

**IN THE SUPREME COURT OF OHIO**

STATE EX REL. JUNE L. BLANK )  
 )  
 and )  
 )  
 STATE EX REL. ESTATE OF )  
 RICHARD L. BLANK )  
 )  
 Relators )  
 )  
 vs. )  
 )  
 JAMES G. BEASLEY, DIRECTOR )  
 OHIO DEPARTMENT OF )  
 TRANSPORTATION )  
 )  
 Respondent )

CASE NO. 2007-2217

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**RELATORS' MEMORANDUM CONTRA RESPONDENT'S  
MOTION TO DISMISS RELATORS' AMENDED COMPLAINT  
FOR WRIT OF MANDAMUS**

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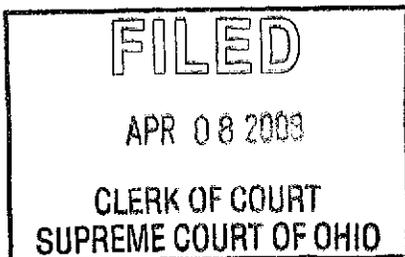
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## **I. Introduction**

The procedural history and facts are extensively set forth in Relators' Amended Complaint for Mandamus filed January 14, 2008 and in the attached Affidavit sworn to by the Relator landowners based on their personal knowledge. A repetition of these matters would be redundant and the contents of the Complaint, Affidavit and Memorandum In Support of the Complaint are incorporated herein to avoid repetition. Respondent's identical motion is pending before this Court in the cases of State ex. rel. Vincent J. DiGiacobbe et. al. v. O.D.O.T. Case No. 08-0093 and State ex. rel. Kathy Kardassilaris, et. al. v. ODOT Case No. 2007-2220.

## **II. Law and Argument**

### **A. The Court Of Claims Does Not Have Jurisdiction To Grant The Relief Sought In Relators' Complaint For Writ Of Mandamus**

Respondent contends that Relators' Complaint is primarily for money damages and that the Court of Claims has sole jurisdiction to hear the case. This is not true.

Relators' Complaint is a claim solely for a writ of mandamus to order O. D. O. T. to file appropriation proceedings for O. D. O. T.'s taking of the following property rights:

- a. Occupied, operated, stored and parked heavy construction equipment upon the parking lots and drives of Blank's real estate; impairing access to their building;
- b. Dragged mud, gouged and roughed up Blank's parking lots and put rocks, cracks, gouges and depressions in the blacktop portions of their parking lot;
- c. Cracked and broke out a portion of a concrete pad and damaged a pillar in the front of their commercial building located at 192 S. High Street;

- d. Used heavy mechanical shovels to pound out shale rock in close proximity to Blank's restaurant building creating extreme vibration and lack of lateral support causing a permanent vertical crack in the south wall of the concrete block masonry of the restaurant building;
- e. Broke through a sewer line to the restaurant building on Blank's real estate causing sewage to back up into the restaurant and made improper repairs thereto;
- f. Broke through gas lines servicing the premises;
- g. Broke a storm sewer line and failed to repair the pipes properly;
- h. Blocked access to the only rear door of Blank's restaurant building where deliveries are received.
- i. Used landowners' real estate outside the boundaries of the parcels taken by ODOT to park heavy machinery and equipment.

Relators do not ask for monetary damages in this case.

The Court of Claims does not have jurisdiction to hear complaints for a writ of mandamus. In *Rosso v. Ohio Dept. of Administrative Services* (1982) 4 Ohio App. 3d 312, the Franklin County Court of Appeals ruled that although a court of claims has full equity powers and, hence, jurisdiction to determine all questions as to liability of private parties removed to such court, the Court of Claims does not have jurisdiction to grant mandamus. Also, in *Brockman v. Ohio Dept of Public Welfare* 7 Ohio App.3d 239, 454 NE 2d 1362 the Franklin County Court of Appeals determined that a Court of Claims was without jurisdiction to rule on a complaint for a writ of mandamus inasmuch as mandamus preceded the establishment of the Court of Claims.

In *J. P. Sand & Grovel Co. v. State* (1976) 51 Ohio app. 2d 83, involving the Ohio Director of Highways, the Franklin County Court of Appeals ruled that the Court of Claims, pursuant to R. C. 2743.02 is deprived of jurisdiction in matters involving the appropriation of private real estate. A motion to certify was overruled by the Supreme Court.

In *Ohio Edison Co. v. O. D. O. T.* (1993) 86 Ohio App. 3d 189, the Franklin County Court of Appeals reversed the Common Pleas Court for transferring the case to the Court of Claims. The Appellate Court had to rule on the issue of whether the trial court had jurisdiction in the case. The Court held that the trial court had jurisdiction to hear the mandamus action since the appellant sought specific remedies pursuant to R. C. 163.51 et sec. rather than strictly money damages.

The *Ohio Edison* opinion stated that the Court of Claims Act R. C. 2743.02 (A) (1) was inapplicable as a result of the adoption of the Court of Claims Act of 1975. The State had previously consented to be sued and actions in mandamus were maintainable against the State prior to the adoption of the Court of Claims Act.

In *Ohio Jurisprudence Pleading and Practice Forms*, Current through the 2007-2008 Edition, Chapter 108 (mandamus) §108:3, the following quote succinctly states the law as follows:

“The court of claims has no authority to issue writs of mandamus because these are extraordinary writs not encompassed by the grant of full equity powers pursuant to the Revised Code.” Citing O.R.C. §2731.02, 2743.03 (A)

This principle was followed in *State ex rel. Mahoning Cty. Comm. Corr. Assn., Inc., v. Shoemaker* (1983) 12 Ohio app. 3d 36. Paragraphs 1 and 2 of the syllabus reflects the holdings of the court as follows:

1. Mandamus is the proper remedy to compel a state official to perform a clear legal duty, and that remedy was not extinguished by the enactment of the Court of Claims Act since such an action is not a suit against the state.

2. The Court of Claims has no authority to issue writs of mandamus. R. C. 2731.02. These are extraordinary writs not encompassed by the grant of “full equity powers” to the Court of Claims found in R. C. 2743.03(A). (Emphasis added)

The case law of Ohio rejects O. D. O. T.’s contention that Relators’ Complaint for Writ of Mandamus should be dismissed because it was required to be filed in the Court of Claims.

**B. Case Law Also Supports Relators Claim For Mandamus Caused By The Taking Of Private Property Rights.**

The Respondent somehow refuses to recognize the wealth of authority cited in Respondent’s Memorandum in Support of Relators’ Complaint for Writ of Mandamus for the taking of property rights. Respondent would instead attempt to categorize the case as one which should be filed in the court of claims as a negligence action for damages.

This refusal by the Respondent to recognize the distinction between property rights being taken by a public agency (O. D. O. T.) as distinguished from an ordinary negligence case for a Court of Claims explains the Respondent’s concern of the delay in the pending appropriation proceedings.

The taking of private property rights requires the public agency that confiscates those rights to be governed by Article I Section 19 of the Ohio Constitution and to follow the proper procedure to compensate the landowner for the right taken and the damages caused by the interference with those rights. This principal is academic and flows directly from the Constitution, which this Court has followed historically beginning with the early 1910 case of

*Board of Commissioners of Portage County v. Gates*, 83 Ohio St. 19. In that case and the subsequent cases, cited in Relators' previous Memorandum In Support of Complaint for Mandamus, it has been made perfectly clear that any actual and material interference with private property by the public agency is a "taking" of property within the meaning of Article I Sec. 19 of the Ohio Constitution.

This court mandated in *Mosley v. City of Lorain* (1976) 48 Ohio St. 2d 334 that a property owner that received damage from flooding or other reasonable foreseeable causes caused by the construction and operation of a municipal storm sewer system was a direct encroachment entitling the owner to compensation under Article I Sec. 19.

Similarly, *Lucas v. Carney* (1958), 167 Ohio St. 416, 5 O.O.2d 63, 149 N.E.2d 238, holds that when public improvements increase the flow of surface water onto private property, overflowing and inundating it, a claim of tanto (or partial) appropriation is raised, and the property owner is entitled to a jury's determination compensation due in accordance with constitutional requirement. *Accord J. P. Sand & Gravel Co. v. State* (1976), 51 Ohio App.2d 83, 89, 50.0.3d 239, 242, 367 N. E.2d 54, 59, and *Nacelle Land Mgt. Corp. v. Ohio Dept. of Natural Resources* (1989), 65 Ohio App.3d 481, 485-486, 584 N.E.2d 790, 793.

In *Livingston Court Apts. v. Columbus* (1998), the City of Columbus tried to use the same argument that Respondent O. D. O. T. is now using in these proceedings claiming that the City's failure to maintain and repair the city sewer system, which caused the owner's basement to flood during heavy rainfall, was a negligence action. The Appellate Court rejected this same contention being advanced by Respondent O. D. O. T. and granted a writ of mandamus to compel the city to commence appropriation proceedings to compensate the owner for the taking of it's property.

Respondent O. D. O. T. states at page 5 of motion to Dismiss that Relators do not allege that the damages caused by it was for a public purpose or intended to be a part of a larger design of the highway improvement project. The property encroachments made by O. D. O. T. were, whether originally intended or unintended, became part of its construction and design of the highway reconstruction. But even if it could be said that the public received no benefit, which premise the Relator rejects, this Court in *City of Norwood v. Sheen* (1933) 126 Ohio St. 482 ruled that any direct encroachment upon land which subjects it to a public use that excludes or restricts the domain and control of the owner over it, is a taking pursuant to Article I Section 19 of the Ohio Constitution.

This clearly was an interference with the owner's property rights as a result of a public taking of private property for which the owners are entitled to compensation. The State does not have a right to confiscate the property rights of the owners without compensating the owner for such an encroachment, intrusion, or interference. The remedy for such is by appropriation of the rights taken and a rendering by a jury of the damages to the residue of the real estate.

O. D. O. T. in desperation cites four cases in support of its contention that the case at bar should not proceed in appropriation, but rather in the Court of Claims. These cases are not even remotely related to the issue at hand.

Respondent's reference to *Zelenak v. Imdus. Comm.* (10 Dist), 148 Ohio App.3d 589 has nothing to do with property rights. In that case the issue involved a worker's compensation case involving temporary total disability payments. Likewise, Respondent's reliance on *Friedman v. Johnson* (1985) 18 Ohio St.3d 85 is misplaced. That case did not involve property rights. Instead the case involved an objection to the procedure by which the Dept. of Mental Retardation officials recovered costs from residents.

Respondent also cites *State ex rel. Blackwell v. Crawford*, 106 Ohio St.3d 447. This case did not involve property rights. It had to do with an original action for a writ of prohibition to prevent a trial court from proceeding in a case seeking declaratory and injunctive relief against the Secretary of State regarding voting systems.

Finally, Respondent attaches the case of *Rosendale v. O. D. O. T.* (2000) Franklin Co. Case No. 06CVH-04-04-4827 as being dispositive of its position. The case is inapplicable and easily distinguished on its facts. In *Rosendale* the Common Pleas Court made it very clear that:

... Plaintiff does not seek the return of specific property, or the performance of some specific act upon the subject property in order to repair damage that has already occurred. Plaintiff does seek an award of money equal to the property's value before the project. Applying the principles set forth in *Zelenak*, Count I of Plaintiff's complaint is clearly one that seeks monetary damages and not equitable relief, though it is plead as seeking a writ of mandamus.

The Common Pleas Court at page 7 of its decision also determined that Count II of Plaintiff's complaint also sought monetary damages and that for that reason the complaint must be dismissed. The Court left Count III standing as a claim for negligence and it was still pending at the time of the Court's decision.

In the case at bar, the landowner has not asked for money damages. The landowner asks solely for a peremptory Writ of Mandamus or an alternative Writ to O. D. O. T., commanding it to appropriate the property rights taken and to afford the owner a jury trial as required by Ohio Constitution Article I Sec. 19 to determine the value of the rights taken and damages caused by the expansion of O. D. O. T.'s taking of property rights from the owners while it was reconstructing the highway based upon a pending appropriation case. Relator also requests that the appropriation case to be filed by Respondent be consolidated with a pending appropriation on the same property which gave rise to the additional intrusion and encroachment.

Respondent states at page 11 of its brief that Relators are:

... first seeking a writ of mandamus over construction related damages as a “taking” before this Court, and then hoping to litigate towards a monetary award by a jury in Trumbull County.”

This is exactly what an appropriation case is all about; namely, to award a property owner a sum of money for the taking of their property rights and the damages to the residue of their property caused by the taking. This is what is provided by Article I Sec.19 of the Ohio Constitution. But there can be no such jury trial until the Director files the appropriation case which a writ of mandamus is required to compel him to do.

In every case, the ultimate result in an appropriation or eminent domain action is to award a sum of money to the property owner for the taking of their property rights and also damages, if any, to the residue of their property as a result of the taking of those rights. Respondent wishes to convince this Court that any time “money” is ultimately involved, or remotely alluded to, the case must go to the Court of Claims.

If that were the case, then there would not be any appropriation or eminent domain proceedings or an O.R.C. Chapter 163. Respondent’s argument would require that all cases would go the Court of Claims because the ultimate issue involves money.

Unfortunately, Respondent would deprive the owners of their constitutional right of a trial by jury in the County where their property is located and hope that this Court would require the owners to submit their claim to a Court of Claims in Franklin County so that O. D. O. T. can conveniently deprive them of a right to trial by jury and then argue that the statute of limitations now bars the owners from any monetary recovery for the taking of their property rights and damages caused to the residue of their real estate.

O. D. O. T.'s contention that the claims do not allege a "taking" for public use, or any other relief which can survive jurisdictional scrutiny, insults the reader's intelligence. In this case, there was an encroachment and taking of the owner's real estate. It was an extension of rights taken in the pending appropriation case, which O. D. O. T. refuses to recognize.

This is a taking of private property rights, pure and simple, which owners maintain and have expert testimony to prove was caused by O. D. O. T.'s intrusion upon their real estate. Respondent's contention that the Court of Claims has exclusive original jurisdiction to hear this mandamus case to compel the Director to appropriate the additional rights and compensate the owner for any damages as a result of the taking is entirely misplaced and self serving. Even in the *Rosendale* case, relied upon by the Respondent, the Court at Page 5 of its opinion acknowledged that the Court of Claims "is powerless to grant" a claim in mandamus.

Respondent's Motion to Dismiss should be overruled and the case should proceed on the sole issue for a writ of mandamus or alternate writ for which the Court of Claims does not have jurisdiction.

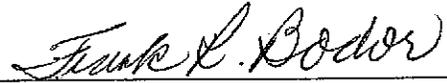
Respectfully Submitted,



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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing *Relator's Memorandum Contra Respondent's Motion To Dismiss Relator's Complaint For Writ of Mandamus* was served upon L. Martin Cordero and Richard J. Makowski 150 East Gay Street, 17<sup>th</sup> floor, Columbus, Ohio 43215-3130; 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 8<sup>th</sup> day of April, 2008.



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