

IN THE SUPREME COURT OF OHIO

STATE EX REL. VINCENT J. DIGIACOBBE  
543 N. High Street  
Cortland, Ohio 44410

and

STATE EX REL. RUTH E. DIGIACOBBE  
543 N. High Street  
Cortland, Ohio 44410

Relators

vs.

JAMES G. BEASLEY, DIRECTOR  
OHIO DEPARTMENT OF  
TRANSPORTATION  
1980 West Broad Street, PO Box 899  
Columbus, Ohio 43216-0899

Respondent

CASE NO. 08-0093

ORIGINAL ACTION IN MANDAMUS

FILED  
JAN 14 2008  
CLERK OF COURT  
SUPREME COURT OF OHIO

COMPLAINT FOR A WRIT OF MANDAMUS WITH  
ATTACHED MEMORANDUM IN SUPPORT & AFFIDAVIT

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Counsel for Respondent

## COMPLAINT FOR A WRIT OF MANDAMUS

1. Relators, Vincent J. DiGiacobbe and Ruth E. DiGiacobbe, [collectively referred to as "Relators"] state that Respondents Gordon Proctor, former Director and the Ohio Department of Transportation [collectively referred to as "Respondents"], filed on October 4, 2001 in Trumbull County Common Pleas Court Case No. 2001-CV-1988 a Petition to Appropriate their property for highway purposes and to fix compensation for a fee simple taking of portions of their property designated as Parcels 26-WD, 26-WD1 along State Route 5, Trumbull County, Ohio. Respondents also appropriated a temporary easement designated as Parcel 26-T for performing work on Relators' property for a period of eighteen (18) months.

2. Respondents took physical possession of the land parcels 26-WD, 26-WD1 and 26-T on April 29, 2002 and pursuant to plans and specifications developed by Respondents reconstructed the highway in front of Relators' real estate on which was located a building with an indoor roller skating rink. The reconstruction of the highway included a change of grade elevations and engineering changes in the collection and distribution of highway surface waters.

3. After the reconstruction of the roadway and the changes made by Respondents to its highway drainage system Relators experienced for the first time on or about September 9, 2004 a huge deluge of water, which collected on the highway and cascaded off the highway surface onto the Relators' land. The water ran down the drive and parking lot through the front entrance doorway and into the building onto the wooden floors of the roller skating rink and into the lounge and service areas of the building.

4. The encroaching waters from the highway caused considerable damage to the roller skating rink floors including a warping and unevenness to the wooden floors and the destruction of carpeting and damage to walls, floors and woodwork.

5. Relators were required to expend resources not only to repair the damages to the real estate but also to construct on its own real estate a structure or structures to intercept the water received from the new highway construction and divert the same away from its building to minimize damages to the property as well as restore the functional and economic use of the building for its existing use as a roller skating rink.

6. Relators state that the Respondents' actions in designing and reconstructing the highway caused the highway waters to be cast and diverted onto the lands of the Relators creating damages to their real estate and was and is a taking of private property rights for which they are entitled to compensation, pursuant to Article I §19 of the Ohio Constitution, for damages caused by the taking.

7. Relators further state that Respondents have failed to appropriate all of the rights taken by the reconstruction of the highway and that unless Respondents are ordered to appropriate the additional rights and use of their property as hereinbefore described they will be severely damaged with no adequate remedy at law for the rights taken in their real estate by Respondents, which Respondents refuse to recognize in the pending Trumbull County Appropriation Case No. 2001-CV-1988.

WHEREFORE, Relators demand that:

- 1) this Court issue a peremptory Writ of Mandamus or an alternative Writ directed to Respondent James G. Beasley, Director of Ohio Department of Highways, and its agents or officers, commanding and compelling Respondents to appropriate the additional property rights taken and damages caused by it as described in ¶2 of this Claim;
- 2) that the value of such additional rights and damages be determined by a jury;

3) that the appropriation case to be filed by the Respondents be consolidated with pending Trumbull County appropriation Case Nos. 2001-CV-1987 and 2001-CV-2422 for judicial economy and to conserve legal resources; and

4) that costs and reasonable attorney fees be assessed to Respondents.



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Attorney for Relators DiGiacobbe

#### MEMORANDUM IN SUPPORT

This Court early on established the academic principle predicated on Article I §19 of the Ohio Constitution that any taking, whether it be physical or merely deprives the owner of an intangible interest appurtenant to the premises entitles the owner of real estate to compensation. Smith v. Erie R. Co. (1938) 134 Ohio St. 135

In City of Norwood v. Sheen (1933) 126 Ohio St. 482 this Court ruled that any direct encroachment upon land, which subjects it to a public use, that excludes or restricts the dominion and control of the owner over it, is a taking of his property, for which he is guaranteed a right of compensation by §19 of the Bill of Rights of the Ohio Constitution.

In Board of Com'rs. of Portage County v. Gates (1910) 83 Ohio St. 19 this Court held that any actual and material interference with private property is a "taking" of property within the meaning of the provision in the Constitution referring to the taking of private property for public purposes without just compensation.

In Masley v. City of Lorain (1976) 48 Ohio St.2d 334 this Court determined that the construction and operation of a municipal storm sewer system so as to cause material damage from flooding or other reasonable, foreseeable causes to a downstream landowner, is a direct encroachment upon the land that subjects it to a public use that excludes or restricts the landowner's dominion and control over his land and such owner has a right to compensation for the property taken under Ohio Constitution Article I §19.

In Lucas v. Carney (1958) 167 Ohio St. 416 this Court determined that where a County as a result of the creation of a public improvement physically encroaches upon the land and property of an owner and deprives that owner of any of the use or enjoyment of his property such encroachment is a taking "pro tanto" of the property so encroached upon for which the County is liable. In such case the owner is entitled to institute an action and have a jury impaneled to determine the compensation due him.

These long established principles were confirmed in this Court's holding in State ex rel. OTR v. Columbus (1996) 76 Ohio St.3d 203 where the Court determined that any physical interference with the property is a "taking" for which compensation may be required under the United State and Ohio Constitution. In that case there was an interference with the owners access to his land even though the owner had not been denied all access to the land in question.

These established principles were followed by lower Appellate Courts. In State ex rel. Livingston Court Apts. v. Columbus (1998) 130 Ohio App.3d 730 the Court ruled that a writ of mandamus, rather than a negligence action, compelling the City to commence appropriation proceedings to compensate the owner for the taking of its property was the appropriate remedy for the taking, which resulted from the City's failure to maintain and repair the City's sewer

system. In that case the owner's basements were flooded by sewage during time of heavy rainfall.

In Ohio Edison v. Desecker (1993) 89 Ohio App.3d 164 it was held that there need not even be a physical taking of property or dispossession of the owner to constitute a "taking." Any substantial interference with elemental rights growing out of ownership of property is a taking. Even a special assessment materially in excess of the benefits conferred has been deemed to invade the inviolability of private property thus contravening Ohio Constitution Article I §19. Laskey v. Hiltz (1951) 91 Ohio App. 136.

In Crane v. Brintnall (1992) 29 Ohio Misc. 75; 58 O.O. 2d 175 a Common Pleas Court ruled that the term "taking" as used in Ohio Constitution Article I §19 includes such items or expense as may be necessarily incurred by the land owner in connection with construction of an improvement of his premises.

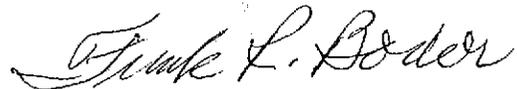
In this case the intrusions, encroachments and interferences by Respondent outside the limits of its taking in the pending appropriation proceedings, as outlined in Relators' Amended Complaint for Mandamus, require that a writ be ordered for Respondent's taking of such rights so that the owners can be justly compensated by a jury under Article I §19 of the Ohio Constitution.

Respondent has evaded its responsibilities required by law to compensate the owners for an unlawful taking of property rights outside the limits of the right-of-way described in its pending appropriation proceedings. It has exhausted its procedural technicalities to deprive the owners of its right to be compensated.

It is now time that justice be served by order of the Court mandating Respondent to perform its responsibilities and obligations under the Constitution and laws of Ohio. A writ of

mandamus or alternative writ should be issued ordering Respondent to file the necessary eminent domain proceedings for the taking and ordering a jury trial. The appropriation proceedings should be consolidated with the pending Trumbull County Common Pleas appropriation Case No. 2001-CV-1988 to avoid separate jury trials and serve judicial economy and litigation expenses for all parties.

Respectfully Submitted,



FRANK R. BODOR (0005387)  
157 Porter Street NE  
Warren, Ohio 44483  
Telephone: (330) 399-2233  
Facsimile: (330) 399-5165  
Attorney for Relators DiGiacobbe

#### PRECIPE FOR SERVICE

TO THE CLERK:

Please issue summons and a copy of the above Complaint for a Writ of Mandamus via certified mail with return receipt upon the Respondents JAMES G. BEASLEY, DIRECTOR OF OHIO DEPARTMENT OF TRANSPORTATION, at the address listed as 1980 W. BROAD STREET, PO BOX 899, COLUMBUS, OHIO 43216-0899.



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FRANK R. BODOR (0005387)  
Attorney for Relators DiGiacobbe

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing *Complaint For Writ Of Mandamus With Attached Memorandum In Support & Affidavits* was served upon Fedele DeSantis, Assistant Attorney General, Transportation Section, State Office Building—11th Floor, 615 W. Superior Avenue, Cleveland, Ohio 44113-1899; and Jason C. Earnhart, Assistant Prosecuting Attorney, Trumbull County Prosecutor's Office, 4th Floor Administration Bldg., 160 High Street NW, Warren, Ohio 44481-1092 via U.S. mail this 10<sup>th</sup> day of January 2008.



FRANK R. BODOR (0005387)

Attorney for Relators DiGiacobbe

**AFFIDAVIT  
OF  
VINCENT J. DIGIACOBBE & RUTH E. DIGIACOBBE**

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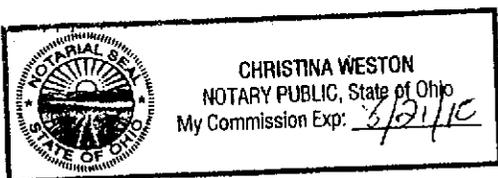
8. Relators state that the facts stated in this affidavit are made on and by the personal knowledge of the Affiant Relators and that they are of sound mind and are adults competent to testify to all matters stated in the affidavit.

Vincent J. DiGiacobbe  
VINCENT J. DIGIACOBBE  
Affiant/Relator

Ruth E. DiGiacobbe  
RUTH E. DIGIACOBBE  
Affiant/Relator

STATE OF OHIO            )  
  ) SS.  
TRUMBULL COUNTY        )

Before me a notary public for Trumbull County, State of Ohio personally appeared the above Affiants, VINCENT J. DIGIACOBBE and RUTH E. DIGIACOBBE, who on January 9, 2008 swore that the facts stated in the above affidavit are based on their personal knowledge; that the facts are admissible in evidence; and that they are competent to testify as to all matters stated herein.



Christina Weston  
NOTARY PUBLIC