

BILL NO. S-19-05-01

SPECIAL ORDINANCE NO. _____

AN ORDINANCE APPROVING BOARD OF
WORKS RESOLUTION NO. 106-5-14-19-1 FOR
PAYMENT OF THE REVISED FINAL
JUDGMENT OF THE COURT (\$400,000.00 PLUS
STATUTORY INTEREST) FOR THE
ACQUISITION OF CERTAIN REAL PROPERTY
(800 GLASGOW AVENUE) FOR USE BY THE
CITY OF FORT WAYNE, INDIANA FOR THE
CONSTRUCTION OF THE THREE RIVERS
PROTECTION AND OVERFLOW REDUCTION
TUNNEL.

WHEREAS, in 2016, Fort Wayne City Utilities filed two separate causes of action seeking judicial condemnation of an improved parcel of real estate (the "Improved Parcel") and a bare land parcel of real estate (the "Bare Land Parcel"), both of which are commonly known as 800 Glasgow Avenue, for use in construction of the Three Rivers Protection and Overflow Reduction Tunnel (the "Condemnation Action"); and

WHEREAS, the Improved Parcel and the Bare Land Parcel were previously owned by Property Max MMXIV, LLC ("Property Max"); and

WHEREAS, On March 14, 2017, the Common Council of the City of Fort Wayne ("Common Council") approved Ordinance No. S-29-17, as amended, authorizing City Utilities to deposit the preliminary sums of \$252,500.00 for the Improved Parcel and \$20,000.00 for the Bare Land Parcel with the Court, said values being determined by a panel of judicially appointed appraisers.

WHEREAS, Property Max filed exceptions to the values of the Improved Parcel and the Bare Land Parcel, claiming the actual fair market value of each parcel greatly exceeded the values determined by the panel of judicially appointed appraisers; and

1 **WHEREAS**, on June 8, 2018, Property Max withdrew the sum of
2 \$252,500.00 from the Court deposit.

3
4 **WHEREAS**, pursuant to Ind. Code § 32-24-1-11(c), a consolidated jury
5 trial was conducted in the Condemnation Action to determine the value of the
6 Improved Parcel and the Bare Land Parcel.

7 **WHEREAS**, on March 21, 2019, the jury returned a favorable verdict,
8 finding the value of the Improved Parcel to be \$380,000.00, and the value of the
9 Bare Land Parcel to be \$20,000.00.

10 **WHEREAS**, on May 2, 2019, the Court entered its Revised Final
11 Judgment in the amount of \$380,000.00 plus accrued interest of \$46,201.18 for
12 the Improved Parcel and \$20,000.00 plus accrued interest of \$3,384.23 for the
13 Bare Land Parcel.

14
15 **WHEREAS**, City Utilities is entitled to a credit equal to the amount of
16 funds previously deposited with the Court and withdrawn by Property Max.

17
18 **WHEREAS**, Pursuant to Section 37.25 of the Fort Wayne Code of
19 Ordinances, City Utilities seeks approval of the Common Council for the payment
20 of the principal sum of \$127,500.00, which represents the difference between the
21 Revised Final Judgment award of \$380,000.00 and the initial withdrawal of
22 \$252,500.00 for the Improved Parcel, plus accrued interest in the amount of
23 \$46,201.18, and, in addition thereto, seeks approval for the payment of the
24 principal amount of \$20,000.00, plus accrued interest in the amount of \$3,384.23
25 for the Bare Land Parcel.

26 **NOW, THEREFORE, BE IT ORDAINED BY THE COMMON**
27 **COUNCIL OF THE CITY OF FORT WAYNE, INDIANA:**

28 **SECTION 1.** That the Board of Works Resolution Number 106-5-

1 14-19-1 for the payment of the following amounts:

2 Improved Parcel—principal sum of \$127,500.00, plus accrued interest of
3 \$46,201.18 for a total of \$173,701.18, and

4 Bare Land Parcel—principal sum of \$20,000.00, plus accrued interest of
5 \$3,384.23 for a total of \$23,384.23

6 is hereby ratified, confirmed, and approved in all respects.

7 **SECTION 2.** The City is authorized to issue two separate checks,
8 payable in the amounts of **\$173,701.18** and **\$23,384.23** toward satisfaction of the
9 May 2, 2019 Revised Final Judgment of the Court in the Condemnation Action.

10 **SECTION 3.** This Ordinance shall be in full force and effect from and
11 after its passage and any and all necessary approval by the Mayor.
12

13
14 _____
Council Member

15
16
17 APPROVED AS TO FORM AND LEGALITY

18
19
20 _____
Carol Helton, City Attorney

Interoffice Memo

Date: May 8, 2019
To: Common Council Members
From: Seth Weinglass, Program Manager – Capital Project Services – Telephone: 427-1330
RE: **Payment of Revised Final Judgment for Condemnation of 800 Glasgow Ave.**

Council Introduction Date: May 14, 2019—Council District #: 5

Background & supporting information:

In 2016 City Utilities filed a lawsuit for condemnation of two adjacent parcels located at 800 Glasgow Avenue for the Three Rivers Protection and Overflow Reduction Tunnel (3RPORT) Project. This property, located in an industrial area adjacent to the wastewater treatment plant, is the location of the 3RPORT working shaft, the base of operations for the tunnel project. The property owner was Property Max MMXIV, LLC, an entity formed by local real estate investor Brian Schaper.

The initial amounts of damages awarded, pursuant to a court-appointed panel's assessment, were \$252,500 for the improved "building parcel" and \$20,000 for the unimproved "bare land parcel." The City deposited those amounts with the court to take possession of the property on March 20, 2017. Property Max contested the initial awards and requested that its damages be determined by a jury, alleging that the value of the parcels exceeded \$1,140,000 and \$210,000, respectively.

On June 8, 2018, Property Max withdrew \$252,500 from the court deposit.

In due course, a jury trial was conducted in March of 2019, resulting in damages awards in the amounts of \$380,000 for the building parcel and \$20,000 for the bare land parcel. Adjusting those amounts to correct for Property Max's withdrawal from the court deposit, and for statutory interest of 8% from the date of possession, the court issued a revised final judgment on May 2, 2019, ordering the City to pay the amounts of \$127,500 (plus \$46,201.18 statutory interest) and \$20,000 (plus \$3,384.23 statutory interest). Such amounts exclude the daily interest (\$27.95 and \$4.39 per diem, respectively) owed from the date such judgment was issued until it is satisfied, which will be advanced by City's outside counsel Carson, LLP.

Implications of not being approved:

The judgment would accrue statutory annual interest of 8%, and the City would risk having to pay additional attorneys' fees and costs to defend against a likely judgment enforcement action.

Justification if prior approval is being requested: Not applicable

Funding source: Sewer Revenue Bond

Attachments:

- Draft of BOPW resolution number 106-5-14-19-1, submitted for approval by the Board of Public Works on May 14, 2019.

CC: Matthew Wirtz
Brandon Almas
Diane Brown
Project file

**A RESOLUTION OF THE BOARD OF PUBLIC WORKS
OF THE CITY OF FORT WAYNE, INDIANA,
APPROVING THE PAYMENT OF THE REVISED FINAL JUDGMENT
FOR THE JUDICIAL CONDEMNATION OF CERTAIN REAL PROPERTY
FOR USE BY THE CITY OF FORT WAYNE, INDIANA,
FOR THE CONSTRUCTION OF THE
THREE RIVERS PROTECTION AND OVERFLOW REDUCTION TUNNEL

RESOLUTION NUMBER 106-5-14-19-1**

WHEREAS, the City of Fort Wayne, City Utilities (the "City") has exercised its power of eminent domain to acquire a fee simple interest in certain real property, located at 800 Glasgow Avenue, in Fort Wayne, Indiana, more particularly described and depicted in Exhibit 1 attached hereto (the "Property"), owned by Property Max MMXIV, LLC ("Property Max"), using the process of judicial condemnation set forth by Indiana Code section 32-24-1; and

WHEREAS, the Property needed to be acquired to serve as the location of the City's base of operations to launch a tunnel boring machine and construct the Three Rivers Protection and Overflow Reduction Tunnel ("3RPORT") project, undertaken by the City to implement a combined sewer overflow long-term control plan to bring the City into compliance with the Consent Decree that the City entered into with U.S. Environmental Protection Agency, the U.S. Department of Justice, and the Indiana Department of Environmental Management; and

WHEREAS, in 2016 the City thus filed a pair of complaints (one for each adjoining parcel being acquired) for condemnation in the Allen Circuit Court, causes numbered 02C01-16-04-PL-00218 and 02C01-16-03-PL-000158, consolidated for hearing by the Court (the "Condemnation Action"); and

WHEREAS, on March 20, 2017, the City deposited two checks to the Clerk of the Allen Circuit Court, in the amounts of \$252,500 and \$20,000, pursuant to the assessments of the Property's fair market value made by a panel of disinterested appraisers appointed by the Court under Indiana Code sections 32-24-1-9 et seq., (the "Court Deposit"); and

WHEREAS, on June 8, 2018, Property Max withdrew the amount of \$252,500 from the Court Deposit; and

WHEREAS, on March 14, 2019, following a jury verdict, the Court awarded damages to Property Max in the amounts of \$380,000 and \$20,000; and

WHEREAS, on May 2, 2019, the Court entered a revised judgment in the Condemnation Action, attached as Exhibit 2 attached hereto, accounting for Property Max's withdrawal of funds and adding statutory interest to the initial judgment, thus ordering the City to pay the amounts of \$127,500 (plus \$46,201.18 statutory interest) and \$20,000 (plus \$3,384.23 statutory interest) to Property Max (excluding daily interest, which the City's counsel has agreed to advance).

NOW THEREFORE, BE IT RESOLVED BY THE BOARD OF PUBLIC WORKS OF THE CITY OF FORT WAYNE, INDIANA, AS FOLLOWS:

The City shall issue two separate checks, payable in the amounts of **\$173,701.18** and **\$23,384.23**, toward satisfaction of the May 2, 2019 final revised judgment in the Condemnation Action.

APPROVED this 14th day of May, 2019.

BOARD OF PUBLIC WORKS

BY: _____
Shan Gunawardena, Chair

BY: _____
Kumar Menon, Member

BY: _____
Mike Avila, Member

ATTEST: _____
Michelle Fulk-Vondran, Clerk

Prepared by: Seth Weinglass, City Utilities, Program Manager – Capital Project Services

ACKNOWLEDGEMENT

STATE OF INDIANA)
) SS
COUNTY OF ALLEN)

Before me, a Notary Public, in and for said County and State personally appeared Shan Gunawardena, Kumar Menon, and Mike Avila, as Members of the Board of Public Works of the City of Fort Wayne, and Michelle Fulk-Vondran, Clerk, and acknowledged the execution of the foregoing contract as and for their voluntary act and deed for the uses and purposes therein contained.

WITNESS my hand and notarial seal this 14th day of May, 2019.

My Commission Expires:

Notary Public

Resident of _____ County

Printed Name of Notary

EXHIBIT 1

Page 1 of 3

PROPERTY OWNER NAMES AND MAILING ADDRESSES:

Former owner: Property Max MMXIV LLC
Mailing Address: 2042 Broadway
Fort Wayne, IN 46802

AFFECTED PROPERTY ADDRESS: 800 Glasgow Ave., Fort Wayne, IN 46803

LAST DEEDS OF RECORD:

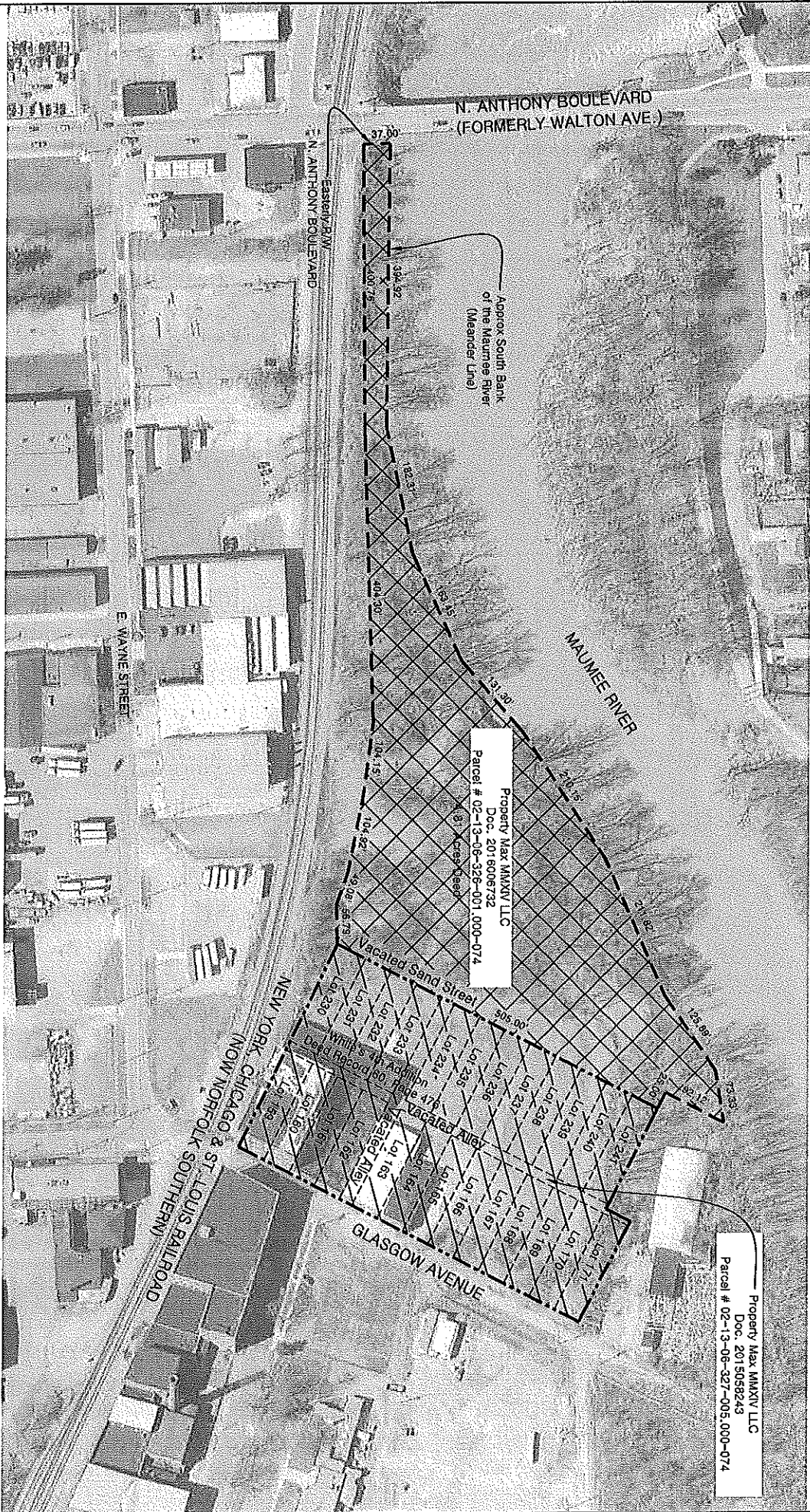
Allen County Recorder's deed reference numbers:

2015058243 (Tax parcel no. 02-13-06-327-005.000-074)

2016006732 (Tax parcel no. 02-13-06-326-001.000-074)

[Scale drawing and full legal descriptions attached on following pages.]

INTERESTS TO BE ACQUIRED: Fee simple for all of both lots.



N. ANTHONY BOULEVARD
(FORMERLY WALTON AVE.)

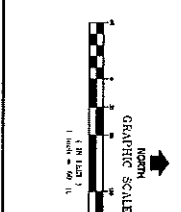
Approx South Bank
of the Maumee River
(Meander Line)

MAUMEE RIVER

Property Max MAXIV LLC
Doc. 2018006732
Parcel # 02-13-08-326-001.000-074

Property Max MAXIV LLC
Doc. 2018006732
Parcel # 02-13-08-326-001.000-074

Consent for Condemnation
Case No. 00021-16-04-01.000118
This drawing was prepared by GAI Consultants under the direction of a Professional Engineer and is for the use of the client only. The drawing is not intended to be represented as a replacement or original boundary survey, a title survey, or a change of location.



REVISIONS	
No.	Date



Design by	Date
Drawn by	JULY 2016
MMK	Jed No.
	D151715.05
Checked by	Design Head
DGC	SH



3RD PART PROJECT	
FORT WAYNE, INDIANA	
PROPERTY EXHIBIT	
Sheet No.	Of
1	1

EXHIBIT "A"

Lots Numbered 159 thru 170, inclusive, and the South 38 feet of Lot Number 171, and Lots numbered 230 thru 241, inclusive, together with the vacated North-South alley that lies between Lots numbered 159 to 168 and Lots numbered 230 to 239, and the vacated East-West alley that lies between Lot Number 162 and Lot Number 163 and Lot Number 233 and Lot Number 234, as vacated by Declaratory Resolution 686-1936 and the vacated alley that lies between Lots numbered 168 and 169 and Lots numbered 239 and 240 and the vacated alley that lies between Lots numbered 169 and 170 and 240 and 241 and the East half of vacated alley adjoining Lot Number 171 on the West as vacated by General Ordinance No. G-23-77, all in White's Fourth Addition to the City of Fort Wayne, according to the plat thereof, as recorded in Deed Record 60, page 476.

Together With:

A parcel of land located in the Southwest Quarter of Section 6, Township 30 North, Range 13 East, Allen County, Indiana, lying West of White's Fourth Addition to the City of Fort Wayne, North of the New York, Chicago and St. Louis railroad (now the Norfolk & Western railroad), South of the Maumee River and East of Walton Avenue (now Anthony Boulevard), more particularly described as follows, to-wit:

Beginning at the Northwest corner of Lot Number 241 in White's Fourth Addition to the City of Fort Wayne, as recorded in Deed Record 60, page 476, Allen County Recorder's Office; thence Southerly along the East right-of-way line of vacated Sand street in said addition (said Sand street vacated 6/77 by General Ordinance G-23-77), a distance of 505.00 feet to the Southwest corner of Lot Number 230 in said addition; thence Westerly by a deflection right of 61 degrees 41 minutes 16 seconds, a distance of 56.79 feet to a point on the Northerly right-of-way line of the Norfolk & Western railroad (formerly the New York, Chicago & St. Louis railroad); thence along said right-of-way as found on station map lands, the N.Y.C. & St. L.R.R. Co., Fort Wayne Div., Sta. 19439+20 to Sta. 19465+60, dated December 31, 1927, sheet S-L2A of V-2, Ind., by a deflection right of 20 degrees 14 minutes 25 seconds, a distance of 49.08 feet; thence continuing along said right-of-way by a deflection left of 7 degrees 48 minutes 39 seconds, a distance of 104.92 feet; thence continuing along said right-of-way by a deflection left of 3 degrees 40 minutes 50 seconds, a distance of 104.15 feet; thence continuing along said right-of-way by a deflection left of 9 degrees 28 minutes 05 seconds, a distance of 404.30 feet; thence continuing along said right-of-way by a deflection right of 1 degree 22 minutes 21 seconds, a distance of 400.76 feet to a point on the Easterly right-of-way line of Anthony Boulevard (formerly Walton Avenue), as now established; thence Northerly along said East right-of-way line of Anthony Boulevard by a deflection right of 88 degrees 14 minutes 24 seconds, a distance of 37.00 feet to a point on the South bank of the Maumee River; thence Easterly along a meander line along the South bank of said river by a deflection right 92 degrees 45 minutes 18 seconds, a distance of 394.92 feet to an iron pin set (all iron pins set by this survey are 1/2 inch diameter by 18 inches long); thence continuing along a meander line by a deflection left of 12 degrees 26 minutes 08 seconds, a distance of 182.31 feet to an iron pin set; thence continuing along a meander line by a deflection left of 16 degrees 06 minutes 39 seconds, a distance of 131.38 feet to an iron pin set; thence continuing along a meander line by a deflection right of 7 degrees 38 minutes 41 seconds, a distance of 210.15 feet to an iron pin set; thence continuing along a meander line by a deflection right of 9 degrees 35 minutes 18 seconds, a distance of 211.82 feet to an iron pin set; thence continuing along a meander line by a deflection left of 10 degrees 50 minutes 29 seconds, a distance of 125.89 feet; thence continuing along a meander line along said South river bank by a deflection right of 25 degrees 49 minutes 54 seconds, a distance of 73.33 feet to a point on the centerline of vacated Sand street; thence Southerly along the centerline of said vacated sand street by a deflection right of 125 degrees 57 minutes 52 seconds, a distance of 92.12 feet to an iron pin set on the Westerly extension of the North line of Lot Number 241 and 25.00 feet West of the Northwest corner of said Lot Number 241; thence Easterly by a deflection left of 90 degrees 00 minutes, a distance of 25.00 feet to the point of beginning, containing 4.81 acres of land, more or less.

EXHIBIT 2
Revised Final Judgment Entered May 2, 2019

STATE OF INDIANA)
) SS:
COUNTY OF ALLEN)

IN THE ALLEN CIRCUIT COURT

CAUSE NO. 02C01-1603-PL-158

CITY OF FORT WAYNE, INDIANA,)

Plaintiff,)

vs.)

PROPERTY MAX MMXIV, LLC,)

Defendant.)

Consolidated with Cause No.:
02C01-1604-PL-218

**ORDER GRANTING DEFENDANT'S MOTION TO CORRECT ERRORS
AND ENTRY OF REVISED FINAL JUDGMENTS**

This matter comes before the Court on Defendant Property Max MMXIV, LLC's Motion to Correct Errors filed on April 12, 2019. On April 15, 2019, Plaintiff City of Fort Wayne, Indiana filed its Response to Defendant's Motion to Correct Errors. Therein, Plaintiff informed the Court that it does not object to Defendant's Motion and agrees with the relief being sought. The Court, being fully advised in the premises, now issues the following Order:

1. On March 20, 2017, Plaintiff deposited a Court award of \$252,500.00 with the Clerk of the Court for the "Building Parcel" related to Cause No. 02C01-1603-PL-158. This Court award was withdrawn by Defendant on June 8, 2018.

2. On March 20, 2017, Plaintiff deposited a Court award of \$20,000.00 with the Clerk of the Court for the "Bare Land Parcel" related to Cause No. 02C01-1604-PL-218. This Court award has not been withdrawn by Defendant.

3. On March 14, 2019, the Court entered a Civil Jury Trial Order. Defendant was awarded damages for the taking of the "Building Parcel" in the amount of \$380,000.00. Defendant was awarded damages for the taking of the "Bare Land Parcel" in the amount of \$20,000.00. Interest owed by Plaintiff to Defendant was not included in either award.

4. Under I.C. § 32-24-1-11(6):

In any trial of exceptions, the court or jury shall compute and allow interest at an annual rate of eight percent (8%) on the amount of a defendant's damages from the date plaintiff takes possession of the property. Interest may not be allowed on any money paid by the plaintiff to the circuit court clerk:

(A) after the money is withdrawn by the defendant; or

(B) that is equal to the amount of damages previously offered by the plaintiff to any defendant and which amount can be withdrawn by the defendant without filing a written undertaking or surety with the court for the withdrawal of that amount.

5. With respect to the "Building Parcel," the Court enters a revised Final Judgment in the amount of \$127,500.00. This figure represents the \$252,500.00 credit for the funds withdrawn by Defendant from the \$380,000.00 jury verdict. Additionally, the Court awards statutory interest through and including May 2, 2019 in the amount of \$46,201.18, along with a statutory interest of \$27.95 per diem after May 2, 2019 until the Judgment is paid.

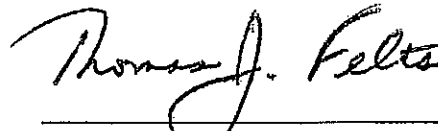
6. With respect to the "Bare Land Parcel," the Court enters a revised Final Judgment in the amount of \$20,000.00. Additionally, the Court awards statutory interest through and including May 2, 2019 in the amount of \$3,384.23, along with a statutory interest of \$4.39 per diem after May 2, 2019 until the Judgment is paid.

7. The Court now directs the Clerk of the Court to disburse the \$20,000.00 paid by Plaintiff for the "Bare Land Parcel" related to Cause No. 02C01-1604-PL-218. The Clerk of the Court should make the check payable to "Carson LLP" and send it to the following address:

Carson LLP
c/o Calvert S. Miller, Esq.
301 W. Jefferson Blvd., Suite 200
Fort Wayne, IN 46802

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Defendant Property Max MMXIV, LLC's Motion to Correct Errors is **GRANTED**.

SO ORDERED this 2nd day of May, 2019.

 WZM

THOMAS J. FELTS, JUDGE
ALLEN CIRCUIT COURT