Phase 1 plans.

On July 31, 1995, Plaintiff filed the instant suit against Defendant Novi, the City Manager Edward Kriewall, the Director of Public Service Anthony Nowicki and the Director of Finance Les Gibson. The complaint sought injunctive relief to have Decker Road completed as agreed to under SAD 132C. After conducting hearings on the matter, this Court issued an Order granting Preliminary Injunctive Relief to Plaintiff on October 30, 1995. That order prohibited further delay in the completion of the Decker and Novi Road intersection as originally planned. If Novi could not complete the intersection within 60 days, they were ordered to re-open the temporary construction road at that intersection. The City of Novi was further restrained from issuing citations against Plaintiff for the signage it had placed on their property.

Novi did not immediately build out the Decker-Novoi intersection but instead chose to wait, as they had planned all along, until the completion of the Decker Road Project in the fall of 1996. During construction of the intersection in 1996, all access to the development at Novi Road was blocked. Again, this Court held hearings and ordered all Defendants to immediately cease construction on the intersection until such time as an alternative access could be set up. This Court also ordered that the barricades at Thirteen Mile Road be immediately removed. For various reasons which will be discussed later in this opinion, Defendants failed to comply with these orders.

Trial in this case began on April 27, 1998, and the submission of proofs was completed on July 17, 1998. The parties have submitted proposed Findings of Facts and Conclusions of Law as well as responses to those pleadings. Plaintiff claims that Defendant Novi is liable to it for

breach of the SAD Agreement, breach of the PUD, the unconstitutional taking of Plaintiff's property, the misappropriation of SAD funds, and the violation of Plaintiff's substantive due process rights pursuant to 42 USC section 1983. Plaintiff claims that Defendants Kriewall, Nowicki and Gibson are individually liable for violating Plaintiff's substantive due process rights under 42 USC section 1983.

On the basis of the evidence submitted at trial, as well as the record as it has been developed in pre-trial hearings, this Court now renders its decision on the merits. As will be discussed in detail below, this Court finds in favor of Plaintiff against Defendant City of Novi. For the reasons discussed in this Opinion, this Court holds that the liability of Defendants Kriewall, Nowicki and Gibson has not been established.

II. Breach of Contract- Special Assessment District

Defendants initially argue that this Court is without jurisdiction to consider Plaintiff's claims under the Special Assessment District. Defendants assert that the Tax Tribunal has exclusive jurisdiction in reviewing governmental decisions concerning special assessments pursuant to *Wikman v Novi*, 413 Mich 617, 626 (1982). This Court finds that the present case does not challenge the issuance or propriety of the special tax assessment. The SAD dispute in this case primarily involves a disagreement over the contractual obligations created by SAD 132C which does not fall within the jurisdiction of the Tax Tribunal.⁶ *Romulus Treasurer v Wayne County Drain Commissioner*, 413 Mich 728, 737-739 (1982).

Plaintiff asserts that SAD 132C, along with the PUD Agreement, created a contractual

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A small part of Plaintiff's case presented claims regarding the method of operation and calculation of SAD 132C and are separately considered under section V of this opinion.

obligation upon Novi to build Decker Road within a reasonable amount of time in conformance with the plans. It is Plaintiff's position that the contract was breached by the City of Novi. Defendant Novi responds that there was no agreement to construct the intersections simultaneously with the remainder of Decker Road and that the plans which Plaintiff relies on to impose this obligation were not the final plans for the project.

It is the opinion of this Court that the plans referred to in SAD 132C⁷ were a material term of the contractual Agreement. These plans clearly provide for the construction of two intersections, one at Novi and Decker Road and the other at Thirteen Mile and Decker Road. SAD 132C expressly refers to and approves of the plans. There is no evidence to support Novi's contention that these plans were not binding upon the parties.

Further, this Court finds that Novi had no legal authority to amend the SAD 132C plans without the approval of Plaintiff. Under the express terms of SAD 132C and Section 30-30 of the Novi Code of Ordinances, SAD 132C is not subject to Novi Ordinance 30-9 which allows for the deviation from SAD plans by City Council Resolution. SAD 132C contains an integration clause and its terms do not include the right to unilaterally amend the Agreement. Thus, the SAD 132C plans could not be unilaterally amended by the City of Novi and the material provisions for construction of Decker Road are binding.

Neither SAD 132C nor the PUD agreement contain a deadline by which construction of the road was to be completed. When a contract does not identify a time for performance, the law will presume a reasonable time. *Duke v Miller*, 355 Mich 540, 543 (1959). This presumption does not result in the Court adding terms to the contract. Rather, it merely gives effect to what it is reasonable to assume the parties actually intended. *Id.*

⁷ Trial Exhibit 58.

Ample evidence was presented at trial that the parties intended the road to be completed in a reasonable amount of time. Defendant Kriewall, the City Manager, testified that roads normally take approximately two years to build, allowing one year for planning and design and one year for actual construction. (T XIII, 75). Novi's contract with B & V called for completion of the road by the fall of 1993, which would be consistent with the two year timetable noted by Defendant Kriewall. (Exhibit 25). Defendant Nowicki also testified that they originally intended to have the road completed in 1993. (T XI, 49). Further, Defendant Kriewall testified that he knew of the importance of the road to Phase 1 of the development and that it was scheduled to begin simultaneously with the road construction. (T XIII, 144). Indeed, the City of Novi had actually requested that Phase 1 be located adjacent to the planned Decker Road; Plaintiff had originally intended to place it in an area adjacent to an already existing road. (T I, 151). Under these circumstances, a reasonable time for completion of the road is two years from the date SAD 132C was executed. This Court finds that the road was not completed in accordance with the SAD 132C plans until long after October of 1993 and therefore, the City of Novi did commit a breach of contract.⁸

Defendant Novi asserts that interpreting SAD 132C to require completion of the intersections in a reasonable time renders the Agreement void as a matter of law.⁹ Novi asserts

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Once the SAD 132C intersections were packaged by the City as part of the two other subsequent projects, the City knew completion of the intersections would be delayed for as long as it took to complete the other projects. (T IX, 16-22, 119; T XI, 44; T XIII, 85-86, 111-112, 142). The length of time the road remained incomplete and the existence of barriers preventing use of even the incomplete road are issues relevant to both the "taking" claim and to the issue of damages and will be discussed in those sections of this opinion.

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Novi also claims that the 1991 City Council could not obligate the City under contract for a period of time beyond the terms of those council members. The only case relied upon by Novi, *Hazel Park v Potter*, 169 Mich App 714 (1988), is limited to employment contracts and expressly distinguishes contracts to perform a particular act. 169 Mich App at 720. This Court therefore rejects Defendant's argument.

that any contract which operates to limit its governmental power to establish streets is unconstitutional and thus *ultra vires*. *Detroit v Michigan Bell*, 374 Mich 543 (1965). Novi argues that the power to determine how and when a road is built is vested solely in the municipality and involves discretionary decisions which cannot be relinquished by contract. *Oakland County Road Commissioners v State Highway Commission*, 79 Mich App 505 (1977). The act of contracting away that power would be a nullity. *Detroit v Michigan Bell, supra*. Thus, according to Defendant Novi, a city may act contrary to its contractual duty where, in the city's discretion, it determines its actions are in the best interests of its citizens.

The Court of Appeals in *Oakland County Road Commissioners* held that where a state highway commission enters into an agreement to build a certain highway and before doing so an emergency, a change in conditions of serious proportions, or an intervening duty to the state as a whole emerges, the highway commission has the right to abandon its promises. *Oakland County Road Commissioners, supra* at 511. In that case, the Court held that the County could not enforce its contract with the State to complete the highway the State had agreed to build. In *Oakland County Road Commissioners*, the intervening duty or change in conditions was the extreme cost overruns which depleted the funding source for the highway. In so holding, the Court of Appeals relied upon a decision of the Oklahoma Supreme Court which found that the Federal government's threat to withdraw funding for a state highway project if the route was not altered was a serious change in circumstances which alleviated the state's contractual duty to build the highway as originally planned. See, *Oakland County, supra*, citing *Harmon County v State Highway Commission*, 163 Okla 207 (1933).

Defendant Novi explains that its deletion of the Novi Road intersection from the Decker

Road Project was in the best interests of the citizens of Novi because it would save them money.¹⁰ This, Novi claims, is sufficient to alleviate any contractual duty it may have had to Plaintiff via SAD 132C to complete the entire project within a reasonable time.

This Court finds that Defendant Novi was not faced with a choice of complying with its contractual obligations or protecting the interests of its citizens. Defendant Novi was not faced with the loss of government funds if it complied with its contractual obligation and it was not forced to stop the building of Decker Road due to lack of funds. Rather, the City of Novi recognized the benefits to be gained under the agreement and used SAD 132C for the benefit of its citizens.¹¹ After exploiting the opportunities created by SAD 132C, Defendant Novi set about denying any corresponding contractual obligations it had under the rubric of “the best interests of its citizens.” In the process it willfully destroyed Plaintiff.

Defendant Novi has conveniently ignored the fact that the key to obtaining the government funding for the MDOT/Novi Road Project was the existence of the Decker Road Project which would link up with it. (T IX, 102-103). To apply the law as Defendant Novi suggests would give government entities unlimited power to enter into contracts, reap the benefits, and then disclaim any obligation as contrary to the best interests of the citizens. “The good faith of government should never be less sacred than that of individuals.” *Hatch v Township Unit School*, 310 Mich 516, 529 (1945). A municipality may not retain the benefits of a contract which has been fully

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Novi has at other times claimed that concern over the water main in the area also was a reason to delay the project. In pre-trial hearings before this Court it was established that a method for alleviating the problem was known to the City and its engineers. This issue is discussed more fully in the “taking” section of this opinion.

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In addition to the other benefits reaped from SAD 132C, this Court recognizes that while Plaintiff agreed to fund the construction of Decker Road through a SAD, the road was to be a major thoroughfare and thus would generally benefit the citizens of Novi.

performed by the other party and at the same time deny the validity of the contract which is neither *malum in se* or *malum prohibitum*. *Hatch, supra* at 535.

It is the opinion of this Court that the City of Novi had the legal authority to enter into the contract to construct Decker Road within a reasonable time. No independent, intervening circumstance existed which would make the timely completion of Decker Road contrary to the best interests of the citizens of Novi. Accordingly, the contract was not *ultra vires* and Defendant Novi cannot deny its contractual obligations under SAD 132C and the PUD Agreement.¹² This Court finds that Defendant Novi committed a breach of the SAD 132C agreement. To the extent that Plaintiff alleges liability of the individual Defendants, this Court finds that Defendants Gibson, Nowicki and Kriewall were not parties to the contract and therefore cannot be held personally liable for its breach.

III. Taking of property without just compensation

The Michigan Constitution provides that when private property is either taken or damaged by the government for public purposes, the landowner has the right to just compensation for the taking or damage to the property. Const 1963, art 10, section 2. The Constitution effectively implies a constitutional contract for the benefit of private property owners. *Lim v Michigan Department of Transportation*, 167 Mich App 751, 754 (1988).

Plaintiff claims that much of the conduct of Defendant Novi operated to deprive Plaintiff of the use of its land and thus amounted to an unconstitutional taking without just compensation.

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This Court recognizes that Plaintiff has also claimed breach of contract as a third party beneficiary to the bond resolution and the construction contract with B & V. Given this Court's disposition as to the SAD 132C claim of breach, it is unnecessary to address the third party beneficiary claims.

Specifically, Plaintiff asserts the following actions each operated to "take" Plaintiff's property: the issuance of Change Orders 1 and 2 to the construction contract with B&V; the blocking of access to Plaintiff's property by erecting barricades at both ends of Decker Road; the demand for and use of Plaintiff's land for the road; the requirement of conservation easements; and the taking of property due to pooling of water caused by construction of Decker Road and by culverts along Novi Road.

Defendant Novi first argues that the act of deleting the intersections from the B&V construction contract cannot be a taking. It asserts that Plaintiff cannot claim that the contract created a vested property right which was taken when Defendant Novi allegedly breached that contract. This Court agrees. As has already been discussed, the failure to build the road according to the plans was a breach of an express contract between the parties for which a remedy at law exists. Further, the failure to complete the intersection in and of itself did not preclude access to Plaintiff's property. During the construction of the road in 1993, access was provided by the temporary construction road at the south end of the property. Presumably, had that road remained open for public use, Plaintiff's development would not have been completely landlocked. Thus, the breach of the contract by Defendant Novi did not create a taking of Plaintiff's property.

However, the subsequent actions of Defendant Novi did result in a taking of Plaintiff's property without just compensation. Once construction of Decker Road, stubbed short at both outlets, was finished, the City completely barricaded access at Novi Road, including the temporary construction road. At that time, barricades were also in place at Decker Road where it intersected with Thirteen Mile Road. (T I, 169-172; T V, 19-20; T IX, 129-132; T XIII, 88-92). The road was

officially closed.¹³ The barricades at Thirteen Mile Road at times covered the entire width of Decker Road and at other times covered only the south bound lanes onto Decker Road. The road was marked "closed to through traffic" and any southbound entry onto the road would have required driving south in the north bound lane, a clear violation of the law. Thus, even during the time that access was not impossible, it was illegal.¹⁴

This situation continued until at least October of 1995, when this Court ordered Defendant Novi to immediately commence work on the Novi Road intersection and if this did not occur within sixty days, to re-open the temporary construction road at Novi Road. (10/25/95 Order). At that time, this Court made a finding that Defendant Novi's stated reason for failing to move forward, the soil instability which affected the water main, was untrue as Novi had the ability to stabilize the soil in the area. (10/25/95 Order).

The development was again totally landlocked when, during construction of the Novi Road Project in the Summer of 1996, the temporary road was completely shut down and torn up. This Court ordered Defendant Novi to immediately cease construction on Novi Road until it could provide Plaintiff with access to the property by a temporary road. This Court further made specific provisions with respect to the storm sewer construction which Defendant Novi initially claimed had necessitated the closure. (10/4/96 Order). Novi failed to comply with the Order claiming they had no authority to stop work on what was a state project. This claim was directly contradicted by the MDOT contract for the construction of Novi Road which states that Novi

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Defendant Nowicki testified that the road was not officially open, it was not plowed by the City, and the City permitted Novi police to use it as a test track for high speed chase training. (T IX, 34-35).

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It is evident that it was Novi's intent to seal the road off, even if they had to use, in one city official's words, "kryptonite" to do it. (T XI, 24-30; Exhibit 81, 3).

would retain ultimate control over the project. (Exhibit 98, 5-6).

Defendant Novi now argues that Plaintiff cannot recover for a taking because all existing routes of access were not blocked - access was merely diverted and perhaps inconvenient. It asserts that Michigan does not recognize a taking where a business is harmed by a diversion of traffic which does not block all access. *State Highway Commissioner v Watt*, 374 Mich 300 (1965); *Biff's v State Highway Commissioner*, 75 Mich App 154 (1977).

“Where a party owns a lot which abuts on that portion of the street vacated so that access to the lot is shut off, it is clear that the lot owner is directly injured . . . The closing up of access to the lot is the direct result of the vacating of the street, and he, by the loss of access to his lot, suffers an injury which is not common to the public.” *State Highway Commissioner v Watt*, 374 Mich at 310.

The right to recovery is thus conditioned upon the abutting landowner's access being either completely or materially cut off by the closure of the street. *State Highway Commissioner v Watt*, 374 Mich at 313.

Based upon the overwhelming evidence submitted at trial, this Court holds that Plaintiff's access to its property was materially cut off by Novi when it closed the road and barricaded it at both ends. This Court does not consider a road which might be traversed if one were willing to commit a traffic violation or illegally remove a barricade as a merely inconvenient diversion of traffic.¹⁵ The City of Novi committed a taking of Plaintiff's right of access to its property and Plaintiff is entitled to compensation.

Plaintiff next asserts that Defendant Novi committed a separate and additional taking when the area of Decker Road near the proposed intersection with Brownstone Road was flooded and saturated with water. The water build-up occurred after Novi had constructed that portion of

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Plaintiff's direct injury is thus compensable and includes, as a measure of damages, the loss of the value of public access to the property.

Decker Road within the development. Evidence was submitted that the construction of the road had caused the pooling of water. (T II, 109; T V, 110-112). Plaintiff sought to alleviate the problem and told Novi that it would agree to the City fixing the problem using SAD funds. Novi refused and told Plaintiff that it was responsible for fixing the problem at its own expense and would have to apply for the proper permits. (T V, 113-114).

At trial, Defendant Nowicki testified that Novi did not fix the problem because it had not been proven conclusively that Novi was responsible for the pooling. (T X, 34). He did acknowledge that all reports generated by the city engineers had pointed out that the pooling problem occurred after the road was built. (T X, 33; Exhibits 66-69). Nowicki denied any knowledge that it was critical to Plaintiff to move fast. He stated that he believed that when Plaintiff built Brownstone Road the problem would be alleviated. (T X, 34, 37). Plaintiff presented testimony that the City of Novi was informed of the critical need to move quickly. Novi would not allow Plaintiff to build Brownstone Road until the water problem was alleviated. (T II, 109; T V, 109-114).

This Court finds that the pooling of water in this area was a result of the building of Decker Road and that Defendant Novi caused the condition. This Court finds that the condition destroyed the value of that land and prevented Plaintiff from building the intended road for an extended period. Defendant Novi thus committed a temporary taking of this property and must compensate Plaintiff for it.

This Court further finds that Plaintiff's related claim, that a separate and additional taking of property in Phase 2 occurred due to flooding caused by defective culverts along Novi Road, has not been adequately established. On this record, this Court cannot conclude that the culverts were within the jurisdiction of the city rather than the county.

Plaintiff claims that Novi effected an additional, unconstitutional taking of property by requiring Plaintiff to donate its land for the construction of Decker Road. Plaintiff presented evidence at trial that as a prerequisite to city approval of SAD 132C, Plaintiff was required to quit claim the land for the road at no cost Novi. (T I, 157-158; T IV, 14). Plaintiff argues that because Novi did not comply with its contractual obligation to complete Decker Road in a timely manner, Plaintiff did not receive the benefit for the consideration paid and is entitled to be justly compensated for it.

Defendant Novi responds that when Plaintiff quit claimed the land to Novi it constituted a fully executed gift for which it cannot recover the value. *Kwiatkowski v Antonecki*, 329 Mich 32, 37 (1950). Defendant Novi also points out that the road has been completed and thus Plaintiff cannot have both specific performance of the contract and an effective rescission of the contract by return of the value of the land.

This Court agrees with Defendant. While Plaintiff may not have entered the Agreement had it known the road would not be completed in a timely manner, this Court cannot both enforce the contract and impose a remedy which would effectively rescind the contract. Additionally, with respect to the land Plaintiff claims was "taken" by the requirement of conservation easements, Plaintiff has not established that Novi's wetlands regulations which require the easements have deprived Plaintiff of economically viable use of the land. *Dowerk v Oxford Township*, ___ Mich App ___ (12/4/98).

IV. Breach of Contract - PUD

A Planned Unit Development is, essentially, contract zoning. The 1995 amendments to the PUD Agreement between Plaintiff and Defendant Novi were extensive. The PUD as originally

drafted and as later amended was clearly intended to be a comprehensive agreement concerning the standards for development of Plaintiff's property. In the instances where further restrictions would be placed on the particular aspects of development, the PUD specifically refers to the applicable zoning ordinance. (See, Exhibit 8, pp 1-13).

The Single Family Residential Development Code section of the PUD sets forth both the architectural standards and site design standards for the development. (Exhibit 8, pp 162-202). The PUD establishes an architectural review committee (VARC) to enforce the design code. All building design plans must be approved by VARC and VARC had the authority to grant necessary variances from the code requirements. (Exhibit 8, 166). The developer, however, retained the right to adjust the standards where necessary. (Exhibit 8, 164). The PUD further contains specifications as to lot layouts and applicable setbacks. (Exhibit 8, 140). The PUD makes consistent references to the major commercial street in the development as Market Street.

Plaintiff claims that Defendant Novi committed numerous breaches of the PUD Agreement. Plaintiff first contends that Defendant Novi violated the PUD Agreement when it warned the potential purchasers of lots that they would be required to seek the City of Novi's approval of the architectural elevations and facades before Novi would issue site plan approvals or building permits. Plaintiff asserts that Novi's improper approval requirements caused the loss of purchasers for the parcels and delays to the development.

Defendant Novi responds that the PUD's statement, that the developer retains the right to adjust the standards as necessary, merely allows Plaintiff to adjust standards so that the different parts of the code can work together. The minutes of the City Council meeting approving the PUD reflect that the intent of the parties was to restrict any deviation from the architectural guidelines. To allow Plaintiff to unilaterally change the guidelines violates the PUD. Novi asserts that

Plaintiff's recourse is to seek to amend the area plan in accordance with the law.

Evidence was submitted at trial that architectural plans were approved by VARC and then rejected by Novi because, in its view, the plans did not comply with the PUD standards. (T XII, 96). Defendant Novi admitted that the plans did not independently violate any code or ordinance. Rather, Novi asserts that the proposed plans did not contain the specific architectural details described in the PUD and that the proposed designs were more typically traditional in nature rather than neo-traditional. (T XII, 67-71, 96; T XXII, 86-112).

This Court finds that the City's requirement that architectural plans be submitted to them for approval violates the PUD Agreement. There is no provision in the plan for such oversight. This Court does agree that under the PUD, the developer's right to adjust the architectural standards is not unlimited. However, the proactive, micro-managing oversight employed by the City of Novi, where no provision for such oversight was made in the PUD, was unreasonable. Novi's right to ensure compliance with the PUD does not give rise to the right to require the City's approval of all architectural plans proposed by potential purchasers. Defendant Novi's actions were a breach of the PUD Agreement.

Plaintiff next claims that Defendant Novi violated the PUD Agreement when it refused to allow construction to begin until Plaintiff obtained formal approval for the set backs under the BOCA code and approval of the state building department. Plaintiff points out that the PUD, which was approved by the City, clearly refers to the applicable set backs. (Exhibit 8, 140). Defendant responds that the PUD actually provides that development must be in accordance with all applicable statutes, ordinances, rules and regulations. Defendant Novi asserts that in requiring the BOCA and state building department approvals, it was merely enforcing existing laws.

The Novi Zoning Ordinance Officer, Mr. Morrone, testified that in June 1995, he reviewed

the preliminary site plans for Phase 2 of the development and thought there might be a problem with the set backs. (T XX, 109-110). He thought that some of the proposed set backs might violate state code. Plaintiff then sought and obtained approval from BOCA International in support of its interpretation of how the set backs complied with the law. Morrone, believing BOCA was incorrect, caused an application to the construction board of appeals to be made. Ultimately, after several delays, Plaintiff's set backs were approved on appeal. (T XX, 113-115).

This Court finds that Defendant Novi's actions violated the PUD Agreement. At the time Morrone "noticed" the potential problem, the PUD Agreement had been in place for two months. At the point that Morrone reviewed the site plans, the City had two competing obligations, first, to ensure the safety of its citizens by enforcing the building codes and second, to comply with its contractual agreement with Plaintiff. Morrone's initial action in raising the problem and seeking a determination under BOCA is consistent with Novi's obligation to enforce the code. However, once approval was obtained by Plaintiff, Novi went beyond its basic obligation and affirmatively fought against the approval which was given by BOCA International. This action was an explicit rejection by Defendant Novi of setbacks which it had contractually approved in the PUD and thus was a breach of the contractual agreement.

Plaintiff additionally claims that Defendant Novi violated the PUD by enforcing buffer zones between the commercial and residential area located in the "bank site" area of the PUD plan. The PUD plan included that particular use for that area, notwithstanding that it did not meet strict application of the buffer requirement. This Court agrees that the use for that site was part of the plan under the PUD and therefore cannot be prohibited by the City's application of the 150 foot buffer requirement.

Finally, Plaintiff claims that Novi again violated the PUD when it assigned the Market Street name to another competing development. Plaintiff asserts that the repeated references to Market Street throughout the PUD created a contractual agreement. Defendant Novi responds that Plaintiff was required to seek administrative approval for the street name which Plaintiff did not do until after the name was approved for another location.

This Court finds that the naming of Market Street in the PUD did not create a contractual obligation on the part of Novi to reserve that name for Plaintiff. The City of Novi has a requirement of formal application and approval of street names. (T I, 79-81). Because the street naming process involves verifying that the name is not already in use and is otherwise acceptable as a street name, it is significantly different from the contract zoning situation. The PUD does not state that the Market Street name is affirmatively reserved. Therefore, the PUD was not violated when that name was not reserved for Plaintiff.

V. SAD 132C Funds

Plaintiff contends that Defendant Novi has commingled SAD funds into one general account in violation of the law and has improperly diverted SAD 132C funds to pay the City's portion of the Novi Road Project. There is no question that, as a result of deleting the intersections from the SAD 132C Agreement, the SAD 132C had a substantial excess. While the current overage results from the bonds sold for the project, the installment payments due from Plaintiff will serve to repay those obligations. Thus, upon completion of Plaintiff's obligation under SAD 132C, it will have an overage exceeding \$500,000.00. Novi is holding "open" a portion of that amount to be applied to the work done on the intersection as part of the Novi Road Project. (T VIII, 19-20, 37-38).

Novi has not, at this point, used these SAD funds to fund its portion of the MDOT/Novi Road Project. (T VIII, 32). Even if Novi were legally entitled to use the funds in this manner, SAD 132C would still be substantially over funded. (T VIII, 19). It is the City of Novi's position that, after the bond obligations are met, the overage would then be applied to satisfy the final installments due from Plaintiff under SAD 132C. (T VIII, 8).

If Plaintiff, who has experienced severe financial difficulties due to the delays which are the subject of this lawsuit, fell into default on the SAD obligation, Novi would take and sell Plaintiff's land to satisfy the bond obligations, even though there was no actual deficiency in the SAD because of the overage. (T VIII, 43). Defendant Novi has admitted that SAD monies are not segregated into separate bank accounts as is required by City Code section 30-23. (T VIII, 30). Novi asserts that such a procedure would be too cumbersome and that the annual audit conducted by an outside firm is sufficient to prevent mishandling. (T VIII, 30). The City of Novi maintains a single fund which it then breaks down by computer program into discreet accounts. (T VIII, 11-12).

As an initial matter, this Court finds that Defendant Novi has not yet diverted SAD 132C funds to meet its obligations under the separate MDOT/Novi Road Project. Further, it appears that the Novi City Code would prohibit the use of funds from the SAD 132C project to pay for improvements which were actually made as part of another project. See, Section 30-23. It is also evident that Novi is violating its own ordinances in the manner in which it is keeping its accounts. See, Sections 30-22 and 30-23. It does appear that under the City Code, the excess funds in SAD 132C are to be applied to the last installments due. See, Section 30-20. This Court has serious questions as to the propriety of the City retaining the interest made on the excess funds in SAD 132C and whether it constitutes arbitraging.

These findings, however, will not be made part of the final decision of this Court. The questions which are raised by Plaintiff concerning the method of calculation and operation of the Special Assessment District are questions within the sole jurisdiction of the Tax Tribunal. The claims against Defendant Gibson as an individual relate solely to the calculation and method of operation of the SAD and therefore are also not within this Court's jurisdiction. Unlike the other claims made by Plaintiff, this claim directly involves the propriety of the special tax assessment as it relates to ultimate disbursement. Thus, pursuant to *Wikman v Novi*, 413 Mich 617 (1982), the Tax Tribunal has exclusive jurisdiction over the matter.

VI. Substantive Due Process

42 USC section 1983 provides that a public officer or municipality that acts under color of law to violate the constitution, thereby causing harm, may be held liable.¹⁶ Where a municipality is being sued under section 1983, the relevant inquiry is: 1) whether plaintiff's harm was caused by a constitutional violation, and 2) if so, whether the city is responsible for that violation. *Collins v Harker Heights*, 503 US 115, 120 (1992).

The substantive due process right provided by the Federal Constitution applies to deliberate decisions of government officials to deprive a person of life, liberty, or property. *Daniels v Williams*, 474 US 327, 331 (1986). The Due Process Clause was intended to protect the individual from the arbitrary exercise of governmental powers by barring government actions which are arbitrary irrational or malicious, even where the procedures used to carry out those actions do not themselves violate the Constitution. *Id*; *Sinaloa Lake Owners Association v City*

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Local governments may be sued in either federal or state court under section 1983. *Monell v New York City Department of Social Services*, 436 U.S. 658, 690 (1978).

of *Simi Valley*, 882 F2d 1398 (CA 9, 1989). The Due Process Clause serves to prevent governmental power from being “used for purposes of oppression.” *Daniels, supra* at 331.

A property owner possesses the right to build on or improve his or her property, although this right can be subjected to legitimate permitting requirements or application of land-use regulations. *Electro-Tech v H.F. Campbell*, 433 Mich 57, 116 & 126 (Brickley, J., dissenting); *Nollan v California Coastal Comm.*, 483 US 825, 834 (1987); *Bello v Walker*, 840 F2d 1124, 1129 (CA 3, 1988), cert den 488 US 868 (1989). Malicious, irrational and arbitrary governmental actions which place restraints on an individuals property rights violate substantive due process. *Sinaloa Lake Owners Association, supra*.

“In determining whether substantive due process rights have been violated, we will look to such factors as the need for the governmental action in question, the relationship between the need and the action, the extent of the harm inflicted, and whether the action was taken in good faith or for the purpose of causing harm.” *Sinaloa Lake Owners Association, supra*, at 1409.

Plaintiff asserts numerous ways in which Defendants arbitrarily and abusively denied the necessary approvals for moving forward on its project and otherwise used city ordinances to delay Plaintiff’s development. While each of these claims will be reviewed individually, this Court must assess them in light of the context in which they occurred. Thus, while the City’s actions in barring access to Plaintiff’s property are legally cognizable as a “taking”¹⁷ and the failure to complete Decker Road is treated in this opinion as a breach of contract, the factual background of those issues provides substantial support for Plaintiff’s substantive due process claims.¹⁸

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The taking claims in this case involve the physical denial of access to the property as well as causing a portion of the property to be physically damaged. In contrast, this due process claim is founded on the denial of Plaintiff’s right to develop their property.

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For example, Novi’s intentional delay in completing Decker Road created a situation where delays in the development process would actually benefit the City. Also instructive is Novi’s use of its ordinances as justification

Plaintiff claims that Defendants deliberately delayed the approval for permits for Phase 2 of the development by falsely claiming that Plaintiff needed a right-of-way permit to cross Novi Road to gain access to Phase 2. Plaintiff submitted testimony at trial that access to Phase 2 was available by entry over Decker Road rather than Novi Road. Plaintiff further submitted testimony that the City of Novi's own subsequent conduct in relationship to Novi Road violated all of the alleged restrictions which it had asserted against Plaintiff.

Defendants respond that the Novi Code requires permits for any construction work that is above infrastructure of the City. Thus, even if access to Phase 2 was not dependent on Novi Road, the construction activity was directly above the city's water main and a permit was required. Defendants claim that subsequent work that the city did was not in an area above a water main and thus is distinguishable.

This Court finds that when Plaintiff initially sought emergency relief from the Court on this issue, Novi asserted its actions were justified because of the right-of-way permit requirement. At trial, faced with evidence that the right-of-way regulation would not be applicable to this situation, Defendant Novi sought to justify its actions on a different basis. Defendant Novi thus clearly demonstrated that when it chooses to do so, it can find an ordinance for any occasion - regardless of the actual need to protect against the harm intended to be prevented by the ordinance. This Court finds that the imposition of an unnecessary right-of-way permit was arbitrary and malicious.

Plaintiff next claims that Defendant Novi improperly refused to issue building permits on Phase I, claiming that the units had not been properly graded. Plaintiff presented evidence that

for its barricading access to Decker Road. The expiration of the County permit for the construction road was used to justify barricading access, yet Novi could have but did not simply apply for an extension of the permit. (T IX, 132).

the grading complied with the approved plans in the PUD. The key problem appeared to have been with the side yard grading. Testimony was presented at trial that the city, through JCK Engineering, generally allowed developers to exceed the ordinance requirement of being within six inches of grade level prior to commencement of building. As a matter of course, grade levels were allowed to be 12 to 18 inches low. This is because when a basement is dug in the building process it creates an excess accumulation of dirt which raises the grade level to that required by ordinance. In allowing the lower grade level at the initial stages, the builder is thereby saved the unnecessary time and expense of adding dirt to the site which will have to be removed as excess after basements are excavated. (T XVII, 26).

Defendant's engineer testified that they did not apply the grade variance to the side and rear yards of the lots because the six inch rule ensured proper drainage from the lots during construction. (T XVII, 26-27). Testimony was submitted that rejection of the mass grading for Phase 1 was caused by Plaintiff's failure to comply with the side yard requirement. However, Plaintiff submitted evidence that it had not been informed of the more stringent requirement applicable to the side and rear yards. As a result of the re-grading requirement, Plaintiff was required to haul dirt onto the site at a cost of \$250,000.00 prior to building and then remove it after building began at a cost of \$250,000.00. (T V, 7).

This Court finds that Plaintiff has established that the grading done in Phase 1 met the requirements of the plan and met the standards of the City as they are applied by the engineers. This Court is convinced that the rigid application of rules to the grading of Phase 1 was contrary to the City's consistent course of conduct and was not for the purpose of allowing proper drainage during construction. It is evident that had Plaintiff been informed of the alleged exception to the exception, it could have initially taken action which would have obviated the need to bring in and

later remove large amounts of dirt. The refusal to grant building permits in Phase 1 occurred at a point in time when Decker Road, as originally planned, should have been completed. Defendants have claimed that Plaintiff could not be damaged by the initial delay in finishing the road because it was not even ready to pull building permits at that time. This Court is convinced that the refusal to grant the building permits and order of mass re-grading of Phase 1 was an arbitrary application of city ordinance and was done for the improper purpose of delaying the development.

Plaintiff further asserts that Defendants improperly required Plaintiff to build landscaping berms when berms were not required in the approved landscape plan for Phase 1. Defendant Novi refused to return Plaintiff's landscape deposits based upon their failure to build these berms and, to date, the City has only partially released the funds, and then only upon order of this Court. Defendants respond that approval of the landscaping plan was conditioned upon a berm being added and that requirement was only recently amended to allow screen plantings instead. Defendants maintain that all of the deposits have not been returned because the landscaping work has not been completed.

The testimony presented at trial established that there was no clear requirement for berming along Decker Road in the landscape plan for Phase 1, instead, the plan called for screening.(T VI, 98-100; T IX, 136-138; T XI, 84-85; T XXII, 151-155, 161-162). While there was some evidence that a city ordinance provided for berms, the plans for screen plantings in Phase 1 were approved by the City of Novi. There appears to have been no basis for Novi's refusal to return part of the deposits other than that the City Forester had decided that berms should be installed regardless of the approved landscaping plan. The City of Novi's actions as to this issue were irrational and arbitrary. However, since no evidence was submitted that the screen

plantings are now complete, this Court cannot now determine that Plaintiff is entitled to return of the remainder of the landscaping deposits.

Plaintiff next argues that Defendants have failed to remove the Road Closed signs as required by order of this Court and have continuously violated orders of this Court and harassed Plaintiff. Defendants deny these allegations.¹⁹ This Court finds one example of the City's behavior quite illustrative of its course of conduct. In October 1995 this Court ordered Novi to maintain access to Phase 1 of the development at Novi Road. In contravention of the order, it allowed the construction road to be barricaded and torn up as part of the Novi Road Project. This Court ordered construction halted until a point of access could be opened at Novi Road. Both Defendants Nowicki and Kriewall admitted that they did not instruct their engineers to stop work and both stated that the construction crew was under the jurisdiction of the MDOT project and not the City of Novi. (T XI, 96-97; XIII, 114-119, 151). Both also testified that the engineers and construction people heard this Court's order in court and thus were sufficiently informed of the order. An additional aspect of this event was that Plaintiff had asked the City to post signs at the barricaded Novi Road directing traffic to Thirteen Mile Road. The City, through Defendant Nowicki, refused and instead transmitted a package of information to Plaintiff instructing them how to apply for zoning variances for directional signs. (T IX, 128-130; T XIII, 151).

Thus, the City of Novi violated a Court order, denied Plaintiff access to its property, failed to order city employees to abide by the order, falsely claimed a lack of jurisdiction over the construction and then refused to post signs - forcing Plaintiff to seek a zoning variance. This is

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Plaintiff has also argued that Defendant Novi refused to allow them to make some use of their property by farming it. This Court finds no merit to this as Defendant did enter an agreement to allow Plaintiff to temporarily use their land in this manner.

a clear violation of Plaintiff's substantive due process rights. Indeed, all of Defendant Novi's actions which this Court has found to have breached the PUD agreement also qualify as violations of Plaintiff's right to substantive due process.

It is the opinion of this Court that the City of Novi repeatedly used its governmental powers and ordinances to impede Plaintiff's right to develop its land. Defendants Kriewall and Nowicki were at all times allowed to make ad hoc decisions about the fate of Plaintiff's development without reference to the larger harm they were causing. Significant oversight of these individuals was absent and resulted in the exercise of government power without regard to the law.

After commencement of this suit, Defendants Nowicki and Kriewall repeatedly failed to abide by orders of this Court and consistently failed to recall their involvement in key decisions concerning Plaintiff's development. If the testimony of Kriewall and Nowicki were to be believed, neither official had any intimate knowledge of the daily operations of their departments and neither believed that they shoulder any responsibility for the decisions made by those persons to whom significant tasks are delegated. It is evident to this Court that these two executive officials created a policy and pattern of delay and obstruction of Plaintiff's development. They intended to delay the project and deliberately ignored the property rights of Plaintiff. They acquiesced in the improper delaying conduct of their subordinates and thus implicitly authorized it. The acts and omissions of Kriewall and Nowicki, as the City Manager and Public Service Director, are attributable to the governmental entity. *Pembaur v Cincinnati*, 475 US 469, 480-481 (1986).

The evidence submitted at trial did not establish that either Nowicki or Kriewall took direct actions or gave direct orders to others to engage in acts which violated Plaintiff's substantive due

process rights. This Court recognizes that respondeat superior liability is not applicable in the context of this section 1983 claim and that many or most of the violations in this case were the result of acts of lesser government employees. *Jackson v Detroit*, 449 Mich 420, 433 (1995). Thus, Kriewall and Nowicki's self-described lack of active involvement protects them from individual civil liability under section 1983. Likewise, since this Court has declined to make a finding on the issues relating to the administration of the SAD fund, there is no basis upon which to find Defendant Gibson individually liable.

However, Defendants Kriewall and Nowicki were the policy makers for Novi as it related to Sandstone issues and their deliberate inaction in curing the numerous violations effectively created a policy of delay at the cost of Plaintiff's property rights. Perhaps Novi's course of conduct began as a way of delaying Plaintiff's development so that the Novi Road project could be undertaken without pressure to open Decker Road. The situation ultimately became what this Court can only describe as a vindictive struggle by Defendant Novi to "beat" Plaintiff. The ammunition used was the arbitrary and capricious application of the city's laws and ordinances. This is the very situation which the Constitutional right to substantive due process was designed to remedy. *Daniels v Williams*, 474 US 327, 331 (1986). Accordingly, this Court finds that the City of Novi violated the substantive due process rights of Plaintiff.

VII. Damages

This Court has found that Defendant Novi committed breaches of contract of SAD 132C and the PUD. This Court has held that Defendant Novi committed an uncompensated, unconstitutional, taking of access to Plaintiff's property as well as the temporary taking of certain property. Finally this Court has found that Defendant Novi violated Plaintiff's substantive due

process rights.

As a result of the breach of SAD 132C and the taking of access to Plaintiff's property, as well as the other improper delays caused by Defendant Novi, Plaintiff's development was destroyed. Defendant Novi's improper conduct occurred continuously from the fall of 1993 to the present. The initial breach of contract and subsequent breaches and constitutional violations all effectively resulted in the obstruction of or delay in Plaintiff's project. The "taking" of access and portions of the land likewise resulted in a loss of use of the land which caused delay in the development. As such, the damages for each separate claim are seamlessly interwoven and, with one exception, are calculable as a whole. This Court finds that Plaintiff is entitled to be placed in the position it would have been in but for the breach. Plaintiff is also entitled to compensation for the value of the property taken when access was denied and the loss of business revenue which resulted. Because the measure of damages for all of the prevailing claims together cover the complete loss of Plaintiff's development, Plaintiff will be compensated in an amount equal to the projected value of the development had it proceeded unhindered. *The Vogue v Shopping Center Inc*, 402 Mich 546 (1978); *In Re Acquisition of Leases*, 205 Mich App 659 (1994).

Plaintiff presented competent and thorough expert testimony in support of its damage claims. Patricia Fix, a CPA specializing in real estate and construction businesses, testified that she conducted an analysis on the current and projected financial condition of Plaintiff's development. (T XIV, 36-41). As part of this analysis, Fix compiled a detailed financial picture of the development and projected figures for the development had it proceeded as planned. (Exhibit 112). Jeffery Rosenbaum, a CPA specializing in the real estate industry, testified that he prepared both historical and pro forma balance sheets for the development based upon the data supplied by Fix's report. (T XV, 17-18). He then compared the development's actual earnings

with the projected (pro forma) earnings and arrived at an amount which represented the loss to Plaintiff as a result of the failure of the development. (T XV, 30).

In contrast, Defendant Novi did not provide this Court with competent evidence in support of its position that Plaintiff's assessment was unreasonable. Defendant's experts were CPA's who specialized in litigation support rather than real estate. In addition, the testimony of Mr. Schmid is found by this Court to be unreliable as he evidenced a lack of familiarity with significant aspects of the development and at several points relied upon inaccurate information in forming his opinions. (T XXIV, 131-157).

Accordingly, this Court finds the testimony of Plaintiff's experts on damages to be reasonable and credible and it will be used as the basis for the award of damages in this case. The damages are:

| | |
|-------------------|-------------------------|
| Pro forma value: | \$21,227,000.00 |
| Historical value: | (\$15,649,201.00) |
| Difference/Loss | <u>\$36, 876,201.00</u> |

Plaintiff is awarded \$36,876,201.00. (Exhibit 113). Plaintiff is also entitled to the carrying costs from January 1, 1998 to January 1, 1999 in the amount of \$2,457,478.00 and to \$6,732.00 for each day thereafter until the date of this opinion. (Exhibit 113).²⁰

| | |
|-----------------------------------|-----------------------|
| 1/1/98 to 1/1/99 carrying costs: | \$2,457,478.00 |
| 1/1/99 to 1/20/99 carrying costs: | \$ 127,908.00 |
| | <u>\$2,585,386.00</u> |

²⁰

Plaintiff seeks additional, separate, carrying costs as to certain claims. This Court finds that Plaintiff has not established that these carrying costs were incurred in addition to those as calculated in the damages as assessed above.

This Court, having effectively remedied the breach in assessing damages, will not award damages for the value of the special assessment nor will it award damages for the value of the Decker Road right-of-way. This Court finds that Plaintiff is not entitled to damages for the loss of reputation or relationship with lenders. The only "tort" claim from which such damages could even arguably flow is the violation of 42 USC section 1983. This Court finds that the record does not support a finding that the instances of conduct found to be substantive due process violations directly resulted in the loss of reputation or relationship with lenders. However, this Court does find that under section 1983 Plaintiff is entitled to recover reasonable attorney fees as part of its costs. *Blum v Stevenson*, 465 US 886, 896-897 (1984). While Plaintiff has submitted a claim for \$750,000.00 in attorney fees, this Court will make a determination on the reasonableness of the fees requested after a hearing on the matter.

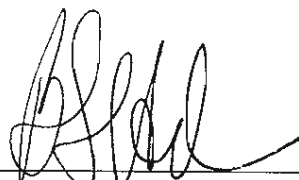
Finally, Defendant Novi's action in forcing Plaintiff to do mass regrading in Phase 1, which this Court found to be a substantive due process violation, resulted in Plaintiff expending \$500,000.00 to transport dirt in and out of the development. This Court awards that amount to Plaintiff.

In sum, the following damages are awarded:

| | |
|------------------------|----------------------|
| Loss of development: | \$36,876,201.00 |
| Carrying costs: | \$ 2,585,386.00 |
| Mass re-grading costs: | <u>\$ 500,000.00</u> |
| Total | \$39,961,587.00 |

Attorney fees, costs and interest shall be awarded following a hearing on the matter.

IT IS SO ORDERED.



BARRY L. HOWARD, Circuit Judge