

Respondents Seneca County Commissioners (“Commissioners”) move this Court to dismiss the Original Action in Mandamus brought by Relator State *ex rel.* The Toledo Blade Co. for lack of subject matter jurisdiction, pursuant to Sup.Ct.R. X, Sect. 5 and the jurisdictional priority rule:

[a]s between [state] courts of concurrent jurisdiction, the tribunal whose power is first involved by the institution of proper proceedings acquires jurisdiction, to the exclusion of old tribunals, to adjudicate upon the whole issue and to settle the rights of parties.

State ex rel. Dannaher v. Crawford (1997) 78 Ohio St.3d 391, 393. The same allegations were already filed in Seneca County on May 23, 2007, so that Court has jurisdiction of these claims.

A Memorandum in Support is attached below.¹



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¹ Lack of subject matter jurisdiction is a clear ground for dismissal. In the interest of judicial economy, the Commissioners have not raised other defenses, but no defenses are intended to be waived in this pleading, including, but not limited to, the following: failure to mitigate, venue (as argued herein), privilege, and mootness.

MEMORANDUM IN SUPPORT

I. INTRODUCTION

This case is about a newspaper's efforts to prevent the Seneca County Commissioners from replacing the former Seneca County courthouse. The Commissioners' decision to build a new, modernized courthouse did not take place overnight—it was the fruit of countless hours of research by them, former Commissioners, public interest groups, and other public discussion. Several Seneca County citizens (“*State ex rel. Cook*”) filed claims in Seneca County to stop the replacement of the courthouse based upon alleged sunshine law violations identical to those filed here. These claims were tried for four days and a preliminary injunction denied. The preliminary injunction has not been appealed, and the case proceeds to a permanent injunction hearing.

This Court lacks subject matter jurisdiction over this case because the claims brought by the *State ex rel. Blade* have already been filed in Seneca County by *State ex rel. Cook*. The risk of inconsistent judgments and prejudice is high. If this Court even issues a peremptory writ, its judgment will conflict with the Seneca County Court's judgment already made on the same issues. The *State ex rel. Blade's* request for a preliminary injunction is based on issues already tried before and decided by the Seneca County Court and that are not on appeal.

What this means to this Court is that all potential public records and public meetings issues will be handled in the case filed below. *State ex rel. Cook* is already advancing these claims and is seeking adjudication of all these issues before the Seneca County Court. If this Court dismissed *State ex rel. Blade's* allegations, its decision on the *State ex rel. Blade's* original action does not preclude the people of Ohio from obtaining relief on these same issues. The Seneca County Court may afford the same relief as this Court. As such, this Court should

dismiss State *ex rel.* Blade's claims so that the case with jurisdictional priority may proceed below.

II. CLAIMS BROUGHT FIRST IN SENECA COUNTY AND NOW WITH THE OHIO SUPREME COURT

There are two separate mandamus actions against the Commissioners' decision-making process regarding the Seneca County courthouse. One is filed in Seneca County, and another is filed in this Court. Both lawsuits involve allegations that the Commissioners failed to keep and provide public records. Both lawsuits involve allegations that the Commissioners held private or email deliberations regarding the replacement of the courthouse. Both lawsuits seek discovery and damages for the alleged destruction of the same records. As such, the Commissioners face the same allegations and same discovery on two different fronts.

A. THE SENECA COUNTY LAWSUIT

Six Ohio citizens filed a mandamus action against the Seneca County Commissioners on May 23, 2007, which was followed by two amended complaints. See State *ex rel.* Cook's July 23, 2007 Second Amended Complaint (attached hereto as Exhibit A).² State *ex rel.* Cook alleged that the Commissioners violated public records and open meetings law³ and sought injunctive relief prohibiting the Commissioners from demolishing their former courthouse. *Id.* State *ex rel.*

² All documents attached to the Commissioners' Motion to Dismiss are documents filed with this Court or the Seneca County Court of Common Pleas. As such, this Court may recognize these documents for purposes of granting the Commissioners' Motion to Dismiss.

³ State *ex rel.* Cook also brought unprecedented breach of fiduciary duty and unauthorized acts claims. See State *ex rel.* Cook's Second Amended Complaint, ¶¶ 92-140, 152-162. The Seneca County Common Pleas Court dismissed these claims under Civ.R. 12. See August 7, 2007 Judgment Entry (attached hereto as Exhibit B). State *ex rel.* Cook appealed these claims to the Third District Court of Appeals, but carefully avoided appealing the denial of the preliminary injunction. See Notice of Appeal (attached hereto as Exhibit C). These claims have no bearing on this Court's jurisdiction.

Cook sought to show that the Commissioners failed to produce or maintain public records, destroyed public records from 2002 until the present (including emails), and conducted private deliberations for courthouse decisions made in August 2006. See post-preliminary injunction hearing briefs of the Commissioners and State *ex rel.* Cook (attached hereto as Exhibits D and E, respectively). The Seneca County Court proceeded with a lengthy preliminary injunction hearing over four days in which it ultimately denied State *ex rel.* Cook's preliminary injunction request. See August 28, 2007 Judgment Entry (attached hereto as Exhibit F).

State *ex rel.* Cook now wishes to proceed with discovery to prepare for a permanent injunction hearing. State *ex rel.* Cook has filed a request for a temporary restraining order and preliminary injunction ordering the Commissioners and Prosecutor to maintain all electronic files that may have discoverable information on them. See State *ex rel.* Cook's Second Request for Injunctive Relief (attached hereto as Exhibit G). A hearing on this issue is scheduled for September 25, 2007. See September 12, 2007 and September 17, 2007 Judgment Entries (attached hereto as Exhibits H and I, respectively). Through discovery requests, State *ex rel.* Cook has also requested all emails from the Commissioners regarding the Seneca County Courthouse, among other things, from January 1, 2006 until the present. See State *ex rel.* Cook's Second Set of Requests for Production (attached hereto as Exhibit J). State *ex rel.* Cook seeks this information to permanently enjoin the replacement of the courthouse on the basis that improper deliberations have occurred.

B. THE OHIO SUPREME COURT LAWSUIT

The Complaint of State *ex rel.* Blade involves the same allegations as those brought by State *ex rel.* Cook. The State *ex rel.* Blade alleged that the Commissioners failed to maintain or produce its public records per their request. Complaint, ¶ 1 (attached hereto as Exhibit K). State

ex rel. Blade also alleged that the Commissioners destroyed the records that it requested. *Id.* at ¶ 3. According to the State *ex rel.* Blade, these emails and other public records are crucial in determining whether a public meetings violation occurred because of private or email deliberations. *Id.* at ¶¶ 6-7. Specifically, State *ex rel.* Blade alleged that Commissioners Sauber and Nutter improperly deliberated before an August 31, 2006 meeting. *Id.* at ¶¶ 12, 21. The Seneca County Common Pleas Court has already ruled that there is no evidence of a violation after four days of observing witnesses' testimony. See August 28, 2007 Judgment Entry.

State *ex rel.* Cook and State *ex rel.* Blade also ask for the same relief. The Supreme Court Complaint asks that the Commissioners be ordered to produce records and recover items that were allegedly deleted. See Complaint, Section A of Prayer for Relief. Just as in the Seneca County case, State *ex rel.* Blade has sought injunctive relief prohibiting the Commissioners from replacing the former courthouse. See Complaint, Section (C)(2) of Prayer for Relief; see also Request for Injunctive Relief, p. 6 (attached hereto as Exhibit L). State *ex rel.* Blade has even sought to have this Court order that the Commissioners refrain from removing any of the electronic data from their computers, just as State *ex rel.* Cook has done in Seneca County. See Complaint, Section (C)(1) of Prayer for Relief; see also Request for Injunctive Relief, p. 4.

The Complaint asks this Court to exercise jurisdiction on the same claims between the same parties that are already being litigated in another Court with concurrent jurisdiction. See R.C. 2731.02; see also R.C. 149.43(C). But the Commissioners are already litigating the case that has been filed with this Court. For purposes of open government, the issues will be fully litigated at the Seneca County Common Pleas Court and should only reach this Court's jurisdiction on appeal. As a result, this Court should dismiss the Complaint for a lack of jurisdiction according to the jurisdictional priority rule.

III. LAW AND ARGUMENT

This Court lacks subject matter jurisdiction for the mandamus action filed by State *ex rel.* Blade against the Commissioners. The jurisdictional priority rule prohibits courts from exercising jurisdiction over the substantially same claims between the substantially same parties if they are already being litigated in a court with concurrent jurisdiction. This is important because it would otherwise subject the parties to potentially inconsistent judgments from two courts, in addition to the administrative and strategic burden of litigating on two fronts. The parties here are the same—the citizens of the State of Ohio. The allegations, prayers for relief, and discovery requests mirror each other. As such, this Court should dismiss the State *ex rel.* Blade’s Complaint for a lack of subject matter jurisdiction and allow State *ex rel.* Cook’s claims to proceed below.

A. The jurisdictional priority rule precludes this Court from exercising subject matter jurisdiction over claims already filed in another Court with concurrent jurisdiction.

The jurisdictional priority rule provides protection for parties and courts for circumstances in which parties attempt to litigate the same issues in different courts at the same time. This principle is not the same as *res judicata* or collateral estoppel. Instead, the jurisdictional priority rule prohibits the interference of proceedings amongst courts with concurrent jurisdiction. Therefore, this Court should dismiss this case because it was filed months after the substantially same allegations were filed in Seneca County between these parties.

The jurisdictional priority rule precludes these parties from litigating the same public records and public meetings issues in the Seneca County Court of Common Pleas and the Ohio Supreme Court at the same time. The jurisdictional priority rule provides:

[a]s between [state] courts of concurrent jurisdiction, the tribunal whose power is first invoked by the institution of proper proceedings acquires jurisdiction, to the exclusion of all tribunals, to adjudicate upon the whole issue and to settle the rights of the parties.

State ex rel. Dannaheer v. Crawford (1997), 78 Ohio St.3d 391, 393, 678 N.E.2d 549 (quoting *State ex rel. Racing Guild of Ohio v. Morgan* (1985), 17 Ohio St.3d 54, 56, 476 N.E.2d 1060) (emphasis added). Once a court of competent jurisdiction acquires subject matter jurisdiction over a matter, its authority continues until the matter is finally disposed of. *John Weenink & Sons Co. v. Court of Common Pleas of Cuyahoga County* (1948), 150 Ohio St. 349, 355, 82 N.E.2d 730; *State ex rel. Republic Servs. of Ohio v. Pike Twp. Bd. of Trustees* (5th Dist. Nos. 2006 CA 00153, 00172), 2007-Ohio-2086, ¶ 43. No court of coordinate or concurrent jurisdiction may interfere with the proceedings in which another court has already obtained jurisdiction. *John Weenink & Sons Co.*, 150 Ohio St. at 355, 82 N.E.2d 730.

This rule divests one court of jurisdiction to adjudicate upon the “whole issue” and settle the rights of those parties. *Id.* at 355, 82 N.E.2d 730; *Miller v. Court of Common Pleas of Cuyahoga County* (1944), 143 Ohio St. 68, 70, 54 N.E.2d 130. This rule applies “if the claims in both cases are sufficiently similar, in that each of the actions ‘comprises part of the “whole issue” that is within the exclusive jurisdiction of the court whose power is legally first invoked.’” *State ex rel. Republic Servs. of Ohio* at ¶ 44 (quoting *State ex rel. Racing Guild*, 17 Ohio St.3d at 56, 476 N.E.2d 1060). The Court must analyze whether the two cases involve the same “whole issue” as follows:

- 1) there must be two cases pending in two different courts of concurrent jurisdiction involving substantially the same parties; and,
- 2) the ruling requested the court subsequently acquiring jurisdiction must affect or interfere with the resolution of the issues before the court where the suit was originally commenced.

Id. (emphasis added). Put more simply, the jurisdictional priority rule applies when the second case involves substantially the same causes of action and the substantially same parties. *State ex rel. Dannaher*, 78 Ohio St. 3d at 393, 678 N.E.2d 549; *State ex rel. Sellers v. Gerken* (1995), 72 Ohio St.3d 115, 117, 647 N.E.2d 807.

Whether the Seneca County Court and the Ohio Supreme Court have concurrent jurisdiction over mandamus claims brought against the Commissioners should not be at issue. According to R.C. 149.43(C), a relator may commence a mandamus action either in the county court where R.C. 149.43(B) was not complied with, the court of appeals in the district where R.C. 149.43 was not complied with, or the Ohio Supreme Court. As a result, an aggrieved party can sue the Seneca County Commissioners either in Seneca County, the Third District Court of Appeals, or the Ohio Supreme Court. See *id.* The Commissioners have been sued both in Seneca County and the Ohio Supreme Court under R.C. 149.43(C). As such, the fact that the Seneca County Court and the Ohio Supreme Court have concurrent jurisdiction over these claims should not be challenged.

Another element of the jurisdictional priority rule that should not be at issue is whether the Seneca County case was filed first. As discussed above, the jurisdictional priority rule provides that the court in which the subsequent lawsuit is filed is divested of its jurisdiction. The Seneca County lawsuit was filed on May 23, 2007. See *State ex rel. Cook's Complaint*. *State ex rel. Blade* did not file its lawsuit until September 10, 2007. Therefore, the jurisdictional priority would apply to the subsequently-filed action by *State ex rel. Blade*.

When examining both lawsuits, this Court should determine that the lawsuits are filed by substantially the same parties over the substantially same issues. If the jurisdictional priority rule

is met, the court in the later-filed action is to dismiss the complaint before it for a lack of subject matter jurisdiction. *State ex rel. Dannaher*, 78 Ohio St. 3d at 393, 678 N.E.2d 549; *Holmes County Bd. of Comm'rs v. McDowell* (2006), 169 Ohio App.3d 120, ¶ 27, 2006-Ohio-5017, 862 N.E.2d 136. As such, this Court should dismiss *State ex rel. Blade's* Complaint.

1. The claims in the two lawsuits are substantially similar.

The jurisdictional priority rule precludes this Court's jurisdiction because the claims in the two lawsuits are substantially similar. In order to determine whether the claims are substantially similar, this Court has held that they are if the ruling in the Court in which the second lawsuit was filed would interfere with resolution of the lawsuit in which the claims were originally commenced. *State ex rel. Republic Servs. of Ohio* at ¶ 44 (quoting *State ex rel. Racing Guild*, 17 Ohio St.3d at 56, 476 N.E.2d 1060). Importantly, the actions need not be exactly the same but rather substantially similar. *State ex rel. Dannaher*, 78 Ohio St. 3d at 393, 678 N.E.2d 549; *State ex rel. Sellers v. Gerken*, 72 Ohio St.3d at 117, 647 N.E.2d 807. Still, these lawsuits are nearly mirror images of each other.

The similarities between the allegations and requests for relief in *State ex rel. Blade's* and *State ex rel. Cook's* lawsuits mean that the Commissioners are at risk for potentially inconsistent judgments from the two courts. The chart below sets forth the most striking similarities, as they are abundant between the two Complaints:

<u>State ex rel. Blade's Complaint in the Ohio Supreme Court</u>	<u>State ex rel. Cook's Complaint filed in the Seneca County Court of Common Pleas</u>
<p>1) concerns the alleged failure to produce public records from January 1, 2006 to the present (see <i>State ex rel. Blade's Complaint</i>, ¶ 13)</p> <p>Conclusion: Both cases concern the same records, if they exist.</p>	<p>1) concerns the alleged failure to produce public records from January 1, 2006 until the present (<i>State ex rel. Cook's Complaint</i>, ¶ 37; <i>State ex rel. Cook's Second Request for Injunctive Relief</i>; <i>State ex rel. Cook's Second Requests for Production of Documents</i>)</p>
<p>2) concerns the alleged failure to maintain public records according to public records law, including the destruction of public records (see <i>State ex rel. Blade's Complaint</i>, ¶¶ 1, 3, 4, 20)</p> <p>Conclusion: Both cases allege that the same records were not maintained and/or destroyed.</p>	<p>2) concerns the alleged failure to maintain public records according to public records law, including the destruction of public records (see <i>State ex rel. Cook's Second Amended Complaint</i>, ¶ 74; see also <i>State ex rel. Cook's Second Request for Injunctive Relief</i>)</p>
<p>4) requests a temporary restraining order prohibiting the demolition of the former courthouse because of allegedly improper deliberations (<i>State ex rel. Blade's Complaint</i>, ¶¶ 6, 7, Section C of Prayer for Relief)</p> <p>Conclusion: Both cases seek injunctive relief prohibiting courthouse demolition because of the allegedly improper deliberations.</p>	<p>4) requested a temporary restraining order and preliminary injunction that have since been denied but seeks discovery towards a permanent injunction because of allegedly improper deliberations (<i>State ex rel. State ex rel. Cook's Motion for Temporary Restraining Order and Preliminary Injunction</i>; see also <i>State ex rel. Cook's post-preliminary injunction hearing brief</i>, pp. 3-9)</p>

<p>5) seeks to invalidate the Commissioners' decision to replace the former courthouse according to a failure to maintain public records and have public deliberations (State <i>ex rel.</i> Blade's Complaint, ¶¶ 6-7)</p> <p><u>Conclusion:</u> Both lawsuits want a court to invalidate the Commissioners' decision because they believe that private deliberations took place and public records support their allegations.</p>	<p>5) seeks to invalidate the Commissioners' decision to replace the former courthouse according to a failure to maintain public records and have public deliberations (State <i>ex rel.</i> Cook's Complaint, Prayer for Relief after ¶ 91)</p>
<p>6) seeks to invalidate the Commissioners' decisions based upon public records requests for post-January 1, 2006 emails from the Commissioners (State <i>ex rel.</i> Blade's Complaint, ¶¶ 13-22)</p> <p><u>Conclusion:</u> Both cases involve the same emails and public records, regardless of the means by which they were requested.</p>	<p>6) seeks to invalidate the Commissioners' decisions based upon subpoenas and requests for production for post-January 1, 2006 emails from the Commissioners (See Second Requests for Production; State <i>ex rel.</i> Cook's subpoenas in case (attached hereto as Exhibits M, N, and O, respectively);</p>
<p>7) requests the Court to grant a temporary restraining order prohibiting the Commissioners from destroying, transferring, or altering any data from their electronic files or computer servers⁴ (see State <i>ex rel.</i> Blade's Complaint, Section (C)(1) of Prayer for Relief; see also State <i>ex rel.</i> Blade's Memorandum in Support of Complaint)</p> <p><u>Conclusion:</u> Both cases involve theories that the Commissioners' electronic data needs preserved through injunctive relief because that same data is crucial to their allegations.</p>	<p>7) requests the Court to grant a temporary restraining order and preliminary injunction prohibiting the Commissioners and Prosecutor from destroying, transferring, or altering any data from their electronic files or computer servers (see State <i>ex rel.</i> Cook's Second Request for Injunctive Relief; see also September 12, 2007 and September 17, 2007 Judgment Entries.</p>

⁴ Please note that the Commissioners have no intentions of anything besides routine, unscheduled server and computer maintenance. The Commissioners would never willingly support, encourage, or condone any spoliation of evidence or destruction of public records.

There is no doubt that both lawsuits seek to invalidate the Commissioners' courthouse decisions through alleging that records evidence that private deliberations took place. The Seneca County Common Pleas Court has already determined that the emails sent from Commissioner Nutter in August 2006 regarding his 15-year master plan were not deliberations for purposes of public records law. See August 28, 2007 Judgment Entry. That Court also concluded that no other violations were shown that could support State *ex rel.* Cook's request for a preliminary injunction. State *ex rel.* Blade now seeks a "second bite at the apple" from this Court saying that the emails were improper without waiting for State *ex rel.* Cook's appeal. This duplicitous suit cannot circumvent the Seneca County Common Pleas Court's jurisdiction while the case proceeds towards a permanent injunction hearing.

The minor factual pleading differences in the Complaint do not mean that the issues, claims, and relief requested in the two lawsuits are not substantially the same. The Complaint has specific allegations regarding public records requests that it made for the Commissioners' post-January 1, 2006 emails. State *ex rel.* Blade's Complaint, ¶¶ 13-22. The pending lawsuit concerns the very same emails. See State *ex rel.* Cook's Second Requests for Production; see State *ex rel.* Cook's post-preliminary injunction hearing brief; see also State *ex rel.* Cook's Second Request for Injunctive Relief. State *ex rel.* Cook has requested the same documents and injunctive relief through discovery that the State *ex rel.* Blade requested. As such, the very same issues will be discoverable and litigated in the Seneca County Court with regard to the Commissioners' 2006 and 2007 emails sought in both cases. The Seneca County lawsuit was filed first and retains jurisdiction over these issues.

The argument that this case is not precluded under collateral estoppel and *res judicata* failed to acknowledge the jurisdictional priority rule and its application. The State *ex rel.* Blade

argued that collateral estoppel and *res judicata* do not make them bound by that result, without explanation. However, the jurisdictional priority rule does not seek to make a judgment final, but it seeks to maintain jurisdiction for a case with the same parties and same issues in one court at a time. These issues are not finally adjudicated at this time in any court. The Commissioners do not seek an order from this Court that these issues are finally adjudicated. Instead, the Commissioners request that this Court dismiss the State *ex rel.* Blade's action for a lack of subject matter jurisdiction so that these issues can proceed where they were first filed.

The County relishes the opportunity to demonstrate that its conduct followed the law in every respect. It should not have to prove it twice and simultaneously. However, if this Court allows both lawsuits to proceed, the Commissioners and public offices statewide could be faced with duplicative lawsuits seeking damages for lost or destroyed records. See *Kish v. Akron*, 109 Ohio St.3d 162, 2006-Ohio-1244, 846 N.E.2d 811. This outcome would be nonsensical and allow every citizen of the State of Ohio to individually bring actions alleging the destruction of the same public records in three forums at the same time.⁵ In this case, at a minimum, the Commissioners would be at risk of paying damages to both the State *ex rel.* Blade and State *ex rel.* Cook for the same lost or destroyed records—double damages because two lawsuits on the same issues were allowed.

The risk for inconsistent judgments from different courts at the same time is even more troublesome. After its review, the Seneca County Common Pleas Court could determine that the Commissioners have not violated Ohio's public records laws. That court could recognize that the Commissioners deleted any emails because they were no longer had "Administrative, Fiscal, Legal, or Historic Value," which is the standard that State *ex rel.* Blade acknowledged governs

⁵ This argument applies equally to Section III(A)(2) below.

the Commissioners' records retention. Complaint, ¶ 19. After that decision, the Supreme Court could rule that the emails were improperly deleted based upon its record. The Commissioners would then be subject to two court orders with contrary rulings. They would simultaneously have judgments by courts of original jurisdiction providing that their alleged destruction of the same records were both proper and improper, then the Ohio Supreme Court could rule on appeal of the trial quite differently. This is the very risk of inconsistent judgments that the jurisdictional priority rule is intended to prevent. As such, this Court should dismiss State *ex rel.* Blade's Complaint.

2. Both lawsuits are brought on behalf of the State of Ohio through a relator against the Seneca County Commissioners so that the parties are substantially the same.

The jurisdictional priority rule precludes this Court's jurisdiction because the parties in both lawsuits are the same. "Mandamus is a writ, issued in the name of the state to an inferior tribunal, a corporation, board, or person, commanding the performance of an act which the law specifically enjoins as a duty resulting from an office, trust, or station." R.C. 2731.01 (emphasis added). The remedy afforded for a party to obtain a public office's compliance with Ohio's sunshine laws is a mandamus action. R.C. 149.43(C). Application for such a writ to enforce sunshine laws shall be in the name of the State of Ohio on the relation of the person applying. R.C. 2731.04. Therefore, any mandamus action filed against a public entity involves the same relator—the State of Ohio.

The people of the State of Ohio are the real parties in both lawsuits against the Seneca County Commissioners. The fact that the Commissioners are the Respondents in both lawsuits is clear. As this Court has recognized, the people of the State of Ohio are the real party where a relator seeks to enforce a public right through mandamus. *State ex rel. Nimon v. Village of*

Springdale (1966), 6 Ohio St.2d 1, 4, 215 N.E.2d 592. In *Nimon*, this Court held that the people are the State of Ohio for purposes of standing in bringing a mandamus claim. *State ex rel. Nimon*, 6 Ohio St.2d at 4, 215 N.E.2d 592. The Ohio Supreme Court provided the following in its analysis:

where the question is one of public right and the object of the mandamus is to procure the enforcement of public duty, the people are regarded as the real party and the relator need not show that he has any * * * special interest in the result, since it is sufficient that he is interested as a citizen or taxpayer in having the laws executed and the duty in question enforced * * *.’ ”

Id. The State of Ohio is the “real party” for standing purposes in a mandamus action, so the State of Ohio should be considered the same party for purposes of the jurisdictional priority rule.

Treating the relators as the State of Ohio in both cases makes sense when examining this Court’s public records decisions. This Court’s sunshine law cases regarding the right to bring a mandamus action to enforce public records or public meetings laws refer to this as the “people’s right.” *Dayton Newspaper v. Dayton* (1976), 45 Ohio St.2d 107, 109, 341 N.E.2d 576. “The rule in Ohio is that public records are the people’s records.” *State ex rel. Patterson v. Ayers* (1960), 171 Ohio St. 369, 371, 171 N.E.2d 508. Statutes and caselaw have codified the people’s right to open access to government papers and proceedings because public entities have a duty to maintain those records. *State ex rel. Warren Newspapers, Inc. v. Hutson* (1994), 70 Ohio St.3d 619, 623, 640 N.E.2d 174. Procuring public records is a right of the people of Ohio. Complaint, ¶¶ 1, 2, 23. Maintaining them is a duty of a public office. *Id.* As such, *State ex rel. Blade* and *State ex rel. Cook* should be treated as the same party for purposes of the jurisdictional priority rule.

This Court should not find that *State ex rel. Cook* and *State ex rel. Blade* are different parties because it would subject public offices to duplicitous litigation in multiple forums at the

same time. If this Court determined that State *ex rel.* Blade and State *ex rel.* Cook are different parties, every public records case could be filed concurrently in common pleas courts, courts of appeals, and the Ohio Supreme Court on the very same issues. See R.C. 2731.02. The law should not provide for such procedural absurdities.

The administrative burden on public offices would be detrimental to their public functions and not assist the citizens in ensuring open government any better when one lawsuit can do just that. In addition, allowing such duplicative lawsuits could provide for triple the damages levied against the public office—if a violation is found—through relators obtaining one set of damages in each court. This would go against this Court’s public records decisions in that public records violations injure the people as a whole and not individuals. Every individual could then make a demand for public records and cripple governmental action.

This Court should determine that the State of Ohio is the real party in both State *ex rel.* Blade’s lawsuit filed in this Court and the lawsuit filed in Seneca County. The State of Ohio seeks relief against the same party in both lawsuits—the Seneca County Commissioners. This Court’s caselaw and the relators’ arguments support such a conclusion. Any result in favor of the relators inures to the benefit of the people of Ohio, not just the individual relators. Upon reaching this conclusion, this Court should dismiss State *ex rel.* Blade’s lawsuit for lack of subject matter jurisdiction.

B. The Seneca County Common Pleas Court already has proper jurisdiction over all of the claims that State *ex rel.* Blade has alleged.

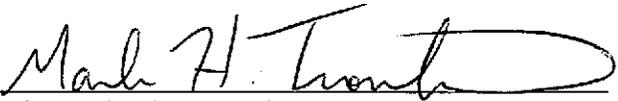
This Court lacks jurisdiction and should be satisfied that all of State *ex rel.* Blade’s claims are being litigated in the Seneca County Court. As the jurisdictional priority rule requires, another court already has jurisdiction over all of State *ex rel.* Blade’s claims. See

Section III(A). State *ex rel.* Cook filed the same claims with the Seneca County Court nearly 4 months before State *ex rel.* Blade filed its claims. *Id.* This Court may someday acquire proper jurisdiction over these claims on appeal, but it lacks the jurisdiction when another court has jurisdiction over those claims. For now, it may satisfy itself that all of the issues concerning State *ex rel.* Blade's lawsuit will be resolved in Seneca County. Therefore, this Court should dismiss State *ex rel.* Blade's claims for a lack of subject matter jurisdiction and allow the same claims to proceed in the Seneca County Court of Common Pleas.

IV. CONCLUSION

For all the foregoing reasons, this Court should dismiss all of the State *ex rel.* Blade's allegations for a lack of subject matter jurisdiction according to the jurisdictional priority rule.

Respectfully submitted,



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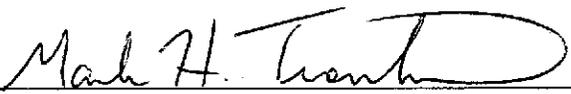
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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was served by regular U.S. Mail, postage prepaid, on
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IN THE COURT OF COMMON PLEAS
SENECA COUNTY, OHIO

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and

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and

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Plaintiffs-Relators

vs.

- * Case No. 07 CV 0271
- * Judge Charles S. Wittenberg
- * **Plaintiff's Amended Complaint for**
- * **(1) Enforcement of Writ of Mandamus,**
- * **(2) Violation of the Public Records Act,**
- * **(3) Violation of the Public Meetings Act,**
- * **(4) Breach of Fiduciary Duty**
- * **(5) Negligence**
- * **(6) Unauthorized Conduct**
- * **(7) Injunctive Relief**
- * **Demand for Trial by Jury Endorsed Hereon**

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I hereby certify this is a true copy of the original pleading now on file in my office this 19th day of Sept - 2007.
 Mary K. Ward, Clerk, Common Pleas Court
 State of Ohio, County of Seneca, Tiffin, Ohio
 by Mary K. Ward Deputy Clerk.

MAINTENANCE CLERK
 2007 JUL 23 PM 1:26
 COMMON PLEAS COURT
 SENeca COUNTY, OHIO
 FILED

EXHIBIT
 A

Seneca County Board of Commissioners *
111 Madison Street *
Tiffin, Ohio 44883 *

and *

Dave Sauber, President *
Seneca County Commissioner *
111 Madison Street *
Tiffin, Ohio 44883 *

and *

Ben Nutter *
Seneca County Commissioner *
111 Madison Street *
Tiffin, Ohio 44883 *

and *

Michael Bridinger *
Seneca County Commissioner *
111 Madison Street *
Tiffin, Ohio 44883 *

and *

Tanya Hemmer *
Clerk for the Board *
Seneca County Commissioners *
111 Madison Street *
Tiffin, Ohio 44883 *

Defendants-Respondents *

Now come the plaintiffs by and through their counsel Barga, Jones & Anderson, Ltd.,

John T. Barga, for their cause of action as follows:

I. Parties

(1) Nancy L. Cook is a resident taxpayer and registered voter who resides at 22 Kennat Boulevard, Tiffin, Seneca County, Ohio 44883;

(2) S. Rayella Engle is a resident taxpayer and registered voter who resides at 1809 East Township Road 201, Tiffin, Seneca County, Ohio 44883

(3) Jacqueline A. Fletcher is a resident taxpayer and registered voter who resides at 7890 East Township Road 8, Republic, Seneca County, Ohio 44867;

(4) Lenora M. Livingston is a resident taxpayer and registered voter who resides at 14 Clay Street, Tiffin, Seneca County, Ohio 44883;

(5) Adams A. Engle is a resident taxpayer and registered voter who resides at 161 North Sandusky Street, Tiffin, Seneca County, Ohio 44883;

(6) Douglas E. Collar is a resident taxpayer and registered voter who resides at 98 Sycamore Street, Tiffin, Seneca County, Ohio 44883;

(7) Seneca County Board of Commissioners (“Board”) is a statutory, governmental organization having its principal place of business at 111 Madison Street, Tiffin, Ohio;

(8) David Sauber is one of the duly elected Seneca County Commissioners;

(9) Ben Nutter is one of the duly elected Seneca County Commissioners;

(10) Michael Bridinger is one of the duly elected Seneca County Commissioners;

(11) Tanya Hemmer is the duly appointed Clerk for the Seneca County

Commissioners.

II. Historical Perspective Facts

(12) We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty

and the pursuit of Happiness. That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed. Declaration of Independence.

(13) The United States of America was founded upon democratic principles that entitle and guarantee to each citizen of the great country the individual freedoms and rights protected by the United States Constitution.

(14) The Preamble to the United States Constitution reads:

We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquillity, provide for the common defence, *promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity*, do ordain and establish this Constitution for the United States of America. (emphasis added)

(15) Amendment V to the United States Constitution, Rights of Persons reads in part:

No person shall be . . . deprived of life, liberty, or property, without due process of law; . . .

(16) Amendment IX to the United States Constitution, Unenumerated Rights reads:

The enumeration in the Constitution, of *certain rights*, shall not be construed to deny or disparage others *retained by the people*. (emphasis added)

(17) Amendment X, to the United States Constitution, Reserved Powers reads:

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, *are reserved* to the States respectively, or *to the people*. (emphasis added)

(18) Amendment XIV to the United States Constitution, Rights Guaranteed and Due

Process reads in part:

SECTION. 1. . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; *nor shall any State deprive any person of . . . property*, without due process of law; . . . (emphasis added)

(19) The State of Ohio was founded upon democratic principles that entitle and guarantee to each citizen of this great state the individual freedoms and rights protected by the Ohio Constitution.

(20) The Preamble to the Ohio Constitution reads:

We, the people of the State of Ohio, grateful to Almighty God for our freedom, to secure its blessings and promote our common welfare, do establish this Constitution.

(21) Section 1, Inalienable Rights of the Ohio Constitution Bill of Rights reads in parts:

All men are, by nature, free and independent, and have certain inalienable rights, among which are those of enjoying and defending . . . and protecting property . . . (emphasis added)

(22) Section 2, Right to alter, reform, or abolish government, and repeal special privileges of the Ohio Constitution Bill of Rights reads in part:

All political power is inherent in the people. Government is instituted for their . . . benefit . . .

(23) Section 20, Powers reserved to the people of the Ohio Constitution Bill of Right reads:

This enumeration of *rights* shall not be construed to impair or deny others *retained by the people*; and *all powers, not herein delegated, remain with the people.* (emphasis added)

(24) One of the strengths of American government is the right of the public to know and understand the actions of their elected representatives. This includes not merely the right to know a government body's final decision on a matter, but the ways and means by which those decisions were reached. There is great historical significance to this basic foundation of popular government, and our founding fathers keenly understood this principle.

(25) Thomas Jefferson said, "The way to prevent errors of the people, is to go give them full information of their affairs through the channel of the public papers, and to contrive that those papers should penetrate the whole mass of the people. 11 The Papers of Thomas Jefferson (1955) 49 (Letter to Col. Edward Carrington, January 16, 1787).

(26) John Adams said, "Liberty cannot be preserved without a general knowledge among the people, who have a right and a desire to know." A Dissertation on the Canon and Federal Law, by John Adams (1765).

(27) James Madison said, "A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both. Knowledge will forever govern ignorance: And a people who mean to be their own Governors, must arm themselves with the power which knowledge gives." Letter from James Madison to W.T. Barry (Aug. 4, 1822), in 9 The Writings of James Madison (1910) 103. State ex rel. Dann v. Taft, 109 Ohio St.3d 364, 2006-Ohio-1825.

(28) A fundamental premise of American democratic theory is that government exists to serve the people. In order to ensure that government performs effectively and properly, it is essential that the public be informed and therefore able to scrutinize the government's work and decisions. Barr v. Matteo, 360 U.S. 564, 577, 3 L.Ed.2d 1434 (1959).

(29) In a democratic nation it is not difficult to understand the societal interest in keeping governmental records open. State ex rel. Natl. Broadcasting Co., Inc. v. Cleveland, 38 Ohio St.3d 79, 81, 526 N.E.2d 786 (1988).

(30) All political power is inherent in the people as government is instituted for their equal protection and benefit. Ohio Constitution, Sec. 2.

(31) Ohio's own history is replete with rich examples of detailed records dating back to the 1800s. Amicus League of Women Voters of Ohio cites many rich examples of the long and illustrious record-keeping of our forebears. When the Ohio legislature created the first boards of county commissioners, it included in that creation a requirement that accurate records be kept by the county commissioners. 2 Ohio Laws 150.

(32) In 1804, in "An act establishing boards of commissioners," the Ohio legislature required:

Sec. 9. That the commissioners shall have a just and accurate record kept of all their corporate proceedings, and for that purpose they are hereby empowered to appoint a clerk. That mandate continues through today in R.C. 305.10, requiring that the clerk "keep a full record of the proceedings of the board."

III. Present Day Perspective Facts

(33) The population of Seneca County, Ohio, according to the US Census Bureau, has been declining from 59,570 in 1991 to 57,255 in 2006.

(34) The number of county real estate tax foreclosures in 2005 was 36, in 2006 the number was 44 and the number for 2007 has yet to be announced.

(35) The number of private real estate foreclosures in Seneca County, Ohio in 2005 was 227, in 2006 the number was 266 and the number through May 4, 2007 is already 98.

(36) The current sales tax rate of 7% in Seneca County, passed by the Board after it was proposed and defeated by the registered voters of Seneca County, is the highest in the State of Ohio.

(37) The number of evictions in Seneca County, Ohio has risen drastically in recent years.

(38) The unemployment rate in March of 2007 for Seneca County, Ohio was 6.1%, it was 4.4% in the nation and it was 5.2% for Ohio.

(39) At the end of 2006, Ohio ranked as the 46th worst in the nation for the highest unemployment rate.

(40) The number of bankruptcies in the State of Ohio in 2006 increased 23.6% from 2005.

(41) During a recent election only 9.2% of the eligible voters voted to support a 1.5 mil levy for the Tiffin Public Schools.

(42) The Seneca County Courthouse is now ranked as the number one (1) building in Ohio for historic significance on the Ohio Preservation List.

(43) The taxpayers of Seneca County cannot afford a multi-million-dollar tax burden under the current economic conditions.

Cause of Action No. 1

Enforcement of Writ of Mandamus

(44) For a writ of mandamus to issue, there must be (1) a clear legal right to the requested relief, (2) a clear legal duty on the part of the respondent to perform the requested act, and (3) no plain and adequate remedy at law. State ex rel. Hodges v. Taft, 64 Ohio St.3d 1, 3, 591 N.E.2d 1186, 1188 (1992).

(45) On October 25, 2005, following a trial, the Seneca County Court of Common Pleas issued a Writ of Mandamus, a copy of which is attached hereto as Exhibit -1, directing the Board to immediately take the following actions:

- a. keep a full record of their proceedings as required by RC 305.10;
- b. keep a general index of such proceedings as required by RC 305.10;
- c. promptly prepare all public records and make them available for inspection by any person at all reasonable times, as required by RC 149.43(D);
- d. to read the minutes of the previous meeting at the beginning of each public session as required by RC 305.11;

- e. make a good faith effort to provide Plaintiff-Relator more detailed information, including how the Commissioners voted and the rationale behind their decisions during the Board meetings of February 20, 2003, May 15, 2003, July 15, 2003 and November 6, 2003.

(46) Based upon information and belief, the Board does not keep a full record of their proceedings as required by R. C. 305.10 and the Writ of Mandamus.

(47) Based upon information and belief, the Board does not have, has not created nor does it maintain a General Index of its proceedings as required by R.C. 305.10 and the Writ of Mandamus.

(48) Based upon information and belief, the Board does not promptly prepare and maintain its public records (meeting minutes) so they are available for inspection at all reasonable times during regular hours as required by R.C. 305.10 and R.C. 149.43(B) and the Writ of Mandamus.

(49) Based upon information and belief, the Board does not read the minutes of the proceedings of the previous public meeting at the opening of a new public meeting as required by R.C. 305.11 and the Writ of Mandamus.

(50) Based upon information and belief, the Board has not made a good faith effort to provide Plaintiff-Relator more detailed information, including how the Commissioners voted and the rationale behind their decisions during the Board meetings of February 20, 2003, May 15, 2003, July 15, 2003 and November 6, 2003.

Relief

WHEREFORE, the plaintiff prays for an order from this Court finding the Board in violation of the, R.C. 305.10, R.C. 305.11, R.C. 149.43 and in contempt of the October 25, 2005 Writ of Mandamus, and further,

the plaintiffs pray for an order imposing the appropriate sanctions and penalties to insure compliance with the original Writ of Mandamus, a second Writ of Mandamus compelling continuing compliance with R.C. 305.10, R.C. 305.11 and R.C. 305.13, reasonable attorney fees, and other such relief allowed by law and in equity.

Cause of Action No. 2

Violation of Public Records Act

(51) 149.43 Availability of *public records* for inspection and copying reads in part:

This version is in effect until 09-29-2007

(A) As used in this section:

(1) "*Public record*" means *records kept by any public office*, including, but not limited to . . . county. . .

(B)(1) Subject to division (B)(4) of this section, *all public records shall be promptly prepared and made available for inspection to any person at all reasonable times during regular business hours*. Subject to division (B)(4) of this section, upon request, *a public office or person responsible for public records shall make copies available at cost, within a reasonable period of time*. In order to facilitate broader access to public records, *public offices shall maintain public records in a manner that they can be made available for inspection in accordance with this division*.

(2) *If any person chooses to obtain a copy of a public record in accordance with division (B)(1) of this section, the public office or person responsible for the public record shall permit that person to choose to have the public record duplicated upon paper, upon the same medium upon which the public office or person responsible for the public record keeps it, or upon any other medium upon which the public office or person responsible for the public record determines that it reasonably can be duplicated as an integral part of the normal operations of the public office or person responsible for the public record. When the person seeking the copy makes a choice under this division, the public office or person responsible for the public record shall provide a copy of it in accordance with the choice made by the person seeking the copy.*

(C) If a person allegedly is aggrieved by the failure of a public office to *promptly prepare a public record and to make it available to the person for inspection in accordance with division (B) of this section*, or if a person who has requested a copy of a public record allegedly is aggrieved by the failure of a public office or the person responsible for the public record *to make a copy available to the*

person allegedly aggrieved in accordance with division (B) of this section, the person allegedly aggrieved may commence a *mandamus action* to obtain a *judgment that orders the public office* or the person responsible for the public record to *comply* with division (B) of this section and that *awards reasonable attorney's fees to the person that instituted the mandamus action*. The mandamus action may be commenced in the court of common pleas of the county in which division (B) of this section allegedly was not complied with, in the supreme court pursuant to its original jurisdiction under Section 2 of Article IV, Ohio Constitution, or in the court of appeals for the appellate district in which division (B) of this section allegedly was not complied with pursuant to its original jurisdiction under Section 3 of Article IV, Ohio Constitution. . .

(2) As used in divisions (B)(3) and (E)(1) of this section:

(E)(2)(a) "*Actual cost*" means the cost of depleted supplies, records storage media costs, actual mailing and alternative delivery costs, or other transmitting costs, and any direct equipment operating and maintenance costs, including actual costs paid to private contractors for copying services. . .

(52) R.C. 305.10 imposes clearly defined and purely ministerial duties on the Board, and it reads as follows:

The clerk of the board of county commissioners *shall keep a full record of the proceedings of the board*, and a *general index of such proceedings*, entering each *motion with the name of the person making it* on the record. He shall call and record the yeas and nays on each motion which involves the *levying of taxes* or appropriation or payment of money. He shall *state fully and clearly in the record any question relating to the powers and duties of the board* which is raised for its consideration by any person having an interest therein, together with the decision on such question, and shall call and record the yeas and nays by which the decision is made . . . (emphasis added)

(53) The rule in Ohio is that public records are the people's records, and officials in whose custody they happen to be are merely trustees for the people; therefore, anyone may inspect such records at any time, subject only to the limitation that such inspection does not endanger the safety of the record, or unreasonably interfere with the discharge of the duties of the officer having custody of the same. Patterson vs. Ayers, 171 Ohio St. 369, 371, 171 N.E. 2d 508, 509 (1960).

(54) Public records are one portal through which the people observe their government, ensuring its accountability, integrity, and equity while minimizing sovereign mischief and malfeasance. State ex rel. Gannett Satellite Information Network, Inc. v. Petro, 80 Ohio St.3d 261, 264, 685 N.E.2d 1223 (1997); State ex rel. Strothers v. Wertheim, 80 Ohio St.3d 155, 157, 684 N.E.2d 1239 (1997).

(55) Public records afford an array of other utilitarian purposes necessary to a sophisticated democracy: they illuminate and foster understanding of the rationale underlying state decisions, promote cherished rights such as freedom of speech and press, State ex rel. Dayton Newspapers, Inc. v. Phillips, 46 Ohio St.2d 457, 467, 351 N.E.2d 127 (1976), and foster openness which encourages the free flow of information where it is not prohibited by law. State ex rel. The Miami Student v. Miami Univ., 79 Ohio St.3d 168, 172, 680 N.E.2d 956 (1997).

(56) Keeping full minutes allows members of the public who are unable to attend the meetings in person to obtain complete and accurate information about the decision-making process of their government. Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 491, 95 S.Ct. 1029, 1044, 43 L.Ed.2d 328, 347 (1975).

(57) In a society in which each individual has but limited time and resources with which to observe at first hand the operations of his government, he relies necessarily upon the press to bring to him in convenient form the facts of those operations. Accord State ex rel. Dayton v. Phillips, 46 Ohio St.2d 457, 467, 351 N. E.2d 127, 134 (1976).

(58) Keeping an accurate record serves many useful functions. First of all, such records provide rich detail as to the history and culture of our country, as our government officials embody the wishes and desires of the people in making their decisions. Sometimes, difficult decisions are reached which go against popular opinion, but which may be necessary for

the common good as determined by the governing bodies. Accurate minutes can reflect the difficult decision-making process involved, and hopefully bring the public to a better understanding of why unpopular decisions are sometimes necessary. Dayton Newspapers, Inc. v. Dayton, 45 Ohio St.2d 107, 109, 341 N.E.2d 576, 577 (1976):

(59) A board of county commissioners has a clear legal duty to record descriptions of pre-arranged discussions in its minutes. State ex rel. Fairfield Leader v. Ricketts, 56 Ohio St.3d 97, 564 N.E.2d 486 (1990).

(60) A "discussion" is an exchange of words, comments or ideas. DeVere vs. Miami University Board of Trustees, Butler Co. App 1986, Lexis 7171.

(61) A "deliberation" involves the weighing an examination of reasons for and against a course of action. Piekutowski vs. South Cent. Ohio Educ. Serv. Ctr. Governing Board, 161 Ohio App 3d 372, 830 N.E. 2d 423 (2005).

(62) Webster's Third New International Dictionary (1986) 918, 919, defines "full" as "containing all that can possibly be placed or put within"; containing all details: complete. Accordingly, a full record would be one in which the details of the recorded event are contained. "Proceedings" is defined as "an official record or account (as in a book of minutes) of things said or done (as at a meeting or convention of a society)."

(63) Question and answer sessions between board members and other persons who are not public officials do constitute 'deliberations' when a majority of the board members also entertain a discussion of public business with one another. Holeski v. Lawrence, 85 Ohio App.3d 824, 830 (1993).

(64) A citizen's ability to evaluate government's effectiveness is one of the hallmarks of a democratic society. Jim Petro, Ohio Attorney General, 2006.

(65) The Ohio Public Records Act imposes two primary obligations upon public offices; (1) provide prompt inspection of public records and (2) provide copies of public records within a reasonable period of time. Jim Petro, Ohio Attorney General, 2006.

(66) The obligations set forth in the Ohio Public Records Act provide the public with two primary rights; (a) the right to prompt inspection of the records and (b) the right to copies within a reasonable period of time. Jim Petro, Ohio Attorney General, 2006.

(67) A public office creates records that are necessary for the adequate and proper documentation of the organization, functions, policies, decisions, procedures and essential transactions of the agency, and for the protection of the legal and financial rights of the state, and persons directly affected by the agency's activities. Jim Petro, Ohio Attorney General, 2006.

(68) A record may be a single document within a larger file of documents as well as a compilation of documents and can be any document, regardless of physical form or characteristic, whether in draft, compiled, raw, or refined form, that is created or received or used by a public office or official in the organization, functions, policies, decisions, procedures, operations, or other activities of the office.

(69) Public scrutiny is necessary to enable the ordinary citizen to evaluate the workings of his or her government and to hold government accountable. If the public can understand the rationale behind its government's decisions, it can question, challenge or criticize those decisions as it finds necessary; the entire process thus allows for greater integrity and prevents important decisions from being made behind closed doors. If on the other hand, the public can not understand the rationale behind its government's decisions, it can not question, challenge or criticize those decisions as it finds necessary.

(70) R.C. 305.10 if read in conjunction with Section 121.22 O.R.C. (The Sunshine Statute) and Section 149.43 O.R.C. (Ohio Public Records Act), clearly indicates that the intention of the legislature is to require the Board of County Commissioners to maintain a full record of its public meetings . The records must reflect the decision making process leading up to the vote including debate and/or discussion of the subject matter.

(71) Based upon information and belief, the Board does not create or maintain a General Index of its public meeting minutes.

(72) Based upon information and belief, the Board does not read, approve or sign the minutes of its previous public meeting immediately upon the opening of each day's public meeting.

(73) Based upon information and belief, the Clerk does not prepare and provide to each Commissioner in written form the records of the previous public meeting immediately upon the opening of each day's public meeting.

(74) Based upon information and belief, the Board does not create or maintain a full and complete record of its public meetings, including the rationale for its decisions that allow the public to understand its decisions and discussions of public business with members of the public.

Relief

WHEREFORE, the plaintiffs pray for a Writ of Mandamus commanding and compelling the Board and the Clerk to comply with R.C. 149.43, R.C. 305.11 and the Writ of Mandamus issued by this Court on October 25, 2005, and further

the plaintiffs pray for an Order of this Court finding the Board and Clerk in contempt of this Court's October 25, 2005 Writ of Mandamus, a second Writ of Mandamus directing the Board and Clerk to purge its contempt within a reasonable period of time, otherwise to impose

sanctions designed to force and insure compliance with both Writs of Mandamus, reasonable attorney fees, and other such relief as allowed by law and in equity.

Cause of Action No. 3

Violation of Public Meetings Act

(75) R.C. 305.11 imposes clearly defined and purely ministerial duty on the Board, and it reads as follows:

Immediately upon the opening of each day's session of the board of county commissioners, the *records of the proceedings of the session of the previous day shall be read, or provided to each commissioner in written form*, by the clerk of the board and, if correct, *approved and signed by the commissioners*. When the board is not in session, the record of proceedings shall be kept in the county auditor's office or, if the county has a full-time clerk, in the county commissioners' office, open at all proper times to public inspection. It shall be certified by the president and clerk of the board and shall be received as evidence in every court in the state.

(76) R. C. 121.22 Ohio Sunshine Law reads in part:

(A) This section shall be *liberally construed to require public officials to take official action and to conduct all deliberations upon official business only in open meetings* unless the subject matter is specifically excepted by law. . . .

(B) . . .

(1) "Public body" means any of the following:

(a) . . . any legislative authority or board, commission . . . of any county. . .

(2) "Meeting" means any *prearranged discussion of the public business of the public body by a majority of its members*. . . .

(C) *All meetings of any public body are declared to be public meetings open to the public at all times. A member of a public body shall be present in person at a meeting open to the public to be considered present or to vote at the meeting and for purposes of determining whether a quorum is present at the meeting.*

The minutes of a regular or special meeting of any public body shall be promptly prepared, filed, and maintained and shall be open to public inspection. . . .

(F) Every public body, *by rule*, shall establish a *reasonable method* whereby any person may determine the *time and place* of all *regularly scheduled meetings* and the *time, place, and purpose* of all *special meetings*. . . .

(H) A resolution, rule, or *formal action of any kind is invalid* unless *adopted in an open meeting of the public body*. A resolution, rule, or *formal action* adopted in an open meeting that *results from deliberations* in a *meeting not open to the public* is *invalid* unless the deliberations were for a purpose specifically authorized in division (G) or (J) of this section and conducted at an executive session held in compliance with this section. A resolution, rule, or formal action adopted in an open meeting is invalid if the public body that adopted the resolution, rule, or formal action violated division (F) of this section.

(I)(1) Any person may bring an action to enforce this section. An action under division (I)(1) of this section shall be brought *within two years* after the date of the *alleged violation* or threatened violation. Upon *proof of a violation or threatened violation* of this section in an action brought by any person, the *court of common pleas* shall *issue an injunction* to *compel the members of the public body to comply with its provisions*.

(2)(a) If the court of common pleas issues *an injunction* pursuant to division (I)(1) of this section, the court shall order the public body that it enjoins to pay a *civil forfeiture of five hundred dollars to the party* that sought the injunction and *shall award* to that party *all court costs* and, subject to reduction as described in division (I)(2) of this section, *reasonable attorney's fees*. The court, in its discretion, may reduce an award of attorney's fees to the party that sought the injunction or not award attorney's fees to that party if the court determines *both* of the following:

(i) That, based on the *ordinary application* of *statutory law* and *case law* as it existed at the time of violation or threatened violation that was the basis of the injunction, a well-informed *public body reasonably would believe* that the public body was *not violating* or *threatening to violate* this section;

(ii) That a well-informed *public body* reasonably *would believe* that the conduct or threatened conduct that was the basis of the injunction would *serve the public policy* that underlies the authority that is asserted as *permitting that conduct or threatened conduct*. . . .

(3) *Irreparable harm and prejudice* to the party that sought the injunction shall be *conclusively and irrebuttably presumed* upon *proof of a violation or threatened violation* of this section.

(4) A member of a public body who knowingly violates an injunction issued pursuant to division (I)(1) of this section may be removed from office by an action brought in the court of common pleas for that purpose by the prosecuting attorney or the attorney general. . . .

(77) The intent of the Ohio Sunshine Law – Public Meetings Act is to require governmental bodies to deliberate public issues in public. All meetings of any public body are declared to be public meetings open to the public at all times. Every public body must vote and take all of official actions and hold all the deliberation's on official business in meetings that are open to the public. R.C. 121.22(C); Mansfield City Council vs. Richland City Council, 5th Dist. Ct. App., 03CA55 (2003). Moraine v. Montgomery Cty. Bd. of Commrs., 67 Ohio St.2d 139, 423 N.E.2d 184 (1981).

(78) A public meeting is a prearranged gathering of a majority of the members of a public body to discuss or conduct a public business. When each of these characteristics is present, the gathering is a meeting, regardless of whether the public body itself initiated a meeting or it was initiated by another party. R.C. 121.22(B)(2); State ex rel. Fairfield Leader vs. Rickets, 56 Ohio St. 3d 97, 564 N.E. 2d. 486 (1990).

(79) Ohio law requires the Clerk of the Board to read the minutes of the proceedings of the Board's previous session or have a paper copy available at the meeting, immediately upon the opening of each day's public Board session.

(80) On May 1, 2007 the Board opened its regular meeting at 10:05 a.m. with the Pledge of Allegiance, the roll call, and then unanimously approved the minutes from the previous meeting without reviewing or reading the same; it is believed that no minutes were prepared or available at the meeting.

(81) Based upon information and belief, the Board does not read the record of the proceedings of the session of the previous day or have the proceedings of the previous day in written form that can be approved and signed by the Board.

(82) Based on information and belief, the normal practice followed by the Board at the beginning of each of its regular and special meetings does not include a reading of the minutes of the previous Board meeting.

(83) All deliberations by the Board on official business must be conducted in public meetings.

(84) Based upon information and belief, the Board conducts some of its deliberations on official business when it is not in a public meeting.

(85) Action on a resolution, rule or formal action of any kind is invalid unless adopted in an open meeting of a public body. Formal action adopted in an open meeting that results when deliberations occurred in a meeting not open to the public, is an invalid action. Barbeck v. Twinsburg Twp., 73 Ohio App.3d 587, 595, 597 N.E.2d 1204 (1992).

(86) Based upon information and belief, on or about August 31, 2006 when the Board met in a general session, Benjamin Nutter authored and presented a fifteen (15) year plan, the Board entertained no discussion upon the plan, immediately voted on the plan, excused themselves individually from the meeting, returned approximately five (5) minutes later and inquired of the public if they had any questions, all in violation of the Open Meeting Act.

(87) Based upon information and belief, the Board does not take all official action in public meetings.

(88) Based upon information and belief, the Board does not record the complete public meeting by excluding comments and questions from the public concerning official county business.

(89) Based upon information and belief, the Board limits members of the public (tax paying citizens of Seneca County) to three (3) minutes, if a member of the public wishes to address the Board regarding public business.

(90) Based on information and belief, the Board adjourns from a general session to an executive session, without stating sufficient reason or explanation for the adjournment.

(91) As a direct and proximate result of the Board failing to conduct all deliberations on official business in public meetings, some of the actions taken with regard to the Courthouse Project are invalid for failure to comply with R.C. 121.22.

Relief

WHEREFORE, plaintiffs pray for a Writ of Mandamus from this Court commanding the Clerk to read or provide the Board with a written copy of the previous meeting minutes, the board to approve and sign a full and complete set of minutes of each and every public meeting immediately upon the opening of each succeeding public meeting, and the Board to conduct all discussions and deliberations of public business in public meetings, reasonable attorney fees and other such relief available at law and in equity, and further

Plaintiffs pray for an Order invalidating all official actions taken by the Board based upon deliberations of its members in private meetings, and other such relief available at law and in equity.

Cause of Action No. 4

Breach of Fiduciary Duty

(92) R.C. 3.22 Oath of office reads in part:

Each person chosen or appointed to an office under the constitution or laws of this state, and each deputy or clerk of such officer, shall take an oath of office before entering upon the discharge of his duties. The failure to take such oath shall not affect his liability or the liability of his sureties.

(93) R.C. 3.23 Contents of oath of office reads in part:

The oath of office of every . . . officer, deputy, or clerk shall be to support the constitution of the United States and the constitution of this state, and faithfully to discharge the duties of the office.

(94) Each person elected to an office under the laws of this state shall take an oath of office before entering upon the discharge of his duties. RC 3.22.

(95) The oath of office of every officeholder shall include provisions to support the Constitution of the United States, and the Constitution of this State, and to faithfully discharge the duties of the office. RC 3. 23.

(96) A public official has a fiduciary duty to each citizen of the state (county). State vs. Kelly, 12 Ohio St. 2d 92, 232 N.E 2d 391 (1967).

(97) A fiduciary duty involves a higher than normal standard of care. Stamper v. Parr-Ruckman Home Town Motor Sales, 25 Ohio St.2d 1, 3, 265 N.E. 2d 785, 786 (1971); Baier v. Cleveland Ry. Co., 132 Ohio St. 388, 391, 8 N.E.2d 1, 2.

(98) The Board has a fiduciary obligation to the taxpayers of Seneca County to perform the duties required by their oath of office, by thoroughly investigating all options, including restoration, renovation and demolition, before embarking upon any project related to the existing Seneca County Courthouse (Courthouse).

(99) Based upon information and belief, the Board has made a series of decisions related to the restoration, renovation, partial demolition and/or complete demolition of the Seneca County Courthouse (Courthouse Project).

(100) Based upon information and belief, the Courthouse Project will cost the taxpayers of Seneca County, between \$10,000,000.00 and \$15,000,000.00.

(101) Based upon information and belief, the last tax increase requested by the Board and put on the ballot for the voters of Seneca County, was defeated.

(102) Based upon information and belief, the taxpayers of Seneca County cannot afford an additional, extraordinary tax burden.

(103) Based upon information and belief, the Board has failed and refused to retain or hire independent professional legal, architectural, engineering, construction, historic preservations or tax advisors.

(104) Based upon information and belief, the Board has already spent over \$300,000.00 on “consultants,” all of whom have been trying to “sell” the Board a plan of action for the Courthouse Project.

(105) Based upon information and belief, this Board has yet to formulate a definitive plan regarding any phase of the Courthouse Project.

(106) Based upon information and belief, the Board has failed and refused to retain the professionals necessary to help it perform its due diligence and investigative work, that will produce the critical information necessary as a prerequisite to the Board making any informed and prudent decisions about the Courthouse Project.

(107) Based upon information and belief, some, if not all, of the decisions have been made by the Board without the benefit of independent professional legal, architectural,

engineering, construction, historic preservationists or tax advisers, who could provide critically necessary information and advice necessary for an informed decision.

(108) Based upon information and belief, the board has breached its fiduciary duty to the taxpayers of Seneca County, by failing to exercise the necessary due diligence requisite for any informed decision already made, or about to be made regarding the Courthouse Project.

(109) As a direct and proximate result of the breach of fiduciary duty, it is impossible for the Board to make any informed decisions about the Courthouse Project, without insuring against waste of the Seneca County taxpayers' money and the imposition of an unnecessary and unfair tax burden upon the taxpayers of Seneca County in an amount yet to be determined.

(110) Based upon information and belief, the Board has not conducted fact finding due diligence and has breached its fiduciary duty to the taxpayers of Seneca County.

(111) On February 27, 2007, a letter was delivered to the Board, that presented questions and raised issues related to the Seneca County Courthouse, the answers to and discussions of, that could lead an informed Board to make prudent, well-informed decisions about the Courthouse Project that would protect and preserve the physical and monetary assets of Seneca County and its taxpayers. A copy of the letter is attached hereto as Exhibit -2.

(112) The Board has failed and refused to respond to the letter, i.e., the questions asked in and the issues presented in the letter.

(113) On March 26, 2007, a separate letter was delivered to the Board again requesting open, public discourse and dialogue on the questions and issues raised in the February 27, 2007 letter related to the Courthouse Project. A copy of the letter is attached hereto as Exhibit -3.

(114) The Board has failed and refused to respond to the March 26, 2007 letter.

(115) On March 26, 2007, a request for inspection of public records was filed with the Seneca County Board of Commissioners office, a copy of which is attached hereto as Exhibit -4.

(116) The Clerk advised that during 2004, 2005, 2006 and 2007, there have been no invoices from expert consultants retained by the Commissioners, including but not limited to, the fields of law, accounting, demolition, EPA Regulations, remediation, engineering, architecture, grant writing, federal tax credits, state tax credits or historical preservation or renovation of the Seneca County Courthouse.

(117) On April 10, 2007 a request for inspection of public records was filed with the Seneca County Board of Commissioners, a copy of which is attached hereto as Exhibit -5.

(118) The Clerk advised that the Board had no correspondence in its records from January 1, 2000 through the present day related to the Seneca County Courthouse, to or from

- a. The Ohio Historical Site Presentation Advisory Board,
- b. The State Historic Preservation Officer
- c. The State Director of Development, or
- d. The State Tax Commission.

(119) The Clerk advised that the Board had no correspondence in its records that relate in any way to

- a. The distinction between “owner” and “certificate owner”
- b. To “qualified rehabilitation expenditures,”
- c. To “rehabilitation tax credit certificates.”

(120) In the mid-1970s, The Tiffin Seneca Bicentennial Commission, Inc., strongly recommended preservation effort of the downtown block encompassed by Washington, Market, Jefferson and Perry Streets, adding these key factors about preservation:

- a. Preservation Means: keeping old buildings and neighborhoods alive through rehabilitation and finding new uses for old buildings.
- b. Preservation tools include: creative use of zoning, tax incentives, government grants, and private financing.
- c. Preservationists include: architects, historians, planners, government officials, contractors, developers, construction workers, craftsmen, homeowners, tenants, photographers, writers, bankers, and lawyers.
- d. Preservation generates: an awareness of a city or town's history, architecture, and environmental features.
- e. Preservation goals are: to create and maintain livable and stimulating communities; to plan for a future that incorporates the best of our past.

See Exhibit -6 attached hereto.

(121) The Board has made a decision to partially or completely demolish the Seneca County Courthouse without explaining its rationale for the decision or how it plans to pay for the demolition and replacement building.

(122) The Board is willing to pay an architectural firm Forty-seven Dollars (\$47.00) per hour for its secretary.

(123) The Board is not willing to retain the services of independent professionals who have the expertise to assist the Board to make well-informed, prudent decisions about the Courthouse Project.

(124) By resolution dated September 20, 2001, the board appointed a courthouse planning committee made up of a cross-section of the Seneca County community at large. The blue ribbon, broad-based citizens committee was made up of the following persons:

James Bailey, Fostoria Mayor
David Bush, Heidelberg Professor
Patti Cole, Republic Lumber Co.
Larry Dunlap, Businessman
Nick Fabrizio, Chiropractor
Susie Feasle, Business Owner
Richard Focht, Chamber of Commerce

David Frisch, Newspaper Publisher
George Kidd, Tiffin University President, Chairman
Michael B. Lang, Attorney
Bob Overholt, Educator.
Howard Smith, Local Historian
Lee Ann Wolf-Langenderfer, Retired Heidelberg Professor
Robert Anderson, Seneca County Administrator
Steve C. Shuff, Common Pleas Judge

(125) On December 17 the committee wrote its report and submitted its recommendations to the board.

The Community Speaks

(126) The Blue Ribbon, Broad-Based Citizens Committee Report in 2001, that made four recommendations:

- A. that, as nearly as practical, the Courthouse exterior and the interior rotunda be restored to their original 1880's appearances;
- B. that the Courthouse be renovated to contain a Common Pleas Court on each of the second and third floors and the Clerk of Courts offices and court related meeting rooms on the first floor;
- C. the Hanson Building insurance monies be used to build a courthouse annex east of the Courthouse; during the courthouse project, the annex will be the interim location of the Common Pleas Courts and the Clerk of Courts; in future years the annex would house needed Americans with Disabilities Act (ADA) compliant facilities for the Probate and Juvenile Courts, the offices of the County Engineer and the offices of the Commissioners; if for some reason, the annex cannot be built adjacent to the Courthouse, then it should be immediately constructed on the site of the former Hanson Building;

D. that primary funding for the Courthouse project be a temporary one quarter percent ($\frac{1}{4}\%$) sales tax.

(127) A former Board, on December 24, 2001 by unanimous vote, adopted a resolution which accepted verbatim the recommendations of the Blue Ribbon Committee and proceeded with plans to renovate the existing Courthouse.

(128) A former Board placed on the ballot a one half percent ($\frac{1}{2}\%$) sales tax issue, which was barely defeated.

Collection of Sales Taxes

(129) A former Board imposed a temporary one half percent ($\frac{1}{2}\%$) sales tax on the people of Seneca County, thereby producing the one quarter percent ($\frac{1}{4}\%$) revenue needed for the renovation.

(130) Most recently, this Board made permanent, the temporary one half percent ($\frac{1}{2}\%$) tax imposed by the previous Board.

(131) Seneca County has been, since the imposition of the temporary sales tax, collecting the one quarter percent ($\frac{1}{4}\%$) sales tax requested and needed in for the Courthouse renovation.

(132) Since those funds have been collected and clearly designated for renovation of the Seneca County Courthouse, those funds are available in the county treasury to complete the renovation project begun by the Board of Commissioners in 2001.

Studies

(133) The Board has indicated that Seneca County needs an additional 20,000 square feet of additional space.

(134) The existing Seneca County Courthouse has approximate 33,000 square feet of usable space.

(135) The Stilson study indicated that the least expensive alternative for reuse of the existing courthouse is space renovation.

(136) The Van Dyke Study indicated that least expensive alternative for reuse of the existing Courthouse space is renovation.

(137) The most recent study conducted by MKC Associates indicates that the least expensive alternative for reuse of the existing courthouse space is renovation.

(138) To date, the Board has spent approximately \$400,000.00 on studies, all of which indicate the least expensive alternative for reuse of the Courthouse space is renovation.

(139) The decision of the current Board to demolish the Courthouse ignores the expertise of three well-recognized architectural engineering firms, is fiscally and financially irresponsible, does not serve the best interests of the people of Seneca County and constitutes a breach of their oath of office and their fiduciary duties to the people of Seneca County.

(140) Before the Board imposes a multi-million dollar financial burden on the taxpayers of Seneca County, the Board must exercise fact finding due diligence before it fulfills its fiduciary duty to the taxpayers of Seneca County.

Relief

WHEREFORE, the plaintiff prays for a Writ of Mandamus from this Court directing the Board to fulfill its fiduciary duty to the taxpayers of Seneca County, perform the necessary due diligence by requiring it to retain the services of the necessary independent professionals who can assist and guide it, so the Board can perform the fact finding and due diligence necessary to make an informed decision before it burdens the taxpayers of Seneca County with an unjustified

multi-million dollar financial burden, reasonable attorney fees and other relief available at law or in equity.

Cause of Action No. 5

Negligence – Damages

(141) Negligence is a failure to use ordinary care.

(142) Every person is required to use ordinary care to avoid injuring another's property.

(143) Ordinary care is the care that a reasonably careful person would use under the same or similar circumstances.

(144) A person may be required by law to do something or not to do something.

(145) Failure to do what is required by law is negligence, as is doing something the law prohibits.

(146) Based on information and belief, the Board is the steward of all Seneca County property, bound by oath and duty to preserve and protect all county property, including the Seneca County Courthouse.

(147) Based upon information and belief, the Board has for decades, failed and neglected to provide basic and routine maintenance and repair the existing Courthouse.

(148) Based upon information and belief, the Board closed the existing Courthouse and moved the Court of Common Pleas and the Clerk of Courts out of the existing Courthouse during calendar year 2004.

(149) Based upon information and belief, the fourth floor of the Courthouse still contains many law books and the main portion of the former Seneca County Law Library, paid for by the taxpayers of Seneca County and State of Ohio.

(150) Based upon information and belief, and as a direct and proximate result of the Board's negligence and failure to properly maintain and repair the Courthouse, it presently sits in a state of bad repair, has suffered waste, including damage and destruction to the former Seneca County Law Library.

(151) As a direct and proximate result of the Board's negligence, the taxpayers of Seneca County have been damaged in an amount yet to be determined.

Relief

WHEREFORE, the plaintiffs pray for Judgment against the Board for damages related to the deterioration, damage and waste of the Courthouse and the former Seneca County Law Library in amount believed to be in excess of \$25,000.00, and further

plaintiff prays for a Writ of Mandamus commanding the Board to restore the Courthouse to the condition it was in when it was closed almost three (3) years ago, reasonable attorney fees and other such relief available at law and in equity.

Cause of Action No. 6

Unauthorized Conduct

(152) The Board of County Commissioners is has been created by the Ohio Legislature. R.C. 305.01.

(153) Seneca County is a statutorily created agency of the state, and only has the authorities granted to it by the state of Ohio.

(154) The State of Ohio is the sovereign body, which oversees county activity, and the State of Ohio, may exercise plenary power with reference to county affairs, county property and county funds.

(155) Seneca County possesses only such powers and privileges as the State of Ohio has delegated to it by statute.

(156) These powers and privileges must be strictly construed against Seneca County.

(157) Seneca County has an obligation to protect the life, liberty and property of the citizens of Seneca County.

(158) The function of Seneca County government is to serve as an agency or instrumentality of the State of Ohio for purposes of political organization and local administration of State policy. This local organization is a conduit for the State Legislature through which the legislative instructions are efficiently and conveniently performed.

(159) The Ohio Legislature has delegated certain specific express authority to the Board. R.C. 307.01 et seq.

(160) The Ohio Legislature has not written any statute or created any authority that authorizes the Board to destroy the Seneca County Courthouse.

(161) The State of Ohio has an interest in the preservation of historic landmarks in the State of Ohio.

(162) The Board, by passing a resolution and taking any formal action to demolish the Seneca County Courthouse has exceeded its statutory authority, and all such actions taken by the Board are invalid and void ab initio.

Relief

Wherefore, the plaintiffs pray for an Order of this Court declaring all actions taken by the Board to demolish the Seneca County Courthouse be void ab initio.

Cause of Action No. 7

Temporary Restraining Order – Injunctive Relief

(163) The purpose of a preliminary injunction is to preserve a status between the parties pending a trial on the merits.

(164) In determining whether to grant an injunction, a court must look at the character of the case, the particular facts involved, and factors relating to public policy and convenience. Cementech, Inc. v. Fairlawn, 109 Ohio St.3d 475, 2006-Ohio-2991.

(165) A party seeking a preliminary injunction bears the burden of establishing, by clear and convincing evidence, that: (1) there is a substantial likelihood that the plaintiff will prevail on the merits; (2) the plaintiff will suffer irreparable injury if the injunction is not granted; (3) no third parties will be unjustifiably harmed if the injunction is granted; and (4) the public interest will be served by the injunction. No one factor in the analysis is dispositive, but the four factors must be balanced as is characteristic of the law of equity. Miller ex rel. Trumbull Industries, Inc. v. Miller, 11th Dist. No. 2004-T-0150, 2005-Ohio-5120, Procter & Gamble v. Stoneham, 140 Ohio App.3d 260, 267 (2000).

(166) There is a substantial likelihood that the plaintiffs will prevail on the merits because of some of the actions taken by the Board to date have not been done in public meetings, the Board and the Clerk do not prepare and maintain minutes from every public meeting in violation of several state laws, the Board has been negligent and committed waste on the existing Courthouse structure, the Board has not fulfilled the duties of the office by failing to perform the basic due diligence, which is a prerequisite to prudent business decisions related to the Courthouse Project, the Board is on course to irreparably damage or destroy the No. 1 building in the entire state of Ohio for historic significance on the Ohio Preservation List, and the Board is clearly violating this Court's Writ of Mandamus dated October 25, 2005.

(167) If destroyed, the No. 1 building in the state of Ohio for historical significance on Ohio Preservation List will be lost forever to the taxpayers of Seneca County and the State of Ohio. If the Seneca County Courthouse is destroyed, the irreparable damage to the taxpayers of Seneca County and the State of Ohio is obvious and not in dispute.

(168) No third parties will be harmed if the injunction is granted, as it will maintain the status of the parties until the issues in this case can be resolved on their merits.

(169) Naturally, the public interest will be served if the main historical structure in Seneca County can be preserved, renovated or restored for the taxpayers of Seneca County, all Ohioans and all visitors to Ohio. See Exhibit -7 attached hereto.

Relief

WHEREFORE, the plaintiffs pray for an order of this Court permanently restraining and enjoining this Board from taking any further action or spending any further money on consultants or studies, until such time as the Board has satisfied this Court that it has

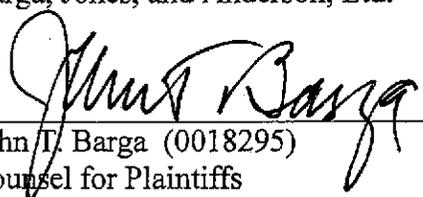
- a) complied fully with the Orders of this Court and the Writ of Mandamus issued by this Court on October 25, 2005,
- b) demonstrated that is complying with R.C. 149.43, R.C. 121.22, R.C. 305.10 and R.C. 305.11,
- c) retained the necessary independent experts to guide it through the maze of tax regulations, tax programs and legal options available for the Courthouse Project,
- d) demonstrated to this Court that the Board and the individual Commissioners have fulfilled the duties set forth in their individual oaths of office, as they relate to the Courthouse Project, specifically but not limited to, retaining the professional expertise

necessary to make the informed decisions required of their office and by the taxpayers of Seneca County, and

e) other relief available at law and in equity.

Respectfully submitted,

Barga, Jones, and Anderson, Ltd.

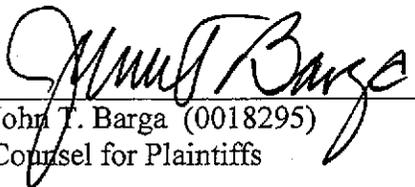


John T. Barga (0018295)
Counsel for Plaintiffs

Demand for Trial by Jury

The plaintiffs hereby demand a trial by jury of all issues in this case so triable.

Barga, Jones, and Anderson, Ltd.



John T. Barga (0018295)
Counsel for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was served by electronic mail on July 23, 2007 upon:

Kenneth Egbert, Jr., Seneca County Prosecuting Attorney, 71 S. Washington St., Suite E., Tiffin, OH 44883, kegbert@senecapros.org.

Mark Landes, 250 East Broad Street, Suite 900, Columbus, Ohio 43215, marklandes@isaacbrant.com.

Mark Troutman, 250 E. Broad Street, Suite 900, Columbus, Ohio 43215, marktroutman@isaacbrandt.com



John T. Barga (0018295)
Counsel for Plaintiffs

FILED
SENeca COUNTY COURT
SENeca COUNTY, OHIO
2007 JUL 23 PM 1:26
MARIA K. WARD
CLERK

Handwritten initials

IN THE COURT OF COMMON PLEAS OF SENECA COUNTY, OHIO

FILED
COMMON PLEAS COURT
SENECA COUNTY, OHIO
2007 AUG -7 AM 11:34
MARTIN WARD
CLERK

STATE OF OHIO, EX REL.,
NANCY L. COOK, et al.
Plaintiffs-Relators

Case No. 07 CV 0271

v.

OPINION AND
JUDGMENT ENTRY

SENECA COUNTY BOARD OF COUNTY
COMMISSIONERS, et al.
Defendants-Respondents

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I

This matter is before the Court on defendants' Civ.R. 12(B)(6) motion to dismiss Court 4 (Breach of Fiduciary Duty) and Court 6 (Unauthorized Conduct) of plaintiffs' amended complaint.¹ Defendants argue that in these courts, plaintiffs have failed to state a claim for which relief can be granted. Plaintiffs have filed memoranda in opposition. In addition, plaintiffs have filed a motion for declaratory judgment and/or judgment on the pleadings and/or summary judgment on Court 6. Opposition briefs and replies have been filed by the parties. As the Court is presently considering evidence relating to plaintiffs' request for a preliminary injunction, the Court must review the legal sufficiency of these claims as they relate to the Court's authority to provide equitable relief.

In reviewing a motion to dismiss under Civ.R.12(B)(6), the Court must accept the material allegations of the complaint as true and make all reasonable inferences in favor of the plaintiffs. Before the motion can be granted, it must appear from the face of the complaint that plaintiffs can prove no set of facts that would entitle them to relief. *Vail v. Plain Dealer Publishing Co.* (1995), 72 Ohio St.3d 279, 280. To grant summary judgment pursuant to Civ.R. 56, plaintiffs must show (1) there is no

¹ Defendants also moved to dismiss Court 5 (Negligence), which the Court is not addressing at this time.

EXHIBIT
B

433 Pg. 1542

genuine issue of material fact; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from the evidence that reasonable minds can only come to a conclusion adverse to the nonmoving party, when viewing the evidence in the light most favorable to the nonmoving party. A motion for judgment on the pleadings under Civ.R. 12(C) may be granted where no material factual issue exists and the moving party is entitled to judgment as a matter of law. The determination is restricted solely to the allegations of the pleadings and the nonmoving parties are entitled to have all material allegations in the complaint, with all reasonable inferences to be drawn therefrom, construed in their favor as true. *State ex rel. Pirman v. Money* (1994), 69 Ohio St.3d 591.

Upon review of the memoranda filed herein, the arguments of counsel set forth therein, and the applicable law, and for the reasons stated herein, the Court finds that defendants' motion to dismiss Count 4 and Count 6 should be granted and plaintiffs' motion for declaratory judgment and/or judgment on the pleadings and/or summary judgment on Count 6 should be denied.²

II

In Court 4 of the complaint, plaintiffs have set forth the following allegations, which the Court accepts as true in considering the motion to dismiss:³ The Seneca County Board of County Commissioners (referred to collectively herein as "defendants") have made a series of decisions related to the restoration, renovation and demolition of the Seneca County Courthouse. This project, which will result in the demolition of the courthouse, will cost between \$10,000,000 and \$15,000,000. In reaching these decisions, defendants have failed and refused to retain or hire independent professional legal, architectural, engineering, construction, historic preservation or tax advisers. Instead defendants have expended over \$300,000 for consultants who have persuaded the commissioners to proceed with the demolition project. Plaintiffs further allege that defendants have "failed and refused to retain the professionals necessary to help it perform its due diligence and investigative work, that will produce the critical information necessary" for defendants to make "any informed and prudent decisions about the Courthouse Project." Accordingly, "some, if not all, of the decisions have been made by the Board

² The hearing on plaintiffs' request for a preliminary injunction will continue only on those remaining claims which enable plaintiffs to seek equitable relief.

³ In addition to factual allegations, plaintiffs have also made numerous legal allegations and arguments.

without the benefit of independent professional" experts and advisers "who could provide critically necessary information and advice necessary for an informed decision."

The complaint further states that in 2001, the Board of Commissioners established a courthouse planning committee which recommended that the courthouse be renovated, that it house the common pleas court, and the committee further suggested methods of funding. On December 24, 2001, the Board adopted the committee's recommendations. Additionally, the complaint alleges that several studies indicate that the least expensive alternative for reuse of existing courthouse space is renovation.

In Count 6 of the complaint, Plaintiffs allege that the Ohio Legislature has delegated certain, limited authority to county boards of county commissioners, which does not include the authority to destroy the Seneca County Courthouse. Plaintiffs contend in Count 6 that defendants have exceeded their statutory authority by taking action to demolish the courthouse.

Plaintiffs request that this Court declare the actions of defendants void, and that it issue a writ of mandamus directing defendants to fulfill their fiduciary duty to perform the necessary due diligence so that defendants can make an informed decision before they cause the expenditure of millions of dollars of public funds. Initially, however, plaintiffs are seeking a preliminary injunction to halt any demolition of the courthouse until the Court rules on the merits of plaintiffs' claims.

III

The question presently before the Court is whether plaintiffs' claims set forth in Count 4 and Count 6 entitle them to relief. In other words, did defendants have the authority to vote to demolish the courthouse, and if so, do they have a "fiduciary duty" to consider expert advice and information, to exercise due diligence and consider all alternatives before the appropriation of county funds.

A. Unauthorized Conduct

As to Count 6 of the complaint, plaintiffs maintain that defendants are without the legal power and authority to demolish the Seneca County Courthouse because such authority has not been provided by the General Assembly. Plaintiffs argue that since counties derive their power from the legislature and are subject to limits placed upon them, then county commissioners cannot demolish a courthouse in the

absence of a specific grant of authority to do so.

In *Gauge County Bd. of Commissioners v. Munn Road Sand & Gravel* (1993), 67 Ohio St.3d 579, 583, the Supreme Court stated that "a county does not have authority to regulate unless the General Assembly affirmatively grants it. The grant must be in clear and certain terms. Because the presumption is against authority, the grant must be strictly construed." The Court further noted that when the legislature "wishes to affirmatively grant power to local authorities to regulate in a particular area, it frequently does so in positive terms."

The Ohio legislature has granted authority to the commissioners regarding county courthouses. R.C. 307.01(A) provides: "A courthouse, jail, public comfort station, offices for county officers, and a county home shall be provided by the board of county commissioners when, in its judgment, any of them are needed. The buildings and offices shall be of such style, dimensions, and expense as the board determines." In addition, R.C. 307.02 states: "The board of county commissioners of any county, in addition to its other powers, may purchase, for cash or by installment payments, enter into lease-purchase agreements, lease with option to purchase, lease, appropriate, construct, enlarge, improve, rebuild, equip, and furnish a courthouse * * *." Plaintiffs contend that since the General Assembly has not explicitly included the authority to demolish a courthouse within these statutes, then defendants have no legal right to proceed with demolition.

There can be no doubt that the legislature has clearly granted broad authority to defendants to regulate the courthouse. Initially, the board of county commissioners have discretion, "within its judgment" to determine if a courthouse is needed. Certainly, defendants can decide whether to even provide a courthouse, and if so, they can establish the type, style, dimensions and costs. Moreover, the commissioners may provide a courthouse by purchasing or leasing it, or they may construct it, as well as rebuild a courthouse.

If defendants possess the authority to decide if a courthouse is needed, then certainly they can determine that a courthouse is not required. R.C. 307.01 and R.C. 307.02 provide the commissioners broad authority to manage and regulate the county courthouse, which implicitly includes removal if the

commissioners deem it is no longer viable. If defendants have authority to determine the nature and style of the courthouse, then they can, within their judgment, alter an existing structure. Certainly, they can decide a courthouse no longer be provided if within their judgment it is not needed. If a courthouse is not further needed, it follows that within defendants' grant of authority must be the power to demolish the building, especially where defendants are expressly given discretion to rebuild, as they have elected to do so in this case. Otherwise, obsolete county buildings, including jails, county offices and county homes, could never be replaced. Certainly, this was not the intent of the legislature.

The Court finds the Board of County Commissioners has the authority to decide and pass a resolution to demolish the county courthouse. Accordingly, defendants' motion to dismiss Count 6 will be granted, and plaintiffs' motion for declaratory judgment and/or judgment on the pleadings and/or summary judgment will be denied.

B. Fiduciary Duty

In Count 4 of the Complaint, which has been captioned "Breach of Fiduciary Duty", plaintiffs are not challenging the decision of defendants to tear down the courthouse. Rather, plaintiffs are questioning the decision-making process and the manner in which defendants made their determination. Count 4 alleges that defendants, as elected officials, have a fiduciary duty to exercise due diligence, to examine all the facts and to consider all relevant and material information before making their decision regarding the courthouse. Plaintiffs contend that defendants have breached this fiduciary duty and have taken actions which are neither prudent nor fiscally responsible. In their motion to dismiss, defendants argue that plaintiffs have not set forth any legal claim in that there is no right of action against county commissioners for a breach of a fiduciary duty and that this Court should not insert itself into the legislative process.

The principles of separation of powers and checks and balances are deemed fundamental to our democratic form of government. *State ex rel. Dann v. Taft*, 2006-Ohio-1825, 109 Ohio St.3d 364. The doctrine of separation of powers "is implicitly embedded in the entire framework of those sections of the Ohio Constitution that define the substance and scope of powers granted to the three branches of

state government." *South Euclid v. Jemison* (1986), 28 Ohio St.3d 157, 158-159. It has long been recognized that both the Ohio and federal constitutions "have always sought to draw a distinct line between the three great branches of government, executive, legislative, and judicial, and carefully separate their jurisdiction and powers. Courts may interpret laws, but they cannot make them." *Honeyman v. Green* (1930), 27 Ohio N.P. 569, 573. As part of the principle of separation of powers, a court should not interfere with or substitute its judgment for that of other branches of government, particularly with regard to the allocation of community resources.

Plaintiffs are seeking judicial review of the adequacy of defendants' decision-making process. They have cited no authority supporting their claim that a court may evaluate and examine the deliberative, fact-finding and information gathering process utilized by officials in arriving at their decisions. This Court, through its own research, has been unable to find any case which has overturned a statute or resolution because of a breach of a legislative or fiduciary duty or because of a failure to use due diligence.

In support of their claim, plaintiffs have attempted to rely upon court decisions which refer to a fiduciary duty of public officials. However, none of these cases pertain to or discuss a duty of due diligence in considering legislative enactments. Plaintiffs cite *State v. McKelvey* (1967), 12 Ohio St.2d 92, where the Supreme Court stated in the first paragraph of the syllabus: "A public official has a fiduciary duty to the citizens of the state." This case, however, did not involve the passage of legislation. Rather, the court found that a county auditor could not profit personally from his position as a public official. In addition, the syllabus of a Supreme Court opinion is not to be construed as being broader than the facts of that specific case warrant. *State v. McDermott* (1995), 72 Ohio St.3d 570, 574. Plaintiffs also rely on *Crane Township ex rel. Stalter v. Secoy* (1921), 103 Ohio St. 258, in which the Supreme Court stated that a public office is a public trust and that the public official as trustee should be held responsible to the same degree as the trustee of a private trust fund. The *Secoy* case involved misappropriation of public funds because township trustees signed warrants in blank both as to amounts and payee, instead of requiring itemized bills to be presented to the township clerk. The Court

explained that if it were a discretionary act, there could be no recovery, but where the law mandates certain actions, a duty is then imposed. The acts of the defendants in *Secoy* were not discretionary and did not relate to legislation.

In the other cases relied upon by plaintiffs, the issues involved either fiduciary duties of nonpublic officials or officials personally profiting from public office. For example, in *Cruz v. South Dayton Urological Assoc., Inc.* (1997), 121 Ohio App.3d 655, the issue related to the fiduciary duty owed to minority shareholders of a corporation by the majority shareholders. In *State v. Lozano*, 2001-Ohio-224, 90 Ohio St.3d 560, a theft-in-office criminal case, the defendant contended he was not a public official. The only mention of "fiduciary duty" was the defendant's reference to *State v. McKelvey*, supra. Upon review of the cases cited by plaintiffs, the Court finds that none support their contention that they have set forth a valid claim in Count 4.

Defendants, as the duly elected commissioners for the County of Seneca, have the authority and the discretion to provide, or not to provide, a courthouse. R.C. 307.01 and R.C. 307.02. It is within defendants' discretion to choose whether to keep the courthouse, to refurbish or renovate the courthouse, to maintain the courthouse, or to demolish and rebuild the courthouse. Whether to preserve the courthouse or to destroy it is a policy decision to be made by the elected county commissioners as provided by law. The commissioners decide what facts, data and information are salient, significant and important for reaching their conclusion. It is inconsistent with the principle of separation of powers for a court to review and rule upon legislative conduct, processes and procedures. As stated in *City of Moraine v. Board of County Commissioners*, 1980 Ohio App. Lexis 10754:

We reemphasize, it is well settled in this state that zoning amendment proceedings call for legislative determinations and the doctrine of separation of powers protects legislative process from encroachment by the judicial branch. Not only do we believe that judicial examination of legislative motive, conduct, and compromise would work as an unwholesome influence in a society that cherishes democratic values, but as our analysis makes clear, the courts are simply without power to extend judicial review into this forbidden realm. Any restriction of legislative power, legislative process, and legislative discretion of the Board of County Commissioners should devolve from the General Assembly.

To recognize a cause of action as alleged by plaintiffs in Count 4 would create a right of judicial

review of every legislative enactment by those members of the public who disagree with policy choices made by their elected representatives. No Ohio court has recognized a fiduciary duty of county commissioners or any other elected legislator to follow some undefined course of due diligence during its decision-making process. The commissioners were elected to make difficult decisions, and it is up to them to determine what information they should consider. Unless defendants have violated the constitution or a statutory mandate, courts are without power to interfere with the legislative process as well as with the authority and discretion of elected public officials. Commissioners must be allowed to do their job without fear of lawsuits and judicial oversight. Courts may interpret laws, but they cannot make them. It is not within the province of the courts to decide what factors should be considered in resolving policy issues. To permit judicial inquiry into the motives, the rationale or the deliberative process of the county commissioners would place the Court into the policy-making arena and would interfere with the other branches of government.

For the reasons stated herein, the Court finds that Count 4 of plaintiffs' complaint fails to state a claim for which relief can be granted, and that defendants' motion to dismiss is well taken. Therefore, such claim will be dismissed and plaintiffs cannot be granted relief for an alleged breach of fiduciary duty.

IV. JUDGMENT ENTRY

It is therefore ORDERED, ADJUDGED and DECREED that defendants' motion to dismiss Count 4 and Count 6 of plaintiffs' amended complaint is GRANTED.

It is further ORDERED, ADJUDGED and DECREED that Count 4 and Count 6 of plaintiffs' amended complaint is dismissed with prejudice.

It is further ORDERED, ADJUDGED and DECREED that plaintiffs' motion for declaratory judgment and/or judgment on the pleadings and/or summary judgment is DENIED.

Charles Wittenberg

Judge Charles S. Wittenberg

Date: 8/7/07

FILED
COMMON PLEAS COURT
SENECA COUNTY, OHIO
2007 AUG - 7 AM 11:34
MARI K. WARD
CLERK

IN THE COURT OF COMMON PLEAS
SENECA COUNTY, OHIO

13-07-26

State of Ohio, ex rel.,
Nancy L. Cook, et al.

Plaintiffs-Appellants

vs.

Seneca County Board of
Commissioners, et al.

Defendants-Appellees

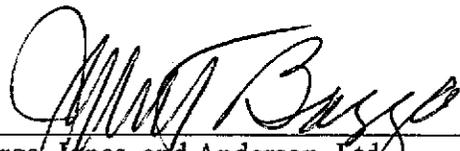
* Case No. 07 CV 0271

* Judge Charles S. Wittenberg

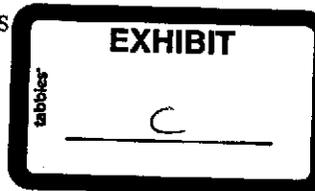
* Plaintiffs-Appellants
* Notice of Appeal

FILED
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SENECA COUNTY, OHIO
2007 SEP - 6 PM 1:15
MARY K. WARD
CLERK

Notice is hereby given that the State of Ohio, ex rel., Nancy L. Cook, S. Rayella Engle, Jacqueline A. Fletcher, Lenora M. Livingston, Adams A. Engle and Douglas E. Collar hereby appeal to the Court of Appeals of Seneca County, Ohio the Third Appellate District, from the Opinions and Judgment Entries signed, filed and journalized in this Court on August 7, 2007 at 11:35 a.m., and subsequently certified on August 28, 2007 at 8:44 a.m. as authorized by Civil Rule 54(B) upon the express determination that there is no just reason for delay, copies of both entries are attached hereto.



Barga, Jones, and Anderson, Ltd.
John T. Barga (0018295)
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Tiffin, OH 44883
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I hereby certify this is a true copy of the original pleading now on file in my office this 19th day of Sept. 2007
Mary K. Ward, Clerk, Common Pleas Court
State of Ohio, County of Seneca, Tiffin, Ohio
by Mary K. Ward Deputy Clerk.

CERTIFICATE OF SERVICE

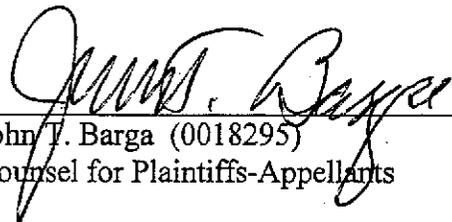
I hereby certify that a true copy of the foregoing was served electronically by e-mail on September 6, 2007 upon:

Judge Charles S. Wittenberg, cwitt841@yahoo.com

Kenneth Egbert, Jr., Seneca County Prosecuting Attorney, 71 S. Washington St., Suite E., Tiffin, OH 44883, kegbert@senecapros.org.

Mark Landes, 250 East Broad Street, Suite 900, Columbus, Ohio 43215,
marklandes@isaacbrant.com;

Mark Troutman, 250 East Broad Street, Suite 900, Columbus, Ohio 43215,
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John T. Barga (0018295)
Counsel for Plaintiffs-Appellants

PS

IN THE COURT OF COMMON PLEAS OF SENECA COUNTY, OHIO

FILED
COMMON PLEAS COURT
SENECA COUNTY, OHIO
2001 AUG -7 AM 11:34
MARILYN WARD
CLERK

STATE OF OHIO, EX REL.,
NANCY L. COOK, et al.
Plaintiffs-Relators

Case No. 07 CV 0271

v.

OPINION AND
JUDGMENT ENTRY

SENECA COUNTY BOARD OF COUNTY
COMMISSIONERS, et al.
Defendants-Respondents

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I

This matter is before the Court on defendants' Civ.R. 12(B)(6) motion to dismiss Count 4 (Breach of Fiduciary Duty) and Count 6 (Unauthorized Conduct) of plaintiffs' amended complaint.¹ Defendants argue that in these counts, plaintiffs have failed to state a claim for which relief can be granted. Plaintiffs have filed memoranda in opposition. In addition, plaintiffs have filed a motion for declaratory judgment and/or judgment on the pleadings and/or summary judgment on Count 6. Opposition briefs and replies have been filed by the parties. As the Court is presently considering evidence relating to plaintiffs' request for a preliminary injunction, the Court must review the legal sufficiency of these claims as they relate to the Court's authority to provide equitable relief.

In reviewing a motion to dismiss under Civ.R.12(B)(6), the Court must accept the material allegations of the complaint as true and make all reasonable inferences in favor of the plaintiffs. Before the motion can be granted, it must appear from the face of the complaint that plaintiffs can prove no set of facts that would entitle them to relief. *Vail v. Plain Dealer Publishing Co.* (1995), 72 Ohio St.3d 279, 280. To grant summary judgment pursuant to Civ.R. 56, plaintiffs must show (1) there is no

¹ Defendants also moved to dismiss Court 5 (Negligence), which the Court is not addressing at this time.

Jr. 433 Pg. 1542

genuine issue of material fact; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from the evidence that reasonable minds can only come to a conclusion adverse to the nonmoving party, when viewing the evidence in the light most favorable to the nonmoving party. A motion for judgment on the pleadings under Civ.R. 12(C) may be granted where no material factual issue exists and the moving party is entitled to judgment as a matter of law. The determination is restricted solely to the allegations of the pleadings and the nonmoving parties are entitled to have all material allegations in the complaint, with all reasonable inferences to be drawn therefrom, construed in their favor as true. *State ex rel. Pirman v. Money* (1994), 69 Ohio St.3d 591.

Upon review of the memoranda filed herein, the arguments of counsel set forth therein, and the applicable law, and for the reasons stated herein, the Court finds that defendants' motion to dismiss Count 4 and Count 6 should be granted and plaintiffs' motion for declaratory judgment and/or judgment on the pleadings and/or summary judgment on Count 6 should be denied.²

II

In Count 4 of the complaint, plaintiffs have set forth the following allegations, which the Court accepts as true in considering the motion to dismiss:³ The Seneca County Board of County Commissioners (referred to collectively herein as "defendants") have made a series of decisions related to the restoration, renovation and demolition of the Seneca County Courthouse. This project, which will result in the demolition of the courthouse, will cost between \$10,000,000 and \$15,000,000. In reaching these decisions, defendants have failed and refused to retain or hire independent professional legal, architectural, engineering, construction, historic preservation or tax advisers. Instead defendants have expended over \$300,000 for consultants who have persuaded the commissioners to proceed with the demolition project. Plaintiffs further allege that defendants have "failed and refused to retain the professionals necessary to help it perform its due diligence and investigative work, that will produce the critical information necessary" for defendants to make "any informed and prudent decisions about the Courthouse Project." Accordingly, "some, if not all, of the decisions have been made by the Board

² The hearing on plaintiffs' request for a preliminary injunction will continue only on those remaining claims which enable plaintiffs to seek equitable relief.

³ In addition to factual allegations, plaintiffs have also made numerous legal allegations and arguments.

without the benefit of independent professional" experts and advisers "who could provide critically necessary information and advice necessary for an informed decision."

The complaint further states that in 2001, the Board of Commissioners established a courthouse planning committee which recommended that the courthouse be renovated, that it house the common pleas court, and the committee further suggested methods of funding. On December 24, 2001, the Board adopted the committee's recommendations. Additionally, the complaint alleges that several studies indicate that the least expensive alternative for reuse of existing courthouse space is renovation.

In Count 6 of the complaint, Plaintiffs allege that the Ohio Legislature has delegated certain, limited authority to county boards of county commissioners, which does not include the authority to destroy the Seneca County Courthouse. Plaintiffs contend in Count 6 that defendants have exceeded their statutory authority by taking action to demolish the courthouse.

Plaintiffs request that this Court declare the actions of defendants void, and that it issue a writ of mandamus directing defendants to fulfill their fiduciary duty to perform the necessary due diligence so that defendants can make an informed decision before they cause the expenditure of millions of dollars of public funds. Initially, however, plaintiffs are seeking a preliminary injunction to halt any demolition of the courthouse until the Court rules on the merits of plaintiffs' claims.

III

The question presently before the Court is whether plaintiffs' claims set forth in Count 4 and Count 6 entitle them to relief. In other words, did defendants have the authority to vote to demolish the courthouse, and if so, do they have a "fiduciary duty" to consider expert advice and information, to exercise due diligence and consider all alternatives before the appropriation of county funds.

A. Unauthorized Conduct

As to Count 6 of the complaint, plaintiffs maintain that defendants are without the legal power and authority to demolish the Seneca County Courthouse because such authority has not been provided by the General Assembly. Plaintiffs argue that since counties derive their power from the legislature and are subject to limits placed upon them, then county commissioners cannot demolish a courthouse in the

absence of a specific grant of authority to do so.

In *Gauge County Bd. of Commissioners v. Munn Road Sand & Gravel* (1993), 67 Ohio St.3d 579, 583, the Supreme Court stated that "a county does not have authority to regulate unless the General Assembly affirmatively grants it. The grant must be in clear and certain terms. Because the presumption is against authority, the grant must be strictly construed." The Court further noted that when the legislature "wishes to affirmatively grant power to local authorities to regulate in a particular area, it frequently does so in positive terms."

The Ohio legislature has granted authority to the commissioners regarding county courthouses. R.C. 307.01(A) provides: "A courthouse, jail, public comfort station, offices for county officers, and a county home shall be provided by the board of county commissioners when, in its judgment, any of them are needed. The buildings and offices shall be of such style, dimensions, and expense as the board determines." In addition, R.C. 307.02 states: "The board of county commissioners of any county, in addition to its other powers, may purchase, for cash or by installment payments, enter into lease-purchase agreements, lease with option to purchase, lease, appropriate, construct, enlarge, improve, rebuild, equip, and furnish a courthouse * * *." Plaintiffs contend that since the General Assembly has not explicitly included the authority to demolish a courthouse within these statutes, then defendants have no legal right to proceed with demolition.

There can be no doubt that the legislature has clearly granted broad authority to defendants to regulate the courthouse. Initially, the board of county commissioners have discretion, "within its judgment" to determine if a courthouse is needed. Certainly, defendants can decide whether to even provide a courthouse, and if so, they can establish the type, style, dimensions and costs. Moreover, the commissioners may provide a courthouse by purchasing or leasing it, or they may construct it, as well as rebuild a courthouse.

If defendants possess the authority to decide if a courthouse is needed, then certainly they can determine that a courthouse is not required. R.C. 307.01 and R.C. 307.02 provide the commissioners broad authority to manage and regulate the county courthouse, which implicitly includes removal if the

commissioners deem it is no longer viable. If defendants have authority to determine the nature and style of the courthouse, then they can, within their judgment, alter an existing structure. Certainly, they can decide a courthouse no longer be provided if within their judgment it is not needed. If a courthouse is not further needed, it follows that within defendants' grant of authority must be the power to demolish the building, especially where defendants are expressly given discretion to rebuild, as they have elected to do so in this case. Otherwise, obsolete county buildings, including jails, county offices and county homes, could never be replaced. Certainly, this was not the intent of the legislature.

The Court finds the Board of County Commissioners has the authority to decide and pass a resolution to demolish the county courthouse. Accordingly, defendants' motion to dismiss Count 6 will be granted, and plaintiffs' motion for declaratory judgment and/or judgment on the pleadings and/or summary judgment will be denied.

B. Fiduciary Duty

In Count 4 of the Complaint, which has been captioned "Breach of Fiduciary Duty", plaintiffs are not challenging the decision of defendants to tear down the courthouse. Rather, plaintiffs are questioning the decision-making process and the manner in which defendants made their determination. Count 4 alleges that defendants, as elected officials, have a fiduciary duty to exercise due diligence, to examine all the facts and to consider all relevant and material information before making their decision regarding the courthouse. Plaintiffs contend that defendants have breached this fiduciary duty and have taken actions which are neither prudent nor fiscally responsible. In their motion to dismiss, defendants argue that plaintiffs have not set forth any legal claim in that there is no right of action against county commissioners for a breach of a fiduciary duty and that this Court should not insert itself into the legislative process.

The principles of separation of powers and checks and balances are deemed fundamental to our democratic form of government. *State ex rel. Dann v. Taft*, 2006-Ohio-1825, 109 Ohio St.3d 364. The doctrine of separation of powers "is implicitly embedded in the entire framework of those sections of the Ohio Constitution that define the substance and scope of powers granted to the three branches of

state government.” *South Euclid v. Jemison* (1986), 28 Ohio St.3d 157, 158-159. It has long been recognized that both the Ohio and federal constitutions “have always sought to draw a distinct line between the three great branches of government, executive, legislative, and judicial, and carefully separate their jurisdiction and powers. Courts may interpret laws, but they cannot make them.” *Honeyman v. Green* (1930), 27 Ohio N.P. 569, 573. As part of the principle of separation of powers, a court should not interfere with or substitute its judgment for that of other branches of government, particularly with regard to the allocation of community resources.

Plaintiffs are seeking judicial review of the adequacy of defendants’ decision-making process. They have cited no authority supporting their claim that a court may evaluate and examine the deliberative, fact-finding and information gathering process utilized by officials in arriving at their decisions. This Court, through its own research, has been unable to find any case which has overturned a statute or resolution because of a breach of a legislative or fiduciary duty or because of a failure to use due diligence.

In support of their claim, plaintiffs have attempted to rely upon court decisions which refer to a fiduciary duty of public officials. However, none of these cases pertain to or discuss a duty of due diligence in considering legislative enactments. Plaintiffs cite *State v. McKelvey* (1967), 12 Ohio St.2d 92, where the Supreme Court stated in the first paragraph of the syllabus: “A public official has a fiduciary duty to the citizens of the state “ This case, however, did not involve the passage of legislation. Rather, the court found that a county auditor could not profit personally from his position as a public official. In addition, the syllabus of a Supreme Court opinion is not to be construed as being broader than the facts of that specific case warrant. *State v. McDermott* (1995), 72 Ohio St.3d 570, 574. Plaintiffs also rely on *Crane Township ex rel. Stalter v. Secoy* (1921), 103 Ohio St. 258, in which the Supreme Court stated that a public office is a public trust and that the public official as trustee should be held responsible to the same degree as the trustee of a private trust fund. The *Secoy* case involved misappropriation of public funds because township trustees signed warrants in blank both as to amounts and payee, instead of requiring itemized bills to be presented to the township clerk. The Court

explained that if it were a discretionary act, there could be no recovery, but where the law mandates certain actions, a duty is then imposed. The acts of the defendants in *Sacoy* were not discretionary and did not relate to legislation.

In the other cases relied upon by plaintiffs, the issues involved either fiduciary duties of nonpublic officials or officials personally profiting from public office. For example, in *Cruz v. South Dayton Urological Assoc., Inc.* (1997), 121 Ohio App.3d 655, the issue related to the fiduciary duty owed to minority shareholders of a corporation by the majority shareholders. In *State v. Lozano*, 2001-Ohio-224, 90 Ohio St.3d 560, a theft-in-office criminal case, the defendant contended he was not a public official. The only mention of "fiduciary duty" was the defendant's reference to *State v. McKelvey*, supra. Upon review of the cases cited by plaintiffs, the Court finds that none support their contention that they have set forth a valid claim in Count 4.

Defendants, as the duly elected commissioners for the County of Seneca, have the authority and the discretion to provide, or not to provide, a courthouse. R.C. 307.01 and R.C. 307.02. It is within defendants' discretion to choose whether to keep the courthouse, to refurbish or renovate the courthouse, to maintain the courthouse, or to demolish and rebuild the courthouse. Whether to preserve the courthouse or to destroy it is a policy decision to be made by the elected county commissioners as provided by law. The commissioners decide what facts, data and information are salient, significant and important for reaching their conclusion. It is inconsistent with the principle of separation of powers for a court to review and rule upon legislative conduct, processes and procedures. As stated in *City of Moraine v. Board of County Commissioners*, 1980 Ohio App. Lexis 10754:

We reemphasize, it is well settled in this state that zoning amendment proceedings call for legislative determinations and the doctrine of separation of powers protects legislative process from encroachment by the judicial branch. Not only do we believe that judicial examination of legislative motive, conduct, and compromise would work as an unwholesome influence in a society that cherishes democratic values, but as our analysis makes clear, the courts are simply without power to extend judicial review into this forbidden realm. Any restriction of legislative power, legislative process, and legislative discretion of the Board of County Commissioners should devolve from the General Assembly.

To recognize a cause of action as alleged by plaintiffs in Count 4 would create a right of judicial

review of every legislative enactment by those members of the public who disagree with policy choices made by their elected representatives. No Ohio court has recognized a fiduciary duty of county commissioners or any other elected legislator to follow some undefined course of due diligence during its decision-making process. The commissioners were elected to make difficult decisions, and it is up to them to determine what information they should consider. Unless defendants have violated the constitution or a statutory mandate, courts are without power to interfere with the legislative process as well as with the authority and discretion of elected public officials. Commissioners must be allowed to do their job without fear of lawsuits and judicial oversight. Courts may interpret laws, but they cannot make them. It is not within the province of the courts to decide what factors should be considered in resolving policy issues. To permit judicial inquiry into the motives, the rationale or the deliberative process of the county commissioners would place the Court into the policy-making arena and would interfere with the other branches of government.

For the reasons stated herein, the Court finds that Count 4 of plaintiffs' complaint fails to state a claim for which relief can be granted, and that defendants' motion to dismiss is well taken. Therefore, such claim will be dismissed and plaintiffs cannot be granted relief for an alleged breach of fiduciary duty.

IV. JUDGMENT ENTRY

It is therefore ORDERED, ADJUDGED and DECREED that defendants' motion to dismiss Count 4 and Count 6 of plaintiffs' amended complaint is GRANTED.

It is further ORDERED, ADJUDGED and DECREED that Count 4 and Count 6 of plaintiffs' amended complaint is dismissed with prejudice.

It is further ORDERED, ADJUDGED and DECREED that plaintiffs' motion for declaratory judgment and/or judgment on the pleadings and/or summary judgment is DENIED.

Charles S. Wittenberg

Judge Charles S. Wittenberg

Date: 8/7/07

FILED
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SENECA COUNTY, OHIO
2007 AUG - 7 AM 11:34
MARTIN, WARD
CLERK

IN THE COURT OF COMMON PLEAS OF SENECA COUNTY, OHIO

STATE OF OHIO, EX REL.,
NANCY L. COOK, et al.
Plaintiffs-Relators

v.

SENECA COUNTY BOARD OF COUNTY
COMMISSIONERS, et al.
Defendants-Respondents

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Case No. 07 CV 0271

OPINION AND
JUDGMENT ENTRY

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Plaintiffs seek a preliminary injunction from the Court to prevent defendants¹ from demolishing the Seneca County Courthouse. Plaintiffs' claim is predicated upon their allegation that defendants violated the Ohio Sunshine Law, R.C.121.22. Specifically, plaintiffs charge that defendants discussed and deliberated privately regarding a 15 Year Master Plan of Space Utilization, which was adopted at a public meeting on August 31, 2006. The Plan provided a blueprint for demolition of the County Courthouse and stated that the commissioners would "immediately request proposals from qualified engineering firms for the development of specifications to remove the 1884 Courthouse."

I. FACTS

On August 31, 2006, at a public meeting, the Seneca County Commissioners² passed a resolution approving a 15 Year Master Plan of Space Utilization and Development. Prior to the meeting, on August 8, 2006, defendant Nutter sent an e-mail to the other commissioners, the county administrator and the clerk of the Board, in which he attached a draft of the Master Plan. The e-mail stated: "Please review the attached and get with me by Monday for any changes. Remember this is the

¹ "Defendants", in this opinion, will refer to the Seneca County Commissioners, unless otherwise noted.
² At that time the members of the Seneca County Board of Commissioners were defendant Nutter, defendant Sauber and Joseph Schock. Defendant Bridinger was elected commissioner subsequent to August 31, 2006.

first rough draft and not necessarily meant for public consumption." Both Nutter and Sauber testified that they never discussed the plan with each other and Nutter received no suggested changes from the other commissioners except for misspellings. Three days before the meeting, on August 28, 2006, Nutter sent another e-mail with an attached copy of the Master Plan to Commissioner Schock, the administrator and the clerk, which stated: "This should have all the corrections. Let me know." This second e-mail was not sent to Sauber. The second draft of the plan corrected the misspellings as well as including changes made by Nutter.

Plaintiff S. Rayella Engle testified that on August 31, 2008, shortly before the meeting began, she walked past an office and observed the three commissioners looking at some papers. She could not hear their conversation, but she stated she heard Nutter refer to "option B."

Shortly thereafter, the meeting of the commissioners was called to order. In new business, Sauber moved to accept a resolution adopting the 15 Year Master Plan, and Schock seconded the motion. There was no discussion, and the resolution passed unanimously.

The Plan adopted by the Commissioners examined seven buildings operated by Seneca County in downtown Tiffin, including the courthouse. Relying on a space study performed by the architecture and engineering firm of Stilson & Associates, Inc., hired by the commissioners in April, 2006, the Master Plan set forth five possible solutions, identified as Options A through E, to meet future space needs. Except for Option A, all other options included demolition of the courthouse. The Master Plan, after examining all the options, provided that the "Board of Commissioners believes a variation of Option B would best serve the space needs of Seneca County." The Master Plan further expressed that the Board "shall immediately request proposals from qualified engineering firms for the development of specifications to remove the 1884 Courthouse."

No formal action was taken by defendants regarding the courthouse until June 25, 2007. At a public meeting on that date, the commissioners, on a 2-1 vote, decided and passed a resolution authorizing MKC, Inc. to prepare a project manual for the deconstruction and salvage of the courthouse.

As of August 8, 2007, the last hearing date in this matter, defendants had not taken any official action to demolish the courthouse. The project manual from MKC, Inc. is to assist the commissioners in preparing documentation, specifications and other requirements necessary for the advertisement of a bid package. Once a bid package has been proposed, it must be adopted by the commissioners and then sent out for bid. After bids are received from contractors, the commissioners then must vote whether to accept a bid.

II. ANALYSIS

Plaintiffs contend that a preliminary injunction should be granted because defendants' decision to adopt the 15 Year Master Plan was in violation of the Ohio Sunshine Law, R.C. 121.22. In general, courts will consider the following factors, which plaintiffs must show by clear and convincing evidence, in deciding whether to grant injunctive relief: (1) the likelihood or probability of plaintiffs' success on the merits; (2) whether the issuance of the injunction will prevent irreparable harm to plaintiffs; (3) what injury to others will be caused by the granting of the injunction; and (4) whether the public interest will be served by the granting of the injunction. *King's Welding & Fabr., Inc. v. King*, 2006-Ohio-5231, 7th App. Dist.; *Corbett v. Ohio Bldg. Auth.* (1993), 86 Ohio App. 3d 44. Pursuant to R.C. 121.22(I)(3), irreparable harm and prejudice to the party seeking an injunction shall be conclusively and irrebuttably presumed upon proof of a violation of the Sunshine Law. The issue for the herein cause is whether plaintiffs have shown a likelihood of success on the merits, i.e., whether defendants violated the Ohio Sunshine Law.

The Ohio Sunshine Law, which is to be liberally construed to require public officials to take official action and to conduct deliberations only in open meetings, R.C. 121.22(A), mandates that the meetings of any public body are "public meetings open to the public at all times." R.C. 121.22(C). Further, at R.C. 121.22(H), a "resolution, rule, or formal action of any kind is invalid unless adopted in an open meeting of the public body. A resolution, rule, or formal action adopted in an open meeting that results from deliberations in a meeting not open to the public is invalid * * *." A meeting is defined as "any prearranged discussion of the public business of the public body by a majority of its members."

R.C. 121.22(B)(2). "Deliberation" is not defined by the Act, but has been construed to mean more than information-gathering, investigation or fact-finding. *Springfield Local Sch. Dist. Bd. of Educ. v. Ohio Ass'n of Pub. School Employees, Local 530* (1995), 106 Ohio App.3d 855. Citing Webster's Third New International Dictionary (1961) the court in *Springfield Local*, defined "deliberation" as "the act of weighing and examining the reasons for and against a choice or measure" or "a discussion and consideration by a number of persons of the reasons for and against a measure." *Id.* at 864.

A person asserting a violation of Ohio's Sunshine Law bears the burden of proving by a preponderance of the evidence the violation occurred. *Steingass Mech. v. Warrensville Heights Bd. of Educ.* (2003), 151 Ohio App. 3d 321; *State ex rel. Randles v. Hill* (Mar. 20, 1992), Lucas App. No. L-90-169, unreported. If a violation or threatened violation of the Sunshine Law is proved, "the court of common pleas shall issue an injunction to compel the members of the public body to comply with its provisions." R.C. 121.22(I)(1).

Plaintiffs maintain that defendants, prior to the meeting of August 31, 2007, privately agreed to accept the 15 Year Master Plan. In order to prevail on a claimed violation of the Sunshine Law, plaintiffs must demonstrate that there was (1) a prearranged (2) discussion (3) of the public business of the public body in question (4) by a majority of its members. *Haverkos v. Northwest Local Sch. Dist. Bd. of Educ.*, 2005-Ohio-3489, 1st App. Dist.

The only contacts among the commissioners prior to the board meeting were the two e-mails from Nutter to the other commissioners.³ The e-mails were unsolicited by the other commissioners and were meant to circulate a draft of the plan. While the first e-mail was to let Nutter know if there were any changes, neither of the other commissioners responded. The second e-mail's purpose was to provide the revised draft of the plan. Again, no response resulted from this e-mail.

The e-mails from Nutter circulating the proposed Master Plan constituted neither a meeting nor deliberations under R.C. 121.22. *Haverkos v. Northwest Local Sch. Dist. Bd. of Educ.*, 2005-Ohio-3489, 1st App. Dist. There is no evidence to suggest the e-mails were prearranged and there

³ Actually, there were a total of four e-mails. Nutter resent the e-mail of August 8 and the e-mail of August 28 because he forgot to attach the draft of the Master Plan on the first ones. Otherwise, the messages in the e-mails were identical.

was no discussion among the commissioners as a result. Further, there is no proof demonstrating either that any of the defendants weighed or considered the merits of the Master Plan or that they discussed whether it should or should not be adopted. It is difficult to construe the two e-mails from one person to two others, with no responses, as a discussion or deliberation.

Plaintiffs argue that the only logical inferences from the e-mails is that the commissioners must have discussed the Master Plan outside the public meeting. However, there is no objective or factual evidence establishing that any unlawful meeting or deliberations took place. Plaintiffs assert such a meeting took place based solely upon subjective and speculative interpretations. Both Nutter and Sauber testified there was never any discussions or responsive e-mails among the commissioners. There is a complete absence of evidence pertaining to an exchange of words, comments or ideas regarding the drafts of the Master Plan. At most the e-mails were informational to advise commissioners of the plan drafted by Nutter from a study and report by Stilson & Associates, Inc., and to see if anyone proposed changes to the draft.

Plaintiffs suggest that adoption of the plan without any formal discussion at the public meeting is proof that defendants had had prior discussions and had already made their decisions. However, as observed in *De Vere v. Miami Univ. Bd. of Trustees* (June 10, 1986), Butler App. No. CA85-05-65, unreported, "Absence of discussion on a particular issue at a public meeting does not mean the board discussed the issue privately. This is particularly true when the matter has been an issue of concern for several years." Likewise, the condition and status of the Seneca County Courthouse had been discussed by the commissioners for many years, had been the subject of a proposed sales tax increase, and had been a major issue in Sauber's election campaign. Defendants reasonably believed no further discussion was necessary.

Plaintiffs further argue that the testimony of S. Rayella Engle is proof of prior discussion and deliberation. However, there is nothing improper or clandestine about the three commissioners being together immediately prior to a public meeting, as long as there is no deliberation of public business. Ms. Engle stated she could not hear their conversation and did not know what papers they were looking

at, yet she heard "option B" mentioned. Such, though, does not constitute sufficient proof of a Sunshine Law violation. It was not established that defendants were looking at the proposed Master Plan, and it is unknown if what Ms. Engle heard as "option B" was in connection to the plan.

In conclusion, the Court finds that plaintiffs have failed to meet their burden to show that they have a substantial likelihood or probability of success to prove a violation of the Ohio Sunshine Law. They have failed to present sufficient proof that defendants engaged in deliberations in a non-public setting in contravention of R.C. 121.22.

The Court appreciates plaintiffs', and their counsel's, desire to preserve the Seneca County Courthouse. The Court agrees with plaintiffs that if defendants are not enjoined and they proceed to demolition, the 1884 County Courthouse will be gone forever, and the loss will be irreparable. However, this Court must apply the law to the facts presented to it, and the Court cannot enjoin the actions of the duly elected commissioners because of sympathy or public opinion. With no violation of the Sunshine Law, there is no basis for the issuance of an injunction. Accordingly, plaintiffs' request for a preliminary injunction to prohibit defendants from proceeding with plans to demolish the Seneca County Courthouse will be denied.

JUDGMENT ENTRY

It is therefore ORDERED, ADJUDGED and DECREED that plaintiffs' motion for a preliminary injunction is DENIED.

It is further ORDERED that pursuant to Civ.R. 54(B) there is no just reason for delay and final judgment is hereby entered in favor of defendants and against plaintiffs on plaintiffs' claims for preliminary injunction, violation of R.C.121.22, breach of fiduciary duty and unauthorized conduct.


Judge Charles S. Wittenberg

8/27/07
Date

IN THE COURT OF COMMON PLEAS
SENECA COUNTY, OHIO

State of Ohio, ex rel.,
Nancy L. Cook, et al.

Plaintiffs

vs.

Seneca County Board of
Commissioners, et al.

Defendants

* Case No. 07 CV 0271

* Judge Charles S. Wittenberg

*
* **PRELIMINARY INJUNCTION**
* **POST HEARING BRIEF AND**
* **CLOSING ARGUMENT OF**
* **PLAINTIFFS**
*

FILED
COMMON PLEAS COURT
SENECA COUNTY, OHIO
2007 AUG 20 PM 3:59
MAYNARD
CLERK

"It is the time for all of us to decide who we are."

Les Miserables, Victor Hugo

Are we to be remembered as a people who stood silently by as our rich heritage, the blood, sweat and tears of our proud ancestors, represented by the historic 1884 Seneca County Courthouse is destroyed by a vote of one (1) single-minded person,

- or -

Are we to be remembered as a humble group that succeeded by enforcing the law and building a consensus of the people of Seneca County, united in purpose, proud of our culture, and our historic Courthouse that represents our Constitutions, our way of life, and the freedoms we all cherish.

This Court, the plaintiffs and the decision on plaintiffs' request for a preliminary injunction are the only things standing between our 1884 historic Seneca County Courthouse and the single-minded horrific wrecking ball of doom. The magnitude of this *temporary decision* is greater than any other event in Seneca County for generations past, or yet to come. The decisions about the fate of the Seneca County Courthouse will travel the path where civic duty

and economic development must pass through a minefield of quick fixes and shortsighted solutions. This crossroad must be passed with clear direction and purpose. The defendants cannot be permitted to proceed through this intersection with blinders that block out the history, culture and desires of the people of Seneca County.

CLOAK OF SECRECY ENSHROUDS THE BOARD'S DECISION MAKING PROCESS

This hearing on plaintiffs' request for preliminary injunction was initially based upon a cause of action against the Board of Seneca County Commissioners (Board) for breach of their fiduciary duty to the citizens of Seneca County to faithfully perform the duties of their public office. This hearing was also based upon a cause of action against the Board for violations the Ohio Sunshine Law when it discussed and deliberated privately about the nature, content and form of the 15 Year Plan and the Resolution adopting the same prior to the public meeting on August 31, 2006. It was at that public meeting when both documents were first presented to the public, and unanimously approved and adopted by the Board, all within a matter of minutes. As this hearing progressed, the Court narrowed its focus to the latter issue and the testimony, especially on the final day of the hearing was limited to the violation of the Ohio Sunshine Law.

The Board has acted secretly, intentionally and deliberately by taking formal action outside of a public meeting, which is not permitted under Ohio Law. The *e-mails*, the *reminder not to disclose the content of the 15 Year Plan* to the public or the *discussions* related to the same and the *lack of forthrightness* demonstrated by the Board toward the public, as the Board considered and decided the fate of the 1884 Seneca County Courthouse, cannot be any more apparent from the record. *Commissioner Nutter even acknowledged that the public could not ask about drafts of the 15 Year Plan if the public did not know about them.* The conduct of the Board is unpardonable.

The Ohio Sunshine Law is designed and intended to allow the people of Seneca County to watch and listen as their public officials take formal action on public issues, so that the public will understand the rationale for the Board's decisions and the deliberations undertaken by these public figures prior to any formal action being taken. In this case, the *formal decision*, the passage of the Resolution to adopt the 15 Year Plan and demolish the 1884 Seneca County Courthouse was *made in private* prior to the public pronouncement of their private decision during the August 31, 2006 public meeting.

The public presentation, passage and adoption of the Resolution of the 15 Year Plan was a *foregone conclusion* and a *slam dunk* for the Commissioners before they walked in to the public meeting room on August 31, 2006.

The *e-mails*, the *drafts*, the *comments* and *other decisions* made privately by the Commissioners prior to the August 31, 2006 public meeting clearly demonstrate a callous disregard for the spirit, purpose and intent of the Ohio Sunshine Law. The intentional *cloak of secrecy* thrown over the *private communications and discussions* by the Board defeats the spirit and the expressed intent of the Ohio Legislature when it passed R.C. 121.22. Two of these Commissioners should be ashamed of the fact that they kept this information from the public, and adopted a plan to demolish the Courthouse, not based upon the public studies but plans and discussions that took place in private.

The *seminal action* taken by the Board, which precipitated a series of events including the August 31, 2006 Resolution, the adoption of the 15 Year Plan and the June 25, 2007 Resolution to demolish the existing 1884 Seneca County Courthouse ignored public opinion, prior action of the Board, advice of experts and even the final recommendations of MKC and Associates (MKC). The Board's course of conduct was *set in motion privately*, prior to the

August 31, 2006 meeting, which has led to the MKC services, the preparation of a demolition bid package, are all void because the seminal decisions made privately prior to the August 31, 2006 public meeting were made in violation of R.C. 121.22.

THE EVIDENCE

What do we know from the testimony and documents produced at the hearing?

Tanya Hemmer and Lucinda Keller testified as follows:

- (a) the Resolution adopting the 15 Year Plan was approved at least 24 hours before the August 31, 2006 public meeting, and before the Agenda was prepared and delivered to the newspapers,
- (b) the Agenda for the August 31, 2006 public meeting was made available to the public via newspapers just hours before the public meeting,
- (c) the Agenda announced that a Resolution would be adopted that incorporated a 15 Year Plan,
- (d) neither the Resolution nor the 15 Year Plan were read out loud or presented to the public in written form prior to the Board voting on the Resolution in the August 31, 2006 public meeting,
- (e) the Board conducted no public debate or deliberations on the Resolution or the 15 Year Plan during the August 31, 2006 meeting before the Resolution was adopted,
- (f) the public was not shown a copy of the Resolution or the 15 Year Plan during the August 31, 2006 meeting prior to the vote on the Resolution,

(g) the presentation of the Resolution and the 15 Year Plan and the unanimous adoption of the Resolution during the August 31, 2006 meeting lasted just a couple of minutes,

(h) Lucinda Keller delegated her responsibility to comply with the subpoena for e-mails to Tanya Hemmer,

(i) Tanya Hemmer did not conduct a search of the computers in the Commissioners' offices for e-mails related to the 15 Year Plan,
Commissioner **David Sauber** testified:

(a) he responded to the August 8, 2006 e-mail of Commissioner Nutter by silent acquiescence, implying that he had no changes that he wished incorporated into the plan,

(b) he read, and presumably deliberated on the Resolution and the 15 Year Plan sometime prior to the August 31, 2006 public meeting,

(c) he did not discuss, debate or deliberate the Resolution or the 15 Year Plan with either of the other Commissioners in the August 31, 2006 public meeting prior to the vote on the Resolution,

(d) he voted on the Resolution and the 15 Year Plan without reading or discussing the contents of either document with either of the other two (2) Commissioners prior to the Vote on the Resolution during the August 31, 2006 public meeting,

(e) the first time the Resolution or the 15 Year Plan was presented to the public was during the August 31, 2006 public meeting,

(f) the passage of the Resolution and the adoption of the 15 Year Plan set the course of conduct for the Board, which calls for the demolition of the 1884 Seneca County Courthouse,

(g) he did not rebut the testimony of Rayella Engle, especially about her observations of the Commissioners just prior to the August 31, 2006 public meeting.

Commissioner **Ben Nutter** testified as follows:

(a) he sent at least four (4) e-mails about the 15 Year Plan to Commissioner Schock before the August 31, 2006 public meeting,

(b) the first and second e-mails asked Commissioner Schock and Commissioner Sauber to review the attached 15 Year Plan and “get with me by Monday for any changes.”

(c) he did not send the third and fourth e-mails to Commissioner Sauber,

(d) he specifically told the Commissioners that this is a “first rough draft,” which was “not necessarily meant for public consumption,”

(e) he actually was asking for feedback to see if they thought it was an accurate summary of the Stilson Report,

(f) on August 28, 2006 he sent a third and fourth e-mail to Commissioner Schock, advising him that he had made the corrections and asking Commissioner Schock to “let me know,” if these are presumably acceptable to Commissioner Schock,

(g) he hand-delivered a third and presumably the final draft of the 15 Year Plan to Commissioners Schock and Sauber, privately in one of the Commissioner's offices, just prior to the public meeting on August 31, 2006,

- (h) he made corrections and changes to the drafts, presumably to satisfy Commissioner Schock and Sauber, on or before presentation of the final draft just prior to the August 31, 2006 meeting,
- (i) the first time the Resolution or the 15 Year Plan were presented to the public was during the August 31, 2006 public meeting, after the Board had voted on the Resolution that adopted the 15 Year Plan,
- (j) the Commissioners read, discussed and deliberated on the Resolution and the 15 Year Plan before the vote and before it was presented to the public in the August 31, 2006 public meeting,
- (k) the Board voted on the Resolution and the 15 Year Plan without reading, discussing or otherwise presenting the documents to the public,
- (l) he did not discuss, debate or deliberate the Resolution or the 15 Year Plan with the other Commissioners in the August 31, 2006 public meeting prior to the Vote for passage of the Resolution that adopted the 15 Year Plan,
- (m) the passage of the Resolution that adopted the 15 Year Plan set the course of conduct for the Board, which requires the demolition of the 1884 Seneca County Courthouse,
- (n) he did not rebut the testimony of Rayella Engle, especially about her observations of the Commissioners just prior to the August 31, 2006 public meeting.

The testimony of **S. Rayella Engle** is as follows:

- (a) on the morning of August 31, 2006, one of her friends called the Commissioners' office to ask what was on the Agenda for that day's public

meeting and she was given initial response that did not mention the Courthouse, but when she specifically asked if the Courthouse was going to be a topic that day, her friend was finally told yes,

(b) she attended the public meeting of the Board held on August 31, 2006 in the county Commissioners' public meeting room,

(c) prior to the August 31, 2006 public meeting, she twice passed a Commissioner's office as she walked through the hallway from the waiting room to the public meeting room,

(d) on both occasions, she saw all three Commissioners in one of their offices huddled around some papers,

(e) she heard Commissioner Nutter, discussing the papers with the other two Commissioners, with specific reference to "option B," the option that was selected by the Commissioners when they passed the Resolution and adopted the 15 Year Plan,

(f) the first time as she was made aware that the 15 Year Plan had been prepared by all three Commissioners and written by Commissioner Nutter was after the Resolution and the 15 Year Plan were adopted and presented to the public in the August 31, 2006 meeting,

(g) neither the Resolution adopting the 15 Year Plan, nor the Plan itself was read or presented to the public before the Resolution was adopted in the August 31, 2006 public meeting,

(h) the Board did not discuss, deliberate or debate the Resolution or the 15 Year Plan before the Resolution was unanimously adopted in the public meeting on August 31, 2006,

(i) the presentation, motion and unanimous adoption or passage of the Resolution that adopted the 15 Year Plan, lasted just a couple of minutes.

**Ohio Sunshine Law
Public Meetings Act**

121.22 Public meetings reads in part as follows:

(A) This section shall be *liberally construed* to require public officials to *take official action* and to *conduct all deliberations* upon *official business only in open meetings* . . . (emphasis added)

(B) As used in this section:

(2) "Meeting" means any *prearranged discussion* of the *public business* of the public body by a majority of its members.

(C) All meetings of any public body are declared to be public meetings open to the public at all times. A member of a public body shall be present in person at a meeting open to the public to be considered present or to vote at the meeting and for purposes of determining whether a quorum is present at the meeting.

(H) A resolution, rule, or formal action of any kind is invalid unless adopted in an open meeting of the public body. A *resolution*, rule, or formal action *adopted in an open meeting that results from deliberations in a meeting not open to the public is invalid* unless the deliberations were for a purpose specifically authorized in division (G) or (J) of this section and conducted at an executive session held in compliance with this section. A resolution, rule, or formal action adopted in an open meeting is invalid if the public body that adopted the resolution, rule, or formal action violated division (F) of this section.

R.C. 121.22(C), which is written in clear, plain language, provides in pertinent part that all meetings of any public body are declared to be public meetings open to the public at all times. Open meetings of any public body are *mandated* by the legislature's unequivocal adoption of the

Sunshine Law as a *matter of public policy*. This is the rule. A violation of the Sunshine Law cannot be "cured" by subsequent open meetings if the public body initially discussed matters in private that should have been discussed in a public meeting.

R.C. 121.22(B)(2) defines "meeting" as "any prearranged discussion of the public business of the public body by a majority of its members. These terms are to be liberally construed to foster and demand open government. R.C. 121.22 (A). The statute further states in section (H) that a Resolution, rule, or formal action of any kind is invalid unless adopted in an open meeting of the public body.

Thus, the logical interpretation of subsection (B)(2) is that no formal action is required to constitute a meeting. The board must merely discuss the public business. Subsection (H) makes it clear that in order to show a violation of the "open meeting" rule, a *resolution*, or formal action of some kind must have been adopted by the public body at a meeting not open to the public. Greene Cty. Guidance Ctr., Inc. v. Greene-Clinton Community Mental Health Bd., 19 Ohio App.3d 1, 4, 482 N.E.2d 982, 986 (1984). Sending e-mails with requests for responses certainly sets in motion private discussions, where in this case, decisions about public business were decided.

The nature and purpose of R.C. 121.22 support the interpretation that the statute is intended to apply to those situations where there has been actual formal action taken; to wit, formal deliberations concerning the public business. Holeski v. Lawrence, 85 Ohio App.3d 824, 621 N.E.2d 802 (1993). In this case it is the passage of the August 31, 2006 Resolution, the adoption of a 15 Year Plan and the June 25, 2007 Resolution that constitute formal action.

In order to prevail on a claimed violation of the Ohio Sunshine Law, one must demonstrate that there was (1) a pre-arranged (2) discussion (3) of the public business of the

public body in question (4) by a majority of its members. Haverkos v. Northwest Local School Dist. Bd. of Edn., 05-LW-2950 (1st), 2005-Ohio-3489.

1. Pre-arranged

Commissioner Nutter initiated a prearranged series of *e-mails*. All three (3) Commissioners *met in private* in one of the commissioners offices, adjacent to the public meeting room, just prior to the August 31, 2006 public meeting.

2. Discussion

Prior to the August 31, 2006 public meeting, the Commissioners conducted discussions by *e-mail*, sending *drafts* of the 15 Year Plan, sending *revisions* of the 15 Year Plan, asking for *feedback* and acknowledging *corrections* made to the 15 Year Plan, and/or changes had been made. Commissioner Nutter recalled at least three (3) versions of the 15 Year Plan. Plus, Commissioner Nutter *reminded* and told the commissioners "*remember this draft is not available for public consumption.*" Finally, just prior to the August 31, 2006 public meeting, the Commissioners met privately in one of the Commissioner's office, adjacent to the public meeting room, where they discussed Option B (of demolition of the courthouse), which was selected and adopted in the public meeting.

3. Public Business of the Public Body in Question

This evidence is clear, convincing and not in dispute.

4. A Majority of Its Members

Every time, two (2) of the three (3) Commissioners discussed public business, and follow those private discussions with a formal public action, they violate the Ohio Sunshine Law.

It is *undisputed* that the 15 Year Plan was *prepared by all three Commissioners* and written by Commissioner Nutter. The August 31, 2006 Resolution and the 15 Year Plan were

prepared and the vote taken on both occurred in a private meetings, with an effort to *conceal this activity from the public*. These informal meetings preceded the August 31, 2006 public meeting where and when the Resolution and 15 Year Plan were first presented to the public and unanimously adopted.

R.C. 121.22(H) invalidates any formal action that results from deliberations conducted in private. The Commissioners' formal action (Resolution) resulted from deliberations taken at private, informal meetings. State, ex rel. Delph v. Barr, 44 Ohio St.3d 77, 541 N.E.2d 59 (1989).

PRELIMINARY INJUNCTION

The purpose behind a Preliminary Injunction is to preserve the status quo between the parties pending a trial on the merits. The party requesting the preliminary injunction must show, by clear and convincing evidence, that (1) there is a substantial likelihood that the plaintiff will prevail on the merits, (2) the plaintiff will suffer irreparable injury if the injunction is not granted, (3) no third parties will be unjustifiably harmed if the injunction is granted, and (4) the public interest will be served by the injunction. Proctor & Gamble Co. v. Stoneham, 140 Ohio App.3d 260, 267, 747 N.E.2d 268. Id. at 267-68 (2000).

No one single factor is dispositive when ruling upon a Motion for Preliminary Injunction, as the factors must be balanced. When there is a strong likelihood of success on the merits, preliminary injunctive relief may be justified even though a plaintiff's case of irreparable injury may be weak. In other words, *what plaintiff must show as to the degree of irreparable harm varies inversely with what plaintiff demonstrates as to its likelihood of success on the merits*.

In determining whether to grant injunctive relief, courts have recognized that no one factor is dispositive. The four (4) factors must be *balanced*, moreover, with the *flexibility* which traditionally has characterized the *law of equity*. When there is a strong likelihood of success on

the merits, preliminary injunctive relief may be justified even though a plaintiff's case of irreparable injury may be weak. Conversely, when there is less likelihood of success on the merits, the plaintiff must show a high degree of irreparable harm. In other words, what plaintiff must show as to the degree of irreparable harm *varies inversely* with what plaintiff demonstrates as to its likelihood of success on the merits. Cleveland v. Cleveland Elec. Illum. Co., 115 Ohio App.3d 1, 14, 684 N.E.2d 343 (1996); King's Welding & Fabricating, Inc. vs. King, (7th App. Dist.) 2006-Ohio-5231.

(1) THERE IS A SUBSTANTIAL LIKELIHOOD THAT THE
PLAINTIFFS WILL PREVAIL ON THE MERITS

When viewed in the light most favorable to plaintiffs, sufficient evidence has been presented to support the first criterion regarding the merits of its claim that the Board violated the Ohio Sunshine Law in this case. The e-mails, the drafts, the comments, the silence and the private meeting, followed by formal action beginning August 31, 2006, all demonstrate a strong likelihood of success on the merits at trial. The record demonstrates that discussions by the Board were conducted privately with a *reminder* that the 15 Year Plan, which includes demolition of the 1884 Seneca County Courthouse, was *not for public consumption*.

(2) THE PLAINTIFFS WILL SUFFER IRREPARABLE INJURY IF
THE INJUNCTION IS NOT GRANTED

An irreparable injury is one, that after its occurrence, there can be no plain, adequate and complete remedy at law, and for which any attempt at monetary restitution is impossible, difficult or incomplete. Cleveland vs. Cleveland Electric Illum. Co. supra p.12.

Irreparable harm depends upon the context. In this case there is no question of whether irreparable harm is likely. It is an absolute fact. Seneca County's most valued treasure is about to be destroyed by an act of single-minded arrogance; a decision made in the face of all available

expert advice, simply because two (2) of the three (3) Commissioners want something different from the professional advice they paid for and the wisdom for prior Board action.

What is at issue in this requested preliminary injunction is more than the preservation of a building. This *temporary request for sanity* that *maintains the status quo* until a full hearing on the issues can be heard, will allow for the probability that this once proud community will acknowledge and pay respect to the diverse culture, rich heritage and bold civic pride which lies dormant beneath the community conscious. This 1884 Courthouse is the heart of this city and county. Two (2) of the three (3) Commissioners want to tear the heart out of our home. They are ignoring the fact that it represents our heritage and generations long past. In a throw away society, some people do not understand the inherent and intrinsic value this 1884 Courthouse. This Courthouse and the most prominent symbol of our “community” is in danger of being lost forever.

**(3) NO THIRD PARTIES WILL BE UNJUSTIFIABLY
HARMED IF THE INJUNCTION IS GRANTED**

The record is absolutely void of any evidence that demonstrates the defendants or any third parties will be harmed if the temporary injunction is granted. Counsel for the defendants has made many unsupported statements on that issue, but this Court must acknowledge that the defendants have provided no evidence of any harm that may result from a temporary injunction. The defendants had every opportunity to offer evidence on this point, but they chose not to. None exists in reality, in fact and most importantly, in the record. This “grand old lady” has survived for 123 years. She has had little use during the last three (3) years, and she is certainly entitled to a couple more months of life. We must keep the respirator on.

(4) THE PUBLIC INTEREST WILL BE SERVED BY THE INJUNCTION

The public interest in this case and the future of the 1884 Courthouse and the future of Seneca County is on almost everyone's mind. The importance of the future of this building can not be understated.

In determining whether to grant injunctive relief, no one factor is dispositive. Cleveland v. Cleveland Elec. Illum. Co. (1996), 115 Ohio App.3d 1, 14, 684 N.E.2d 343, 351. The four factors must be *balanced with the flexibility* which traditionally has characterized the *law of equity*. What a plaintiff must show as to the likelihood of success on the merits *varies inversely* with what a plaintiff must demonstrate as to the degree of irreparable harm. King's Welding & Fabricating, Inc. v. King, (7th App. Dist.) 2006-Ohio-5231.

The issue whether of to grant or deny a preliminary injunction is a matter solely within the discretion of the trial court, and a reviewing court will not disturb the judgment of the trial court in the absence of a clear abuse of discretion. Garono v. State, 37 Ohio St.3d 171, 173 (1988). Further, in determining whether to grant a preliminary injunction, a court must look at the specific facts and circumstances of the case. Keefer v. Ohio Dept. of Job and Family Services, Franklin App. No. 03AP-391, 2003-Ohio-6557. The specific facts of this case cry out for and demand the issuance of a preliminary injunction.

Discussion / Argument

The *first e-mail* (Exhibit -53) sent by Commissioner Nutter, dated August 8, 2006 at 3:41 p.m. about the "space study" did not contain an attachment, but did contain a *reminder* that, "*remember*, this is the first rough draft, and *not necessarily meant for public consumption*,"

Second e-mail (Exhibit -54) sent by Commissioner Nutter, dated August 8, 2006 at 3:54 p.m. did contain the attachment, which was the first rough draft of the 15 Year Plan, and it also contained the *reminder*, that, "*Remember*, this is the first rough draft and *not necessarily meant*

for public consumption.” These two (2) e-mails asked both Commissioners to review the rough draft of the 15 Year Plan and to *get with Commissioner Nutter by Monday for any changes.*

This specific *request* by Commissioner Nutter asked both Commissioners to review the proposed rough draft of the proposed a 15 Year Plan and *to contact him* to discuss changes that they wanted in the document. These *communications* clearly required a response from both Commissioners and was not intended for the public.

Regarding the first and second e-mails, the fact that Mr. Sauber testified that he did not discuss the drafts with Mr. Nutter or Mr. Schock prior to the August 31, 2006 meeting, can only lead to one of two permissible inferences; first, by his silence he implicitly agreed with, consented to and *convey that message by his silence* to Mr. Nutter, or second, that he did have discussions with Mr. Nutter about the changes and the corrections, and he now realizes but does not want to admit that he made a mistake by discussing the drafts of the 15 Year Plan outside of a public meeting. Mr. Nutter *requested* Mr. Sauber review the attached 15 Year Plan and *get with Mr. Nutter* by Monday for any changes. This specific request requires a response and *Commissioner Sauber's response was acquiescent silence* or otherwise. This *act of silence* in these circumstances is certainly a *communication*.

The **third e-mail** (Exhibit -55) sent by Commissioner Nutter, dated August 28, 2006 at 9:19 a.m. was directed only to Commissioner Schock, but not Commissioner Sauber. Even though it indicated a draft of the 15 Year Plan was attached, this e-mail contained the message that *“all the corrections”* have been made, and Commissioner Nutter made a specific request of Commissioner Schock to *“let him know”* if all the corrections had been made.

The **fourth e-mail** (Exhibit -56) sent by Commissioner Nutter, dated August 28, 2006 at 9:32 a.m. was directed to Commissioner Schock, but not Commissioner Sauber. It did have a

revised 15 Year Plan with “*all the corrections*” and the *specific request* from Commissioner Nutter to “*let me know*” if all the corrections have been made.

The third and fourth e-mails sent by Commissioner Nutter, were sent only to Commissioner Schock and not to Commissioner Sauber. Since Commissioner Sauber testified that he did not discuss any of the drafts of the 15 Year Plan with Commissioner Nutter or Commissioner Schock prior to the meeting on August 31, 2006, the logical inference from his absence in these two (2) e-mails, and his silence is, first, that Commissioner Sauber consented to and by his silence *conveyed that message* to Commissioner Nutter, or second, that they now realize, but do not want to admit, that they made a mistake by privately discussing the drafts of the 15 Year Plan outside of a public meeting, specifically prior to the August 31, 2006 public meeting when the Resolution was passed and the 15 Year Plan adopted.

The only other possible explanation for not sending the third and fourth e-mails to Commissioner Sauber, is that Commissioner Nutter had already discussed the changes and corrections with Commissioner Sauber, and it was not necessary for Commissioner Sauber to be part of the further discussions with Commissioner Schock. Commissioner Sauber's *silence* must be seen for what it was; a *clear indication* that he accepted and did not object to the corrections, or second, that he understands that he made, but he does not want to admit that he made, a mistake by discussing the corrections outside of a public meeting. In either event in the third and fourth e-mails from Commissioner Nutter provided substantive information about the 15 Year Plan and *asked for a “let me know” response from* Commissioner Schock. No further response was needed from Commissioner Sauber. The discussion was complete.

This Court can only conclude that the *e-mail communications*, from Commissioner Nutter, first to both Commissioners and then only to Commissioner Schock, constitute private

discussions and deliberations outside of a public meeting about public business. Commissioner Nutter disseminated and engaged in an exchange of communications with both Commissioners by a series of e-mails concerning the form and substance of the 15 Year Plan, which Commissioner Sauber approved by *silent acquiesce*.

The most obvious and glaring example produced thus far in this case is the *private meeting* of all three (3) Commissioners, just prior to the August 31, 2006 public meeting, where they discussed "Option B." This evidence is clear and not rebutted.

DEFENDANTS' CLOSING ARGUMENT AND COMMENTS ON EVIDENCE

The Ohio Supreme Court has held that a fact-finder may base a reasonable inference in part upon another inference and in part upon additional facts. Hurt v. Charles J. Rogers Transp. Co., 164 Ohio St. 329 (1955), paragraph two of the syllabus. A reasonable inference based in part upon another inference and in part upon additional facts is a *permissible parallel inference*, that may even be indulged by a jury. Hurt v. Charles J. Rogers Transp. Co., supra. Motorists Mut. Ins. Co. v. Hamilton Twp. Trustees, 28 Ohio St.3d 13 (1986) Such an inference is called a parallel inference. Nageotte v. Cafaro Co., 160 Ohio App.3d 702, 2005-Ohio-2098. *Parallel inferences are reasonable inferences and an essential element of the deductive reasoning process by which most successful claims are proven.* Donaldson v. N. Trading Co., 82 Ohio App.3d 476, 481 (1992). Parallel inferences may be used in combination with additional facts. Drawing multiple inferences separately from the same set of facts is also permissible. McDougall v. Glenn Cartage Co., 169 Ohio St. 522, 160 N.E.2d 266 (1959), paragraph two of the syllabus. Darling v. Darling, (7th App. Dist.) 2007-Ohio-3151.

For example, if the Commissioners were not discussing "Option B" of the 15 Year Plan in one of their offices prior to the August 31, 2006 public meeting, then what were they doing

and what reasonable inference can be drawn from these facts. The only inference to be drawn from their silence, lack of rebuttal evidence, is that Rayella Engle's testimony was accurate and they were discussing Option B, which they adopted during a public meeting. If they were discussing "Option B" for their Cleveland Indians or Cleveland Browns tickets, they could easily have taken the witness stand and explained what they were doing. The defendants did not rebut or refute the testimony of S. Rayella Engle about their pre-public meeting conference. The only reasonable inference to be drawn from their silence is that Rayella Engle's testimony was accurate and they were discussing Option B, which they immediately adopted during the August 31, 2006 public meeting.

The defendants have improperly characterized the evidence in this case and the inferences that this Court may reasonably draw from these facts. Trial courts, even juries, are permitted to use *parallel inferences* in their *deductive* and *common sense reasoning process* to determine the true facts.

Defensive Allegations

The defendants have set forth statements which they believe are supported by the evidence in this hearing, each of which requires a direct response, because it is either not supported by the record, questionable, not rebutted and in some instances simply not true.

The defendants have stated on page 4 of their "Closing" that the following statements are true:

(a) "Years of public deliberation, debate and an election on what to do with the former courthouse."

This statement which is not supported by the record, contains allegations irrelevant to whether the Ohio Sunshine Law has been violated, and relate directly to the breach of fiduciary duty claim, the cause of action which this court has already dismissed.

(b) *The Commissioner Nutter's August 8, 2006 and August 28, 2006 e-mails, wherein he forwarded his 15 Year Plan to the other commissioners, which consisted mainly of verbatim language from a report to the commissioners nearly three months earlier.*

The evidence in this case demonstrates in Exhibits 51 and 52 that this statement is not true. Exhibits 51 and 52 clearly demonstrate that not only were *textual changes* made to the plan, but the entire *cost approach cost/analysis 7 page attachment* in the first rough draft was deleted from draft to draft as the 15 Year Plan circulated among the Commissioners. Even a cursory review of those two Exhibits clearly demonstrates that substantial changes were made between the two drafts represented by Exhibit 51 and 52.

(c) *“Commissioner Sauber's testimony that he never discussed the Plan with Commissioner Nutter before approving it at the Board's August 31, 2006 open meeting.”*

This statement can not be true because the Plan itself states clearly on the first page that the 15 Year Plan that it was *prepared by all three commissioners*. The statement on the front of the document is either false and Commissioner Sauber did not participate in the preparation of this Plan and voted on something he had never discussed with the other Commissioners, or Commissioner Sauber did respond to the e-mails and did discuss Option B with the other two (2) Commissioners just prior to the August 31, 2006 meeting, a fact that was not rebutted. Was Commissioner Sauber truthful on the written document, or was his testimony in Court truthful? He can not sustain both inconsistent positions.

(d) *“Commissioner Nutter's testimony that the only other changes he made were minor grammatical changes, such as the misspelling of former Commissioner Shock's name.”*

The evidence in this case does not support this statement nor Commissioner Nutter's testimony for all of the reasons set forth above in the discussion of “b.”

(e) *Commissioner Nutter's testimony, repeated numerous times at the hearing that "we have never had any improper deliberations."*

This statement attributed to Commissioner Nutter, even if it was made in open court, was clearly scripted before he came to court, because it ignores the existence of e-mails, the drafts attached to the e-mails and circulated within the Commissioners' office, the responses he received either verbally, by e-mail or acquiescent silence, and the fact that all three commissioners were seen conferring, just prior to the August 31, 2006 meeting about "Option B," in fact the option adopted in the August 31, 2006 meeting. All of these facts violate the Ohio Sunshine Law.

(f) *"Plaintiff Engle's testimony that she saw the three commissioners in an office looking at an unidentified, stapled packet before the August 31, 2006 Board meeting."*

This is *true*, it must be accepted as truthful by the Court, because it was not rebutted or denied by the defendants during the hearing. The defendants had every opportunity to refute, contradict or explain what they were talking about, but they did not and could not testify under oath that the meeting and the discussion as described, did not occur.

(g) *Plaintiff Engle's testimony that she heard Commissioner Nutter refer to some Option B while examining the stapled sheet."*

Again, this is a *true statement*. It must be accepted by the court as truthful, because it was not rebutted or denied by the defendants during the hearing. The defendants had every opportunity to refute, contradict or explain what they were talking about, but they did not and could not testify under oath that the meeting and the discussion as described, did not occur.

(h) *Numerous witnesses' testimony that the Commissioners' August 31, 2006 approval of Commissioner Nutter's 15 Year Plan was made with little or no discussion that date."*

This statement of fact is *true and uncontested*. The fact that the 15 Year Plan was first disclosed to the public during the August 31, 2006 public meeting, and the fact that there was no discussion or debate about the Plan, during the meeting, prior to its vote, can only lead to the reasonable inference that the three (3) Commissioners had discussed, deliberated and accepted the Plan, prepared the Resolution adopting the Plan, and included the passage of the Resolution adopting the 15 Year Plan at least 24 hours prior to the public meeting, because the Agenda was given to the media on August 15, 2006. It is important for the Court to note that the Tiffin newspaper, the Advertiser Tribune, with the Agenda was published and *made available to the public just a few hours before the public meeting*.

The defendants claim the following evidence is missing from the hearing:

(a) *Commissioner Nutter's two August 2006 e-mails led to any deliberations with any other Commissioner regarding his 15 year plan before August 31, 2006.*

First, the plan states in writing that it is *not* Commissioner Nutter's plan, because it was *prepared* by all three (3) Commissioners. The term deliberations includes a broad range of conduct and activity. Commissioner Nutter communicated first when he asked the other two (2) Commissioners to respond back him on both occasions. Each time there was a response in one form or another (comment or silence), there was a discussion (changed were made) and an exchange of information between two (2) of the three (3) (majority) of the Board members. As the Court knows, the Commissioners did not rebut or deny the testimony of Rayella Engle about the August 31, 2006 private meeting.

(b) *"That Commissioner Sauber deliberated with anyone in private regarding the 15 year plan."*

This statement ignores the existence of the cover sheet to the 15 Year Plan that plainly states the Plan was prepared in part by Commissioner Sauber, the e-mails, the fact that Commissioner Sauber was not included in the third and fourth e-mails, and that he was seen

privately discussing Option B with the other two commissioners prior to the August 31, 2006 public meeting. He did not take the stand and rebut or deny the testimony of Rayella Engle. Commissioner Sauber's conduct violates the Ohio Sunshine Law.

(c) *"Whether Commissioner Nutter was holding the 15 Year Plan when Plaintiff Engle walked by their offices."*

This accepted *true fact* could have been refuted or denied by either Commissioner Nutter or Commissioner Sauber had they chose to do so. Clearly, their absence from the witness stand and their decision not to rebut or deny the testimony of Rayella Engle can only lead to one reasonable inference. The meeting, their deliberations and discussions occurred exactly as Rayella Engle testified. They could not under oath deny her testimony.

(d) *"That Commissioner Nutter said anything other than Option B as alleged by plaintiff Engle."*

Again, neither Commissioner Nutter nor Commissioner Sauber testified on rebuttal or denied the observations of Rayella Engle. The fact that all three Commissioners were in the room together prior to the August 31, 2006 meeting discussing Option B is a true, not rebutted fact. The only logical inference to be drawn from that fact is that they were discussing the 15 Year Plan, the Resolution and their decision to select Option B, which called for the demolition of the 1884, Seneca County Courthouse. If they were not discussing public business, Option B to the 15 Year Plan or some other non-public matter, they could easily have taken the stand and explained their meeting. They could not and they did not.

The defendants rely upon the case of Haverkos vs. Northwest Local School District Board of Education, 2005-Ohio-3489 for the proposition that e-mails cannot be considered as discussions under the Ohio Sunshine Law. This position is not even rational. This very narrow court decision revolved around *one e-mail*, which sent a suggestion to members of a committee. The facts that distinguish this case from the case at bar are that the *one e-mail* sent in the

Haverkos case did not ask for a review of any documents. It did not ask for any changes and it did not ask for a response (“Let me know” or “get to me”) in return. That case does not stand for the proposition that all e-mails may not be considered to violate Ohio's open meeting laws. That statement made by the defendants is simply not accurate.

As this Court well knows, *people quite often communicate by e-mail* more than they do by letter or by telephone, because of the *ease of access* to the addressee *and delivery* of the e-mail.

The defendants claim that even if there was a violation of the Ohio Sunshine Law on August 31, 2006, that violation of law should not have any effect on subsequent decisions, especially June 25, 2007, when the Board made another decision (the same one announced on August 31, 2006) following Option B of the 15 Year Plan to demolish the Courthouse. The Court has in its possession, the DVD (official minutes) of the June 25, 2007 meeting of the Commissioners, and the Court need only review that DVD to learn that the statements made by the defendants on page 7 of their Closing Brief, that “they entertained public comment and engaged in open discussion amongst themselves before the two-to-one vote that the Courthouse should be demolished,” is simply not true. The Board did not entertain any public comment, in fact, the disk will show that there was no public comment allowed and that they did not engage in open discussion among themselves other than a few brief comments before taking the vote. The DVD, official minutes of the June 25, 2007 public meeting, becomes mysteriously defective and silent when Commissioner Bridinger begins speaking about his plan. Why when the remainder of the DVD appears and plays without defect, is Commissioner Bridinger’s presentation not recorded properly?

A most interesting fact in defendants' Brief, on page 7 filed with this Court on August 13, 2007, they indicate that the Board had already *voted to approve the bid package and begin the environmental studies on the Courthouse*. Even though this is not reflected in the record of this case, the *Advertiser-Tribune reported that the decision to approve the bid package* was made on August 13, 2007, the day before the Commissioners actually voted in public on August 14, 2007 to *approve the bid package and begin the environmental studies* on the Courthouse. It is obvious that the defendants told their counsel what their decision would be before they actually acted in public session to approve the bid package and begin environmental studies on the courthouse. Questions thus now arise related to when exactly and how did the Board discuss, deliberate and decide this public business and convey that information to their counsel before they announced their decision in public.

This Court must remember and acknowledge that the *course of conduct set in motion* by the Board for demolition of the Seneca County Courthouse *occurred prior to the August 31, 2006 meeting* and was simply ratified during the public meeting. Are the defendants to be permitted to continue on a secretive and surreptitious course of conduct, merely announcing their privately made decisions in public meetings, or will Seneca County government have the transparency required by the Ohio Sunshine Law so that the people of Seneca County will have access to the discussions, deliberations and rationale for the decisions made by the Board? Clearly, the Ohio Legislature has said that if the Board does not comply with the Ohio Sunshine Law and conduct their discussions and deliberations and make their decisions in public meetings, then those decisions that result therefrom are absolutely void.

SUMMARY

This motion for a temporary preliminary injunction asks the Court to maintain the *status quo* between the plaintiffs and the defendants for a brief period of time until the various Courts of Ohio can fully resolve all of the issues in this case on the merits. To date, the two causes of action that have been dismissed on procedural grounds, and the remaining testimony about potential violations of the Ohio Sunshine Law all give rise to and support the issuance of the preliminary injunction. The short length of time the plaintiffs are requesting will extend the life of this 123 year-young “Grand Old Lady,” and allow this litigation to proceed in a orderly manner.

To obtain a preliminary injunction, the plaintiffs in this case must show, and they have shown, first, that there is a likelihood of prevailing upon the merits of their claim that the Board has violated the Ohio Sunshine Law. Even if the Court is not convinced at this stage of the proceedings that the plaintiffs will ultimately prevail at trial, when the Court applies the *inverse variability standard* to the “likelihood of success” versus the “magnitude of the irreparable harm,” the flexible standards in the law of equity weigh heavily in favor of granting the preliminary injunction. The opportunity for continued discovery of e-mails and drafts that were not produced by the defendants, even though requested, can only lead to the conclusion that a preliminary injunction is eminently appropriate in the circumstances of this case.

Second, the plaintiffs have also demonstrated that they will suffer irreparable injury if the injunction is not granted. This cause of action brought by the State of Ohio on behalf of the six named plaintiffs to prevent the destruction of our historic 1884 Seneca County Courthouse clearly establishes the irreparable injury that is about to occur if not temporarily stopped by this Court.

Third, there is absolutely no evidence in the record or any inferences that can be drawn from evidence in the record that would indicate that any parties will be unjustifiably harmed if the injunction is granted. Fourth and finally, the plaintiffs have shown that the public interest will be served by the injunction. As the Court knows the renovation, restoration and/or destruction of the 1884 Seneca County Courthouse has been the topic of widespread press and television coverage, public debate, and of great interest to all of the people in Seneca County, Ohio who will ultimately bear the burden of paying for the course of action chosen by the Board.

Without question that plaintiffs have met their burden to satisfy the Court and established a basis for issuing a temporary preliminary injunction.

In order to show a violation of the Ohio Sunshine Law, which entitles the plaintiffs to a preliminary injunction, the plaintiffs must show that prearranged discussions of public business by the public body in question were conducted by a majority of public body's members.

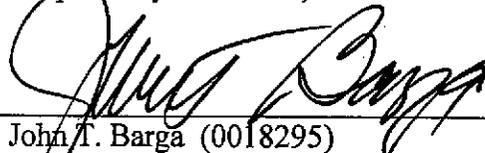
Without restating or reiterating the evidence in this case, and the absence of any evidence to the contrary by the Board, the record is abundantly clear and convincing that violations of the Ohio Sunshine Law have been committed, and that perhaps two (2) of the three (3) Commissioners realized at the time that they were violating the Ohio Sunshine Law.

Since the plaintiffs have established sufficient evidence to demonstrate a violation of the Ohio Sunshine Law, and since they have satisfied the elements necessary for the issuance of a preliminary injunction, the plaintiffs are asking this Court to exercise its discretion, make a reasonable decision that prevents a travesty like none other ever visited upon Seneca County, without harming any individuals and serving the public interest by granting a temporary preliminary injunction. No harm can come from issuing the preliminary injunction and irreparable, unpardonable harm will occur if the injunction is not issued. No one will be able to

repair the damage done by destruction of the 1884 Seneca County Courthouse. Once it is gone, it is gone forever. A brief respite from this chaos, created by this Board's action, will serve everyone's best interests.

We believe this Court will not allow one (1) single-minded commissioner (2-1 vote) to determine the destiny of this historic Courthouse, this city, and this county, before all of the legal issues in this case are fully resolved.

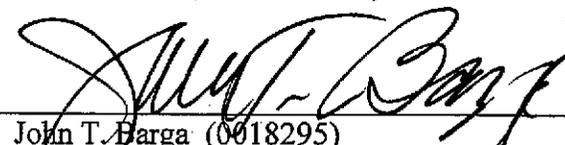
Respectfully submitted,


John T. Barga (0018295)
Counsel for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was served electronically by e-mail on July 29, 2007 upon:

- Judge Charles S. Wittenberg, cwitt841@yahoo.com
- Kenneth Egbert, Jr., Seneca County Prosecuting Attorney, 71 S. Washington St., Suite E., Tiffin, OH 44883, kegbert@senecapros.org.
- Mark Landes, 250 East Broad Street, Suite 900, Columbus, Ohio 43215, marklandes@isaacbrant.com;
- Mark Troutman, 250 East Broad Street, Suite 900, Columbus, Ohio 43215, marktroutman@isaacbrant.com.


John T. Barga (0018295)
Counsel for Plaintiffs

FILED
SENeca COUNTY OHIO
2007 AUG 20 PM 3:59
MARCOLETTA STANARD
CLERK

IN THE COURT OF COMMON PLEAS
SENECA COUNTY, OHIO

STATE OF OHIO ex rel. NANCY L. COOK,
et al.,

Plaintiffs-Relators,

v.

SENECA COUNTY BOARD OF
COMMISSIONERS, *et al.*,

Defendants-Respondents.

CASE NO. 07CV0271

JUDGE WITTENBERG

FILED
COMMON PLEAS COURT
SENECA COUNTY, OHIO
2007 AUG 13 PM 1:51
MARY K. WARD
CLERK

POST-PRELIMINARY INJUNCTION HEARING BRIEF OF ALL RESPONDENTS

After hearing the evidence and reviewing the law, this Court should not issue the preliminary injunction requested by plaintiffs enjoining all actions of the Commissioners related to the former Seneca County courthouse.¹ The Plaintiffs-Relators ("Cook") have only established inferences upon inferences to argue in support of their injunction. They have established no violations of Ohio's public meetings laws.² Without evidence to support any likelihood of success on Cook's claims, this Court should deny Cook's request for a preliminary injunction because she has failed to meet her burden.

I. NO IMPROPER DELIBERATIONS HAVE BEEN SHOWN

This Court should deny Cook's request for a preliminary injunction regarding the former Seneca County Courthouse because the evidence fails to establish that any improper

¹ Plaintiffs have asked this Court broadly to interfere with the Board's work as follows: a) making any final determination regarding the partial or complete demolition of the Seneca County Courthouse; b) purchasing, selling or constructing any buildings on land that will have any impact on any decision about the future of the existing courthouse; c) allowing any further waste of the Courthouse and the Seneca County Law Library ... (Plaintiffs' Response to Defendants' Omnibus Filing and Hearing Brief, p. 1).

² The Commissioners reserve the right to file a Reply brief if other issues are briefed by Cook, by the Court's leave. By the close of the preliminary injunction hearing, plaintiffs admitted that the only issue remaining was the open meetings claims. As such, the Commissioners have specifically limited their brief to that issue.

I hereby certify this is a true copy of the

original pleading now on file in my office

this 19th day of Sept. 2007.

Mary K. Ward, Clerk, Common Pleas Court

State of Ohio, County of Seneca, Tiffin, Ohio

by *Mary K. Ward* Deputy Clerk

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EXHIBIT
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deliberations occurred. This Court should only issue a preliminary injunction if Cook has established a substantial likelihood of success on the merits, which she has not. Cook's arguments are mere inferences that some deliberations may have occurred before the August 31, 2006 Board meeting. The fact that the Commissioners deliberated little, if at all, on August 31, 2006 establishes nothing.

- The plan was a summary of a study done by Stilson, a plan in the public for months and discussed repeatedly by the Commissioners in public.
- The issue of the courthouse had been in the public discourse for many years.
- The August 31 vote was to set a blueprint for future public actions toward the replacement of the former courthouse. Some of these actions are yet to occur.

Plaintiff Engle's testimony that she saw Commissioner Nutter holding a sheet of paper and referencing "Option B" does not support Cook's claims either. She did not testify regarding any additional conversations that she heard. As shown below, deliberation requires discussion.

The term "deliberation" has specific legal meaning under Ohio law. A "deliberation" is the weighing and examination of reasons for and against a particular course of action. *Piekutowski v. South Cent. Ohio Educ. Servs. Ctr. Governing Bd.* (4th Dist. 2005), 161 Ohio App.3d 372, 379, 830 N.E.2d 423; *Theile v. Harris* (June 11, 1986), Case No. C-860103, 1986 WL 6514, at *5. "Deliberations involve a decisional analysis, *i.e.*, an exchange of views on the facts in an attempt to reach a decision." *Piekutowski*, 161 Ohio App.3d at 379, 830 N.E.2d 423 (emphasis added). In *Piekutowski*, the board members had a closed door "free-for-all" that resulted in each member giving their opinion (voting) regarding a particular course of action. *Id.*

at 379. The Court upheld the lower court's finding that those actions violated the law. *Id.* at 385. There is no such evidence here.

The Fourth District Court of Appeals has defined deliberations in the following manner:

a public body deliberates upon official business after it has obtained the relevant and salient facts necessary to reach a correct, proper, prudent and responsible decision. We hold that after a public body has obtained the facts, it deliberates by thoroughly discussing all of the factors involved, carefully weighing the positive factors against the negative factors, cautiously considering the ramifications of its proposed action, and gradually arriving at a proper decision which reflects this legislative process.

Theile, 1996 WL at *5 (emphases not added). As such, "deliberation" requires more than merely passing a document around for review before a meeting.

Deliberations do not include fact-finding or informational sessions. *Springfield Local Sch. Dist. Bd. of Educ. v. Ohio Ass'n of Pub. Sch. Empl. Local 530* (9th Dist. 1995), 106 Ohio App.3d 855, 864, 667 N.E.2d 458. "Question-and-answer sessions between board members and other persons who are not public officials do not constitute "deliberations" unless a majority of the board members also entertain a discussion of public business with one another." *Id.* (emphasis added). As a result, the law permits the Commissioners to engage in fact-finding sessions outside their open meetings so long as deliberations do not occur in private. After four days of testimony, Cook has failed to establish any examples of private deliberations.

Even if an improper deliberation is established, which has not occurred, it must have also caused the public action taken after an improper deliberation. *Greene County Guidance Ctr. v. Greene-Clinton Comm. Mental Health Bd.* (2nd Dist. 1984), 19 Ohio App.3d 1, 5, 482 N.E.2d 982. In the *Greene* case, the Court analyzed this part of the test closely because public discussion on same? issue discussed in private had occurred for more than two years. *Id.* at 5. The public body extensively discussed the issues and went around the room to get a straw poll of

the opinions of all of its members. *Id.* The Court found the "straw polls" to be improper deliberations. *Id.* Again, Cook has failed to establish any evidence of such actions here.

The evidence in this proceeding amounts to the following:

- Years of public deliberation, debate, and an election on what to do with the former courthouse.
- Commissioner Nutter's August 8, 2006 and August 28, 2006 emails wherein he forwarded his 15-year plan to the other Commissioners, which consisted mainly of verbatim language from a report to the Commissioners nearly three months earlier;
- Commissioner Sauber's testimony that he never discussed the plan with Commissioner Nutter before approving it at the Board's August 31, 2006 open meeting;
- Commissioner Nutter's testimony that the only changes he made were minor grammatical changes, such as the misspelling of former Commissioner Schock's name;
- Commissioner Nutter's testimony, repeated numerous times at the hearing, that "we have never had any improper deliberations;"
- Plaintiff Engle's testimony that she saw the three Commissioners in an office looking at an unidentified, stapled packet before the August 31, 2006 Board meeting;
- Plaintiff Engle's testimony that she heard Commissioner Nutter refer to some "Option B" while examining the stapled sheet; and,
- numerous witnesses' testimony that the Commissioners' August 31, 2006 approval of Commissioner Nutter's 15-year plan was made with little or no discussion that date.

Based upon this evidence, no improper deliberations have been shown.

Numerous things are missing from Cook's evidence that she will attempt to infer from the facts. Despite her efforts, Cook lacks the following information to prove by clear and convincing evidence her entitlement to an injunction:

- that Commissioner Nutter's two August 2006 emails led to any deliberations with any other Commissioner regarding his 15-year plan before August 31, 2006;
- that Commissioner Sauber deliberated with anyone in private regarding the 15-year plan;
- whether Commissioner Nutter was holding the 15-year plan when Plaintiff Engle walked by their offices; and,
- that Commissioner Nutter said anything other than "Option B," as alleged by Plaintiff Engle.

When reviewing Cook's evidentiary deficiencies, Cook lacks any support that the Commissioners deliberated before August 31, 2006. Even with Plaintiff Engle's testimony, Cook has no basis to establish that the Commissioners were looking at Commissioner Nutter's report. More importantly, Plaintiff Engle never testified that she heard any reference to anything other than "Option B." In itself, this fails to establish that any improper deliberations took place. As such, Cook lacks any evidence of the Commissioners' alleged wrongdoing.

Commissioner Nutter's email does not even implicate Ohio's public meetings law. See *Haverkos v. Northwest Loc. Sch. Dist. Bd. of Educ.*, 2005-Ohio-3489 (attached hereto as Exhibit A). In *Haverkos*, one school board member emailed other board members about considering a response to a newspaper article criticizing the school board. *Id.* at 1. No board member responded. *Id.* Another board member drafted a response to the article. *Id.* The letter was read at the meeting before all board members signed it. *Id.* Applicable to this case, the Court concluded that the email did not violate open meetings laws in part because it failed to meet the prearrangement requirement necessary for an open meetings law violations. *Id.* at 7.

The *Haverkos* case went further and declared all emails inapplicable to Ohio's open meeting laws. *Id.* at 9. The Court determined that the email was not a "discussion" because it

was one email to others without any responses or counter-responses. *Id.* In addition, the Court analyzed law from other jurisdictions to conclude that Ohio law does not include emails as part of open meetings law. *Id.* Even in jurisdictions where emails are explicitly subject to open meetings laws, the mere sending of an email is not a “meeting” because members must collectively intend to meet to conduct formal business. *Id.* As a result, the *Haverkos* case makes Commissioner Nutter’s emails irrelevant to this Court’s analysis because they are either inapplicable to open meetings law and do not constitute meetings or discussions.

After reviewing all of the evidence, this Court may only come to the conclusion that the public decisions of the Commissioners are valid. The evidence failed to establish that any improper deliberations occurred. Cook’s thin evidence and a string of hoped-for inferences do not meet Cook’s burden in showing substantial likelihood of success on the merits. As such, this Court should deny her preliminary injunction request.

II. POST-AUGUST 31, 2006 COURTHOUSE DECISIONS ARE VALID

The Commissioners’ current course towards demolition of the former Seneca County Courthouse should not be undone by this Court, even if it finds that some actions were improper on August 31, 2006. As the uncontested evidence established, the 15-year plan adopted on that date is a “roadmap” from which the Commissioners have strayed already. It was not a necessary vote for the replacement of the courthouse and so it should not invalidate future decisions that are independent of it. Even if a technical violation is shown on August 31, and a review of that decision could be invalidated, the Commissioners would have remedied that numerous times over. On June 25, 2007, the Commissioners requested a bid package from a contractor so that the demolition project could go out for bid. The Commissioners approved the bid package on August 6, 2007 so that they could proceed with getting bids for the work in the near future. As

this Court's questions at the hearing recognized, the Commissioners still must contract with a company to actually demolish the courthouse. As such, this Court should not issue a preliminary injunction regarding the former Seneca County courthouse because an invalidation of the August 31, 2006 resolution would not affect current and future decisions.

On June 25, 2007, the Commissioners met and decided in a 2-1 vote that the courthouse should be demolished. At that meeting, the Commissioners did all of the following:

- listened to an estimation of the costs of various options for the courthouse;
- entertained public comment;
- engaged in open discussion amongst themselves; and,
- Commissioners Nutter and Sauber voted in favor of going forward with a manual so that demolition of the courthouse could be properly bid in accordance with Ohio law.

Since that date, the Commissioners have made numerous additional public decisions regarding the courthouse.

More recently, the Commissioners voted to approve the bid package and begin environmental studies on the courthouse. Numerous courthouse decisions are yet to come, including the decision that Commissioner Nutter testified would mean "no turning back"—approval of a contract for the demolition the former Seneca County courthouse. The decision to contract for the demolition of the courthouse is yet to come and requires a separate, formal resolution by the Board. As such, Cook has not established that any actions, let alone futures actions, should be invalidated or enjoined by this Court.

A close reading of R.C. 121.22(H) is required for this case. It provides:

[a] resolution, rule, or formal action of any kind is invalid unless adopted in an open meeting of the public body. A resolution, rule, or formal action adopted in

an open meeting that results from deliberations in a meeting not open to the public is invalid unless the deliberations were for a purpose specifically authorized in division (G) of this section and conducted at an executive session held in compliance with this section.

While this statute makes the formal action invalid if discussed in an improper meeting, it does not and should not prevent the public body from ever acting on that issue. To do so would interminably cripple a public body's ability to do business for a technical violation. In fact, the authority dealing with invalidation of decisions deals with situations in which distinct resolutions are invalidated, not a series of resolutions subsequently enacted by the public body. Therefore, all of the Commissioners' subsequent resolutions should not be invalidated under any of this authority.

If this Court remains concerned with the August 31, 2006 events, the Commissioners' actions subsequent to the August 31, 2006 decision have cured their actions that date many times over. Some of the cases regarding this issue are as follows, despite their minimal relevancy:

- *Beisel v. Monroe Cty. Bd. of Educ.* (Aug. 29, 1990), Case No. CA-678, 1990 WL 125485—This case held that a Court may award an injunction regardless of the public body's subsequent attempt to cure the violation. *Id.* at 2. However, the Court held that the public body's actions were cured by a subsequent public discussion on an issue, despite prior improper discussions in executive session. *Id.* This case has little important because the Commissioners' decision to raze the courthouse involves more than the August 31, 2006 acceptance of the 15-year plan.
- *State ex rel. Cincinnati Enquirer v. Hamilton Co. Comm'rs* (Apr. 26, 2002), Case No. C-010605, 2002 WL 727023—The Court observed that the remedy for Sunshine Law violations is to order the resulting resolution invalid and order the public body to re-deliberate.³ *Id.* at 1. With regard to Cook's allegations, the courthouse plans can go forward without the 15-year plan. In addition, the Commissioners have already deliberated on subsequent issues and made

³ See also *Theile v. Harris* (June 11, 1986), Case No. C-860103, 1986 WL 6514, at *6 (refusing to invalidate formal action taken in public because of prior investigatory sessions, even if "fatuous" violations are found); *Kuhlman v. Vill. of Leipsic* (Mar. 27, 1995), 1995 WL 141528, at *3 (allowing a decision made in an open meeting with public discussion to stand, even if prior closed meeting may have begun the discussion).

numerous decisions so that nothing would be left for the Court to remedy. None of these subsequent decisions have been challenged by Cook.

- *Gannett Satellite Info. Network v. Chillicothe City Sch. Dist. Bd. of Educ.* (1988), 41 Ohio App.3d 218, 221, 534 N.E.2d 1239—The Court held that a technical violation of rules providing for executive session could not be cured by subsequent discussion in an open meeting. The Court never provided that invalidation is necessary if formal action is subsequently taken in accordance with the open meetings act, as occurred here, especially when different resolutions have been passed.
- *M.F. Waste Ventures, Inc. v. Amanda Twp. Bd. of Trustees* (Feb. 12, 1988), Case No. 1-87-46, 1988 WL 17731—The Third District held that adoption of resolutions discussed in improper meetings were invalid. *Id.* at 4. However, the Court never discussed whether full deliberations took place on these issues in subsequent meetings and their potential effect. This case also never discussed whether subsequent separate and distinct resolutions should be invalidated. As such, it should not forever preclude the Commissioners from making any decisions with regard to the former Seneca County courthouse.

Here, the Commissioners openly met dozens of times since August 31, 2006 and have taken several affirmative steps to proceed to the demolition of the courthouse. As Commissioner Nutter testified, the 15-year plan is a roadmap and not the final act to replace the courthouse. Otherwise, the Commissioners would not need to meet openly and have the opportunity to debate everything they have since August 31, 2006. Future decisions such as choosing a demolition contractor would be unnecessary. Post-August 31, 2006 actions are yet to be challenged by Cook. Future actions cannot be challenged yet. No evidence supports that any of these should be invalidated.

This Court should not extend any of the cases above to prevent the Commissioners from acting on the courthouse indefinitely. This caselaw pertains only to individual resolutions challenged by the relators in those cases. Even if the August 31, 2006 decision is invalidated, the law cannot be construed to make the courthouse forever “untouchable.” As such, this Court should not issue a preliminary injunction against the Commissioners.

III. NO MINIMUM DELIBERATION REQUIREMENT EXISTS

This Court should deny Cook's request for a preliminary injunction because the Open Meetings Act does not mandate the amount of deliberation needed before the Commissioners vote on a topic.⁴ There is no authority to support minimum deliberation requirements in Ohio law. Therefore, this Court should not invalidate the Commissioners' approval of the 15-year plan on August 31, 2006 because the Commissioner did not discuss the plan beforehand.

While no authority exists to support minimum deliberation requirements, significant authority exists to allow public bodies to determine the manner in which they run their proceedings. Public bodies may use their own discretion in determining a voting method. *State ex rel. Roberts v. Snyder* (1948), 149 Ohio St. 333, 78 N.E.2d 716. The Open Meetings Act does not require a "roll call" vote, except before adjournment into executive session. R.C. 121.22(G). Numerous such examples may be found in caselaw. Therefore, this Court should not order any injunctive relief with regard to Cook's arguments that the Commissioners did not sufficiently deliberate on August 31, 2006.

IV. THE PUBLIC COMMENT AT OPEN MEETINGS IS NOT REQUIRED FOR LEGITIMATE DECISIONS

This Court should not grant Cook's request for a preliminary injunction on the basis that the Board does not allow citizens to speak infinitely at its meetings. R.C. 121.22 never affords the public the right to comment at public meetings. In Ohio, the law protects a citizen's opportunity to attend a public meeting but not the right to be heard at that meeting. See *Black v. Mecca Tshp. Bd. of Trustees* (11th Dist. 1993), 91 Ohio App.3d 351, 356, 632 N.E.2d 923;

⁴ Any potential claims of this nature should also be construed to be another way of arguing Cook's fiduciary duty claims, which were dismissed by this Court on August 5, 2007.

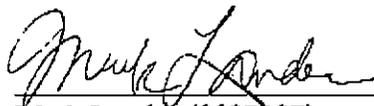
Forman v. Blaser (3rd Dist. 1988), 1988 WL 87146, at *3. The Commissioners have never closed its doors for one of its regularly-held meetings.

Cook has neither alleged nor established any instance wherein her right to attend a meeting was denied. The Commissioners allow public comment at their meetings, but they may limit the discussion to maintain order and efficiency. Cook's complaints of this nature have no basis in law and should not be considered by the Court in ruling upon her request for a preliminary injunction. As such, this Court should deny Cook's preliminary injunction request.

V. — CONCLUSION

No basis in fact or law exists to supplant the validly-made decisions by the Defendants-Respondents made in numerous open meetings after lively public debate. When considering this legal authority and the evidence, this Court should deny the Plaintiffs-Relators' request for a preliminary injunction.

Respectfully submitted,



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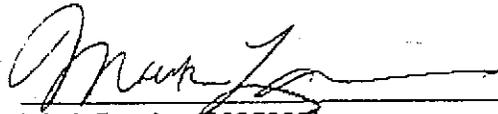
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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was served by regular U.S. Mail and email, postage prepaid, on August 13, 2007 to the following:

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IN THE COURT OF COMMON PLEAS
SENECA COUNTY, OHIO

State of Ohio, ex rel.,
Nancy L. Cook, et al.

Plaintiffs

vs.

Seneca County Board of
Commissioners, et al.

Defendants

* Case No. 07 CV 0271

* Judge Charles S. Wittenberg

*
* **PRELIMINARY INJUNCTION**
* **POST HEARING BRIEF AND**
* **CLOSING ARGUMENT OF**
* **PLAINTIFFS**
*

"It is the time for all of us to decide who we are."

Les Miserables, Victor Hugo

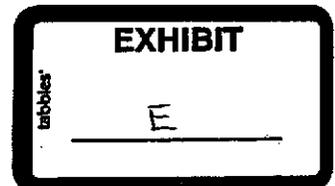
Are we to be remembered as a people who stood silently by as our rich heritage, the blood, sweat and tears of our proud ancestors, represented by the historic 1884 Seneca County Courthouse is destroyed by a vote of one (1) single-minded person,

- or -

Are we to be remembered as a humble group that succeeded by enforcing the law and building a consensus of the people of Seneca County, united in purpose, proud of our culture, and our historic Courthouse that represents our Constitutions, our way of life, and the freedoms we all cherish.

This Court, the plaintiffs and the decision on plaintiffs' request for a preliminary injunction are the only things standing between our 1884 historic Seneca County Courthouse and the single-minded horrific wrecking ball of doom. The magnitude of this *temporary decision* is greater than any other event in Seneca County for generations past, or yet to come. The decisions about the fate of the Seneca County Courthouse will travel the path where civic duty

FILED
COMMON PLEAS COURT
SENECA COUNTY, OHIO
2007 AUG 20 PM 3:59
MARCY H. WATSON
CLERK



The Ohio Sunshine Law is designed and intended to allow the people of Seneca County to watch and listen as their public officials take formal action on public issues, so that the public will understand the rationale for the Board's decisions and the deliberations undertaken by these public figures prior to any formal action being taken. In this case, the *formal decision*, the passage of the Resolution to adopt the 15 Year Plan and demolish the 1884 Seneca County Courthouse was *made in private* prior to the public pronouncement of their private decision during the August 31, 2006 public meeting.

The public presentation, passage and adoption of the Resolution of the 15 Year Plan was a *foregone conclusion* and a *slam dunk* for the Commissioners before they walked in to the public meeting room on August 31, 2006.

The *e-mails*, the *drafts*, the *comments* and *other decisions* made privately by the Commissioners prior to the August 31, 2006 public meeting clearly demonstrate a callous disregard for the spirit, purpose and intent of the Ohio Sunshine Law. The intentional *cloak of secrecy* thrown over the *private communications and discussions* by the Board defeats the spirit and the expressed intent of the Ohio Legislature when it passed R.C. 121.22. Two of these Commissioners should be ashamed of the fact that they kept this information from the public, and adopted a plan to demolish the Courthouse, not based upon the public studies but plans and discussions that took place in private.

The *seminal action* taken by the Board, which precipitated a series of events including the August 31, 2006 Resolution, the adoption of the 15 Year Plan and the June 25, 2007 Resolution to demolish the existing 1884 Seneca County Courthouse ignored public opinion, prior action of the Board, advice of experts and even the final recommendations of MKC and Associates (MKC). The Board's course of conduct was *set in motion privately*, prior to the

August 31, 2006 meeting, which has led to the MKC services, the preparation of a demolition bid package, are all void because the seminal decisions made privately prior to the August 31, 2006 public meeting were made in violation of R.C. 121.22.

THE EVIDENCE

What do we know from the testimony and documents produced at the hearing?

Tanya Hemmer and **Lucinda Keller** testified as follows:

- (a) the Resolution adopting the 15 Year Plan was approved at least 24 hours before the August 31, 2006 public meeting, and before the Agenda was prepared and delivered to the newspapers,
- (b) the Agenda for the August 31, 2006 public meeting was made available to the public via newspapers just hours before the public meeting,
- (c) the Agenda announced that a Resolution would be adopted that incorporated a 15 Year Plan,
- (d) neither the Resolution nor the 15 Year Plan were read out loud or presented to the public in written form prior to the Board voting on the Resolution in the August 31, 2006 public meeting,
- (e) the Board conducted no public debate or deliberations on the Resolution or the 15 Year Plan during the August 31, 2006 meeting before the Resolution was adopted,
- (f) the public was not shown a copy of the Resolution or the 15 Year Plan during the August 31, 2006 meeting prior to the vote on the Resolution,

(g) the presentation of the Resolution and the 15 Year Plan and the unanimous adoption of the Resolution during the August 31, 2006 meeting lasted just a couple of minutes,

(h) Lucinda Keller delegated her responsibility to comply with the subpoena for e-mails to Tanya Hemmer,

(i) Tanya Hemmer did not conduct a search of the computers in the Commissioners' offices for e-mails related to the 15 Year Plan, Commissioner **David Sauber** testified:

(a) he responded to the August 8, 2006 e-mail of Commissioner Nutter by silent acquiescence, implying that he had no changes that he wished incorporated into the plan,

(b) he read, and presumably deliberated on the Resolution and the 15 Year Plan sometime prior to the August 31, 2006 public meeting,

(c) he did not discuss, debate or deliberate the Resolution or the 15 Year Plan with either of the other Commissioners in the August 31, 2006 public meeting prior to the vote on the Resolution,

(d) he voted on the Resolution and the 15 Year Plan without reading or discussing the contents of either document with either of the other two (2) Commissioners prior to the Vote on the Resolution during the August 31, 2006 public meeting,

(e) the first time the Resolution or the 15 Year Plan was presented to the public was during the August 31, 2006 public meeting,

(f) the passage of the Resolution and the adoption of the 15 Year Plan set the course of conduct for the Board, which calls for the demolition of the 1884 Seneca County Courthouse,

(g) he did not rebut the testimony of Rayella Engle, especially about her observations of the Commissioners just prior to the August 31, 2006 public meeting.

Commissioner **Ben Nutter** testified as follows:

(a) he sent at least four (4) e-mails about the 15 Year Plan to Commissioner Schock before the August 31, 2006 public meeting,

(b) the first and second e-mails asked Commissioner Schock and Commissioner Sauber to review the attached 15 Year Plan and “get with me by Monday for any changes.”

(c) he did not send the third and fourth e-mails to Commissioner Sauber,

(d) he specifically told the Commissioners that this is a “first rough draft,” which was “not necessarily meant for public consumption,”

(e) he actually was asking for feedback to see if they thought it was an accurate summary of the Stilson Report,

(f) on August 28, 2006 he sent a third and fourth e-mail to Commissioner Schock, advising him that he had made the corrections and asking Commissioner Schock to “let me know,” if these are presumably acceptable to Commissioner Schock,

(g) he hand-delivered a third and presumably the final draft of the 15 Year Plan to Commissioners Schock and Sauber, privately in one of the Commissioner's offices, just prior to the public meeting on August 31, 2006,

(h) he made corrections and changes to the drafts, presumably to satisfy Commissioner Schock and Sauber, on or before presentation of the final draft just prior to the August 31, 2006 meeting,

(i) the first time the Resolution or the 15 Year Plan were presented to the public was during the August 31, 2006 public meeting, after the Board had voted on the Resolution that adopted the 15 Year Plan,

(j) the Commissioners read, discussed and deliberated on the Resolution and the 15 Year Plan before the vote and before it was presented to the public in the August 31, 2006 public meeting,

(k) the Board voted on the Resolution and the 15 Year Plan without reading, discussing or otherwise presenting the documents to the public,

(l) he did not discuss, debate or deliberate the Resolution or the 15 Year Plan with the other Commissioners in the August 31, 2006 public meeting prior to the Vote for passage of the Resolution that adopted the 15 Year Plan,

(m) the passage of the Resolution that adopted the 15 Year Plan set the course of conduct for the Board, which requires the demolition of the 1884 Seneca County Courthouse,

(n) he did not rebut the testimony of Rayella Engle, especially about her observations of the Commissioners just prior to the August 31, 2006 public meeting.

The testimony of **S. Rayella Engle** is as follows:

(a) on the morning of August 31, 2006, one of her friends called the Commissioners' office to ask what was on the Agenda for that day's public

meeting and she was given initial response that did not mention the Courthouse, but when she specifically asked if the Courthouse was going to be a topic that day, her friend was finally told yes,

(b) she attended the public meeting of the Board held on August 31, 2006 in the county Commissioners' public meeting room,

(c) prior to the August 31, 2006 public meeting, she twice passed a Commissioner's office as she walked through the hallway from the waiting room to the public meeting room,

(d) on both occasions, she saw all three Commissioners in one of their offices huddled around some papers,

(e) she heard Commissioner Nutter, discussing the papers with the other two Commissioners, with specific reference to "option B," the option that was selected by the Commissioners when they passed the Resolution and adopted the 15 Year Plan,

(f) the first time as she was made aware that the 15 Year Plan had been prepared by all three Commissioners and written by Commissioner Nutter was after the Resolution and the 15 Year Plan were adopted and presented to the public in the August 31, 2006 meeting,

(g) neither the Resolution adopting the 15 Year Plan, nor the Plan itself was read or presented to the public before the Resolution was adopted in the August 31, 2006 public meeting,

(h) the Board did not discuss, deliberate or debate the Resolution or the 15 Year Plan before the Resolution was unanimously adopted in the public meeting on August 31, 2006,

(i) the presentation, motion and unanimous adoption or passage of the Resolution that adopted the 15 Year Plan, lasted just a couple of minutes.

**Ohio Sunshine Law
Public Meetings Act**

121.22 Public meetings reads in part as follows:

(A) This section shall be *liberally construed* to require public officials to *take official action* and to *conduct all deliberations upon official business only in open meetings . . .* (emphasis added)

(B) As used in this section:

(2) "Meeting" means any *prearranged discussion* of the *public business* of the public body by a majority of its members.

(C) All meetings of any public body are declared to be public meetings open to the public at all times. A member of a public body shall be present in person at a meeting open to the public to be considered present or to vote at the meeting and for purposes of determining whether a quorum is present at the meeting.

(H) A resolution, rule, or formal action of any kind is invalid unless adopted in an open meeting of the public body. A *resolution*, rule, or formal action *adopted in an open meeting that results from deliberations in a meeting not open to the public is invalid* unless the deliberations were for a purpose specifically authorized in division (G) or (J) of this section and conducted at an executive session held in compliance with this section. A resolution, rule, or formal action adopted in an open meeting is invalid if the public body that adopted the resolution, rule, or formal action violated division (F) of this section.

R.C. 121.22(C), which is written in clear, plain language, provides in pertinent part that all meetings of any public body are declared to be public meetings open to the public at all times.

Open meetings of any public body are *mandated* by the legislature's unequivocal adoption of the

Sunshine Law as a *matter of public policy*. This is the rule. A violation of the Sunshine Law cannot be "cured" by subsequent open meetings if the public body initially discussed matters in private that should have been discussed in a public meeting.

R.C. 121.22(B)(2) defines "meeting" as "any prearranged discussion of the public business of the public body by a majority of its members. These terms are to be liberally construed to foster and demand open government. R.C. 121.22 (A). The statute further states in section (H) that a Resolution, rule, or formal action of any kind is invalid unless adopted in an open meeting of the public body.

Thus, the logical interpretation of subsection (B)(2) is that no formal action is required to constitute a meeting. The board must merely discuss the public business. Subsection (H) makes it clear that in order to show a violation of the "open meeting" rule, a *resolution*, or formal action of some kind must have been adopted by the public body at a meeting not open to the public. Greene Cty. Guidance Ctr., Inc. v. Greene-Clinton Community Mental Health Bd., 19 Ohio App.3d 1, 4, 482 N.E.2d 982, 986 (1984). Sending e-mails with requests for responses certainly sets in motion private discussions, where in this case, decisions about public business were decided.

The nature and purpose of R.C. 121.22 support the interpretation that the statute is intended to apply to those situations where there has been actual formal action taken; to wit, formal deliberations concerning the public business. Holeski v. Lawrence, 85 Ohio App.3d 824, 621 N.E.2d 802 (1993). In this case it is the passage of the August 31, 2006 Resolution, the adoption of a 15 Year Plan and the June 25, 2007 Resolution that constitute formal action.

In order to prevail on a claimed violation of the Ohio Sunshine Law, one must demonstrate that there was (1) a pre-arranged (2) discussion (3) of the public business of the

public body in question (4) by a majority of its members. Haverkos v. Northwest Local School Dist. Bd. of Edn., 05-LW-2950 (1st), 2005-Ohio-3489.

1. Pre-arranged

Commissioner Nutter initiated a prearranged series of *e-mails*. All three (3) Commissioners *met in private* in one of the commissioners offices, adjacent to the public meeting room, just prior to the August 31, 2006 public meeting.

2. Discussion

Prior to the August 31, 2006 public meeting, the Commissioners conducted discussions by *e-mail*, sending *drafts* of the 15 Year Plan, sending *revisions* of the 15 Year Plan, asking for *feedback* and acknowledging *corrections* made to the 15 Year Plan, and/or changes had been made. Commissioner Nutter recalled at least three (3) versions of the 15 Year Plan. Plus, Commissioner Nutter *reminded* and told the commissioners "*remember this draft is not available for public consumption.*" Finally, just prior to the August 31, 2006 public meeting, the Commissioners met privately in one of the Commissioner's office, adjacent to the public meeting room, where they discussed Option B (of demolition of the courthouse), which was selected and adopted in the public meeting.

3. Public Business of the Public Body in Question

This evidence is clear, convincing and not in dispute.

4. A Majority of Its Members

Every time, two (2) of the three (3) Commissioners discussed public business, and follow those private discussions with a formal public action, they violate the Ohio Sunshine Law.

It is *undisputed* that the 15 Year Plan was *prepared by all three Commissioners* and written by Commissioner Nutter. The August 31, 2006 Resolution and the 15 Year Plan were

prepared and the vote taken on both occurred in a private meetings, with an effort to *conceal this activity from the public*. These informal meetings preceded the August 31, 2006 public meeting where and when the Resolution and 15 Year Plan were first presented to the public and unanimously adopted.

R.C. 121.22(H) invalidates any formal action that results from deliberations conducted in private. The Commissioners' formal action (Resolution) resulted from deliberations taken at private, informal meetings. State, ex rel. Delph v. Barr, 44 Ohio St.3d 77, 541 N.E.2d 59 (1989).

PRELIMINARY INJUNCTION

The purpose behind a Preliminary Injunction is to preserve the status quo between the parties pending a trial on the merits. The party requesting the preliminary injunction must show, by clear and convincing evidence, that (1) there is a substantial likelihood that the plaintiff will prevail on the merits, (2) the plaintiff will suffer irreparable injury if the injunction is not granted, (3) no third parties will be unjustifiably harmed if the injunction is granted, and (4) the public interest will be served by the injunction. Proctor & Gamble Co. v. Stoneham, 140 Ohio App.3d 260, 267, 747 N.E.2d 268. Id. at 267-68 (2000).

No one single factor is dispositive when ruling upon a Motion for Preliminary Injunction, as the factors must be balanced. When there is a strong likelihood of success on the merits, preliminary injunctive relief may be justified even though a plaintiff's case of irreparable injury may be weak. In other words, *what plaintiff must show as to the degree of irreparable harm varies inversely with what plaintiff demonstrates as to its likelihood of success on the merits*.

In determining whether to grant injunctive relief, courts have recognized that no one factor is dispositive. The four (4) factors must be *balanced*, moreover, with the *flexibility* which traditionally has characterized the *law of equity*. When there is a strong likelihood of success on

the merits, preliminary injunctive relief may be justified even though a plaintiff's case of irreparable injury may be weak. Conversely, when there is less likelihood of success on the merits, the plaintiff must show a high degree of irreparable harm. In other words, what plaintiff must show as to the degree of irreparable harm *varies inversely* with what plaintiff demonstrates as to its likelihood of success on the merits. Cleveland v. Cleveland Elec. Illum. Co., 115 Ohio App.3d 1, 14, 684 N.E.2d 343 (1996); King's Welding & Fabricating, Inc. vs. King, (7th App. Dist.) 2006-Ohio-5231.

(1) THERE IS A SUBSTANTIAL LIKELIHOOD THAT THE
PLAINTIFFS WILL PREVAIL ON THE MERITS

When viewed in the light most favorable to plaintiffs, sufficient evidence has been presented to support the first criterion regarding the merits of its claim that the Board violated the Ohio Sunshine Law in this case. The e-mails, the drafts, the comments, the silence and the private meeting, followed by formal action beginning August 31, 2006, all demonstrate a strong likelihood of success on the merits at trial. The record demonstrates that discussions by the Board were conducted privately with a *reminder* that the 15 Year Plan, which includes demolition of the 1884 Seneca County Courthouse, was *not for public consumption*.

(2) THE PLAINTIFFS WILL SUFFER IRREPARABLE INJURY IF
THE INJUNCTION IS NOT GRANTED

An irreparable injury is one, that after its occurrence, there can be no plain, adequate and complete remedy at law, and for which any attempt at monetary restitution is impossible, difficult or incomplete. Cleveland vs. Cleveland Electric Illum. Co. supra p.12.

Irreparable harm depends upon the context. In this case there is no question of whether irreparable harm is likely. It is an absolute fact. Seneca County's most valued treasure is about to be destroyed by an act of single-minded arrogance; a decision made in the face of all available

expert advice, simply because two (2) of the three (3) Commissioners want something different from the professional advice they paid for and the wisdom for prior Board action.

What is at issue in this requested preliminary injunction is more than the preservation of a building. This *temporary request for sanity* that *maintains the status quo* until a full hearing on the issues can be heard, will allow for the probability that this once proud community will acknowledge and pay respect to the diverse culture, rich heritage and bold civic pride which lies dormant beneath the community conscious. This 1884 Courthouse is the heart of this city and county. Two (2) of the three (3) Commissioners want to tear the heart out of our home. They are ignoring the fact that it represents our heritage and generations long past. In a throw away society, some people do not understand the inherent and intrinsic value this 1884 Courthouse. This Courthouse and the most prominent symbol of our “community” is in danger of being lost forever.

(3) NO THIRD PARTIES WILL BE UNJUSTIFIABLY
HARMED IF THE INJUNCTION IS GRANTED

The record is absolutely void of any evidence that demonstrates the defendants or any third parties will be harmed if the temporary injunction is granted. Counsel for the defendants has made many unsupported statements on that issue, but this Court must acknowledge that the defendants have provided no evidence of any harm that may result from a temporary injunction. The defendants had every opportunity to offer evidence on this point, but they chose not to. None exists in reality, in fact and most importantly, in the record. This “grand old lady” has survived for 123 years. She has had little use during the last three (3) years, and she is certainly entitled to a couple more months of life. We must keep the respirator on.

(4) THE PUBLIC INTEREST WILL BE SERVED BY THE INJUNCTION

The public interest in this case and the future of the 1884 Courthouse and the future of Seneca County is on almost everyone's mind. The importance of the future of this building can not be understated.

In determining whether to grant injunctive relief, no one factor is dispositive. Cleveland v. Cleveland Elec. Illum. Co. (1996), 115 Ohio App.3d 1, 14, 684 N.E.2d 343, 351. The four factors must be *balanced with the flexibility* which traditionally has characterized the *law of equity*. What a plaintiff must show as to the likelihood of success on the merits *varies inversely* with what a plaintiff must demonstrate as to the degree of irreparable harm. King's Welding & Fabricating, Inc. v. King, (7th App. Dist.) 2006-Ohio-5231.

The issue whether of to grant or deny a preliminary injunction is a matter solely within the discretion of the trial court, and a reviewing court will not disturb the judgment of the trial court in the absence of a clear abuse of discretion. Garono v. State, 37 Ohio St.3d 171, 173 (1988). Further, in determining whether to grant a preliminary injunction, a court must look at the specific facts and circumstances of the case. Keefer v. Ohio Dept. of Job and Family Services, Franklin App. No. 03AP-391, 2003-Ohio-6557. The specific facts of this case cry out for and demand the issuance of a preliminary injunction.

Discussion / Argument

The *first e-mail* (Exhibit -53) sent by Commissioner Nutter, dated August 8, 2006 at 3:41 p.m. about the "space study" did not contain an attachment, but did contain a *reminder* that, "*remember*, this is the first rough draft, and *not necessarily meant for public consumption*,"

Second e-mail (Exhibit -54) sent by Commissioner Nutter, dated August 8, 2006 at 3:54 p.m. did contain the attachment, which was the first rough draft of the 15 Year Plan, and it also contained the *reminder*, that, "*Remember*, this is the first rough draft and *not necessarily meant*

for public consumption.” These two (2) e-mails asked both Commissioners to review the rough draft of the 15 Year Plan and to *get with Commissioner Nutter by Monday for any changes.* This specific *request* by Commissioner Nutter asked both Commissioners to review the proposed rough draft of the proposed a 15 Year Plan and *to contact him* to discuss changes that they wanted in the document. These *communications* clearly required a response from both Commissioners and was not intended for the public.

Regarding the first and second e-mails, the fact that Mr. Sauber testified that he did not discuss the drafts with Mr. Nutter or Mr. Schock prior to the August 31, 2006 meeting, can only lead to one of two permissible inferences; first, by his silence he implicitly agreed with, consented to and *convey that message by his silence* to Mr. Nutter, or second, that he did have discussions with Mr. Nutter about the changes and the corrections, and he now realizes but does not want to admit that he made a mistake by discussing the drafts of the 15 Year Plan outside of a public meeting. Mr. Nutter *requested* Mr. Sauber review the attached 15 Year Plan and *get with Mr. Nutter* by Monday for any changes. This specific request requires a response and *Commissioner Sauber's response was acquiescent silence* or otherwise. This *act of silence* in these circumstances is certainly a *communication*.

The **third e-mail** (Exhibit -55) sent by Commissioner Nutter, dated August 28, 2006 at 9:19 a.m. was directed only to Commissioner Schock, but not Commissioner Sauber. Even though it indicated a draft of the 15 Year Plan was attached, this e-mail contained the message that *“all the corrections”* have been made, and Commissioner Nutter made a specific request of Commissioner Schock to *“let him know”* if all the corrections had been made.

The **fourth e-mail** (Exhibit -56) sent by Commissioner Nutter, dated August 28, 2006 at 9:32 a.m. was directed to Commissioner Schock, but not Commissioner Sauber. It did have a

revised 15 Year Plan with *“all the corrections”* and the *specific request* from Commissioner Nutter to *“let me know”* if all the corrections have been made.

The third and fourth e-mails sent by Commissioner Nutter, were sent only to Commissioner Schock and not to Commissioner Sauber. Since Commissioner Sauber testified that he did not discuss any of the drafts of the 15 Year Plan with Commissioner Nutter or Commissioner Schock prior to the meeting on August 31, 2006, the logical inference from his absence in these two (2) e-mails, and his silence is, first, that Commissioner Sauber consented to and by his silence *conveyed that message* to Commissioner Nutter, or second, that they now realize, but do not want to admit, that they made a mistake by privately discussing the drafts of the 15 Year Plan outside of a public meeting, specifically prior to the August 31, 2006 public meeting when the Resolution was passed and the 15 Year Plan adopted.

The only other possible explanation for not sending the third and fourth e-mails to Commissioner Sauber, is that Commissioner Nutter had already discussed the changes and corrections with Commissioner Sauber, and it was not necessary for Commissioner Sauber to be part of the further discussions with Commissioner Schock. Commissioner Sauber's *silence* must be seen for what it was; a *clear indication* that he accepted and did not object to the corrections, or second, that he understands that he made, but he does not want to admit that he made, a mistake by discussing the corrections outside of a public meeting. In either event in the third and fourth e-mails from Commissioner Nutter provided substantive information about the 15 Year Plan and *asked for a “let me know” response from* Commissioner Schock. No further response was needed from Commissioner Sauber. The discussion was complete.

This Court can only conclude that the *e-mail communications*, from Commissioner Nutter, first to both Commissioners and then only to Commissioner Schock, constitute private

discussions and deliberations outside of a public meeting about public business. Commissioner Nutter disseminated and engaged in an exchange of communications with both Commissioners by a series of e-mails concerning the form and substance of the 15 Year Plan, which Commissioner Sauber approved by *silent acquiesce*.

The most obvious and glaring example produced thus far in this case is the *private meeting* of all three (3) Commissioners, just prior to the August 31, 2006 public meeting, where they discussed "Option B." This evidence is clear and not rebutted.

DEFENDANTS' CLOSING ARGUMENT AND COMMENTS ON EVIDENCE

The Ohio Supreme Court has held that a fact-finder may base a reasonable inference in part upon another inference and in part upon additional facts. Hurt v. Charles J. Rogers Transp. Co., 164 Ohio St. 329 (1955), paragraph two of the syllabus. A reasonable inference based in part upon another inference and in part upon additional facts is a *permissible parallel inference*, that may even be indulged by a jury. Hurt v. Charles J. Rogers Transp. Co., supra. Motorists Mut. Ins. Co. v. Hamilton Twp. Trustees, 28 Ohio St.3d 13 (1986) Such an inference is called a parallel inference. Nageotte v. Cafaro Co., 160 Ohio App.3d 702, 2005-Ohio-2098. *Parallel inferences are reasonable inferences and an essential element of the deductive reasoning process by which most successful claims are proven.* Donaldson v. N. Trading Co., 82 Ohio App.3d 476, 481 (1992). Parallel inferences may be used in combination with additional facts. Drawing multiple inferences separately from the same set of facts is also permissible. McDougall v. Glenn Cartage Co., 169 Ohio St. 522, 160 N.E.2d 266 (1959), paragraph two of the syllabus. Darling v. Darling, (7th App. Dist.) 2007-Ohio-3151.

For example, if the Commissioners were not discussing "Option B" of the 15 Year Plan in one of their offices prior to the August 31, 2006 public meeting, then what were they doing

and what reasonable inference can be drawn from these facts. The only inference to be drawn from their silence, lack of rebuttal evidence, is that Rayella Engle's testimony was accurate and they were discussing Option B, which they adopted during a public meeting. If they were discussing "Option B" for their Cleveland Indians or Cleveland Browns tickets, they could easily have taken the witness stand and explained what they were doing. The defendants did not rebut or refute the testimony of S. Rayella Engle about their pre-public meeting conference. The only reasonable inference to be drawn from their silence is that Rayella Engle's testimony was accurate and they were discussing Option B, which they immediately adopted during the August 31, 2006 public meeting.

The defendants have improperly characterized the evidence in this case and the inferences that this Court may reasonably draw from these facts. Trial courts, even juries, are permitted to use *parallel inferences* in their *deductive* and *common sense reasoning process* to determine the true facts.

Defensive Allegations

The defendants have set forth statements which they believe are supported by the evidence in this hearing, each of which requires a direct response, because it is either not supported by the record, questionable, not rebutted and in some instances simply not true.

The defendants have stated on page 4 of their "Closing" that the following statements are true:

(a) *"Years of public deliberation, debate and an election on what to do with the former courthouse."*

This statement which is not supported by the record, contains allegations irrelevant to whether the Ohio Sunshine Law has been violated, and relate directly to the breach of fiduciary duty claim, the cause of action which this court has already dismissed.

(b) *The Commissioner Nutter's August 8, 2006 and August 28, 2006 e-mails, wherein he forwarded his 15 Year Plan to the other commissioners, which consisted mainly of verbatim language from a report to the commissioners nearly three months earlier.*

The evidence in this case demonstrates in Exhibits 51 and 52 that this statement is not true. Exhibits 51 and 52 clearly demonstrate that not only were *textual changes* made to the plan, but the entire *cost approach cost/analysis 7 page attachment* in the first rough draft was deleted from draft to draft as the 15 Year Plan circulated among the Commissioners. Even a cursory review of those two Exhibits clearly demonstrates that substantial changes were made between the two drafts represented by Exhibit 51 and 52.

(c) *“Commissioner Sauber's testimony that he never discussed the Plan with Commissioner Nutter before approving it at the Board's August 31, 2006 open meeting.”*

This statement can not be true because the Plan itself states clearly on the first page that the 15 Year Plan that it was *prepared by all three commissioners*. The statement on the front of the document is either false and Commissioner Sauber did not participate in the preparation of this Plan and voted on something he had never discussed with the other Commissioners, or Commissioner Sauber did respond to the e-mails and did discuss Option B with the other two (2) Commissioners just prior to the August 31, 2006 meeting, a fact that was not rebutted. Was Commissioner Sauber truthful on the written document, or was his testimony in Court truthful? He can not sustain both inconsistent positions.

(d) *“Commissioner Nutter's testimony that the only other changes he made were minor grammatical changes, such as the misspelling of former Commissioner Shock's name.”*

The evidence in this case does not support this statement nor Commissioner Nutter's testimony for all of the reasons set forth above in the discussion of “b.”

(e) *Commissioner Nutter's testimony, repeated numerous times at the hearing that "we have never had any improper deliberations."*

This statement attributed to Commissioner Nutter, even if it was made in open court, was clearly scripted before he came to court, because it ignores the existence of e-mails, the drafts attached to the e-mails and circulated within the Commissioners' office, the responses he received either verbally, by e-mail or acquiescent silence, and the fact that all three commissioners were seen conferring, just prior to the August 31, 2006 meeting about "Option B," in fact the option adopted in the August 31, 2006 meeting. All of these facts violate the Ohio Sunshine Law.

(f) *"Plaintiff Engle's testimony that she saw the three commissioners in an office looking at an unidentified, stapled packet before the August 31, 2006 Board meeting."*

This is *true*, it must be accepted as truthful by the Court, because it was not rebutted or denied by the defendants during the hearing. The defendants had every opportunity to refute, contradict or explain what they were talking about, but they did not and could not testify under oath that the meeting and the discussion as described, did not occur.

(g) *Plaintiff Engle's testimony that she heard Commissioner Nutter refer to some Option B while examining the stapled sheet."*

Again, this is a *true statement*. It must be accepted by the court as truthful, because it was not rebutted or denied by the defendants during the hearing. The defendants had every opportunity to refute, contradict or explain what they were talking about, but they did not and could not testify under oath that the meeting and the discussion as described, did not occur.

(h) *Numerous witnesses' testimony that the Commissioners' August 31, 2006 approval of Commissioner Nutter's 15 Year Plan was made with little or no discussion that date."*

This statement of fact is *true and uncontested*. The fact that the 15 Year Plan was first disclosed to the public during the August 31, 2006 public meeting, and the fact that there was no discussion or debate about the Plan, during the meeting, prior to its vote, can only lead to the reasonable inference that the three (3) Commissioners had discussed, deliberated and accepted the Plan, prepared the Resolution adopting the Plan, and included the passage of the Resolution adopting the 15 Year Plan at least 24 hours prior to the public meeting, because the Agenda was given to the media on August 15, 2006. It is important for the Court to note that the Tiffin newspaper, the Advertiser Tribune, with the Agenda was published and *made available to the public just a few hours before the public meeting*.

The defendants claim the following evidence is missing from the hearing:

(a) *Commissioner Nutter's two August 2006 e-mails led to any deliberations with any other Commissioner regarding his 15 year plan before August 31, 2006.*

First, the plan states in writing that it is *not* Commissioner Nutter's plan, because it was *prepared* by all three (3) Commissioners. The term deliberations includes a broad range of conduct and activity. Commissioner Nutter communicated first when he asked the other two (2) Commissioners to respond back him on both occasions. Each time there was a response in one form or another (comment or silence), there was a discussion (changes were made) and an exchange of information between two (2) of the three (3) (majority) of the Board members. As the Court knows, the Commissioners did not rebut or deny the testimony of Rayella Engle about the August 31, 2006 private meeting.

(b) *"That Commissioner Sauber deliberated with anyone in private regarding the 15 year plan."*

This statement ignores the existence of the cover sheet to the 15 Year Plan that plainly states the Plan was prepared in part by Commissioner Sauber, the e-mails, the fact that Commissioner Sauber was not included in the third and fourth e-mails, and that he was seen

privately discussing Option B with the other two commissioners prior to the August 31, 2006 public meeting. He did not take the stand and rebut or deny the testimony of Rayella Engle. Commissioner Sauber's conduct violates the Ohio Sunshine Law.

(c) *"Whether Commissioner Nutter was holding the 15 Year Plan when Plaintiff Engle walked by their offices."*

This accepted *true fact* could have been refuted or denied by either Commissioner Nutter or Commissioner Sauber had they chose to do so. Clearly, their absence from the witness stand and their decision not to rebut or deny the testimony of Rayella Engle can only lead to one reasonable inference. The meeting, their deliberations and discussions occurred exactly as Rayella Engle testified. They could not under oath deny her testimony.

(d) *"That Commissioner Nutter said anything other than Option B as alleged by plaintiff Engle."*

Again, neither Commissioner Nutter nor Commissioner Sauber testified on rebuttal or denied the observations of Rayella Engle. The fact that all three Commissioners were in the room together prior to the August 31, 2006 meeting discussing Option B is a true, not rebutted fact. The only logical inference to be drawn from that fact is that they were discussing the 15 Year Plan, the Resolution and their decision to select Option B, which called for the demolition of the 1884, Seneca County Courthouse. If they were not discussing public business, Option B to the 15 Year Plan or some other non-public matter, they could easily have taken the stand and explained their meeting. They could not and they did not.

The defendants rely upon the case of Haverkos vs. Northwest Local School District Board of Education, 2005-Ohio-3489 for the proposition that e-mails cannot be considered as discussions under the Ohio Sunshine Law. This position is not even rational. This very narrow court decision revolved around *one e-mail*, which sent a suggestion to members of a committee. The facts that distinguish this case from the case at bar are that the *one e-mail* sent in the

Haverkos case did not ask for a review of any documents. It did not ask for any changes and it did not ask for a response (“Let me know” or “get to me”) in return. That case does not stand for the proposition that all e-mails may not be considered to violate Ohio's open meeting laws. That statement made by the defendants is simply not accurate.

As this Court well knows, *people quite often communicate by e-mail* more than they do by letter or by telephone, because of the *ease of access* to the addressee *and delivery* of the e-mail.

The defendants claim that even if there was a violation of the Ohio Sunshine Law on August 31, 2006, that violation of law should not have any effect on subsequent decisions, especially June 25, 2007, when the Board made another decision (the same one announced on August 31, 2006) following Option B of the 15 Year Plan to demolish the Courthouse. The Court has in its possession, the DVD (official minutes) of the June 25, 2007 meeting of the Commissioners, and the Court need only review that DVD to learn that the statements made by the defendants on page 7 of their Closing Brief, that “they entertained public comment and engaged in open discussion amongst themselves before the two-to-one vote that the Courthouse should be demolished,” is simply not true. The Board did not entertain any public comment, in fact, the disk will show that there was no public comment allowed and that they did not engage in open discussion among themselves other than a few brief comments before taking the vote. The DVD, official minutes of the June 25, 2007 public meeting, becomes mysteriously defective and silent when Commissioner Bridinger begins speaking about his plan. Why when the remainder of the DVD appears and plays without defect, is Commissioner Bridinger’s presentation not recorded properly?

A most interesting fact in defendants' Brief, on page 7 filed with this Court on August 13, 2007, they indicate that the Board had already *voted to approve the bid package and begin the environmental studies on the Courthouse*. Even though this is not reflected in the record of this case, the *Advertiser-Tribune reported that the decision to approve the bid package* was made on August 13, 2007, the day before the Commissioners actually voted in public on August 14, 2007 to *approve the bid package and begin the environmental studies* on the Courthouse. It is obvious that the defendants told their counsel what their decision would be before they actually acted in public session to approve the bid package and begin environmental studies on the courthouse. Questions thus now arise related to when exactly and how did the Board discuss, deliberate and decide this public business and convey that information to their counsel before they announced their decision in public.

This Court must remember and acknowledge that the *course of conduct set in motion* by the Board for demolition of the Seneca County Courthouse *occurred prior to the August 31, 2006 meeting* and was simply ratified during the public meeting. Are the defendants to be permitted to continue on a secretive and surreptitious course of conduct, merely announcing their privately made decisions in public meetings, or will Seneca County government have the transparency required by the Ohio Sunshine Law so that the people of Seneca County will have access to the discussions, deliberations and rationale for the decisions made by the Board? Clearly, the Ohio Legislature has said that if the Board does not comply with the Ohio Sunshine Law and conduct their discussions and deliberations and make their decisions in public meetings, then those decisions that result therefrom are absolutely void.

SUMMARY

This motion for a temporary preliminary injunction asks the Court to maintain the *status quo* between the plaintiffs and the defendants for a brief period of time until the various Courts of Ohio can fully resolve all of the issues in this case on the merits. To date, the two causes of action that have been dismissed on procedural grounds, and the remaining testimony about potential violations of the Ohio Sunshine Law all give rise to and support the issuance of the preliminary injunction. The short length of time the plaintiffs are requesting will extend the life of this 123 year-young “Grand Old Lady,” and allow this litigation to proceed in a orderly manner.

To obtain a preliminary injunction, the plaintiffs in this case must show, and they have shown, first, that there is a likelihood of prevailing upon the merits of their claim that the Board has violated the Ohio Sunshine Law. Even if the Court is not convinced at this stage of the proceedings that the plaintiffs will ultimately prevail at trial, when the Court applies the *inverse variability standard* to the “likelihood of success” versus the “magnitude of the irreparable harm,” the flexible standards in the law of equity weigh heavily in favor of granting the preliminary injunction. The opportunity for continued discovery of e-mails and drafts that were not produced by the defendants, even though requested, can only lead to the conclusion that a preliminary injunction is eminently appropriate in the circumstances of this case.

Second, the plaintiffs have also demonstrated that they will suffer irreparable injury if the injunction is not granted. This cause of action brought by the State of Ohio on behalf of the six named plaintiffs to prevent the destruction of our historic 1884 Seneca County Courthouse clearly establishes the irreparable injury that is about to occur if not temporarily stopped by this Court.

Third, there is absolutely no evidence in the record or any inferences that can be drawn from evidence in the record that would indicate that any parties will be unjustifiably harmed if the injunction is granted. Fourth and finally, the plaintiffs have shown that the public interest will be served by the injunction. As the Court knows the renovation, restoration and/or destruction of the 1884 Seneca County Courthouse has been the topic of widespread press and television coverage, public debate, and of great interest to all of the people in Seneca County, Ohio who will ultimately bear the burden of paying for the course of action chosen by the Board.

Without question that plaintiffs have met their burden to satisfy the Court and established a basis for issuing a temporary preliminary injunction.

In order to show a violation of the Ohio Sunshine Law, which entitles the plaintiffs to a preliminary injunction, the plaintiffs must show that prearranged discussions of public business by the public body in question were conducted by a majority of public body's members.

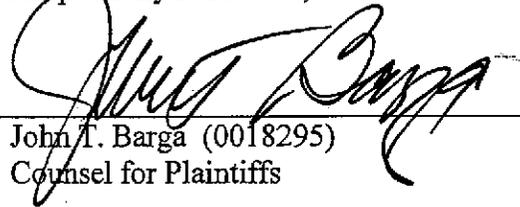
Without restating or reiterating the evidence in this case, and the absence of any evidence to the contrary by the Board, the record is abundantly clear and convincing that violations of the Ohio Sunshine Law have been committed, and that perhaps two (2) of the three (3) Commissioners realized at the time that they were violating the Ohio Sunshine Law.

Since the plaintiffs have established sufficient evidence to demonstrate a violation of the Ohio Sunshine Law, and since they have satisfied the elements necessary for the issuance of a preliminary injunction, the plaintiffs are asking this Court to exercise its discretion, make a reasonable decision that prevents a travesty like none other ever visited upon Seneca County, without harming any individuals and serving the public interest by granting a temporary preliminary injunction. No harm can come from issuing the preliminary injunction and irreparable, unpardonable harm will occur if the injunction is not issued. No one will be able to

repair the damage done by destruction of the 1884 Seneca County Courthouse. Once it is gone, it is gone forever. A brief respite from this chaos, created by this Board's action, will serve everyone's best interests.

We believe this Court will not allow one (1) single-minded commissioner (2-1 vote) to determine the destiny of this historic Courthouse, this city, and this county, before all of the legal issues in this case are fully resolved.

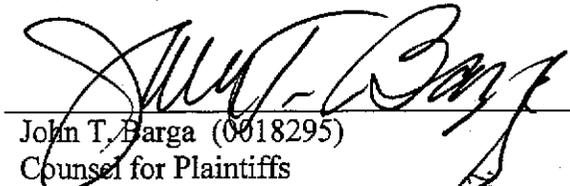
Respectfully submitted,

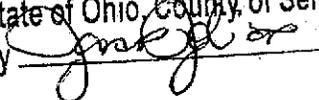

John T. Barga (0018295)
Counsel for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was served electronically by e-mail on July 29, 2007 upon:

- Judge Charles S. Wittenberg, cwitt841@yahoo.com
- Kenneth Egbert, Jr., Seneca County Prosecuting Attorney, 71 S. Washington St., Suite E., Tiffin, OH 44883, kegbert@senecapros.org.
- Mark Landes, 250 East Broad Street, Suite 900, Columbus, Ohio 43215, marklandes@isaacbrant.com;
- Mark Troutman, 250 East Broad Street, Suite 900, Columbus, Ohio 43215, marktroutman@isaacbrant.com.


John T. Barga (0018295)
Counsel for Plaintiffs

I hereby certify this is a true copy of the original pleading now on file in my office this 19 day of Sept 2007.
Mary K. Ward, Clerk, Common Pleas Court
State of Ohio, County of Seneca, Tiffin, Ohio
by  Deputy Clerk.

FILED
COMMON PLEAS COURT
SENECA COUNTY, OHIO
2007 AUG 20 PM 3:59
MARY K. WARD
CLERK

IN THE COURT OF COMMON PLEAS OF SENECA COUNTY, OHIO

STATE OF OHIO, EX REL.,
NANCY L. COOK, et al.
Plaintiffs-Relators

v.

SENECA COUNTY BOARD OF COUNTY
COMMISSIONERS, et al.
Defendants-Respondents

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Case No. 07 CV 0271

OPINION AND
JUDGMENT ENTRY

FILED
SENECA COUNTY, OHIO
2007 AUG 28 AM 8:4
MAYOR, CLERK

Plaintiffs seek a preliminary injunction from the Court to prevent defendants¹ from demolishing the Seneca County Courthouse. Plaintiffs' claim is predicated upon their allegation that defendants violated the Ohio Sunshine Law, R.C.121.22. Specifically, plaintiffs charge that defendants discussed and deliberated privately regarding a 15 Year Master Plan of Space Utilization, which was adopted at a public meeting on August 31, 2006. The Plan provided a blueprint for demolition of the County Courthouse and stated that the commissioners would "immediately request proposals from qualified engineering firms for the development of specifications to remove the 1884 Courthouse."

FACTS

On August 31, 2006, at a public meeting, the Seneca County Commissioners² passed a resolution approving a 15 Year Master Plan of Space Utilization and Development. Prior to the meeting, on August 8, 2006, defendant Nutter sent an e-mail to the other commissioners, the county administrator and the clerk of the Board, in which he attached a draft of the Master Plan. The e-mail stated: "Please review the attached and get with me by Monday for any changes. Remember this is the

¹ "Defendants", in this opinion, will refer to the Seneca County Commissioners, unless otherwise noted.

² At that time the members of the Seneca County Board of Commissioners were defendant Nutter, defendant Sauber and Joseph Schock. Defendant Bridinger was elected commissioner subsequent to August 31, 2006.



first rough draft and not necessarily meant for public consumption." Both Nutter and Sauber testified that they never discussed the plan with each other and Nutter received no suggested changes from the other commissioners except for misspellings. Three days before the meeting, on August 28, 2006, Nutter sent another e-mail with an attached copy of the Master Plan to Commissioner Schock, the administrator and the clerk, which stated: "This should have all the corrections. Let me know." This second e-mail was not sent to Sauber. The second draft of the plan corrected the misspellings as well as including changes made by Nutter.

Plaintiff S. Rayella Engle testified that on August 31, 2008, shortly before the meeting began, she walked past an office and observed the three commissioners looking at some papers. She could not hear their conversation, but she stated she heard Nutter refer to "option B."

Shortly thereafter, the meeting of the commissioners was called to order. In new business, Sauber moved to accept a resolution adopting the 15 Year Master Plan, and Schock seconded the motion. There was no discussion, and the resolution passed unanimously.

The Plan adopted by the Commissioners examined seven buildings operated by Seneca County in downtown Tiffin, including the courthouse. Relying on a space study performed by the architecture and engineering firm of Stilson & Associates, Inc., hired by the commissioners in April, 2006, the Master Plan set forth five possible solutions, identified as Options A through E, to meet future space needs. Except for Option A, all other options included demolition of the courthouse. The Master Plan, after examining all the options, provided that the "Board of Commissioners believes a variation of Option B would best serve the space needs of Seneca County." The Master Plan further expressed that the Board "shall immediately request proposals from qualified engineering firms for the development of specifications to remove the 1884 Courthouse."

No formal action was taken by defendants regarding the courthouse until June 25, 2007. At a public meeting on that date, the commissioners, on a 2-1 vote, decided and passed a resolution authorizing MKC, Inc. to prepare a project manual for the deconstruction and salvage of the courthouse.

As of August 8, 2007, the last hearing date in this matter, defendants had not taken any official action to demolish the courthouse. The project manual from MKC, Inc. is to assist the commissioners in preparing documentation, specifications and other requirements necessary for the advertisement of a bid package. Once a bid package has been proposed, it must be adopted by the commissioners and then sent out for bid. After bids are received from contractors, the commissioners then must vote whether to accept a bid.

II. ANALYSIS

Plaintiffs contend that a preliminary injunction should be granted because defendants' decision to adopt the 15 Year Master Plan was in violation of the Ohio Sunshine Law, R.C. 121.22. In general, courts will consider the following factors, which plaintiffs must show by clear and convincing evidence, in deciding whether to grant injunctive relief: (1) the likelihood or probability of plaintiffs' success on the merits; (2) whether the issuance of the injunction will prevent irreparable harm to plaintiffs; (3) what injury to others will be caused by the granting of the injunction; and (4) whether the public interest will be served by the granting of the injunction. *King's Welding & Fabr., Inc. v. King*, 2006-Ohio-5231, 7th App. Dist.; *Corbett v. Ohio Bldg. Auth.* (1993), 86 Ohio App. 3d 44. Pursuant to R.C. 121.22(I)(3), irreparable harm and prejudice to the party seeking an injunction shall be conclusively and irrebuttably presumed upon proof of a violation of the Sunshine Law. The issue for the herein cause is whether plaintiffs have shown a likelihood of success on the merits, i.e., whether defendants violated the Ohio Sunshine Law.

The Ohio Sunshine Law, which is to be liberally construed to require public officials to take official action and to conduct deliberations only in open meetings, R.C. 121.22(A), mandates that the meetings of any public body are "public meetings open to the public at all times." R.C. 121.22(C). Further, at R.C. 121.22(H), a "resolution, rule, or formal action of any kind is invalid unless adopted in an open meeting of the public body. A resolution, rule, or formal action adopted in an open meeting that results from deliberations in a meeting not open to the public is invalid * * *." A meeting is defined as "any prearranged discussion of the public business of the public body by a majority of its members."

R.C. 121.22(B)(2). "Deliberation" is not defined by the Act, but has been construed to mean more than information-gathering, investigation or fact-finding. *Springfield Local Sch. Dist. Bd. of Educ. v. Ohio Ass'n of Pub. School Employees, Local 530* (1995), 106 Ohio App.3d 855. Citing Webster's Third New International Dictionary (1961) the court in *Springfield Local*, defined "deliberation" as "the act of weighing and examining the reasons for and against a choice or measure" or "a discussion and consideration by a number of persons of the reasons for and against a measure." *Id.* at 864.

A person asserting a violation of Ohio's Sunshine Law bears the burden of proving by a preponderance of the evidence the violation occurred. *Steingass Mech. v. Warrensville Heights Bd. of Educ.* (2003), 151 Ohio App. 3d 321; *State ex rel. Randles v. Hill* (Mar. 20, 1992), Lucas App. No. L-90-169, unreported. If a violation or threatened violation of the Sunshine Law is proved, "the court of common pleas shall issue an injunction to compel the members of the public body to comply with its provisions." R.C. 121.22(I)(1).

Plaintiffs maintain that defendants, prior to the meeting of August 31, 2007, privately agreed to accept the 15 Year Master Plan. In order to prevail on a claimed violation of the Sunshine Law, plaintiffs must demonstrate that there was (1) a prearranged (2) discussion (3) of the public business of the public body in question (4) by a majority of its members. *Haverkos v. Northwest Local Sch. Dist. Bd. of Educ.*, 2005-Ohio-3489, 1st App. Dist.

The only contacts among the commissioners prior to the board meeting were the two e-mails from Nutter to the other commissioners.³ The e-mails were unsolicited by the other commissioners and were meant to circulate a draft of the plan. While the first e-mail was to let Nutter know if there were any changes, neither of the other commissioners responded. The second e-mail's purpose was to provide the revised draft of the plan. Again, no response resulted from this e-mail.

The e-mails from Nutter circulating the proposed Master Plan constituted neither a meeting nor deliberations under R.C. 121.22. *Haverkos v. Northwest Local Sch. Dist. Bd. of Educ.*, 2005-Ohio-3489, 1st App. Dist. There is no evidence to suggest the e-mails were prearranged and there

³ Actually, there were a total of four e-mails. Nutter resent the e-mail of August 8 and the e-mail of August 28 because he forgot to attach the draft of the Master Plan on the first ones. Otherwise, the messages in the e-mails were identical.

was no discussion among the commissioners as a result. Further, there is no proof demonstrating either that any of the defendants weighed or considered the merits of the Master Plan or that they discussed whether it should or should not be adopted. It is difficult to construe the two e-mails from one person to two others, with no responses, as a discussion or deliberation.

Plaintiffs argue that the only logical inferences from the e-mails is that the commissioners must have discussed the Master Plan outside the public meeting. However, there is no objective or factual evidence establishing that any unlawful meeting or deliberations took place. Plaintiffs assert such a meeting took place based solely upon subjective and speculative interpretations. Both Nutter and Sauber testified there was never any discussions or responsive e-mails among the commissioners. There is a complete absence of evidence pertaining to an exchange of words, comments or ideas regarding the drafts of the Master Plan. At most the e-mails were informational to advise commissioners of the plan drafted by Nutter from a study and report by Stilson & Associates, Inc., and to see if anyone proposed changes to the draft.

Plaintiffs suggest that adoption of the plan without any formal discussion at the public meeting is proof that defendants had had prior discussions and had already made their decisions. However, as observed in *De Vere v. Miami Univ. Bd. of Trustees* (June 10, 1986), Butler App. No. CA85-05-65, unreported, "Absence of discussion on a particular issue at a public meeting does not mean the board discussed the issue privately. This is particularly true when the matter has been an issue of concern for several years." Likewise, the condition and status of the Seneca County Courthouse had been discussed by the commissioners for many years, had been the subject of a proposed sales tax increase, and had been a major issue in Sauber's election campaign. Defendants reasonably believed no further discussion was necessary.

Plaintiffs further argue that the testimony of S. Rayella Engle is proof of prior discussion and deliberation. However, there is nothing improper or clandestine about the three commissioners being together immediately prior to a public meeting, as long as there is no deliberation of public business. Ms. Engle stated she could not hear their conversation and did not know what papers they were looking

at, yet she heard "option B" mentioned. Such, though, does not constitute sufficient proof of a Sunshine Law violation. It was not established that defendants were looking at the proposed Master Plan, and it is unknown if what Ms. Engle heard as "option B" was in connection to the plan.

In conclusion, the Court finds that plaintiffs have failed to meet their burden to show that they have a substantial likelihood or probability of success to prove a violation of the Ohio Sunshine Law. They have failed to present sufficient proof that defendants engaged in deliberations in a non-public setting in contravention of R.C. 121.22.

The Court appreciates plaintiffs', and their counsel's, desire to preserve the Seneca County Courthouse. The Court agrees with plaintiffs that if defendants are not enjoined and they proceed to demolition, the 1884 County Courthouse will be gone forever, and the loss will be irreparable. However, this Court must apply the law to the facts presented to it, and the Court cannot enjoin the actions of the duly elected commissioners because of sympathy or public opinion. With no violation of the Sunshine Law, there is no basis for the issuance of an injunction. Accordingly, plaintiffs' request for a preliminary injunction to prohibit defendants from proceeding with plans to demolish the Seneca County Courthouse will be denied.

JUDGMENT ENTRY

It is therefore ORDERED, ADJUDGED and DECREED that plaintiffs' motion for a preliminary injunction is DENIED.

It is further ORDERED that pursuant to Civ.R. 54(B) there is no just reason for delay and final judgment is hereby entered in favor of defendants and against plaintiffs on plaintiffs' claims for preliminary injunction, violation of R.C.121.22, breach of fiduciary duty and unauthorized conduct.

Charles S. Wittenberg

Judge Charles S. Wittenberg

8/27/07
Date

ac

IN THE COURT OF COMMON PLEAS
SENECA COUNTY, OHIO

FILED
COMMON PLEAS COURT
SENECA COUNTY, OHIO
2007 AUG 30 AM 9:01
MARY K. WARD
CLERK

State of Ohio, ex rel.
Nancy L. Cook, et al.

Plaintiffs

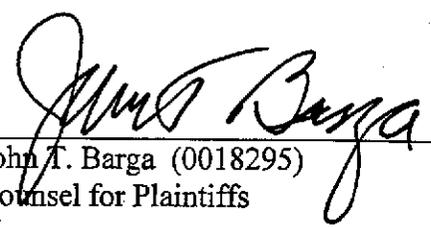
vs.

Seneca County Board of
Commissioners, et al.

Defendants

* Case No. 07 CV 0271
* Judge Charles S. Wittenberg
* Plaintiffs' Motion for Temporary
* Restraining Order and Preliminary
* Injunction
*
*

Now come the plaintiffs as authorized by Ohio Civil Rule 65 requesting a Temporary Restraining Order and a Preliminary Injunction against the defendants from destroying, selling, transferring or otherwise disposing of any of the computers, servers, related hardware and software used by the Seneca County Commissioners and the Seneca County Prosecutor since July 1, 2006 until further order of this Court.



John T. Barga (0018295)
Counsel for Plaintiffs

BRIEF IN SUPPORT OF MOTION

The evidence produced thus far in this case clearly indicates that e-mail transmissions were sent by at least one (1) County Commissioner concerning public business to two (2) other County Commissioners. The disclosure of these emails is the basis for further discovery as authorized by Ohio Civil Rule 26 in preparation for trial on the merits of the causes of action set forth in this complaint.

EXHIBIT
tabbies
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I hereby certify this is a true copy of the original pleading now on file in my office this 19th day of Sept 2007.
Mary K. Ward, Clerk, Common Pleas Court
State of Ohio, County of Seneca, Tiffin, Ohio
by Mary K. Ward Deputy Clerk.

RULE 26. General Provisions Governing Discovery reads in part:

(A) Policy; discovery methods.

It is the policy of these rules (1) *to preserve the right of attorneys to prepare cases for trial* with that degree of privacy necessary to *encourage them to prepare their cases thoroughly* and *to investigate* not only the favorable but the unfavorable aspects of such cases and (2) *to prevent an attorney from taking undue advantage of his adversary's industry or efforts.*

Parties may obtain discovery by one or more of the following methods: deposition upon oral examination or written questions; written interrogatories; *production of documents* or *things* or permission to enter upon land or other property, for inspection and other purposes; physical and mental examinations; and requests for admission. Unless the court orders otherwise, the frequency of use of these methods is not limited.

(B) Scope of discovery.

Unless otherwise ordered by the court in accordance with these rules, the scope of discovery is as follows:

(1) In General. Parties may obtain discovery regarding any matter, not privileged, which is *relevant to the subject matter involved in the pending action*, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence. (emphasis added)

Unless ordered by this Court to preserve the source of discoverable information and relevant evidence (computers, servers, hardware, software, etc.), the defendants may destroy the source of that information and evidence, frustrating and preventing the plaintiffs' industrious efforts at discovery. The Court will recall that requests were made by subpoenae, through testimony and public document requests for e-mails related to this case. The defendants responded by either delegating the requests to others, not performing the requested searches or simply ignoring their legal obligations to search for e-mails.

Recently, the Seneca County Prosecutor made a request of the Seneca County Commissioners for funds to replace the Prosecutor's computer and the server in the Prosecutor's office. The timing of this request, following closely on the heels of public requests made and subpoenae served in this litigation for electronic discovery of e-mails, raises questions which are relevant and material to the issues set forth in this complaint. It is therefore imperative that this Court prohibit the Seneca County Commissioners from destroying, selling, transferring or otherwise disposing of their own and the Seneca County Prosecutor's computers, all of the electronic equipment that supports the same and the software used on that equipment.

This order will not interfere in either the discretionary or ministerial duties of Seneca County Prosecutor or the Seneca County Commissioners. This is a direct request of the Court to order the preservation of computer equipment and information which may contain discoverable, relevant and material evidence, before it is sold, transferred, destroyed or otherwise disposed.

Relief

Wherefore, the plaintiffs demand a Temporary Restraining Order and Preliminary Injunction against the Seneca County Commissioners preventing them from destroying, selling, transferring, gifting and/or otherwise disposing of the Seneca County Commissioners' and the Seneca County Prosecutor's computers, the support equipment and software until further order of this Court.

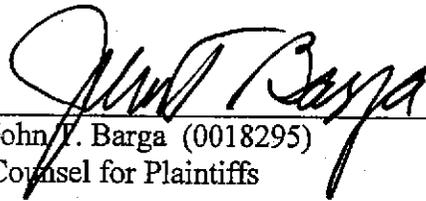


John T. Barga (0018295)
Counsel for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was served electronically by e-mail on August 30, 2007 upon:

Judge Charles S. Wittenberg, cwitt841@yahoo.com
Kenneth Egbert, Jr., Seneca County Prosecuting Attorney, 71 S. Washington St., Suite E.,
Tiffin, OH 44883, kegbert@senecapros.org.
Mark Landes, 250 East Broad Street, Suite 900, Columbus, Ohio 43215,
marklandes@isaacbrant.com;
Mark Troutman, 250 East Broad Street, Suite 900, Columbus, Ohio 43215,
marktroutman@isaacbrant.com.



John V. Barga (0018295)
Counsel for Plaintiffs

FILED
JANON PLEAS COURT
SENECA COUNTY, OHIO
2007 AUG 30 AM 9:01
MARY K. WARD
CLERK

Judge Michael P. Kelbley
Seneca County Common Pleas Court
117 East Market Street
Suite 4303
Tiffin, Ohio 44883

Rachel Rentz, Court Administrator
(419) 448-5099

COURT NOTICE

DATE: September 4, 2007
TO: The Honorable Charles Wittenberg
Attorney John Barga
Attorney Mark Landes/Mark Troutman
Prosecuting Attorney Kenneth Egbert, Jr.

FILED
COMMON PLEAS COURT
SENECA COUNTY, OHIO
2007 SEP -4 PM 3:59
MARTIN WAHID
CLERK

Case Number: 07-CV-0271
Case Caption: State of Ohio, ex rel. v Seneca County Commissioners, et al.

You are hereby notified that the above captioned case has been assigned as follows:

TELEPHONE CONFERENCE RE: MOTION FOR INJUNCTION
filed by Plaintiff on 8-30-07

on Wednesday, September 12, 2007, at 1:30 p.m.

DEFENDANTS' TO FILE RESPONSE TO PLAINTIFFS' NEW MOTION FOR INJUNCTION NO LATER THAN: Monday, September 10, 2007, 4:00 p.m. copies of the response to be e-mailed to all parties and copy FAXed to the Seneca County Clerk of Court's Office

Rachel Rentz
Court Administrator

IN THE COURT OF COMMON PLEAS OF SENECA COUNTY, OHIO

STATE OF OHIO, EX REL.,
NANCY L. COOK, et al.
Plaintiffs-Relators

Case No. 07 CV 0271

v.

ORDER

SENECA COUNTY BOARD OF COUNTY
COMMISSIONERS, et al.
Defendants-Respondents

FILED
CLERK
2007 SEP 12 PM 3:26
SENECA COUNTY

September 12, 2007: Telephone status pretrial held. After discussion of pending motions, the Court issues the following orders:

It is ORDERED that the matter is set for hearing on September 18, 2007 at 11:30 AM, regarding plaintiffs-relators' motion for a preliminary injunction pertaining to discovery and plaintiffs-relators' motion regarding inspection of the Seneca County Courthouse.

It is further ORDERED that defendants-respondents are granted leave until October 11, 2007 to file a response to the motion of Mary C. Ranker to Join These Proceedings.

Charles Wittenberg

Judge Charles S. Wittenberg

9/12/07

Date

EXHIBIT
tabbler
H

IN THE COURT OF COMMON PLEAS OF SENECA COUNTY, OHIO

STATE OF OHIO, EX REL.,
NANCYL L. COOK, et al.
Plaintiffs-Relators

Case No. 07 CV 0271

v.

ORDER

SENECA COUNTY BOARD OF COUNTY
COMMISSIONERS, et al.
Defendants-Respondents

FILED
CLERK
2007 SEP 18 AM 8:48
SENeca COUNTY, OHIO

On September 15, 2007, after a telephone pre-trial with counsel, the Court set a hearing date of September 18, 2007 regarding plaintiffs' request for a preliminary injunction and their request to inspect the Seneca County Courthouse. The hearing was limited to the type of information plaintiffs sought from computers or servers of Seneca County and/or the Seneca County Prosecutor's Office and whether all information would be transferred to a new server if the defendants chose to place digital information from the present computer system to a new one. In addition, the Court needed to know if and when defendants intended to transfer computerized information to a new server, and how much time plaintiffs required to obtain the computer discovery they seek.

Since the pre-trial, plaintiffs have served subpoenas for testimony and documents upon numerous individuals, including the Seneca County Prosecutor who is one of the attorneys representing defendants in the instant case. In response, the prosecutor has filed a motion to quash the subpoena served upon him. Moreover, the day after the pre-trial plaintiffs served a five page request for production of documents and items, including e-mails and other information maintained on computers, to defendants. On September 17, 2007, defendants filed a motion to dismiss the request for a preliminary injunction or in the alternative a motion for continuance, as well as their own motion to quash subpoenas.



In light of the foregoing, the Court has determined that the hearing scheduled for September 18, 2007 should be continued, so that all issues can be heard together.

It is therefore ORDERED that the hearing scheduled for September 18, 2007 is vacated.

It is further ORDERED that this matter is scheduled for hearing on September 25, 2007 at 9:30 AM regarding the following:

(a) Plaintiffs' request to enjoin disposal of county computers, specifically for determination of-

1. If and when defendants intended to transfer computerized information to a new server;
2. How much time plaintiffs require to obtain the computer discovery they seek; and
3. Whether all information, including deleted e-mails, would be transferred to a new server

or computer.

(b) The Prosecutor's motion to quash subpoena;

(c) Defendants' motion to dismiss the second request for a preliminary injunction; and

(d) Any issues regarding plaintiffs' request to inspect the Seneca County Courthouse.

It is further ORDERED that plaintiff shall file any opposition or other response to defendants' motion to dismiss and motion to quash by September 24, 2007.

It is further ORDERED that plaintiffs shall file any opposition or other response to the prosecutor's motion to quash by September 24, 2007.

It is further ORDERED that defendants shall not sell, transfer, trade or otherwise dispose of any computers, servers or hard drives which they own, possess, control or over which they have authority prior to September 25, 2007.



Judge Charles S. Wittenberg

9/18/07
Date

cc

IN THE COURT OF COMMON PLEAS
SENECA COUNTY, OHIO

FILED
COMMON PLEAS COURT
SENECA COUNTY, OHIO
2007 SEP 13 PM 1:05
MARY K. WARD
CLERK

State of Ohio, ex rel., Nancy L. Cook, et al.

* Case No. 07 CV 0271

Plaintiffs

* Judge Charles S. Wittenberg

vs.

* **The Second Request for
Production of Documents and Items
From State of Ohio, ex rel., Nancy L.
Cook, et al.**

Seneca County Board of
Commissioners, et al.

* **To Seneca County Board of
Commissioners, et al.**

Defendants

(Civil Rule 34)

To: Seneca County Board of
Commissioners, et al.
Mark Landes
250 East Broad Street, Suite 900
Columbus, Ohio 43215
marklandes@isaacbrant.com

Notice: If you would like this document
provided by other means, please
contact the undersigned.

As authorized by Ohio Civil Rule 34, State of Ohio, ex rel., Nancy L. Cook, hereby
requests permission from Seneca County Board of Commissioners, to conduct the following
described activities:

- a. To inspect and copy any designated documents (including writings, drawings, graphs, charts, photographs, phonorecords, computer generated documents, e-mails and other data compilations from which intelligence can be perceived, with or without the use of detection devices) that are in the possession, custody, or control of the party upon whom the request is served;
- b. To inspect and copy, test, or sample any tangible things that are in the possession, custody, or control of the party upon whom the request is served;



I hereby certify this is a true copy of the original pleading now on file in my office this 19 day of Sept. 2007.
Mary K. Ward, Clerk, Common Pleas Court
State of Ohio, County of Seneca, Tiffin, Ohio
by Mary K. Ward Deputy Clerk

- c. To enter upon designated land or other property in the possession or control of the party upon whom the request is served for the purpose of inspection and measuring, surveying, photographing, testing, or sampling the property or any designated object or operation on the property.

If the served party is an organization, such as a public or private corporation or association, the organization will choose one or more of its proper employees, officers or agents to produce the items requested.

At this time, State of Ohio, ex rel., Nancy L. Cook, et al. specifically requests that Seneca County Board of Commissioners, et al. produce the following items:

Related to Commissioner Ben Nutter (“you”):

- (1) all e-mails plus attachments, and all other forms of electronic communications **sent by you** or at your instruction, in any manner, from January 1, 2006 through September 14, 2007, that relate in any manner to the Ohio historic 1884 Seneca County Courthouse or the 15 Year Space Needs Master Plan,
- (2) all e-mails plus attachments, and all other forms of electronic communications **received by you** or at your instruction, in any manner, from January 1, 2006 through September 14, 2007, that relate in any manner to the Ohio historic 1884 Seneca County Courthouse or the 15 Year Space Needs Master Plan
- (3) all e-mails plus attachments and all other forms of electronic communications, that were sent to other persons, but were copied to you or shared with you, from January 1, 2006 through September 14, 2007, that relate in any manner to the Ohio historic 1884 Seneca County Courthouse or the 15 Year Space Needs Master Plan,
- (4) you are instructed to search all computers to which you actually used to send or receive, or which were actually used by others, to send or to receive the items requested in Item (1), Item (2) and Item (3) above,
- (5) in an effort to further explain this request, the term “all computers” described in Item (4) above includes all computers at all places of employment, your office, your home, in the Seneca County Courts, personal desktop computers, personal laptop computers and all other forms of electronic communication equipment belonging to you, your employer, co-workers, friends, acquaintances, family members, experts, consulted and all other persons,

- (6) the e-mail plus attachments from Prosecutor Kenneth Egbert addressed to Commissioner Sauber and Nutter and dated January 24, 2007, wherein he stated "stay the course,"
- (7) the e-mail plus attachments from Magistrate Kathryn Hanson addressed to you and dated March 2, 2007 that discusses at length various issues regarding the courthouse,
- (8) the e-mail plus attachments described in item (6) above that you forwarded to Commissioner David Sauber.

Related to Commissioner David Sauber("you"):

- (9) all e-mails plus attachments, and all other forms of electronic communications **sent by you** or at your instruction, in any manner, from January 1, 2006 through September 14, 2007, that relate in any manner to the Ohio historic 1884 Seneca County Courthouse or the 15 Year Space Needs Master Plan,
- (10) all e-mails plus attachments, and all other forms of electronic communications **received by you** or at your instruction, in any manner, from January 1, 2006 through September 14, 2007, that relate in any manner to the Ohio historic 1884 Seneca County Courthouse or the 15 Year Space Needs Master Plan
- (11) all e-mails plus attachments and all other forms of electronic communications, that were sent to other persons, but were copied to you or shared with you, from January 1, 2006 through September 14, 2007, that relate in any manner to the Ohio historic 1884 Seneca County Courthouse or the 15 Year Space Needs Master Plan,
- (12) you are instructed to search all computers to which you actually used to send or receive, or which were actually used by others, to send or to receive the items requested in Item (1), Item (2) and Item (3) above,
- (13) in an effort to further explain this request, the term "all computers" described in Item (4) above includes all computers at all places of employment, your office, your home, in the Seneca County Courts, personal desktop computers, personal laptop computers and all other forms of electronic communication equipment belonging to you, your employer, co-workers, friends, acquaintances, family members, experts, consulted and all other persons,
- (14) the e-mail plus attachments from Prosecutor Kenneth Egbert addressed to Commissioner Sauber and Nutter and dated January 24, 2007, wherein he stated "stay the course,"
- (15) the e-mail plus attachments from Magistrate Kathryn Hanson addressed to Commissioner Nutter and dated March 2, 2007 that discusses at length various issues regarding the courthouse,
- (16) the e-mail plus attachments described in item (6) above that you received from Commissioner Ben Nutter.

Related to County Administrator Lucida Keller (“you”):

- (17) all e-mails plus attachments, and all other forms of electronic communications **sent by you** or at your instruction, in any manner, from January 1, 2006 through September 14, 2007, that relate in any manner to the Ohio historic 1884 Seneca County Courthouse or the 15 Year Space Needs Master Plan,
- (18) all e-mails plus attachments, and all other forms of electronic communications **received by you** or at your instruction, in any manner, from January 1, 2006 through September 14, 2007, that relate in any manner to the Ohio historic 1884 Seneca County Courthouse or the 15 Year Space Needs Master Plan,
- (19) all e-mails plus attachments and all other forms of electronic communications, that were sent to other persons, but were copied to you or shared with you, from January 1, 2006 through September 14, 2007, that relate in any manner to the Ohio historic 1884 Seneca County Courthouse or the 15 Year Space Needs Master Plan,
- (20) you are instructed to search all computers to which you actually used to send or receive, or which were actually used by others, to send or to receive the items requested in Item (1), Item (2) and Item (3) above,
- (21) in an effort to further explain this request, the term “all computers” described in Item (4) above includes all computers at all places of employment, your office, your home, in the Seneca County Courts, personal desktop computers, personal laptop computers and all other forms of electronic communication equipment belonging to you, your employer, co-workers, friends, acquaintances, family members, experts, consulted and all other persons,
- (22) the e-mail plus attachments from Prosecutor Kenneth Egbert addressed to Commissioner Sauber and Nutter and dated January 24, 2007, wherein he stated “stay the course,”
- (23) the e-mail plus attachments from Magistrate Kathryn Hanson addressed to you and dated March 2, 2007 that discusses at length various issues regarding the courthouse, the e-mail plus attachments described in item (6) above that you forwarded to Commissioner David Sauber.

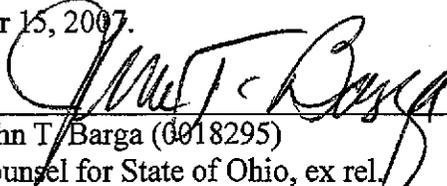
Related to Clerk Tanya Hemmer (“you”):

- (24) all e-mails plus attachments, and all other forms of electronic communications **sent by you** or at your instruction, in any manner, from January 1, 2006 through September 14, 2007, that relate in any manner to the Ohio historic 1884 Seneca County Courthouse or the 15 Year Space Needs Master Plan,
- (25) all e-mails plus attachments, and all other forms of electronic communications **received by you** or at your instruction, in any manner, from January 1, 2006 through

September 14, 2007, that relate in any manner to the Ohio historic 1884 Seneca County Courthouse or the 15 Year Space Needs Master Plan,

- (26) all e-mails plus attachments and all other forms of electronic communications, that were sent to other persons, but were copied to you or shared with you, from January 1, 2006 through September 14, 2007, that relate in any manner to the Ohio historic 1884 Seneca County Courthouse or the 15 Year Space Needs Master Plan,
- (27) you are instructed to search all computers to which you actually used to send or receive, or which were actually used by others, to send or to receive the items requested in Item (1), Item (2) and Item (3) above,
- (28) in an effort to further explain this request, the term "all computers" described in Item (4) above includes all computers at all places of employment, your office, your home, in the Seneca County Courts, personal desktop computers, personal laptop computers and all other forms of electronic communication equipment belonging to you, your employer, co-workers, friends, acquaintances, family members, experts, consulted and all other persons,
- (29) the e-mail plus attachments from Prosecutor Kenneth Egbert addressed to Commissioner Sauber and Nutter and dated January 24, 2007, wherein he stated "stay the course,"
- (30) the e-mail plus attachments from Magistrate Kathryn Hanson addressed to you and dated March 2, 2007 that discusses at length various issues regarding the courthouse,
- (31) the e-mail plus attachments described in item (6) above that you forwarded to Commissioner David Sauber.

You may comply with this request by producing the original specified items at, or mailing copies of the original items to Barga, Jones & Anderson, Ltd. c/o John T. Barga at 120 Jefferson Street, Tiffin, Ohio 44883 on or before October 15, 2007.



John T. Barga (6018295)
Counsel for State of Ohio, ex rel.
Nancy L. Cook, et al.

I have personally been responsible for or supervised the items being submitted in response to this Request for Production and Items.

Signature

Printed name

Title (if applicable)

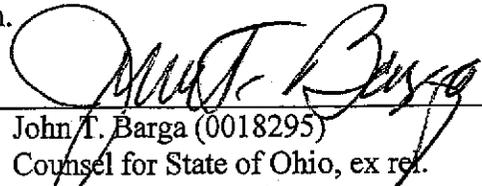
SWORN TO BEFORE ME and subscribed to in my presence this ____ day of _____, 2007.

Notary Public

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was forwarded by regular U.S. Mail and electronic mail on the 13th day of September, 2007 upon the following:

- Judge Charles S. Wittenberg, cwitt841@yahoo.com
- Kenneth Egbert, Jr., Seneca County Prosecuting Attorney, 71 S. Washington St., Suite E., Tiffin, OH 44883, kegbert@senecapros.org.
- Mark Landes, 250 East Broad Street, Suite 900, Columbus, Ohio 43215, marklandes@isaacbrant.com;
- Mark Troutman, 250 East Broad Street, Suite 900, Columbus, Ohio 43215, marktroutman@isaacbrant.com.



 John T. Barga (0018295)
 Counsel for State of Ohio, ex rel.
 Nancy L. Cook, et al.

IN THE SUPREME COURT OF OHIO

The State of Ohio, *ex rel.*
The Toledo Blade Co.,

Relator,

v.

Seneca County Board of Commissioners
111 Madison Street
Tiffin, OH 44883,

Respondents.

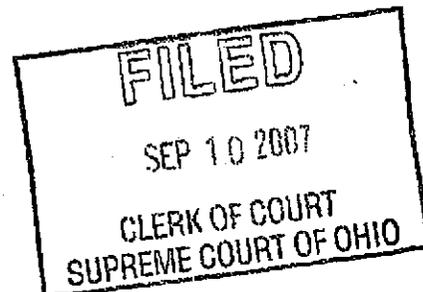
07 - 1694

Original Action in Mandamus

COMPLAINT FOR AN ORIGINAL WRIT OF MANDAMUS
AND ANCILLARY INJUNCTIVE RELIEF,
INCLUDING TEMPORARY RESTRAINING ORDER

Fritz Byers (0002337) (COUNSEL OF RECORD)
824 Spitzer Building
Toledo, Ohio 43604
Tele: 419-241-8013
Fax: 419-241-4215
Email: fbyers@accesstoledo.com

COUNSEL FOR RELATOR



IN THE SUPREME COURT OF OHIO

THE STATE OF OHIO, *ex rel.*
THE TOLEDO BLADE CO.
541 North Superior Street
Toledo, OH 43660,

Relator,

- vs -

Case Number: ..

SENECA COUNTY BOARD OF
COMMISSIONERS,
111 Madison Street
Tiffin, OH 44883

ORIGINAL ACTION IN
MANDAMUS
(Public Records)

Respondents.

COMPLAINT FOR AN ORIGINAL WRIT OF MANDAMUS
AND ANCILLARY INJUNCTIVE RELIEF,
INCLUDING TEMPORARY RESTRAINING ORDER

OVERVIEW

(1) This is an original action for a writ of mandamus, as well as for ancillary declaratory and injunctive relief, compelling the respondent, as the public office or persons responsible for certain public records, to comply with their obligations under the Ohio Public Records Act, R.C. 149.43(B) (the "Act"), and to remedy past failures to comply with those obligations. In violation of its obligations, the respondent Board has (a) failed to produce public records for inspection and copying, and (b) has failed to maintain public records in the manner required by the Act. As a consequence of that failure, the respondent

Board has failed to make public records available for inspection as required by the Act. This Court has jurisdiction of the action under Article IV, section 2, of the Constitution of Ohio, and under R.C. 149.43(C) and 2731.02.

(2) Consistent with the provisions of Chapter 305 of the Ohio Revised Code, the respondent Seneca County Board of Commissioners (the "Board") is responsible for conducting the official business of Seneca County. The laws of Ohio – in particular, the Ohio Public Records Act and the Ohio Open Meetings Act, R.C. 121.22 – mandate that this business be conducted openly in full public gaze.

(3) The Board has violated that mandate in its decision-making on a highly visible matter of acute public interest: the decision to destroy the historic Seneca County Courthouse and to replace it with a "modern" facility. This action does not challenge that decision; rather, it challenges the Board's violation of public-records law in connection with that decision. In particular, it challenges the Board's unlawful destruction of public records, and its failure to make records available for inspection.

(4) The missing records relate to, among other things, the Board's decision to destroy the Courthouse. Public records in the possession of Relator reflect certain aspects of the process by which that decision was made, including the conduct of deliberations, on the subject of destruction of the courthouse, by the Board other than in open meetings of the Board, in violation of the Open Meetings Act, R.C. 121.22.

(5) The doctrine of spoliation of evidence, long and repeatedly embraced by this Court, supports the inference that the destroyed records would likewise document open-meetings violations.

(6) Ohio's Open Meetings Act expressly provides that a formal action of any kind by a public body is invalid unless (a) the action itself was adopted at an open meeting and (b) all deliberations on that action were likewise conducted at an open meeting. R.C. 121.22(H).

(7) Respondent's public-records violations therefore require not only the writ of mandamus expressly authorized by R.C. 149.43.C, but also ancillary injunctive relief enjoining the respondents to comply with the Public Records Act, to take all available measures to retrieve the destroyed records, and, critically, enjoining the Respondents from destroying the Seneca County Courthouse or otherwise implementing any or all of the decisions relating to the destruction of the Courthouse until the Respondent Board has fully complied with the Public Records Act and the Open Meetings Act.

PARTIES

(8) Relator The Toledo Blade Co. ("The Blade") is an operating division of Block Communications, Inc., a corporation organized under the laws of the State of Ohio. The Blade is principally engaged in the publication of a newspaper of general circulation. In this enterprise, The Blade employs, among others, reporters and editors who act on behalf of the Blade and on behalf of the general public in gathering information by various means, including the inspection of public records, as a basis for publication of information that affects the public interest and informs the public about matters of public interest. Among

these reporters and editors are David Murray, Special Assignments Editor, and Steven Eder, Staff Writer.

(9) Respondent Seneca Board of County Commissioners is public body that exists and operates under the terms and conditions of Chapter 305 of the Ohio Revised Code. The Board is a "public office" as defined in and for purposes of the Act. R.C. 149.011(A).

BACKGROUND

(10) The City of Tiffin is the county-seat of Seneca County. The Board's offices and the county courthouse are in Tiffin.

(11) The Seneca County Courthouse was built in 1884. It was designed by architect Elijah E. Myers, one of that century's premiere designers of public buildings. Among other buildings, Myers designed state capitol buildings in Michigan, Texas, and Colorado. The Tiffin County courthouse is one of Myers's few Ohio works.

(12) On August 31, 2006, the Board approved, by a 3-0 vote, a Space Needs Master Plan that expressly directed the Board to pursue the destruction of the "1884 Courthouse." Since that time, the Board has taken numerous actions in pursuit of the Master Plan directive. On August 6, 2007, the Board voted, 2-1, to move ahead with a plan that calls for the Courthouse to be destroyed in Fall 2007.

VIOLATIONS OF THE PUBLIC RECORDS ACT

(13) In the course of covering the Board's discussions and decisions regarding the destruction of the courthouse, The Blade has requested to inspect and to copy specific records held by the Board. In particular, The Blade has sought all emails – received, sent,

and deleted – of the three Commissions, from January 1, 2006 to the present. In response, the Board, through counsel, has made certain emails available for inspection.

(14) The emails produced by the Board make clear that the Board has violated the Act by destroying or otherwise making unavailable emails that are public records under the Act, in violation of the Act and the Schedule for Records Retention and Disposition that the Seneca County Records Commission filed with the Ohio Historical Society.

(15) While proving the destruction of emails is in some ways like proving a negative, the records produced make clear that certain emails have been destroyed. Numerous examples exist. They include the following:

(A) On January 24, 2007, Seneca County Prosecutor Ken Egbert sent an email to the three commissioners, advising them about the courthouse and urging them to “stay the course.” It was addressed to Commissioners Sauber and Nutter. But in response to The Blade’s public-records request, the Board produced no emails from Nutter’s email inbox between January 1, 2007 and July 19, 2007.

(B) On March 2, 2007, Seneca County Juvenile Court Magistrate Kathryn Hanson sent an email to Commissioner Nutter, discussing at length various issues regarding the Courthouse. Nutter, in turn, forwarded the email to commissioner Sauber. But, again, in response to The Blade’s public-records request, the Board produced no emails from Nutter’s email inbox between January 1, 2007 and July 19, 2007.

(16) The Board produced no emails from Commissioner Nutter’s inbox from the period from January 1, 2007 through July 19, 2007. The Board produced 46 emails from

Nutter's inbox, all received after July 19, 2007. The Board withheld 35 emails from Nutter's account on the ground of attorney-client privilege. Nutter has admitted to destroying emails received between January 1, 2007 and July 19, 2007.

(17) The Board produced no emails from Commissioner Bridinger's inbox or sent-messages folder; it produced seven items from his deleted-messages folder. Bridinger has admitted to destroying all emails from his account, although he stated that he has recently begun saving all emails having to do with county business. (Bridinger was elected in 2006 and replaced former Commissioner Schock.)

(18) The Board produced 20 emails from Commissioner Sauber from 2006. One email was withheld on the ground of attorney-client privilege. There were substantial gaps between the dates of the emails produced for Sauber. For example, there were no emails between April 12, 2006 and June 23, 2006. In contrast, the Board produced 420 emails from Sauber's account in 2007.

(19) The Schedule of Records Retention and Disposition filed by Seneca County with the Ohio Historical Society provides that e-mail will be retained if it "has a significant Administrative, Fiscal, Legal, or Historic Value."

(20) The emails destroyed by the Board were destroyed in violation of the County's Schedule of Records Retention and Disposition, and so in violation of the Act.

(21) Emails reviewed by The Blade make clear that the commissioners used email communications to conduct deliberations on the subject of the destruction of the courthouse. For example, on August 8, 2006, before the August 31, 2006 vote to approve

the Space Needs Master Plan, the commissioners exchanged emails about the draft Master Plan. Commissioner Nutter wrote to Commissioners Sauber and Schock, asking them to review a draft of the study and "get with me by Monday [August 14] for any changes." In other words, let's deliberate before the public meeting.

(22) These emails fall within The Blade's public-records request, but were not produced by the County in response to that request. They were obtained, rather, from a third party. When pressed for an explanation as to why these emails were not produced by the Board, The Blade was informed the failure was "an oversight."

PUBLIC BENEFIT

(23) Under the Act, public records are to be made available for inspection and copying on the request of any person. The obligation of public offices and persons responsible for public records to make the records available on request does not depend on the importance of the reason for the request. In a mandamus action, however, the entitlement of the relator to an award of attorney fees may be affected by the degree of public benefit resulting from the issuance of a writ compelling the records' availability. In this action, as set forth, relator seeks an award of its attorney fees.

(24) The functioning of County government is inherently a matter of great and grave public significance. But in this instance, the public interest to be served by this mandamus action is particularly powerful. All institutions of government are public trusts, and historic buildings are uniquely so. A county courthouse is a singularly powerful symbol of

government; it is, as well, a symbol of the enduring history of a government committed to the rule of law and devoted to the idea that ours is a government of laws, not individuals.

(25) It is thus all the more important that decisions, made temporally by individuals, about a government's history should be subjected to the public scrutiny commanded by Ohio's public-records and open-meetings laws. Elected officials acting in good faith should have nothing to hide regarding their deliberations and decisions. And to ensure that principle, Ohio law mandates openness in deliberations and decisions through a well-harmonized pair of laws -- Public Records and Open Meetings -- that operate together to cement the crucial principles of transparency and public scrutiny.

(26) The Board has said publicly that the judiciary has no role in reviewing the Board's decision about the courthouse, that this is a matter of separation of powers. To be sure, the Board is entitled, under settled principles of constitutional governance, to make decisions falling lawfully within its purview. But settled rules of law, honored in the United States since the founding of the Republic, assign to the judiciary the crucial role of making sure that governments and the people who constitute them follow the established rules. This action seeks this Court's intervention, not to reverse the Board's decision on its merits, but to address the Board's knowing and intentional violation of the Public Records Act.

(27) It is, to be sure, alarming that this violation appears to have been undertaken intentionally for the purpose of destroying evidence of a related violation of Ohio's Open Meetings Act. In this context, the Board's invocation of "separation of powers" as a means of avoiding judicial scrutiny strikes a particularly hollow note.

(28) Indeed, in this case, issuance of the writ of mandamus and the accompanying ancillary relief sought will in truth enhance the proper functioning of government by vindicating the profound judgments the General Assembly and this Court have made about open government in Ohio.

(29) More fundamentally, issuance of a writ of mandamus in this case will subject the Board's deliberations and decision-making to healthy, indeed necessary public scrutiny. Either that scrutiny will give the public needed assurance that the Board's decisions about the Courthouse are prudent, lawful, and productive, or it will expose imprudence, incompetence, illegality, or dishonesty. In either event, the benefit to the public will be palpable.

PRAYER FOR RELIEF

Relator seeks the following relief:

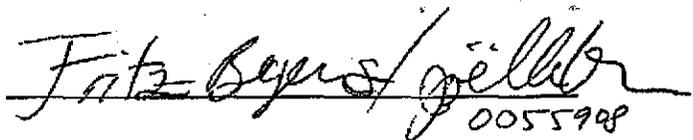
A. A peremptory writ of mandamus directing the respondent (i) to make responsive public records available to Relator promptly and without delay for inspection and copying, and to do so at all times in response to future requests; (ii) to take the necessary steps to recover the content of all requested records that have supposedly been deleted, and to report to this Court promptly as to the steps that have been taken and their efficacy; and (iii) to make each of the recovered emails promptly available to Relator for inspection and copying.

B. If this Court does not issue a peremptory writ of mandamus, then entry of an alternative writ commanding the Respondent to show cause why a final writ in the above terms should not issue.

C. In either case, entry of a temporary restraining order, prohibiting the respondent and all those in active concert or participation with it from doing any of the following during the pendency of this action: (1) acting to destroy, delete, despoil, remove, or in any way render inaccessible or less accessible or retrievable any electronic communications or electronic documents or physical or electronic copies or backup or archival copies thereof that refer to or concern in any way the county courthouse of Seneca County and that are in the possession, custody, or control of respondents or of any persons acting in concert with or at the direction of respondents; and (2) implementing any part of any resolutions, plans, or decisions adopted by the Board of Commissioners of Seneca County regarding the demolition, replacement, or renovation of the courthouse of Seneca County, including without limitation the solicitation or letting of bids or contracts for plans or for the implementation of plans.

D. In any event, an award to Relator of its costs of suit including its attorney fees.

E. And such other relief as is proper.

A handwritten signature in black ink, appearing to read "Fritz Byers" followed by a flourish. Below the signature, the number "0055998" is written in a smaller, less legible hand.

Fritz Byers (0002337)
824 Spitzer Building
Toledo, Ohio 43604
Phone: 419-241-8013
Fax: 419-241-4215
e-mail: fbyers@accesstoledo.com

Counsel for Relator

IN THE SUPREME COURT OF OHIO

The State of Ohio, *ex rel.*
The Toledo Blade Co.,

Relator,

v.

Seneca County Board of Commissioners,

Respondents.

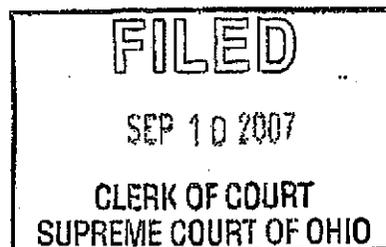
07 - 1694

Original Action in Mandamus

AFFIDAVIT OF STEVEN D. EDER

Fritz Byers (0002337) (COUNSEL OF RECORD)
824 Spitzer Building
Toledo, Ohio 43604
Tele: 419-241-8013
Fax: 419-241-4215
Email: fbyers@accesstoledo.com

COUNSEL FOR RELATOR



IN THE SUPREME COURT OF OHIO

THE STATE OF OHIO, ex rel.
THE TOLEDO BLADE CO.
541 North Superior Street
Toledo, OH 43660,

Relator,

- vs -

Case Number:

SENECA COUNTY BOARD OF
COMMISSIONERS
111 Madison Street
Tiffin, OH 44883

ORIGINAL ACTION IN
MANDAMUS
(Public Records)

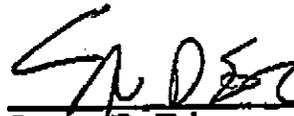
Respondent.

AFFIDAVIT OF STEVEN D. EDER

I, Steven D. Eder, being first duly sworn, hereby testify as follows:

1. I am over the age of eighteen and competent to testify on the basis of personal knowledge.
2. I have read the Complaint for Original Writ of Mandamus filed by The Toledo Blade Company in this action.
3. I have personal knowledge of the facts stated in that complaint, other than the historical facts relating to the design of the courthouse (which facts I have verified by independent research), and those facts are true to the best of my knowledge.

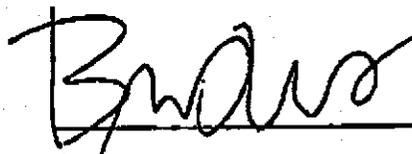
Affiant says nothing further.



Steven D. Eder

STATE OF OHIO)
) SS:
COUNTY OF LUCAS)

10th Sworn to and subscribed in my presence in Toledo, Lucas County, Ohio this
of September, 2007.



BRIAN D. VICENTE
Permanent Notary

IN THE SUPREME COURT OF OHIO

07-1694

The State of Ohio, *ex rel.*
The Toledo Blade Co.,

Relator,

Original Action in Mandamus

v.

Seneca County Board of Commissioners,

Respondents.

MEMORANDUM IN SUPPORT OF COMPLAINT FOR AN ORIGINAL
WRIT OF MANDAMUS AND ANCILLARY INJUNCTIVE RELIEF,
INCLUDING TEMPORARY RESTRAINING ORDER

Fritz Byers (0002337) (COUNSEL OF RECORD)
824 Spitzer Building
Toledo, Ohio 43604
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Fax: 419-241-4215
Email: fbyers@accesstoledo.com

COUNSEL FOR RELATOR

FILED
SEP 10 2007
CLERK OF COURT
SUPREME COURT OF OHIO

EXHIBIT
L

IN THE SUPREME COURT OF OHIO

THE STATE OF OHIO, *ex rel.*
THE TOLEDO BLADE CO.
541 North Superior Street
Toledo, OH 43660,

Relator,

- vs -

Case Number:

SENECA COUNTY BOARD OF
COMMISSIONERS
111 Madison Street
Tiffin, OH 44883

ORIGINAL ACTION IN
MANDAMUS
(Public Records)

Respondent.

MEMORANDUM IN SUPPORT OF
COMPLAINT FOR AN ORIGINAL WRIT OF MANDAMUS
AND ANCILLARY INJUNCTIVE RELIEF,
INCLUDING TEMPORARY RESTRAINING ORDER

Fritz Byers (0002337)
824 Spitzer Building
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e-mail: fbyers@accesstoledo.com

Counsel for Relator

MEMORANDUM

This is an action in mandamus to enforce the provisions of Ohio's Public Records Act, R.C. ch. 149 ("the Act"). Relator seeks a writ of mandamus directing Respondent forthwith to comply with the Act. Relator further seeks ancillary relief, including a temporary restraining order. The temporary injunctive relief is necessary to maintain the status quo and prevent irreparable harm to the public pending this Court's entry of a final judgment in this action.

As set forth in the Complaint (which is supported by the Affidavit of Steven D. Eder), relator seeks a writ compelling the respondent county commissioners of Seneca County to provide access to various electronic-mail communications regarding plans to demolish the Seneca County courthouse. Respondents have claimed that a large number of these communications have been deleted and are not retrievable. As set out in the complaint, the destruction of the e-mails is itself independently a violation of the Act, since the destruction was contrary to the records-retention policies of the county record commission and was accomplished without prior notice to the state auditor and the Ohio Historical Society. R.C. 149.351 & 149.38. Moreover, as has been repeatedly demonstrated, deleted e-mails are rarely totally expunged but frequently can be retrieved recovery experts.¹

¹ See, e.g., ABC News, "White House E-mails: Gone But Not Forgotten?" (April 12, 2007), available online at http://blogs.abcnews.com/theblotter/2007/04/white_house_ema.html.

In this case, the e-mails in question are of special importance because they are likely to demonstrate respondents' violation of the Open Meetings Act, R.C. § 121.22 ("the Meetings Act"), in their consideration and adoption of plans for the demolition of the Seneca County courthouse. Indeed, emails obtained by Relator from another source demonstrate such a violation. While respondents took the formal action authorizing the demolition at a public meeting, it is clear (and in any event clearly inferable) that the Respondent's deliberations on that action were conducted not in open public meetings but through email correspondence and meetings and discussions of two or more members of the Respondent Board that occurred other than in meetings

That inference is further supported by the inferences properly to be drawn from respondents' unlawful destruction of the e-mails. Indeed, as this Court has long held, the spoliation of evidence can properly raise, not merely an inference, but a *presumption* that the lost information is adverse to the spoliator. *Banks v. Canton Hardware Co.* (1952), 156 Ohio St. 453, 461.² If the decision to authorize demolition was – as it must be presumed to have been – the product of non-public deliberations, then the decision itself is invalid even though formally adopted at public meeting. R.C. 121.22(H).

Notwithstanding these considerations, respondents are proceeding as if the authorization was validly adopted. They are, in short, cynically employing their lawless

² In cases of intentional destruction, "the maxim, *omnia praesumuntur contra spoliatores* (all things are presumed against a wrongdoer)" applies, so that "the utmost inference logically possible should favor the party aggrieved, and that the contents of the documents destroyed should be presumed to be what the party aggrieved so alleges them." 156 Ohio St. at 461.

flouting of the Records Act as a vehicle for insulating from scrutiny and sanction their probable violations of the Meetings Act.³

In this proceeding, relator seeks to remedy the Records Act violations. In particular, relator seeks a writ and ancillary relief to obtain access to the supposedly deleted e-mails, prospective relief to prevent recurrence of respondents' lawlessness, and substitutionary relief to the extent that the e-mails are in fact non-recoverable. An essential part of any remedy, however, will be depriving respondents of the fruits of their Records-Act violations, including assurances that any Meetings Act violations disclosed by the missing e-mails are themselves remedied.

In the present motion for a temporary restraining order, relator seeks to hold the situation in the status quo in order to permit this Court to arrive at an orderly and lawful determination of Relator's right of access to the e-mails under the Records Act. In particular, Relator seeks a restraining order that would forbid any action by respondents to render any of their electronic communications or their backups inaccessible or even less accessible. In addition, the restraining order would prohibit Respondent Board from capitalizing on its behavior to date by holding the fruits of the misconduct – the demolition authorization – in abeyance until this Court has ruled and the deleted documents have been restored or accounted for.

³ Indeed, there has been a painfully clear demonstration of this. A group of local residents sued the Seneca Count Board of Commissioners in the Seneca County Court of Common Pleas, alleging a violation of the Open Meetings Act. The trial court rejected that claim, ruling that the plaintiffs had failed to adduce evidence of the violation. In other words, the plaintiffs lost in substantial part because the Board destroyed the evidence that would have supported the plaintiffs

If, at the conclusion of the case, the e-mails have been disclosed and no Meetings-Act violation has been shown, respondents will be free to proceed. If, on the other hand, and as is far more likely, the e-mails disclose violations of the Meetings Act (or if such violations are to be presumed due to the non-recoverable destruction of the e-mails), the authorization will be established as invalid pursuant to the Meetings Act.

Interlocutory relief by way of a restraining order is precisely the appropriate remedy in a situation such as this. Original actions in this Court are governed by the Civil Rules unless the Civil Rules are "clearly inapplicable." *Supreme Court Rules of Practice*, Rule 10 § 2. Civil Rule 65(A) provides for the issuance of temporary restraining orders upon a showing of irreparable injury to the moving party in the event that the order is not issued. Even in the absence of the rule, of course, this Court would have the inherent authority to preserve the status quo by such an order:

That the court has jurisdiction in equity, pending the final determination of the case, in the interest of justice, to make such interlocutory injunctive orders as may be necessary to preserve the rights of the parties in the subject-matter of the controversy, to the end that the final judgment of the court may not be defeated by the action of either party to the litigation in advance of the rendition of such judgment has long been the law ****

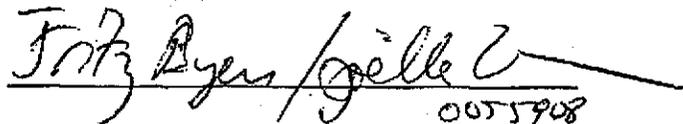
State ex rel. City of Cleveland v. Court of Appeals for Eighth Dist. (1922), 104 Ohio St. 96, 105.

In this case, a final judgment as to respondents' numerous Records-Act violations would not afford complete relief if respondents could capitalize on the fruits of the violations during this Court's deliberations. Respondents no doubt expect that the wheels of

claim. Of course, under long-settled rules of collateral estoppel and res judicata, Relator here is not bound by that result, nor does it preclude this action. But the outcome is instructive.

justice will grind sufficiently slowly that the product of their Meetings-Act violations will be a fait accompli before those violations can be fully remedied. If respondents are permitted to proceed, and the destruction of the Seneca County courthouse is permitted to occur, no subsequent judgment in this case or in any other can fully remedy the wrong. The loss to the public in that event will be undeniable, not only in terms of the financial loss from the expenditure of funds on an unlawful project, but far more deeply and irreparably from the loss of the historical and aesthetic value of the courthouse. Indeed, the destruction of a historic building presents perhaps the archetypal example of irreparable harm.

This Court must enter a temporary restraining order in order to assure that the relief ultimately given for respondents' Records-Act violations does not fall short of complete relief. The present motion must be granted.

Handwritten signature of Fritz Byers in cursive script, with a horizontal line underneath. To the right of the signature, the number "0055908" is handwritten.

Fritz Byers (0002337)
824 Spitzer Building
Toledo, Ohio 43604
Phone: 419-241-8013
Fax: 419-241-4215
e-mail: fbyers@accesstoledo.com

Counsel for Relator

COURT OF COMMON PLEAS, Seneca County, Ohio

State of Ohio ex rel.
Anonymous No. 1, et al.

Case No. 07 CV 0271

Plaintiff,

vs.

Seneca County Commissioners, et al.

Defendant,

SUBPOENA

Civil/Criminal
Duces Tecum
Grand Jury

SERVICE

Personal
Residential
Certified Mail

STATE OF OHIO

Seneca COUNTY, SS:

To the Sheriff of Seneca County, Ohio, Greetings:

You are hereby commanded to subpoena the person named below.

TO: Tanya Hemmer 111 Madison St.
NAME Tiffin, Ohio 44883
ADDRESS

You are hereby commanded to appear before the Honorable Judge Charles Wittenberg of the
Common Pleas Court at the Court House in said Seneca County, at Tiffin
Ohio, on the 9th day of July 2007 A.D., at 9:30 o'clock A. M. to testify as
a witness in a certain case pending in said court on behalf of the plaintiffs upon cross-examination

Plaintiff/Defendant-

YOU ARE FURTHER ORDERED TO BRING WITH YOU: all of the documents set forth on Exhibit -1
attached hereto.

I hereby certify this is a true copy of the
original pleading now on file in my office
this 19th day of Sept 2007.
Mary K. Ward, Clerk, Common Pleas Court
State of Ohio, County of Seneca, Tiffin, Ohio
by Mary K Ward Deputy Clerk.

FILED
COMMON PLEAS COURT
SENECA COUNTY, OHIO
2007 JUL - 3 PM 3:45
MARY K. WARD
CLERK

and not depart the Court without leave. And therein to fail not, under penalty of the law, and to have then and there this writ. Present this subpoena to the Clerk of Court upon your arrival and before you leave. You may be held in contempt of Court for failure to appear.

John T. Barga
John T. Barga Attorney for Plaintiff/Defendant

WITNESS my hand and seal of said Court this

3 day of July 2007
Mary K Ward
Clerk

SHERIFF USE ONLY
FEES

Service \$ _____ Type of Service:
Mileage \$ _____ PERSONAL - CINDY KELLER
TOTAL \$ _____ Date of Service

7/3/07 12:07pm

COURT OF COMMON PLEAS

Sheriff of John T. Barga County, Ohio SENECA COUNTY, OHIO

EXHIBIT
M

Pat Adams
Deputy Clerk

IN THE COURT OF COMMON PLEAS
SENECA COUNTY, OHIO

State of Ohio, ex rel.,
Jane Anonymous No. 1, et al.

Plaintiffs

vs.

Seneca County Board of
Commissioners, et al.

Defendants

* Case No. 07 CV 0271
* Judge Charles S. Wittenberg
* **Exhibit -1**
* **Subpoena Duces Tecum to**
* **Clerk of Seneca County Board**
* **Of Commissioners**
*

Items to be Produced

1. all invoices you have received since January 1, 2000 from expert consultants, retained by the Board of Commissioners, including but not limited to, the fields of law, accounting, demolition, EPA regulations, remediation, engineering, architecture, grant writing, federal tax credits, state tax credits and historical preservation programs related to the demolition or renovation of the Seneca County Courthouse;
2. all cost estimates you have received since January 1, 2002 for the demolition of the existing Seneca County Courthouse;
3. all cost estimates you have received since January 1, 2002 for the renovation of the existing Seneca County Courthouse;
4. all cost estimates you have received since January 1, 2002 for the construction of a new Seneca County Courthouse;
5. all reports, notes, memos, summaries and other written documents received by the Board of Commissioners, produced by all citizen groups formed to study the demolition, renovation or use of the Seneca County Courthouse since January 1, 2000;
6. the minutes of the February 27, 2007 Commissioners' meeting.
7. a copy of the **program** created and maintained for the effective management of the records of the Seneca County Board of Commissioners,
8. a copy of the **directives** for the active continuation of the records management program created and maintained by the Seneca County Board of Commissioners,
9. a copy of the **meeting minutes** of the **Seneca County Records Commission** for 2005, 2006, and 2007,

10. a copy of all **correspondence** between the Seneca County Board of Commissioners and the **Ohio Historical Society** regarding the Seneca County Courthouse from January 1, 2000 through the present day,
11. a copy of all **correspondence** between the Seneca County Board of Commissioners and the **Ohio Historical Site Preservation Advisory Board** regarding the Seneca County Courthouse from January 1, 2000 through the present day,
12. all **correspondence** sent or received by the Seneca County Board of Commissioners that relates in any way to "**qualified rehabilitation expenditures**" since January 1, 2006,
13. all **correspondence** sent or received by the Seneca County Board of Commissioners that relate in any way to "**rehabilitation tax credit certificate**" since January 1, 2006,
14. all **correspondence** sent or received by the Seneca County Board of Commissioners that relate in any way to the distinction between "**owner**" and "**certificate owner**" since January 1, 2006,
15. all **correspondence** sent or received by the Seneca County Board of Commissioners that relate in any way to "**State Historic Preservation Officer**" since January 1, 2006,
16. all **correspondence** sent or received by the Seneca County Board of Commissioners that relate in any way to "**State Director of Development**" since January 1, 2006,
17. all **correspondence** sent or received by the Seneca County Board of Commissioners that relate in any way to "**State Tax Commission**" since January 1, 2006,
18. Minutes of Public Meetings of the Board of Seneca County Commissions
 - a. November 26, 2001
 - b. December 18, 24 of 2001
 - c. May 6, 7, 8 of 2002
 - d. July 1, 2002
 - e. January 21, 22 of 2004
 - f. February 11, 2004
 - g. March 9, 2004
 - h. August 31, 2006
 - i. January 16, 21, 29 of 2007
 - j. February 1, 6 of 2007
 - k. May 7, 14, 31 of 2007
 - l. June 4, 7, 8 of 2007



Barga, Jones & Anderson, Ltd.

Attorneys and Counselors at Law
120 Jefferson St., Tiffin, Ohio 44883
Telephone: (419) 447-0507 · Telefax: (419) 447-1335

John T. Barga
bargalaw@rrohio.com

Susan M. Jones
smjbargalaw@rrohio.com

Eleanor J. Anderson
ebargalaw@rrohio.com

FAX

To:	Kenneth Egbert, Jr.	From:	John Barga
Fax:	443-7911	Pages:	4
Phone:		Date & Time:	7/3/07 2:35 p.m.
Re:	State of Ohio v. Board of Commissioners	CC:	
Sender:	Carolyn		

Subpoena – Tanya Hemmer

Exhibit-1
Subpoena Duces Tecum to
Clerk of Seneca County Board
of Commissioners

The information contained in this facsimile is confidential and may also be protected by the attorney-client privilege. The information is intended only for the use of the individual or entity to which it is addressed. Further, if you are not the addressee, please notify us immediately by calling us collect at (419) 447-0507. We will then advise you how we will retrieve this confidential transmission. Please do not disseminate or distribute this material to anyone. Thank you.

*If you experience any difficulties with this transmission,
please call (419) 447-0507.*

IN THE COURT OF COMMON PLEAS OF SENECA COUNTY, OHIO

STATE OF OHIO, EX REL.,
JANE ANONYMOUS NO. 1, et al.
Plaintiffs-Relators

v.

SENECA COUNTY BOARD OF COUNTY
COMMISSIONERS, et al.
Defendants-Respondents

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Case No. 07 CV 02

OPINION AND
JUDGMENT ENTRY

MAREK K. WARD
CLERK

2007 JUL -5 PM 1:20

FILED
COMMON PLEAS COURT
SENECA COUNTY, OHIO

This matter is before the Court on the motion of defendants-respondents [hereinafter defendants] to dismiss the complaint. Plaintiffs-relators [hereinafter plaintiffs] have filed a memorandum opposing the motion. Upon review of the arguments of counsel and the applicable law, the Court finds that the motion to be well taken and should be granted, with plaintiffs having a limited right to amend.

I. PROCEDURAL HISTORY

Plaintiffs filed their complaint on May 23, 2007, naming as defendants the Seneca County Board of Commissioners, the three County Commissioners and the clerk for the Board of Commissioners. The six plaintiffs in this case have not identified themselves and the caption set forth in the complaint describes the plaintiffs as Jane Anonymous No. 1, Jane Anonymous No. 2, Jane Anonymous No. 3, Jane Anonymous No. 4, John Anonymous No. 1, and John Anonymous No. 2. Further, each anonymous plaintiff lists his or her address as "Seneca County Resident Tiffin, Ohio 44883." At paragraphs one through six of the complaint, it is alleged that each anonymous plaintiff is a resident taxpayer and registered voter in Seneca County, Ohio. The complaint sets forth six causes of actions: (1) enforcement of a writ of mandamus; (2) violation of R.C. 149.43, Ohio's Public Records Act; (3) violation of R.C. 212.22, the Ohio Sunshine Law; (4) breach of fiduciary duty; (5) negligence; and (6) injunctive relief.

On June 19, 2007, the anonymous plaintiffs filed a motion for a temporary restraining order [TRO]

33 pg. 1537

as well as an affidavit of plaintiffs' counsel, seeking, *inter alia*, an order enjoining defendants from demolishing any part of the Seneca County Courthouse. The next day defendants filed a response to plaintiffs' motion for a TRO, and on June 22, 2007, defendants filed a supplemental memorandum in opposition to the motion for a TRO. On June 25, 2007, the Court held a telephone status conference with counsel for the parties and scheduled the matter for hearing on July 9, 2007, regarding a preliminary injunction. The Court did not issue a temporary restraining order. Subsequently, defendants, on June 25, filed their motion to dismiss.

II. ANALYSIS

Under Ohio law, when a party files a motion to dismiss for failure to state a claim, all the factual allegations of the complaint must be taken as true and all reasonable inferences must be drawn in favor of the nonmoving party. *Byrd v. Faber* (1991), 57 Ohio St.3d 56, 60. The Ohio Supreme Court, in *O'Brien v. Univ. Community Tenants Union, Inc.* (1975), 42 Ohio St.2d 242, 245, citing *Conley v. Gibson* (1957), 355 U.S. 41, stated: "In appraising the sufficiency of the complaint we follow, of course, the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."

In their motion to dismiss, defendants contend that the Ohio Rules of Civil Procedure mandate the names and addresses of all parties appear on the complaint and that an identifiable complainant is essential to maintain a legal action. Without meeting these requirements, the complaint fails to set forth a viable claim for relief. Plaintiffs respond that their identities are not the issue in this case and that defendants' legal authority is inapplicable to the instant matter.

The Court's analysis begins with the Ohio Rules of Civil Procedure. The Civil Rules provide no procedure or authority for anonymous plaintiffs. On the contrary, Civ.R. 10(A) provides in part: "In the complaint the title of the action shall include the names and addresses of all the parties * * *." Here, it is undisputed that the complaint in the instant cause fails to comply with Civ.R. 10(A). In *Group of Tenants From The Grandview Homes v. Mar-Len Realty, Inc.* (1974), 40 Ohio App. 2d 449, the Third District Court of Appeals held that such requirements were mandatory, stating: "It is urged that this is simply a matter of form. We disagree. The existence of an identifiable complainant is essential to the existence of

an action.” Id. at 450. The Court of Appeals further declared: “If there is no complainant, there is no complaint.”

The holding in *Group of Tenants* applies here as well. The six unknown individuals who have not included their names and addresses in the complaint herein are essentially the same as the group of unknown persons in *Group of Tenants*. Without knowledge of the persons who are seeking extraordinary relief in this case, the defendants as well as the Court are unable to determine who has responsibility for the case, whether there are potential issues of standing and whether any or all of the plaintiffs are the real parties in interest. (See Civ.R. 17(A), which provides that “Every action shall be prosecuted in the *name* of the real party in interest.” [Emphasis added.]

In a situation similar to the case *sub-judice*, the Common Pleas Court of Franklin County dismissed a complaint when the plaintiff was denominated as Jane Doe. *Doe v. John Doe, Publisher* (Feb. 8, 2006), 05 CVC-08-9029, unreported. In *Doe*, the court, relying on *Group of Tenants*, held that the anonymous plaintiff’s complaint failed to comply with Civ.R. 10(A) in that it did not identify her and did not state her address. Jane Doe’s complaint was dismissed without prejudice.

Plaintiffs allege in their memorandum that they are not seeking personal gain, but, instead, they are bringing this case as a special proceeding on behalf of all residents, voters and taxpayers of Seneca County in order to require defendants to comply with Ohio law, and, therefore, plaintiffs identities are unimportant. To be sure, each anonymous plaintiff has been captioned as “State ex rel.” and has sought to proceed for a writ of mandamus in the name of the state on relation of each Jane or John Anonymous requesting the writ. However, plaintiffs are also seeking monetary relief under their claim for negligence in an amount in excess of \$25,000 and thus are in fact requesting a financial recovery.

Regarding plaintiffs’ actions seeking mandamus, R.C. 2731.04 provides that an “Application for the writ of mandamus must be by petition, in the name of the state on the relation of the person applying, and verified by affidavit.” The Sixth District Court of Appeals has held that Civ.R. 10(A) governs mandamus actions and “that failure to bring a mandamus action in the name of the state on the relation of the person requesting the writ as required by R.C. 2731.04 (State ex rel. John Doe) is sufficient grounds to deny the application for the writ.” *Pogoloff v. Pogoloff* (May 1, 1998), Lucas App. No. L-98-1133, unreported; *Crenshaw v. State* (May 22, 1997), L-97-1155. Accordingly, Civ.R. 10(A) applies to the

anonymous plaintiffs' claim for a writ of mandamus, as well as the other causes of action, and plaintiffs are therefore mandated to comply with the rule.

Even though the Rules of Civil Procedure and case holdings have disfavored party anonymity, both federal and Ohio courts have tacitly approved the practice of bringing suits anonymously. See e.g. *Roe v. Wade* (1973), 410 U.S. 113; *Doe v. Archdiocese of Cincinnati*, 2006-Ohio-2626, 109 Ohio St.3d 491. Federal Courts have noted that plaintiffs suing anonymously is both rare and disfavored. *Femedeer v. Haun* (10th Cir. 2000), 227 F.3d 1244, 1246; *Doe v. Blue Cross & Blue Shield United* (7th Cir. 1997), 112 F.3d 869, 872. As observed by one court:

"It is clear that a practice has developed permitting individuals to sue under fictitious names where the issues involved are matters of a sensitive and highly personal nature. Characteristic of these are the birth control cases, the abortion cases, the welfare cases involving illegitimate children or children whose fathers have abandoned them, and at least one case involving homosexuality. In a case where economic interests were involved a court indicated some doubt about the right to proceed anonymously." *Doe v. Deschamps* (D. Mont. 1974), 64 F.R.D. 652, (Citations omitted.).

There is a strong public policy in favor of openness and public accessibility in our courts. Civ.R. 10(A), by providing that that the complaint shall give the names and addresses of all the parties, unequivocally affirms the principle that civil actions are public proceedings. "Identifying the parties to the proceeding is an important dimension of publicness. The people have a right to know who is using their courts." *Doe v. Blue Cross & Blue Shield United* (7th Cir. 1997), 112 F.3d 869, 872.

When faced with the question of anonymous plaintiffs, federal courts have balanced the privacy concerns of individuals against the presumption of openness of judicial proceedings. See, e.g. *Doe v. Stegall* (5th Cir. 1981), 653 F.2d 180. See also *Doe v. Rostker* (N.D. Cal. 1981), 89 F.R.D. 158, 162-163, where the court stated:

"A plaintiff should be permitted to proceed anonymously in cases where a substantial privacy interest is involved. The most compelling situations involve matters which are highly sensitive, such as social stigmatization, real danger of physical harm, or where the injury litigated against would occur as a result of the disclosure of the plaintiff's identity. That the plaintiff may suffer some embarrassment or economic harm is not enough. There must be a strong social interest in concealing the identity of the plaintiff. By balancing the need to maintain individual privacy rights against the right of the public and defendants to know all the facts surrounding judicial proceedings, this court has concluded that the plaintiffs' alleged privacy interests do not outweigh the public nature of the American courts of law."

The anonymous plaintiffs herein maintain that if their identities are revealed they will be subjected to

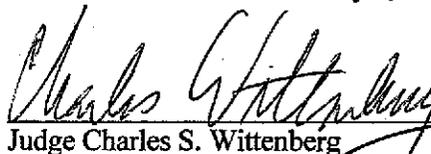
public ridicule and taunts. Plaintiffs have provided no authority to the Court to support such reasons as a basis for anonymity. Certainly, plaintiffs' action for legal and equitable remedies is contrary to the decision of the County Commissioners, but the Court cannot find that they have overcome the strong presumption in favor of openness in our judicial proceedings. In any event, it cannot be said that plaintiffs' attempt to prevent demolition of the Seneca County Courthouse is as exceedingly unpopular as they suggest. This Court is aware of media reports indicating vocal, strong and possibly widespread opposition to the decision of the County Commissioners. However, in an attempt to support their argument for anonymity, plaintiffs have attached a photocopy of one letter to the editor of an unnamed newspaper. While the author of the letter is clearly opposed to the actions of the plaintiffs, any possible "ridicule" in the letter is instead directed toward the plaintiffs' desire to remain unknown. Thus, the Court finds that plaintiffs have not set forth a compelling or substantial justification to proceed anonymously.

Because the spirit of the Civil Rules seeks resolution of cases upon their merits and not upon pleading deficiencies, *Patterson v. V&M Auto Body* (1992), 63 Ohio St.3d 573, 577, the Court will permit plaintiffs to amend the complaint. If the plaintiffs wish to continue to maintain this action, they will be granted a limited time to amend the complaint so that it complies with the mandates of Civ. R. 10(A). As the Court has set a hearing on the issue of a preliminary injunction for Monday, July 9, 2007, plaintiffs are given leave until Friday, July 6, 2007, to file an amended complaint. If plaintiffs fail to file an amended complaint by such date, this case will be dismissed without prejudice and the hearing shall not occur. This will provide to defendants and the Court adequate notice as to whether the hearing will go forward.

III. JUDGMENT ENTRY

It is therefore ORDERED that the motion of defendants to dismiss the complaint shall be GRANTED IN PART.

It is ORDERED that plaintiffs' complaint shall be dismissed without prejudice on July 6, 2007 UNLESS plaintiffs file an amended complaint no later than 12:00 NOON on July 6, 2007.


Judge Charles S. Wittenberg

FILED
COMMON PLEAS COURT
SENECA COUNTY, OHIO
2007 JUL -5 PM 1:20
MARTIN WARD
CLERK

COURT OF COMMON PLEAS, Seneca County, Ohio

State of Ohio, ex rel.
Nancy L. Cook, et al.

Case No. 07 CV 0271

Plaintiff,

SUBPOENA

vs.

Civil/Criminal
Duces Tecum
Grand Jury

Seneca County Commissioners

Defendant,

SERVICE

Personal
Residential
Certified Mail

STATE OF OHIO

Seneca COUNTY, SS:

To the Sheriff of Seneca County, Ohio, Greetings:

You are hereby commanded to subpoena the person named below.

TO: Cindy Keller 111 Madison Street
NAME Tiffin, Ohio 44883
ADDRESS

You are hereby commanded to appear before the Honorable Judge Charles Wittenberg of the
Common Pleas Court at the Court House in said Seneca County, at Tiffin
Ohio, on the 25th day of July 2007 A.D., at 9:30 o'clock A.M. to testify as
a witness in a certain case pending in said court on behalf of the plaintiffs upon cross-examination
Plaintiff/Defendant-

YOU ARE FURTHER ORDERED TO BRING WITH YOU:

All of the items set forth on Exhibit -1 attached hereto.

FILED
COMMON PLEAS COURT
SENECA COUNTY, OHIO
2007 JUL 17 PM 3:59

MARY K. WARD
CLERK

I hereby certify this is a true copy of the
original pleading now on file in my office
this 19th day of Sept. 2007.
Mary K. Ward, Clerk, Common Pleas Court
State of Ohio, County of Seneca Tiffin, Ohio

and not depart the Court without leave. And therein to fail not, under penalty of the law, and to have them hold me to this writ. Pre-
sent this subpoena to the Clerk of Court upon your arrival and before you leave, you may be held in contempt of Court for failure to
appear.

John T. Barga Attorney for Plaintiff/Defendant

WITNESS my hand and seal of said Court this

17th day of July 2007
Mary K. Ward
Clerk

SHERIFF USE ONLY
FEES

Service \$ _____ Type of Service: _____
Mileage \$ _____ PERSONAL - TANYA
TOTAL \$ _____ Date of Service

7/17/07 3:25pm COURT OF COMMON PLEAS

Sheriff of John T. Barga

EXHIBIT
N

Mary K. Ward
Deputy Clerk

**IN THE COURT OF COMMON PLEAS
SENECA COUNTY, OHIO**

State of Ohio, ex rel.,
Nancy L. Cook, et al.

Plaintiffs

vs.

Seneca County Board of
Commissioners, et al.

Defendants

* Case No. 07 CV 0271
* Judge Charles S. Wittenberg
*
* **Cindy Keller Subpoena**
* **Exhibit -1**
*
*

-
1. all public notices given by the Board of Seneca County Commissioners for the public meeting conducted on August 31, 2006,
 2. all e-mail or electronic messages sent or received within the office of the Board of Seneca County Commissioners on Seneca County computers, prior to the August 31, 2007 public meeting that relate in any manner to the 15 Year Plan for Seneca County, developed by the three (3) Commissioners and written by Commissioner Ben Nutter,
 3. a paper copy of the August 31, 2006 minutes of the Board of Seneca County Commissioners' public meeting duly approved and signed by the Board at the next following public meeting of the Board,
 4. an audio/video copy of the August 31, 2006 public meeting of the Board of Seneca County Commissioners,
 5. all public notices given by the Board of Seneca County Commissioners for the public meeting conducted on June 25, 2007,
 6. all e-mail or electronic messages sent or received within the office of the Board of Seneca County Commissioners on Seneca County computers, prior to the June 25, 2007 public

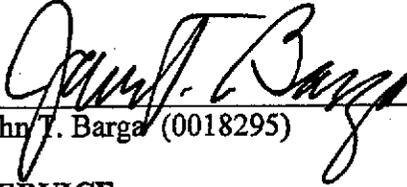
meeting that relate in any manner to the decision made at that meeting to demolish the Seneca County Courthouse,

7. a paper copy of the June 25, 2007 minutes of the Board of Seneca County Commissioners public meeting, duly approved and signed by the Board at the next following public meeting,

8. a copy of all records provided to Mary C. Ranker in response to the directive set forth in the October 25, 2005 Writ of Mandamus issued by this Court,

9. the General Index for the minutes of the meetings of the Board of Seneca County Commissioners as Ordered by this Court on October 25, 2005 as part of the Writ of Mandamus compelling the Board of Seneca County Commissioners to perform certain mandatory duties.

Respectfully submitted,



John T. Barga (0018295)

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was served by electronically by e-mail on July 17, 2007 upon:

Kenneth Egbert, Jr., Seneca County Prosecuting Attorney, 71 S. Washington St., Suite E.,
Tiffin, OH 44883, kegbert@senecapros.org.

Mark Landes, 250 East Broad Street, Suite 900, Columbus, Ohio 43215,
marklandes@isaacbrant.com;

Mark Troutman, 250 East Broad Street, Suite 900, Columbus, Ohio 43215,
marktroutman@isaacbrant.com.



John T. Barga (0018295)
Counsel for Plaintiffs

COURT OF COMMON PLEAS, Seneca County, Ohio

State of Ohio, ex rel.
Nancy L. Cook, et al.

Case No. 07 CV 0271

Plaintiff,

SUBPOENA

vs.
Seneca County Board of County
Commissioners, et al.

Civil/Criminal-
Duces Tecum
Grand Jury

Defendant,

SERVICE

STATE OF OHIO

Personal
Residential
Certified Mail

Seneca COUNTY, SS:

To the Sheriff of Seneca County, Ohio, Greetings:

You are hereby commanded to subpoena the person named below.

TO: Commissioner Ben Nutter 111 Madison St.
NAME Tiffin, OH 44883
ADDRESS

You are hereby commanded to appear before the Honorable Judge Wittenberg of the
Common Pleas Court at the Court House in said Seneca County, at Tiffin,
Ohio, on the 18th day of September A.D., 2007 at 11:30'clock A.M. to testify as
a witness in a certain case pending in said court on behalf of the Plaintiff on cross-examination.
Plaintiff/Defendant

YOU ARE FURTHER ORDERED TO BRING WITH YOU:

All of the items and documents described on Exhibit-1
attached hereto.

FILED
COMMON PLEAS COURT
SENeca COUNTY, OHIO
2007 SEP 13 PM 3:24
MARY K. WARD
CLERK

I hereby certify this is a true copy of the
original pleading now on file in my office
this 19th day of Sept 2007
Mary K. Ward, Clerk, Common Pleas Court
State of Ohio, County of Seneca, Tiffin, Ohio
by Mary K. Ward Deputy Clerk.

and not depart the Court without leave. And therein to fail not, under penalty of the law, and to have then and there this writ. Pre-
sent this subpoena to the Clerk of Court upon your arrival and before you leave. You may be held in contempt of Court for failure to
appear.

John T. Barga Attorney for Plaintiff/Defendant

WITNESS my hand and seal of said Court this

13th day of September 2007
Mary K. Ward
Clerk

SHERIFF USE ONLY
FEES

Service \$ _____ Type of Service:
Mileage \$ _____ OFFICE/TANVA
TOTAL \$ _____ Date of Service

9/13/07 @ 3:00pm. COURT OF COMMON PLEAS

Sheriff of John T. Barga

EXHIBIT
0

A COUNTY, OHIO
Mary K. Ward
Deputy Clerk

Commissioner Ben Nutter

Subpoena Exhibit 1

- (1) all e-mails plus attachments, and all other forms of electronic communications **sent by you** or at your instruction, in any manner, from January 1, 2006 through September 14, 2007, that relate in any manner to the Ohio historic 1884 Seneca County Courthouse or the 15 Year Space Needs Master Plan,
- (2) all e-mails plus attachments, and all other forms of electronic communications **received by you** or at your instruction, in any manner, from January 1, 2006 through September 14, 2007, that relate in any manner to the Ohio historic 1884 Seneca County Courthouse or the 15 Year Space Needs Master Plan,
- (3) all e-mails plus attachments and all other forms of electronic communications, that were sent to other persons, but were copied to you or shared with you, from January 1, 2006 through September 14, 2007, that relate in any manner to the Ohio historic 1884 Seneca County Courthouse or the 15 Year Space Needs Master Plan,
- (4) you are instructed to search all computers to which you actually used to send or receive, or which were actually used by others, to send or to receive the items requested in Item (1), Item (2) and Item (3) above,
- (5) in an effort to further explain this request, the term "all computers" described in Item (4) above includes all computers at all places of employment, your office, your home, in the Seneca County Courts, personal desktop computers, personal laptop computers and all other forms of electronic communication equipment belonging to you, your employer, co-workers, friends, acquaintances, family members, experts, consulted and all other persons,
- (6) the e-mail plus attachments from Prosecutor Kenneth Egbert addressed to Commissioner Sauber and Nutter and dated January 24, 2007, wherein he stated "stay the course,"
- (7) the e-mail plus attachments from Magistrate Kathryn Hanson addressed to you and dated March 2, 2007 that discusses at length various issues regarding the courthouse,
- (8) the e-mail plus attachments described in item (6) above that you forwarded to Commissioner David Sauber.

COURT OF COMMON PLEAS, Seneca County, Ohio

State of Ohio, ex rel.
Nancy L. Cook, et al.

Case No. 07 CV 0271

Plaintiff,

SUBPOENA

vs.
Seneca County Board of County
Commissioners, et al.

Civil/Criminal
Duces Tecum
Grand Jury

Defendant.

SERVICE

Personal
Residential
Certified Mail

STATE OF OHIO

Seneca COUNTY, SS:

To the Sheriff of Seneca County, Ohio, Greetings:

You are hereby commanded to subpoena the person named below.

TO: Commissioner Dave Sauber
NAME

111 Madison St.

Tiffin, OH 44883

ADDRESS

You are hereby commanded to appear before the Honorable Judge Wittenberg of the
Common Pleas Court at the Court House in said Seneca County, at Tiffin
Ohio, on the 18th day of September A.D., 2007 at 11:30 o'clock A.M. to testify as
a witness in a certain case pending in said court on behalf of the Plaintiff on cross-examination.
Plaintiff/Defendant

YOU ARE FURTHER ORDERED TO BRING WITH YOU:

All of the items and documents described on Exhibit-1 attached hereto.

FILED
COMMON PLEAS COURT
SENECA COUNTY, OHIO
2007 SEP 13 PM 3:22
MARY K. WARD
CLERK

I hereby certify this is a true copy of the
original pleading now on file in my office
this 19th day of Sept 2007.

Mary K. Ward, Clerk, Common Pleas Court
State of Ohio, County of Seneca Tiffin, Ohio

and not depart the Court without leave. And therein to fail not, under penalty of my law, and to have them and there this writ. Present this subpoena to the Clerk of Court upon your arrival and before you leave. You may be held in contempt of Court for failure to appear.

John T. Barga Attorney for Plaintiff/Defendant

WITNESS my hand and seal of said Court this

13th day of September 2007

Mary K. Ward

Clerk

SHERIFF USE ONLY
FEES

Service \$ _____ Type of Service: _____

Mileage \$ _____ OFFICE/TANYA

TOTAL \$ _____ Date of Service

9/13/07 @3:00p.M.

COURT OF COMMON PLEAS

SENECA COUNTY, OHIO

Sheriff of _____ County, Ohio

Sheriff

Deputy

John T. Barga

Mary K. Ward
Deputy Clerk

Commissioner David Sauber

Subpoena Exhibit 1

- (1) all e-mails plus attachments, and all other forms of electronic communications **sent by you** or at your instruction, in any manner, from January 1, 2006 through September 14, 2007, that relate in any manner to the Ohio historic 1884 Seneca County Courthouse or the 15 Year Space Needs Master Plan,
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- (4) you are instructed to search all computers to which you actually used to send or receive, or which were actually used by others, to send or to receive the items requested in Item (1), Item (2) and Item (3) above,
- (5) in an effort to further explain this request, the term "all computers" described in Item (4) above includes all computers at all places of employment, your office, your home, in the Seneca County Courts, personal desktop computers, personal laptop computers and all other forms of electronic communication equipment belonging to you, your employer, co-workers, friends, acquaintances, family members, experts, consulted and all other persons,
- (6) the e-mail plus attachments from Prosecutor Kenneth Egbert addressed to Commissioner Sauber and Nutter and dated January 24, 2007, wherein he stated "stay the course,"
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- (8) the e-mail plus attachments described in item (6) above that you received from Commissioner Ben Nutter.

COURT OF COMMON PLEAS, Seneca County, Ohio

State of Ohio, ex rel.
Nancy L. Cook, et al.

Case No. 07 CV 0271

Plaintiff,

SUBPOENA

vs.

Civil/Criminal
Duces Tecum
Grand Jury

Seneca County Board of County
Commissioners, et al.

Defendant,

SERVICE

Personal
Residential
Certified Mail

STATE OF OHIO

Seneca COUNTY, SS:

To the Sheriff of Seneca County, Ohio, Greetings:

You are hereby commanded to subpoena the person named below.

TO: Lucinda "Cindy" Keller 111 Madison St.
NAME Tiffin, OH 44883
ADDRESS

You are hereby commanded to appear before the Honorable Judge Wittenberg of the
Common Pleas Court at the Court House in said Seneca County, at Tiffin
Ohio, on the 18th day of September A.D., 2007 at 12:20 o'clock P.M. to testify as
a witness in a certain case pending in said court on behalf of the Plaintiff on cross-examination
Plaintiff/Defendant

YOU ARE FURTHER ORDERED TO BRING WITH YOU:

All of the items and documents described on Exhibit-1 attached hereto.

FILED
COMMON PLEAS COURT
SENECA COUNTY, OHIO
2007 SEP 13 PM 3:24
MAY 10 11 AM '07
CLERK

I hereby certify this is a true copy of the
original pleading now on file in my office
this 19th day of Sept 2007.

Mary K. Ward, Clerk, Common Pleas Court

State of Ohio, County of Seneca, and therein this writ. Pre-
sent this subpoena to the Clerk of Court upon your arrival and before you leave. You may be held in contempt of court for failure to
appear.

John T. Barga Attorney for Plaintiff/Defendant

WITNESS my hand and seal of said Court this

13th day of September 2007

Mary K. Ward

Clerk

SHERIFF USE ONLY FEES

Service \$ _____ Type of Service:
Mileage \$ _____ OFFICE / TANTRA
TOTAL \$ _____ Date of Service
9/13/07 @ 3:00 p.m.

COURT OF COMMON PLEAS

SENECA COUNTY, OHIO

Sheriff of _____ County, Ohio

John T. Barga Sheriff

Deputy

Mary K. Ward
Deputy Clerk

County Administrator Lucida Keller

Subpoena Exhibit 1

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- (8) the e-mail plus attachments described in item (6) above that you forwarded to Commissioner David Sauber.

COURT OF COMMON PLEAS, Seneca County, Ohio

State of Ohio, ex rel.

Nancy L. Cook, et al.

Plaintiff,

Case No. 07 CV 0271

SUBPOENA

Seneca County Board^{of} of County Commissioners, et al.

Defendant,

Civil/Criminal
Duces Tecum
Grand Jury

SERVICE

Personal
Residential
Certified Mail

STATE OF OHIO

Seneca COUNTY, SS:

To the Sheriff of Seneca County, Ohio, Greetings:

You are hereby commanded to subpoena the person named below.

TO: Tanya Hemmer 111 Madison St.
NAME Tiffin, OH 44883
ADDRESS

You are hereby commanded to appear before the Honorable Judge Wittenberg of the Common Pleas Court at the Court House in said Seneca County, at Tiffin Ohio, on the 18th day of September A.D., 2007 at 12:30 o'clock P.M. to testify as a witness in a certain case pending in said court on behalf of the Plaintiff on cross-examination.
Plaintiff/Defendant

YOU ARE FURTHER ORDERED TO BRING WITH YOU:

All of the items and documents described on Exhibit-1 attached hereto.

I hereby certify this is a true copy of the original pleading now on file in my office this 19th day of Sept 20, 07.
Mary K. Ward, Clerk, Common Pleas Court
State of Ohio, County of Seneca, Tiffin, Ohio

FILED
COMMON PLEAS COURT
SENECA COUNTY, OHIO
2007 SEP 13 PM 3:24
MARILENE WARD
CLERK

and not depart the Court without leave. And therein to fail not, under penalty of the law, and to obey this writ. Present this subpoena to the Clerk of Court upon your arrival and before you leave. You may be held in contempt of Court for failure to appear.

John T. Barga Attorney for Plaintiff/Defendant

SHERIFF USE ONLY FEES

Service \$ _____ Type of Service: PERSONAL
Mileage \$ _____
TOTAL \$ _____ Date of Service 9/13/07 @ 3:00p.m.

WITNESS my hand and seal of said Court this

13th day of September 2007

Mary K. Ward

Clerk

COURT OF COMMON PLEAS

Sheriff of _____ County, Ohio

SENECA COUNTY, OHIO

John T. Barga Sheriff

Deputy

Mary K. Ward
Deputy Clerk

Clerk Tanya Hemmer

Subpoena Exhibit 1

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- (3) all e-mails plus attachments and all other forms of electronic communications, that were sent to other persons, but were copied to you or shared with you, from January 1, 2006 through September 14, 2007, that relate in any manner to the Ohio historic 1884 Seneca County Courthouse or the 15 Year Space Needs Master Plan,
- (4) you are instructed to search all computers to which you actually used to send or receive, or which were actually used by others, to send or to receive the items requested in Item (1), Item (2) and Item (3) above,
- (5) in an effort to further explain this request, the term "all computers" described in Item (4) above includes all computers at all places of employment, your office, your home, in the Seneca County Courts, personal desktop computers, personal laptop computers and all other forms of electronic communication equipment belonging to you, your employer, co-workers, friends, acquaintances, family members, experts, consulted and all other persons,
- (6) the e-mail plus attachments from Prosecutor Kenneth Egbert addressed to Commissioner Sauber and Nutter and dated January 24, 2007, wherein he stated "stay the course,"
- (7) the e-mail plus attachments from Magistrate Kathryn Hanson addressed to you and dated March 2, 2007 that discusses at length various issues regarding the courthouse,
- (8) the e-mail plus attachments described in item (6) above that you forwarded to Commissioner David Sauber.

COURT OF COMMON PLEAS, Seneca County, Ohio

State of Ohio, ex rel.

Nancy L. Cook, et al.

Plaintiff,

Case No. 07 CV 0271

SUBPOENA

vs.
Seneca County Board of County Commissioners, et al.

Defendant.

Civil/Criminal
Duces Tecum
Grand Jury

SERVICE

Personal
Residential
Certified Mail

STATE OF OHIO

Seneca

COUNTY, SS:

To the Sheriff of Seneca County, Ohio, Greetings:

You are hereby commanded to subpoena the person named below.

TO: Kathryn Hanson
NAME

108 Jefferson St.

Tiffin, OH 44883

ADDRESS

You are hereby commanded to appear before the Honorable Judge Wittenberg of the Common Pleas Court at the Court House in said Seneca County, at Tiffin Ohio, on the 18th day of September A.D., 2007 at 11:50 o'clock A.M. to testify as a witness in a certain case pending in said court on behalf of the Plaintiff on cross-examination.
Plaintiff/Defendant

YOU ARE FURTHER ORDERED TO BRING WITH YOU:

All of the items and documents described on Exhibit-1 attached hereto.

I hereby certify this is a true copy of the original pleading now on file in my office this 19th day of Sept 2007.
Mary K. Ward, Clerk, Common Pleas Court
State of Ohio, County of Seneca, Tiffin, Ohio
by Mary K Ward Deputy Clerk.

FILED
COMMON PLEAS COURT
SENECA COUNTY, OHIO
2007 SEP 13 PM 1:36
MARY K. WARD
CLERK

and not depart the Court without leave. And therein to fail not, under penalty of the law, and to have then and there this writ. Present this subpoena to the Clerk of Court upon your arrival and before you leave. You may be held in contempt of Court for failure to appear.

[Signature]
Attorney for Plaintiff/Defendant

WITNESS my hand and seal of said Court this

13th day of September 2007

Mary K Ward

Clerk

COURT OF COMMON PLEAS

SENECA COUNTY, OHIO

[Signature]
Deputy Clerk

SHERIFF USE ONLY
FEES

Service \$ _____ Type of Service: _____

Mileage \$ _____

TOTAL \$ _____ Date of Service _____

Sheriff of _____ County, Ohio

Sheriff

Deputy

COURT OF COMMON PLEAS, Seneca County, Ohio

State of Ohio, ex rel.
Nancy L. Cook, et al.

Case No. 07 CV 0271

Plaintiff,

SUBPOENA

vs.
Seneca County Board of County
Commissioners, et al.

Civil/Criminal
Duces Tecum
Grand Jury

Defendant,

SERVICE

STATE OF OHIO

Personal
Residential
Certified Mail

Seneca COUNTY, SS:

To the Sheriff of Seneca County, Ohio, Greetings:

You are hereby commanded to subpoena the person named below.

TO: Tiffin Fire Chief William Ennis, Jr. 53 S. Monroe St.
NAME Tiffin, OH 44883
ADDRESS

You are hereby commanded to appear before the Honorable Judge Wittenberg of the
Common Pleas Court at the Court House in said Seneca County, at Tiffin
Ohio, on the 18th day of September A.D., 2007 at 12:45 o'clock P.M. to testify as
a witness in a certain case pending in said court on behalf of the Plaintiff on cross-examination.
Plaintiff/Defendant

YOU ARE FURTHER ORDERED TO BRING WITH YOU:

All of the items and documents described on Exhibit-1 attached hereto.

I hereby certify this is a true copy of the original pleading now on file in my office this 19th day of Sept 2007.
Mary K. Ward, Clerk, Common Pleas Court
State of Ohio, County of Seneca, Tiffin, Ohio
by Mary K. Ward Deputy Clerk.

FILED
COMMON PLEAS COURT
SENECA COUNTY, OHIO
2007 SEP 13 PM 3:24
MARY K. WARD
CLERK

and not depart the Court without leave. And therein to fail not, under penalty of the law, and to have then and there this writ. Present this subpoena to the Clerk of Court upon your arrival and before you leave. You may be held in contempt of Court for failure to appear.

John T. Barga Attorney for Plaintiff/Defendant

SHERIFF USE ONLY
FEES

Service \$ _____ Type of Service: PERSONAL
Mileage \$ _____
TOTAL \$ _____ Date of Service 9/13/07 @ 3:10p.m.

WITNESS my hand and seal of said Court this
13th day of September 2007
Mary K. Ward
Clerk

COURT OF COMMON PLEAS

SENECA COUNTY, OHIO

Sheriff of John T. Barga County, Ohio
Sheriff
Deputy

Mary K. Ward
Deputy Clerk

Tiffin Fire Chief William Ennis, Jr.

Subpoena Exhibit 1

- (1) all e-mails plus attachments, and all other forms of electronic communications **sent from** the Tiffin Fire Department computers in any manner, from January 1, 2006 through September 14, 2007, that relate in any manner to the Ohio historic 1884 Seneca County Courthouse or the 15 Year Space Needs Master Plan,
- (2) all e-mails plus attachments, and all other forms of electronic communications **received on** the Tiffin Fire Department computers in any manner, from January 1, 2006 through September 14, 2007, that relate in any manner to the Ohio historic 1884 Seneca County Courthouse or the 15 Year Space Needs Master Plan,
- (3) all e-mails plus attachments and all other forms of electronic communications, that were sent to other persons, but were copied to Ben Nutter, from January 1, 2006 through September 14, 2007, that relate in any manner to the Ohio historic 1884 Seneca County Courthouse or the 15 Year Space Needs Master Plan,
- (4) you are instructed to search all computers to which Ben Nutter had access to at the Tiffin Fire Department, to send or to receive the items requested in Item (1), Item (2) and Item (3) above,
- (5) in an effort to further explain this request, the term "all computers" described in Item (4) above includes all computers and all other forms of electronic communication equipment owned by, leased by or in the possession of the Tiffin Fire Department.

COURT OF COMMON PLEAS, Seneca County, Ohio

State of Ohio, ex rel.

Nancy L. Cook, et al.

Case No. 07 CV 0271

Plaintiff,

SUBPOENA

Seneca County Board ^{vs} of County Commissioners, et al.

Civil/Criminal
Duces Tecum
Grand Jury

Defendant,

SERVICE

STATE OF OHIO

Personal
Residential
Certified Mail

Seneca COUNTY, SS:

To the Sheriff of Seneca County, Ohio, Greetings:

You are hereby commanded to subpoena the person named below.

TO: Prosecutor Kenneth Egbert 71 S. Washington St., Suite 1204
NAME Tiffin, OH 44883
ADDRESS

You are hereby commanded to appear before the Honorable Judge Wittenberg of the Common Pleas Court at the Court House in said Seneca County, at Tiffin Ohio, on the 18th day of September A.D., 2007 at 12:01 o'clock P.M. to testify as a witness in a certain case pending in said court on behalf of the Plaintiff on cross-examination.
Plaintiff/Defendant

YOU ARE FURTHER ORDERED TO BRING WITH YOU:

All of the items and documents described on Exhibit-1 attached hereto

FILED
COMMON PLEAS COURT
SENECA COUNTY, OHIO
2007 SEP 13 PM 3:24

I hereby certify this is a true copy of the original pleading now on file in my office this 19th day of Sept 2007.
Mary K. Ward, Clerk, Common Pleas Court
State of Ohio, County of Seneca, Tiffin, Ohio
by Mary K. Ward Deputy Clerk.

and not depart the Court without leave. And therein to fail not, under penalty of the law, and to have then and there this writ. Present this subpoena to the Clerk of Court upon your arrival and before you leave. You may be held in contempt of Court for failure to appear.

John T. Barga Attorney for Plaintiff/Defendant

SHERIFF USE ONLY
FEES

Service \$ _____ Type of Service: _____

Mileage \$ _____ OFFICE

TOTAL \$ _____ Date of Service

9/13/07 @ 3:15 p.m.

WITNESS my hand and seal of said Court this

13th day of September, 2007

Mary K. Ward

Clerk

Sheriff of _____ County, Ohio

COURT OF COMMON PLEAS

SENECA COUNTY, OHIO

John T. Barga Sheriff

Mary K. Ward Deputy Clerk

Prosecutor Kenneth Egbert

Subpoena Exhibit 1

- (1) all e-mails plus attachments, and all other forms of electronic communications **sent by you** or at your instruction, in any manner, from January 1, 2006 through September 14, 2007, that relate in any manner to the Ohio historic 1884 Seneca County Courthouse or the 15 Year Space Needs Master Plan,
- (2) all e-mails plus attachments, and all other forms of electronic communications **received by you** or at your instruction, in any manner, from January 1, 2006 through September 14, 2007, that relate in any manner to the Ohio historic 1884 Seneca County Courthouse or the 15 Year Space Needs Master Plan,
- (3) all e-mails plus attachments and all other forms of electronic communications, that were sent to other persons, but were copied to you or shared with you, from January 1, 2006 through September 14, 2007, that relate in any manner to the Ohio historic 1884 Seneca County Courthouse or the 15 Year Space Needs Master Plan,
- (4) you are instructed to search all computers to which you actually used to send or receive, or which were actually used by others, to send or to receive the items requested in Item (1), Item (2) and Item (3) above,
- (5) in an effort to further explain this request, the term "all computers" described in Item (4) above includes all computers at all places of employment, your office, your home, in the Seneca County Courts, personal desktop computers, personal laptop computers and all other forms of electronic communication equipment belonging to you, your employer, co-workers, friends, acquaintances, family members, experts, consulted and all other persons,
- (6) the e-mail plus attachments that you sent, addressed to Commissioner Sauber and Nutter and dated January 24, 2007, wherein you stated "stay the course,"
- (7) all executed and/or unexecuted contracts, between the Seneca County Prosecutor's office and/or or Seneca County and any third party, for which the Seneca County Prosecutor has requested funding or will request funding from the Seneca County Board of Commissioners, for the purchase, lease, lease-purchase and/or any other arrangements that relate to the proposed destruction and/or disposition of computer equipment in the Seneca County Prosecutor's office,
- (8) all other documents of every nature and kind that relate in any way to the documents and records requested in Item (7) above.