STATE OF MICHIGAN

COURT OF APPEALS

COUNTY OF LENAWEE,

Plaintiff-Appellant,

v

DAVID WAGLEY, BARBARA WAGLEY, and BANK OF LENAWEE,

Defendants-Appellees,

and

PAVILLION MORTGAGE,

Defendant.

UNPUBLISHED
December 20, 2011

No. 302533
Lenawee Circuit Court
LC No. 05-001960-CC

COUNTY OF LENAWEE,

Plaintiff-Appellant,

v

ROBERT D. GARDNER, MICHELE A. GARDNER, and SKY BANK,

Defendants-Appellees,

and

UNITED BANK & TRUST,

Defendant.

No. 302534
Lenawee Circuit Court
LC No. 05-001961-CC

COUNTY OF LENAWEE,

Plaintiff-Appellant,

v

PHILLIP HALSTEAD, MARY HALSTEAD, LENCO CREDIT UNION, and ALDEN STATE BANK,

Defendants-Appellees.

No. 302535
Lenawee Circuit Court
LC No. 05-001962-CC

COUNTY OF LENAWEE,

Plaintiff-Appellant,

v

ROBERT L. SELLERS, SR., and UNITED MORTGAGE COMPANY,

Defendants-Appellees.

No. 302537
Lenawee Circuit Court
LC No. 05-002000-CC

COUNTY OF LENAWEE,

Plaintiff-Appellant,

v

RICHARD F. BARON and MARY SHARON BARON, Co-trustees of the BARON FAMILY LIVING TRUST,

Defendants-Appellees.

No. 302538
Lenawee Circuit Court
LC No. 05-002001-CC

Before: MURPHY, C.J., and JANSEN and OWENS, JJ.

PER CURIAM.

These appeals involve five condemnation actions initiated by plaintiff Lenawee County (the "county") concerning five different parcels of property near the Lenawee County Airport. Defendants consist of the individual property owners and entities holding mortgage interests in the properties. The county appeals by leave granted in each of the five cases, challenging two separate interlocutory orders entered by the trial court in January 2011. The county argues that the trial court erred with respect to an order denying the county's motion in limine "to preclude defendants from introducing any evidence that residential use of their property after the taking is prohibited based upon FAA [Federal Aviation Administration] regulations that prohibit

residences within the Runway Protection Zone [RPZ]." The county further contends that the trial court erred with respect to an order granting defendants' motion in limine to "exclude inadmissible hearsay relied upon by [the county's] expert witnesses." Finally, the county maintains that the case should be remanded to a different judge, given that the trial judge has displayed bias against the county. We reverse the trial court's order denying the county's motion in limine regarding FAA regulations, we affirm the order granting defendants' motion in limine, and we reject the county's request to have the case reassigned to a different judge on remand.

The county filed these actions in 2005. The complaints similarly described that the county intended to undertake an airport expansion and improvement project that necessitated its acquisition of avigation easements[1] over the five involved properties. The complaints further indicated that defendants had rejected the county's good-faith offers of compensation. In January 2006, the trial court entered an order requiring a total taking. In the order, the trial court ruled in part:

> The Court has reviewed the briefs and materials submitted by the parties and entertained oral argument. The Court has determined that the [FAA] regulations required the removal of Defendants' home as a result of its location in a[n] [RPZ] as a matter of law. Therefore, no issue of fact exists because the acquisition of the portion of the parcel of property actually needed by Plaintiff destroys the practical value or utility of the remainder of the parcel, requiring Plaintiff to acquire and pay just compensation for the whole parcel pursuant to MCL 213.54(1).

This passage reflects that the trial court was of the opinion that there could be no residential occupancy of a structure located in the RPZ, and, therefore, because a property within the RPZ could not be used for residential purposes, the practical value or utility of the property was effectively destroyed, resulting in the need to pay just compensation for a total taking of the whole property. In other words, because the landowners were left with parcels upon which they could not have a house for residential use, the property was essentially rendered worthless, thereby requiring the county to "pay just compensation for the whole parcel," and giving the county the opportunity to "elect whether to receive title and possession of the . . . parcel." MCL 213.54(1).[2]

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[1] Black's Law Dictionary (7th ed), p 527, defines an "avigation easement" as "[a]n easement permitting unimpeded aircraft flights over the servient estate."

[2] MCL 213.54(1) provides:

> If the acquisition of a portion of a parcel of property actually needed by an agency would destroy the practical value or utility of the remainder of that parcel, the agency shall pay just compensation for the whole parcel. The agency may elect whether to receive title and possession of the remainder of the parcel. The question as to whether the practical value or utility of the remainder of the parcel

The county filed a motion for reconsideration, and the trial court issued a written opinion denying the motion, stating as follows:

> All of [the county's] new evidence suggests that FAA regulations do not require a total taking; however, the regulations do "strongly request" absolute fee be taken. . . . Although this Court may not have been required to order a total taking, this Court stated on the record several reasons why it felt a total taking was necessary. Specifically, this Court held:
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> "Land uses prohibited are residences and places of public assembly. I don't know how any rule can be clearer than that. . . . Now, I am presuming that there will be occasions when the winds are funny and people will actually be landing coming this way and they could skid off, or you know, heaven help us that we ever had a plane that would have a malfunction, say, in its landing gear. . . . And so here we are. We are expecting people to live under the threat of imminent danger in a house where the RPZ is, at the minimum point, is a matter of a few feet over their chimney. Now granted, planes normally come in at [a] different level, but I would suspect that if all airline pilots came in at the right level you wouldn't need an RPZ more than ten feet wide. They could fly right down that line. That isn't what happens in this world. People do make mistakes. . . . Here we are flying huge airplanes into an airport right over the top of people's heads. And I don't understand how anyone can be expected, unless they want to, to live in that kind of environment. . . . I think my view here, that the value of these homes, there may be residual value for some people who may want to live there, but I don't think these people have to live there. And I think these properties have to be taken, so I will order that."
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> Obviously, this Court based its total taking on more than a single FAA regulation prohibiting residential homes in the RPZ. This Court believes forcing Defendants to remain in their home constitutes an unnecessary risk to their lives. Furthermore, pursuant to FAA Order 5100.38C, [the county] is "strongly urged" to acquire fee title of Defendants' property. [Omissions in original.]

The county appealed the trial court's ruling, and this Court reversed and remanded for further proceedings. *Lenawee Co v Wagley*, unpublished opinion per curiam of the Court of Appeals, issued March 22, 2007 (Docket Nos. 268819, 268820, 268821, 268822 and 268823). This Court stated that the first argument posed by the county was "that the trial court erred in finding, as a matter of law, that FAA regulations preclude residences in RPZs." *Id.*, slip op at 4. The panel noted that defendants had argued below that "their residences were located in a RPZ and that FAA regulations required that the homes be razed and the sites cleared, resulting in

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> of property is in fact destroyed shall be determined by the court or jury and incorporated in its verdict.

Here, the "acquisition of a portion of" any given property would relate to the county's acquisition of an avigation easement interest from the property owner.

destruction of the value or utility of the remainder of the parcels." *Id.* at 3. Our review of defendants' appellate brief filed in the prior appeal reveals that they argued that the county "completely ignores the unqualified statement regarding the incompatibility of residential uses in an RPZ in its own FEA [Final Environmental Assessment]." Defendants also argued that any claim by the county that FAA regulations did not require the acquisition of fee simple ownership of property located in the RPZ was beside the point, where "[r]egardless of who owns the fee simple land after the taking, a prohibition against its use for residential purposes destroys the practical value of the remainder, thus requiring a total taking pursuant to MCL 213.54." Accordingly, squarely before this Court in the first appeal, at least in part, was the question whether FAA regulations allowed residential occupancy of structures in an RPZ.

This Court first acknowledged that FAA Policy and Procedures Memorandum ("PPM") 5300.1B, issued in 1999, provided in part that RPZs must be cleared of "incompatible land uses," which included "residences," and that the governmental agency should acquire the fee relative to such properties. *Lenawee Co*, slip op at 4-5. Part of the PPM quoted by this Court provided, "'If fee acquisition is determined to be infeasible, for any part of the [RPZ], that portion of the [RPZ] must be protected by an avigation easement against incompatible land use restrictions listed in paragraph 3.b.(1),'" which included residences. *Id.* at 4. The PPM further provided that "'[t]his easement must prohibit incompatible land uses . . ., [and] [i]f the present land use on the proposed easement property is incompatible, it must be properly mitigated and approved by the FAA.'" *Id.* The panel found that, "[g]enerally speaking," a residence constituted an incompatible land use and the county "should" acquire a property in fee. *Id.* at 5. But the Court noted, however, that the plain language of the PPM indicated that "acquiring the properties in fee is not necessary, and that an alternative to a complete acquisition is obtaining an avigation easement." *Id.* This Court then held:

> [C]ontrary to the trial court's interpretation, FAA regulations do not require [the county] to acquire defendants' residences in fee as a matter of law simply as a result of their location within the RPZ. Rather, an avigation easement is an acceptable alternative if approved by the FAA. [*Id.*]

We note that the trial court did not actually rule that FAA regulations required the county to acquire defendants' properties in fee. Rather, the trial court concluded that FAA regulations did not permit residential use in an RPZ, which had the effect of a total taking because the practical value of any given property was destroyed if residential use was barred.[3] At first glance, and as argued by defense counsel at oral argument here, it appears that the prior panel did

[3] There is a difference between the proposition that FAA regulations require acquisition of a fee interest in RPZ property and the proposition that FAA regulations prohibit residential use of RPZ property; they are not one in the same. A total taking would obviously and definitively occur with an actual acquisition of property but would only potentially occur where property usage was merely limited, e.g., where a residence could not be maintained on the land. A parcel could still have some value despite the fact that the parcel could not be used as a residence. Farm land is a good example.

not reach the issue of whether FAA regulations prohibit residences in an RPZ. However, the panel proceeded to address whether there was evidence of FAA approval, and it indicated that the county had indeed provided evidence that the FAA had determined that the acquisition of avigation easements was appropriate. *Id.* This Court stated that the FAA itself had indicated that "FAA regulations do not prohibit the location of residences . . . within an RPZ." *Id.* According to the panel, the FAA had also stated in correspondence that, "'[p]er FAA standards, the residences are not obstructions to the approach surface or to air navigation'" and that "'[t]hese conditions are considered safe by FAA standards.'" *Id.* at 6. This Court concluded:

> [The county] presented documentary evidence that the avigation easements were "approved by the FAA." *Thus, the trial court erred in determining that a total taking was required under FAA regulations* "as a matter of law." [*Id.* (emphasis added).]

This part of the panel's ruling did not frame its conclusion in terms of FAA regulations not requiring fee acquisition; rather, the opinion's language is framed in terms of FAA regulations not requiring a total taking within the context of the trial court's ruling, which ruling, as indicated above, found that FAA regulations prohibited residences in an RPZ. Accordingly, and importantly for purposes of our law of the case analysis below, we find that this Court's prior opinion effectively encompassed the question whether FAA regulations prohibit residential occupancy in RPZs, with the Court implicitly yet effectively ruling that such occupancy is permitted under an avigation easement so long as the FAA approved of the easement.[4] As discussed in detail below, our focus, for purposes of the law of the case doctrine, must be on whether there has been a change in FAA regulations since the prior opinion was issued and

[4] Obviously, this Court's prior opinion and holding would be entirely nonsensical if the avigation easements, for which the Court found evidence showing FAA approval, did not permit residential use. The avigation easements do "prohibit[] any ground structures . . . which encourage the congregation of people in the [RPZ]." This language is a bit vague, but arguably could preclude residences. However, the avigation easements also provide: "The GRANTOR shall not use nor permit construction on the GRANTOR's land . . ., any structure that is a hazard to the general public or air navigation including the construction of *new residences*, fuel handling and storage facilities, smoke-generating activities, or places of public assembly, such as churches, schools, office buildings, shopping centers, and stadiums." (Emphasis added.) Use of the term "new residences," when considered in conjunction with the nonexclusive list of prohibited structures, which does not include the basic structure of a home, house, or residence, suggests that existing residences are allowable. For the prior opinion to make any sense, we must necessarily assume that the panel was aware of the language in the easements and concluded that residences were not prohibited. We note that in December 2009, following the first appellate opinion, the parties entered into a stipulation permitting reconstruction or the rebuilding of residences, which resulted in an amendment of the easements. However, the stipulation also provided that entry of the order on the matter "shall not be deemed an acknowledgment by the Defendants that continued occupation of the residence is appropriate in the after taking scenario."

whether facts subsequently developed showing that FAA approval of the avigation easements had been revoked or vacated in some manner.

We must still discuss another aspect of this Court's earlier opinion. After addressing the matters and issues that we examined above, this Court proceeded to address, under MCL 213.54(1), the alternate reasons given by the trial court for finding a total taking, as set forth in the trial court's opinion on reconsideration. This Court held:

> The trial court's finding that a total taking was required was based not on evidence submitted by defendants, but, rather, on the court's subjective findings that there may be mistakes made, or unusual circumstances presented, that may endanger the lives of the persons in the homes. But the proper standard to be applied when determining whether an agency acquiring a portion of a parcel of property shall pay a property owner just compensation for a "total taking" is whether the partial acquisition would destroy the practical value or utility of the remainder of that parcel. Although the trial court stated that the avigation easements destroyed the practical value or utility of the properties, the court made no findings based on any evidence to support the statement. To the contrary, the trial court specifically found that "there may be some residual value for some people who want to live there." Indeed, [the county] presented evidence that "there are many airports which have obtained avigation easements in the RPZs which were acquired over existing residences" and that "These avigation easements include the same, or substantially the same conditions imposed by the avigation easements being acquired in this matter." [The county] also presented evidence that the new runway "is longer and further from the affected residences," and that this "will enable pilots to land further from the effected residences, thus reducing noise levels in comparison with the existing runway." [The county] also presented evidence that "the actual aircraft elevation above the houses will be higher," and that the State of Michigan and the FAA conducted "thorough environmental, noise, and safety reviews before construction," and that both entities issued a "joint Finding of No Significant Impact." This evidence suggests, from a practical standpoint, the easement may have little, if any, negative impact on the affected properties. [The county] also presented evidence that properties encumbered by avigation easements generally suffer an approximate 6% diminution in value.
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> In light of the evidence presented by [the county] in response to defendants' motion, the trial court erred by finding as a matter of law that the avigation easements resulted in a total taking of defendants' properties. Whether defendants suffered a total taking – that is, whether the practical value or utility of the remainder of the parcels was destroyed – is a disputed question of fact relevant to the determination of just compensation. . . . The trial court improperly invaded the province of the jury and deprived [the county] of its right to a jury trial on the issue of just compensation. [*Lenawee Co*, slip op at 8.]

On remand, the parties engaged in extensive discovery and other pretrial proceedings, including the motions in limine that are the subjects of this appeal. On October 20, 2008, a

stipulated order was entered, which provided "that neither party shall illicit [sic] testimony from the Federal Aviation Administration or the Michigan Department of Transportation Bureau of Aeronautics [DTBA]." Subsequently, the two motions in limine were filed by the parties.

First, defendants filed the motion "to exclude inadmissible hearsay relied upon by [the county's] expert witnesses." Defendants sought to exclude an unsigned letter from Christopher Blum, the FAA's regional administrator for the Great Lakes Region, to United States Senator Carl Levin, which included detailed responses to various questions posed by Senator Levin in an earlier correspondence regarding FAA regulations and aspects of the planned RPZ expansion.[5] Defendants also sought to exclude an affidavit from Irene Porter, a Detroit FAA manager, concerning FAA regulations, policies, and procedures in connection with land acquisitions and RPZs. Next, defendants sought to exclude information from a study conducted by Daniel P. McMillen regarding the impact of avigation easements around Chicago's O'Hare Airport, along with excerpts from an appraisal report prepared by David Maturen, a real estate appraiser, which analyzed the impact of avigation easements at the Grand Haven Airport. Defendants also cited the stipulation, which precluded testimony by the FAA and DTBA, as the basis for barring testimony by Blum and Porter. Defendants argued that neither McMillen nor Maturen were identified on an expert witness list and neither supplied expert reports as ordered by the court; therefore, they should not be allowed to testify. Defendants stated that the county was planning on introducing the above-referenced letter, affidavit, study, and report indirectly through the testimony of the county's real estate appraiser. Defendants argued that such indirect introduction would violate MRE 703, which provides that "[t]he facts or data in the particular case upon which an expert bases an opinion or inference shall be in evidence," and that it would offend the rules regarding hearsay, MRE 801-806. Defendants further maintained, citing MRE 401 and 403, that the documents contained unsupported conclusions, that they were cumulative, that they were irrelevant, that they were confusing and misleading, and that the probative value of the documents was substantially outweighed by the danger of unfair prejudice.

The trial court granted defendants' motion, excluding the testimony of Blum, Porter, McMillen, and Maturen, and excluding from evidence the documents associated with those individuals, which documents could not be referenced or relied on by any witness.[6] The trial court gave the following reasoning in support of its ruling at the hearing on the motion:

> The most important point here is that [defendants' counsel] entered into this agreement [excluding FAA and DTBA testimony] with the other side. And it's fairly clear. It is not ambiguous. It is clear on its face. It refers to any testimony. And the inequity – and I think that's the significant point . . . is that [defense counsel was] not able to examine people based on this stipulation, and

[5] This document was relied on, in part, by this Court in the prior opinion. *Lenawee Co*, slip op at 5-6.

[6] The order also excluded testimony and an affidavit by Richard Hammond, a representative of the DTBA.

> therefore, it would be inequitable to allow the [county] to use documents [defendants] were not able to address, so [defendants'] motion is granted.

In the second motion in limine at issue, the county sought "to preclude defendants from introducing any evidence that residential use of their property after the taking is prohibited based upon FAA regulations that prohibit residences within the Runway Protection Zone." The county wished to exclude defendants from referencing at trial a portion of an appraisal report prepared by David E. Burgoyne, defendants' expert, which set forth an appraisal predicated on the assumption that residential occupancy of defendants' homes was prohibited after the taking due to their location in the RPZ. In a cover letter executed by Burgoyne, he stated that he prepared the appraisal according to instructions given him by defense counsel. Burgoyne wrote:

> As a result [of counsel's directive], this report is actually three appraisals. As it is based on the partial taking concept, the first appraisal addresses the market value of the entire subject before the taking, as if the current Lenawee Airport Project had not been contemplated. The second addresses the market value of the subject after the taking based on the assumption that the property could remain occupied, but taking into account the full impact of the acquisition of the avigation easement.
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> The third analysis considers the full impact of the taking based upon the expert report of Snyder & Associates,[7] an airport planning firm that opines that *residential use after the taking is improper based upon FAA regulations that prohibit residences within the [RPZ]*. . . . Both after taking scenarios assume that the Lenawee Airport will utilize the property to the greatest extent as allowed by law, although in the first case it is presumed that the residence will be allowed to remain and continue to be occupied, *contrary to [FAA] regulations*. [Emphasis added.]

The county offered three arguments in support of its motion: (1) the law of the case doctrine precluded defendants from introducing evidence indicating that continued residential use of their property in the RPZ after the taking is prohibited by FAA regulations; (2) defendants stipulated to the acquisition of the easements which permitted residential use in the RPZ, thereby waiving any challenge to the easements;[8] and (3) defendants' claim that continued residential use

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[7] In counsel's letter to Burgoyne, counsel stated, "Snyder & Associates has opined that Lenawee County was, at the minimum, required to acquire an avigation easement that prohibits residential occupation of the subject property. Please appraise the property after the taking a second time based upon the assumption that residential occupancy of the home is prohibited." A report by Snyder & Associates is included in the lower court record.

[8] On November 21, 2007, the trial court entered an "order for payment of estimated just compensation and surrender of possession," which provided in part:

> [T]he [county] shall pay to the Defendants, the estimated just compensation set forth in the Declaration of Taking within four (4) weeks of the

in the RPZ violated FAA regulations must be pursued in a federal forum, but cannot again be raised in this case.

Defendants responded that the law of the case doctrine did not apply because this Court had identified issues of fact and remanded the case for additional proceedings and because the facts underlying the appeal had materially changed. Defendants also observed that the stipulated order upon which the county relied for its waiver argument clearly preserved defendants' right to contest the just compensation offered by the county.

At the same hearing in which the trial court granted defendants' motion in limine, the court denied the county's motion in limine regarding FAA regulations. In denying the motion, the trial court reasoned:

> My ruling earlier was that as a matter of law the FAA regulations required a total taking. That's what I ruled. [The Court of Appeals] said – despite what the regulation reads, they said no, it doesn't. So the only issue that I saw the [C]ourt of [A]ppeals really addressing was whether, if you have a chicken, if it's really a chicken or if it's a dog. I don't know what they are doing. . . .
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> [Y]ou can certainly cross examine [Burgoyne] and point out that that isn't correct. What do you want me to do? I don't understand. I don't understand what you want here. I mean, he calls a witness and they testify wrongly. It's not my job to come in here and correct their testimony. It's [y]our job to cross examine them at trial and show that they are wrong, or ask for a directed verdict on that issue after proofs or something. I don't know. I am not – maybe I am not a condemnation expert, but I have never seen anything like that. Every little nickel and dime issue here. . . .

The county appeals by leave granted the two orders issued by the trial court.

We review for an abuse of discretion a trial court's decision to admit or exclude evidence; however, where the determination involves a preliminary question of law, such as whether a statute or rule of evidence precludes admissibility, our review is de novo. *Dep't of Transp v Frankenlust Lutheran Congregation*, 269 Mich App 570, 575; 711 NW2d 453 (2006).

We first find that, under the law of the case doctrine, the trial court erred in denying the county's motion to exclude any testimony or evidence indicating that residential use of defendants' properties in the RPZ after the taking was prohibited by FAA regulations. Our ruling effectively bars admission of Burgoyne's appraisal that was predicated on the assumption that FAA regulations prohibit residential use.

> entry of this Order, that amount being $47,500.00. The acceptance of the estimated just compensation does not constitute a waiver of the right of the Defendants to contest the just compensation offered by the [county].

We review de novo the legal question of whether and to what extent the law of the case doctrine applies in a given situation. *Kasben v Hoffman*, 278 Mich App 466, 470; 751 NW2d 520 (2008). In *Grievance Administrator v Lopatin*, 462 Mich 235, 259-260; 612 NW2d 120 (2000), the Michigan Supreme Court, explaining the principles regarding the law of the case doctrine, stated:

> Under the law of the case doctrine, if an appellate court has passed on a legal question and remanded the case for further proceedings, the legal questions thus determined by the appellate court will not be differently determined on a subsequent appeal in the same case where the facts remain materially the same. The appellate court's decision likewise binds lower tribunals because the tribunal may not take action on remand that is inconsistent with the judgment of the appellate court. Thus, as a general rule, an appellate court's determination of an issue in a case binds lower tribunals on remand and the appellate court in subsequent appeals.
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> Law of the case applies, however, only to issues actually decided, either implicitly or explicitly, in the prior appeal. [Citations, footnote, and internal quotations marks omitted.]

The rationale behind the law of the case doctrine is to maintain consistency and to avoid reconsideration of issues and matters previously decided during the course of a particular lawsuit. *Schumacher v Dep't of Natural Resources*, 275 Mich App 121, 128; 737 NW2d 782 (2007). A conclusion by this Court that a prior appellate decision in the same case constituted error is not sufficient, in and of itself, to justify ignoring the doctrine. *Bennett v Bennett*, 197 Mich App 497, 500; 496 NW2d 353 (1992). "Normally, the law of the case applies regardless of the correctness of the prior decision, but the doctrine is not inflexible." *Freeman v DEC Int'l, Inc*, 212 Mich App 34, 38; 536 NW2d 815 (1995). The law of the case doctrine does not preclude reconsideration of a question if there has been an intervening change of law. *Id.* For this exception to apply, the change of law must occur after this Court's initial decision. *Id*. "When this Court reverses a case and remands it for a trial because a material issue of fact exists, the law of the case doctrine does not apply because the first appeal was not decided on the merits." *Brown v Drake-Willock Int'l, Ltd*, 209 Mich App 136, 144; 530 NW2d 510 (1995), citing *Borkus v Michigan Nat'l Bank*, 117 Mich App 662, 666; 324 NW2d 123 (1982).

Here, the law of the case doctrine precludes introduction of or reference to the challenged information or evidence, where this Court's previous opinion, consistent with our earlier discussion, necessarily encompassed a finding that FAA regulations permitted residences in RPZs under avigation easements if the FAA approved the avigation easements. *Lenawee Co*, slip op at 5-6. This holding reflected the Court's interpretation of FAA regulations and constituted a ruling on a legal question that the trial court was not permitted to disregard and ignore on remand. Honoring this Court's holding would not be accomplished, as suggested by the trial court, by allowing the challenged evidence to be heard by the jury and then permitting the county to merely cross-examine Burgoyne on this Court's decision or to move for a directed verdict. An important aspect of any motion in limine is that it serves to preemptively address evidentiary issues so as to prevent the jury from inadvertently hearing evidence subject to exclusion that could taint the jury. We question the soundness of even contemplating cross-

examination relative to the subject of appellate court rulings, and a party should not be forced to move for a directed verdict on a matter already conclusively passed on by this Court.

This Court's prior ruling provided, after indicating that the trial court misinterpreted FAA regulations, that "an avigation easement is an acceptable alternative if approved by the FAA," that the county "presented documentary evidence that the avigation easements were approved by the FAA," and that "the trial court erred in determining that a total taking was required under FAA regulations 'as a matter of law.'" *Id.* at 5-6. To the extent that the panel's ruling can be construed as a finding that FAA regulations would prohibit residential occupancy in RPZs if the FAA does not approve of an avigation easement allowing such occupancy,[9] there is no evidence in the record countering or contradicting the evidence relied on previously by this Court that showed FAA approval of the airport expansion and improvement project and the avigation easements.

This Court's earlier ruling recognized the evidence showing the FAA's approval and did not take note of any evidence suggesting that FAA approval was lacking. The panel's focus was on the validity of the trial court's determination that FAA regulations established as a matter of law that a total taking occurred, and this Court did not hold that there was actually a genuine issue of material fact regarding FAA approval of avigation easements or regarding whether FAA regulations prohibited residency in the RPZ. There has been no factual development since the first appeal indicating that FAA approval of the avigation easements has been revoked or vacated. Further, there is no indication that there has been an intervening change of law since this Court's prior opinion was issued, i.e., that FAA regulations were amended or added since this Court's ruling that would alter the ruling. It is entirely improper, under the law of the case doctrine, to allow the jury to hear testimony regarding an appraisal predicated on purported FAA regulations that prohibit residency in the RPZ.

At oral argument, defense counsel adamantly maintained that this Court's prior opinion only addressed whether FAA regulations required acquisition of a fee interest as to property located in an RPZ, not whether FAA regulations prohibited residences in RPZs. We have addressed and rejected that argument as explained earlier. Defense counsel also contended that there was no dispute by anyone that the governing FAA principle is that FAA regulations prohibit residences in RPZs unless the FAA makes a finding of impracticability relative to eliminating residential use or removing homes, which finding has never been made by the FAA. Perhaps this is the case; however, we cannot invoke and employ the principle because to do so would contravene the analysis, reasoning, and holding in this Court's prior opinion. And under the law of the case doctrine, it matters not whether the first panel's ruling was legally incorrect. *Freeman*, 212 Mich App at 38; *Bennett*, 197 Mich App at 500.

Moving on with our analysis, this Court also ruled that whether defendants suffered a total taking was a "disputed question of fact relevant to the determination of just compensation." *Lenawee Co*, slip op at 8. This ruling, however, did not pertain to the FAA regulations. Rather,

[9] Again, as explained above, we are operating on the necessary conclusion that the prior panel interpreted the avigation easements as allowing residential use.

this Court was examining the issue reached in the trial court's opinion on the county's motion for reconsideration, in which, the court gave an alternate reason for finding a total taking essentially unassociated with the FAA regulations after the court itself backed away somewhat from its initial position that FAA regulations prohibited residency. The trial court ruled that a total taking occurred because residing and living in homes located on the properties encumbered by avigation easements presented an unnecessary risk to defendants' lives. It was this particular ruling that was being addressed by this Court, not the FAA regulations, when the Court found the existence of a genuine issue of material fact. Accordingly, that portion of this Court's ruling is irrelevant for our purposes relative to the law of the case doctrine.

The county logically proceeded on remand under the reasonable impression that the question of whether FAA regulations prohibited defendants from residing in their homes was no longer subject to dispute, absent a change in law or evidence showing a lack of FAA approval, neither of which is reflected in the record. This would explain why the county agreed to the order precluding the parties from eliciting FAA and DTBA testimony. In our view, after this Court's earlier opinion, the five cases should have come down to having a jury determine just compensation based on a diminution of value as caused by a property being encumbered by an avigation easement, with the jury still having the ability to determine that a total taking effectively occurred as caused by an easement, but not based on FAA regulations. In sum, the trial court erred in denying the county's motion in limine.

Next, we address the county's assertion that the trial court erred in granting defendants' motion in limine. The county argues that it should be permitted to call FAA and DTBA witnesses to testify, if necessary, in rebuttal. We agree with defendants and the trial court that the stipulated order precluding the parties from eliciting FAA and DTBA testimony was clear and unequivocal; there was no exception for rebuttal testimony. See *Laffin v Laffin*, 280 Mich App 513, 517; 760 NW2d 738 (2008) (consent orders are in the nature of contracts and ordinary contract principles apply; contractual language that is plain and unambiguous must be accepted and enforced as drafted). Moreover, the county's arguments about presenting rebuttal testimony was based on the fear, borne out by the trial court's ruling, that Burgoyne would testify with respect to the appraisal predicated on the assumption that FAA regulations prohibited residential occupancy of the homes. The county wanted to be able to counter that evidence. We have now reversed the trial court's ruling on the matter, so the county's concerns should be alleviated.

Next, the county argues that Blum's letter to Senator Levin was admissible under MRE 803(8) and MRE 803(24), noting also that this Court in the first opinion referred to and relied on said letter.[10] The trial court excluded the letter on the basis of the stipulated order precluding FAA and DTBA testimony and did not address the hearsay arguments. We note that the stipulated order was entered after this Court issued its previous opinion; therefore, the fact that

[10] The county does not challenge those portions of the trial court's order that excluded Porter's affidavit, McMillen's study touching on O'Hare avigation easements, Maturen's report relative to avigation easements at the Grand Haven Airport, and Hammond's affidavit. Accordingly, those portions of the order are also affirmed.

this Court treated the letter as admissible evidence is of no import if the stipulated order barred the evidence. We find it unnecessary to address the hearsay arguments because, although the stipulated order specifically pertained to eliciting FAA and DTBA testimony, allowing the county's expert to indirectly reference the letter drafted by Blum, an FAA regional administrator, and especially the responses to Senator Levin contained in the letter, would violate the spirit and intent of the stipulated order. If Blum could not take the stand to testify in light of the stipulated order, his commentary should not be allowed in through the backdoor by way of the letter and the expert's testimony. Moreover, once again, the county's efforts to admit the letter is in conjunction with rebutting Burgoyne's appraisal premised on FAA regulations prohibiting residential occupancy in the RPZ. Our holding today eliminates the need to engage in rebuttal on the subject.

Finally, the county urges us to disqualify the trial judge on the ground that he is biased or prejudiced against the county and federal agencies. "[T]o preserve for appellate review the issue of a denial of a motion for disqualification of a trial court judge, a party must request referral to the chief judge of the trial court [or the state court administrator] after the trial court judge's denial of the party's motion." *Welch v District Court*, 215 Mich App 253, 258; 545 NW2d 15 (1996); see also MCR 2.003(D)(3)(a). Here, the county never even moved to disqualify the trial judge, let alone take the matter to the chief judge or the state court administrator; therefore, the matter was not properly preserved for our review. Moreover, the county has failed to meet its heavy burden in overcoming the presumption of impartiality. *In re MKK*, 286 Mich App 546, 566; 781 NW2d 132 (2009). We note that a generalized hostility directed toward a class of claimants does not equate to grounds for disqualification, nor do critical or harsh remarks made to counsel suffice. *Id.* at 566-567. On review of the entire record, including the passages cited by the county, we find that the county has not demonstrated actual bias or prejudice on the part of the trial judge as necessary for disqualification and that the judge did not display deep-seated favoritism toward defendants or antagonism toward the county. *Armstrong v Ypsilanti Charter Twp*, 248 Mich App 573, 597; 640 NW2d 321 (2002). At most, we have vigorously-expressed, repeatedly-erroneous rulings against the county, but this does not provide a basis for disqualification. *Id.* at 597-598.

Affirmed in part, reversed in part, and remanded for proceedings consistent with this opinion. We do not retain jurisdiction. No party having prevailed in full, we decline to award taxable costs pursuant to MCR 7.219.

/s/ William B. Murphy
/s/ Kathleen Jansen
/s/ Donald S. Owens