

**EXPLANATION OF WHY THIS CASE IS A CASE
OF PUBLIC OR GREAT GENERAL INTEREST**

This case presents narrow questions of law, which impact with broad statewide importance to Ohio citizens and their real estate property rights as follows: (1) despite no physical intrusion into a private owner's real estate, whether a governmental condemning authority's conduct can amount to such substantial or unreasonable interference with the private owner's property rights as to constitute an involuntary, or *pro tanto*, taking of the real estate without just compensation to the property owner; and (2) whether such substantial or unreasonable interference provides a meritorious procedural basis for the affected private property owner to seek a writ of *mandamus* against the governmental condemning authority to compel the authority to initiate a land appropriate proceeding.

These issues test the competing fundamental constitutional right to own and use private property against the power of eminent domain of governmental condemning authorities, such as Appellee Department of Transportation of the State of Ohio ("ODOT"). This Court incompletely addressed this issue in State ex rel. Shelly Materials, Inc. v. Clark Cty Bd. of Commrs., 115 Ohio St.3d 337, 2007-Ohio-5022. In Shelly Materials, *supra* at 341, this Court reviewed the standard for determining the existence of a taking depending on the nature of the regulatory action pursuant to the holdings of Lucas v. South Carolina Coastal Council (1992), 505 U.S. 1003 (governmental regulation that completely deprives an owner of all economically beneficial uses of the property) and Loretto v. Teleprompter Manhattan CATV Corp. (1982), 458 U.S. 419 (government action that causes an owner to suffer a permanent physical invasion of property).

The compelling scenario of this case presents a set of facts that requires guidance from this Court in order to clarify what standard would constitute "substantial or unreasonable

interference” by a condemning authority with a private owner’s use of his or her property which would equate to an involuntary taking of the property.

By its very nature, the import of this case goes well-beyond a simple dispute between a property owner and the State of Ohio. The issues in this case relate to what extent of burden the State can impose on a property owner before that burden becomes a substantial or unreasonable interference with one’s rights protected by the Constitution. A decision in this case will have a widespread effect as to how the State and other public condemning authorities deal with private property owners who face the prospect of eminent domain.

With respect to the definition of “substantial or unreasonable interference” in the context of a public condemning authority’s conduct, lower courts have spoken to this issue, but the decisions lack consistency. E. g., *see*, State, ex rel. Pitz v. Columbus (Franklin Co. 1988), 56 Ohio App.3d 37; and State ex rel. Livingston Court Apts. v. City of Columbus (Franklin Co. 1998), 130 Ohio App.3d 730, 738.

Since the opinion of the Court of Appeals in this case fails to address conduct of the condemning authority beyond its expression of intent to acquire the property, the opinion only adds to the confusion. The Court of Appeals equates substantial or unreasonable interference with actual physical interference. The Court of Appeals completely failed to factor the State’s initial written statements that the property would not be acquired, the landowner’s detrimental reliance on the State’s initial representations, the State’s reversal of position, and the State’s protracted and ongoing failure to initiate land appropriation proceedings. All of this occurred to the dismay of Appellant Fred Finley (“Mr. Finley”), while the State has been fully aware that its actions and omissions to act have caused devastating economic consequences for Mr. Finley as the private land owner. No Ohio court has specifically addressed such circumstances in ruling

on a private owner's petition for a writ of *mandamus* against a public condemning authority. The Court of Appeals' opinion simplistically lumps this case into the category of all appropriation cases and fails to deal with distinguishing facts of this case. This case, therefore, serves as the appropriate vehicle for the Court to eliminate confusion and bring clarity to the meaning of "substantial or unreasonable interference" within the context of the law of eminent domain in Ohio.

Since the Ohio Supreme Court has never confronted and ruled specifically on such a scenario as in this case and since such a scenario will no doubt again present itself, this case qualifies as a case of public or great general interest.

STATEMENT OF THE CASE AND FACTS

I. STATEMENT OF THE CASE

Mr. Finley is the owner, president, and sole shareholder of Appellant Cleveland Cold Storage, Inc. (“CCS”). On June 6, 2007, Appellants filed a petition for a writ of *mandamus* to order Appellee James G. Beasley, Director of ODOT, and ODOT (jointly “Appellees”) to proceed with eminent domain proceedings pursuant to Chapter 163 of the Ohio Revised Code in the Common Pleas Court of Franklin County, Ohio, Case No. 05CVC10-11840 (“Franklin County case”). In a second count in their petition and complaint in the Franklin County case, Appellants pleaded their claim for economic damages associated with Appellees’ conduct which amounted to Appellee’s involuntary taking of Appellants’ real estate. In a decision filed on August 10, 2007, pursuant to Civ. R. 12(B)(6), the Common Pleas Court of Franklin County, Ohio, granted Appellees’ contested motion to dismiss. The decision was journalized by a judgment entry filed on August 27, 2007. On September 11, 2007, Appellants timely filed their notice of appeal with the Tenth District Court of Appeals.

On March 31, 2008, the Tenth District Court of Appeals issued an opinion affirming the dispositive ruling in the Franklin County case. The Court of Appeals essentially indicated that the action as described by Appellants in their complaint was not an actual physical interference with CCS, but rather just a statement of ODOT’s intention to acquire the property, which does not amount to a substantial or unreasonable interference with Appellants’ property rights.

Contending that the Tenth District erred in rendering such holdings, Appellants pursue jurisdiction with the Supreme Court for further review of the legal issues of this case.

II. FACTS

Appellants pleaded the following in their Petition and Complaint in the Franklin County case:

CCS was incorporated on June 27, 1990, as an Ohio corporation to function in performance of its original purpose, storage of refrigerated food products. R. 3, Complaint, ¶19. On October 22, 1992, Mr. Finley acquired title to the CCS property by Warranty Deed (R. 3, Exhibit B) which contains the legal description for the CCS property. R. 3, Complaint, ¶20.

On March 13, 2003, ODOT convened a “scoping committee” meeting for study of the Cleveland Innerbelt Plan (“CIP”). As part of the study, Appellees issued a list of properties potentially impacted for the central viaduct northern alignment of the CIP. ODOT did not include the CCS property among the listed properties. R. 3, Complaint, ¶21.

In anticipation of the CIP and on notice that ODOT did not plan to acquire the CCS property as part of the CIP, on June 3, 2003, Mr. Finley hired the architectural firm of Johnson & Lee, Ltd. (“J&L”), to conceptualize and prepare a design for optimum redevelopment of the CCS property (R. 3, Complaint, ¶22). On August 17, 2003, Mr. Finley engaged Telesis Corporation to promote J&L’s design for redevelopment of the CCS property (R. 3, Complaint, ¶23). In December of 2005, Mr. Finley hired the management firm of SRP Development (“SRP”) to employ J&L’s design for redevelopment of the CCS property (R. 3, Complaint, ¶24).

On June 29, 2004, Mr. Finley corresponded with Appellees and Cleveland Mayor Jane Campbell (“Mayor Campbell”) to advise that Mr. Finley had engaged in negotiations with officials of the City of Cleveland for conversion of the CCS property from industrial use to residential use, and Mr. Finley asked for Appellees’ confirmation that ODOT would not seek to acquire the CCS property in an eminent domain action for the CIP. R. 3, Complaint, ¶25. In a

letter dated July 12, 2004, Appellees informed Mr. Finley that the CCS property would not be a required acquisition for the CIP. R. 3, Complaint, ¶27.

On August 6, 2004, the Cleveland City Planning Commission rezoned the geographic area where the CCS property is located from an “industrial district” to a “general retail business use district”. R. 3, Complaint, ¶28. In a “general retail business use district” in the City of Cleveland, all residential uses are permitted, including single-family, two-family, and multi-family, as well as retail uses. R. 3, Complaint, ¶29.

Consistent with J&L’s proposed design for development of the CCS property, Mr. Finley continued with investment of substantial money and time for redevelopment of the CCS property into a mixed-use building for commercial occupants on the ground level, high-end residential condominiums on floors above the commercial level, and underground parking. R. 3, Complaint, ¶¶30 and 31.

On August 4, 2005, purportedly responding to Mr. Finley’s June 29, 2004, correspondence, Appellees stated that based upon the redesigned alignment of the westbound bridge for the CIP and I-90, Appellees would now require acquisition of the CCS property. R. 3, Complaint, ¶33. In its August 4, 2005, letter, ODOT advised that it anticipated initiation of right-of-way acquisition to commence in 2007 and invited Plaintiff to demonstrate hardship for advanced acquisition of the CCS property. R. 3, Complaint, ¶34.

On August 24, 2005, on behalf of CCS, CCS’s attorney, Kevin R. Keogh, submitted a request for “hardship” acquisition to Appellees with regard to the CCS property. R. 3, Complaint, ¶35. Appellees have not proceeded with a hardship purchase of the CCS property.

On August 27, 2005, due to economic hardship as a result of Appellees’ determination that acquisition of the CCS building was necessary and Appellees’ failure to engage in good-

faith efforts to acquire the CCS property, Mr. Finley caused CCS to file Chapter 11 bankruptcy in the United States Bankruptcy Court, Northern District of Ohio, Case No. 05-22097; and this Chapter 11 filing was subsequently converted to Chapter 7 (“CCS bankruptcy”). R. 3, Complaint, ¶38.

On October 20, 2005, Appellees performed an appraisal of the CCS property which placed the fair market value of the property at \$1,900,000. R. 3, Complaint, ¶39.

On December 28, 2005, Appellees made an offer to the Trustee of the CCS bankruptcy to purchase the CCS property, free and clear of all liens, claims, and encumbrances, for the price of \$1,900,000. R. 3, Complaint, ¶40.

On October 29, 2006, on behalf of Appellants, The Robert Weiler Company (“Weiler Co.”) published an appraisal of the CCS property based on the redevelopment plan in place prior to Appellees’ notice of its intended acquisition of the CCS property; and the Weiler Co. appraised a fair market value of the CCS property between \$4,425,000 and \$4,450,000 (“Weiler Co. appraisal”). R. 3, Complaint, ¶41. Mr. Finley immediately provided copies of the Weiler Co. appraisal to the CCS bankruptcy trustee and to Appellees. R. 3, Complaint, ¶42.

On November 21, 2006, the CCS bankruptcy trustee determined that sale of the CCS property was not feasible and discharged and closed the CCS bankruptcy case. R. 3, Complaint, ¶43. Upon closure of the CCS bankruptcy case, Mr. Finley and CCS were restored as the real parties-in-interest to bring the petition and complaint against Appellees. R. 3, Complaint, ¶44.

ARGUMENT IN SUPPORT OF PROPOSITION OF LAW

PROPOSITION OF LAW: When a public condemning authority's actions or omissions have allegedly so impaired and encumbered the property as to create lack of any beneficial use to the property owner, the authority's alleged actions or omissions give rise to a meritorious basis for a private property owner to seek a writ of *mandamus* against the authority to compel the authority to initiate land appropriation proceedings.

It is clear that private landowners can properly bring mandamus actions against government entities to force the entities to proceed with land appropriation of private real estate spoliated by the entities' action or inaction. State ex rel. Van Gundy v. Indus. Comm. (2006), 111 Ohio St.3d 395, 398, 2006-Ohio-5854. Pursuant to the Ohio Constitution, Article 1, Section 19, an entity is required to compensate an individual for property taken for public use; any taken whether it be physical or **merely deprivation of the owner's intangible interest appertinent to the premises**, entitles the owner to compensation. Smith v. Erie Railroad Co. (1983), 134 Ohio St.135. The crucial question in a land appropriation case is whether property has been taken by the entity from the owner.

In Ohio, the broad interpretation prevails in the right of a private landowner to pursue compensation from a public condemning authority for the impairment of the owner's rights in the owners' land. In many instances, courts have confirmed that the private landowner may recover not only for taking altogether, but also for a taking *pro tanto*. Id. at 143. *See also*, City of Norwood v. Sheen Ex'r (1933), 126 Ohio St. 482; Schimmelmann v. Lake Shore & Michigan Southern Railroad Co. (1911), 83 Ohio St. 356; Mansfield v. Balliett (1902), 65 Ohio St. 451; Lotze v. City of Cincinnati (1899), 61 Ohio St. 272; and Cohen v. City of Cleveland (1885), 43 Ohio St. 190.

The value of property consists in the owner's absolute right of dominion, use, and disposition for every lawful purpose. This necessarily excludes the power of others from

exercising any dominion, use, or disposition over it. Hence any interference by another with the owner's use and enjoyment of his property is a taking to that extent. To deprive him or her of any *valuable* use of his land is to deprive him or her of his or her land *pro tanto*. Mansfield, *supra* at 92 (emphasis added).

Certain acts of the state could reasonably be interpreted as a substantial interference or domination of private property may be found to be a taking of such property. Daulton v. Board of County Commissioners, Licking County (Sept. 14, 2000) Case No. 00CA38, 5th Dist. Ct. App., Oh., 2000-WL-1335066, unreported. Any substantial interference with the elemental rights growing out of ownership of private property is considered a taking. State ex rel. Pitts v. Columbus (1988), 56 Ohio App.3d 37, 41 quoting Smith v. Erie RR Co., *supra* at 142. To constitute a taking, such interference must be more than a loss of the comfortable enjoyment, desirability, or market value of the property. Probst v. Summit County (March 26, 1997), Summit App. No. 17810, 9th Dist. App. Ct., 1997 WL 148614, unreported at 5. Substantial interference occurs when an owner is prevented from enjoying the continued use to which the property had been previously devoted. Wray v. Fitch (1994), 95 Ohio App.3d 249, 252.

To deprive one of the use of his land is depriving him of his land and the private injury is thereby as completely affected as if the land itself were physically taken away.

Lucas v. Carney (1958), 167 Ohio St. 423. Any actual and material interference with such property rights which causes special and substantial injury to the owner is a taking of his property. Mansfield, *supra* at ¶2 of the syllabus.

Even with the lower courts decisions as what constitutes a *pro tanto* taking or the meaning of "substantial or unreasonable interference" of one's property, it is not surprising that

the guidelines are not clear as to what facts support such a decision in favor of the property owner under such circumstances as confronted by Mr. Finley in this case.

In the Franklin County case, Appellants' pleadings sufficiently allege that Mr. Finley has been unable to use his CCS property for any gainful purpose, unable to develop the CCS property, and unable to sell the CCS property, all due to the actions and inaction of ODOT. Appellants allege that ODOT's conduct has substantially interfered with CCS and Mr. Finley's property in direct contravention of Section 18, Article I of the Ohio Constitution. Construing the pleadings most favorably for Appellants establishes that there has been substantial interference with the CCS property; thereby sufficiently pleading that a *pro tanto* taking has occurred.

Based on Ohio's precedents with broad application of laws to a condemning authority's taking of private real property, Appellants brought this action. Based on the broad view adopted by Ohio courts, a taking can occur under circumstances alleged by Appellants. Appellants detrimentally relied on Appellees' original assurance that the CCS property was not necessary for the CIP. Based on such reasonable reliance, Mr. Finley began costly economic development of the CCS property. Subsequently, Appellees reversed their position and notified Appellants that the CIP project required acquisition of the CCS property. ODOT's promised acquisition of the CCS property imposed an immediate label on the CCS property – "not available for development and for sale to one buyer – ODOT". Months of inaction by ODOT imposed extreme economic hardship on Mr. Finley. Appellees' actions have substantially interfered with Appellants' use of the CCS property. Appellees' assertion that Mr. Finley can develop his building is ludicrous. Based on the written representations of ODOT that ODOT will certainly acquire the CCS property, the property owner cannot retrieve any economic benefit or value from the CCS property until ODOT actually acquires the real estate by eminent domain.

This case is more than a condemning authority's expression of intention to take property. This case involves Appellants' allegations of ODOT's brazen display of unreasonable authority to blanket a private landowner's property with a cloud on the title, marketability, and fundamental use of the property – indefinitely. Where is ODOT's reasonableness in its dealings with Mr. Finley? Does such conduct constitute ODOT's substantial or unreasonable interference with Mr. Finley's rights in the CCS property? Mr. Finley simply requests the right to offer evidence to the trial court in support of his allegations in support of his pursuit of a writ of *mandamus* against ODOT.

CONCLUSION

Based on the foregoing, Appellants request that this Court grant jurisdiction and review these matters of public or great general interest with regard to one's inherent rights in private real property and competing interests of the eminent domain power of the State.

Respectfully submitted,

CHESTER, WILLCOX & SAXBE, L.L.P.

By:  _____
Frank A. Ray (0007762)
Janica A. Pierce (0073074)
65 East State Street, Suite 1000
Columbus, Ohio 43215
Telephone: (614) 221-7791
Facsimile: (614) 221-8957
Email: fray@cwslaw.com
jpierce@cwslaw.com

Attorneys for Appellants

CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing was served upon Stephen H. Johnson and Richard J. Makowski, attorneys for Appellees, 150 East Gay Street, 17th Floor, Columbus, Ohio 43215, by ordinary U. S. mail, postage prepaid, this 14th day of May, 2008.



Frank A. Ray (0007762)
Attorney for Appellants

cc: Fred Finley

APPENDIX

Decision of the Court of Common Pleas of Franklin County, Ohio, Granting Defendants' Motion to Dismiss, Filed August 10, 2007..... A1-A8

Opinion of the Tenth District Court of Appeals, dated March 31, 2008 A9-A16

Judgment Entry of the Tenth District Court of Appeals, dated April 1, 2008A17

IN THE COURT OF COMMON PLEAS, FRANKLIN COUNTY, OHIO
CIVIL DIVISION

STATE OF OHIO ex rel. CLEVELAND :
COLD STORAGE, et al., :
Plaintiffs, :
v. : Case No. 07CVH06-7537
DIRECTOR, OHIO DEPARTMENT OF : Judge Schneider
TRANSPORTATION, et al., :
Defendants. :

DECISION GRANTING DEFENDANTS' MOTION TO DISMISS,
FILED JULY 5, 2007
(Case Not Terminated)

Rendered this 10 day of August, 2007.

Schneider, J.

I. Motion to Dismiss under Civ. R. 12(B)(6)

A defendant may raise a defense of "failure to state a claim upon which relief can be granted" by motion. Civ. R. 12(B)(6). In construing a complaint for purposes of a Civ. R. 12(B)(6) motion, "it is presumed that all factual allegations in the complaint are true and it must appear beyond doubt that the plaintiff can prove no set of facts warranting recovery." Tulloh v. Goodyear Atomic Corp. (1992), 62 Ohio St. 3d 541, 544 (citing O'Brien v. Univ. Community Tenants Union (1975), 42 Ohio St. 2d 242 (syllabus)); State ex rel. Seikbert v. Wilkinson (1994), 69 Ohio St. 3d 489, 490 (per curiam) (citing Perez v. Cleveland (1993), 66 Ohio St. 3d 397, 399; O'Brien 42 Ohio St. 2d 242 (syllabus)); Byrd v. Faber (1991), 57 Ohio St. 3d 56, 60. As such, "all reasonable inferences must be drawn in favor of the nonmoving party." Byrd, 57 Ohio St. 3d at 60 (citing Mitchell v.

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Lawson Milk Co. (1988), 40 Ohio St. 3d 190, 192); Seikbert, 69 Ohio St. 3d at 490 (citing Perez, 66 Ohio St. 3d at 399). However, "unsupported conclusions of a complaint are not considered admitted and are not sufficient to withstand a motion to dismiss." Seikbert, 69 Ohio St. 3d at 490 (citing State ex rel. Hickman v. Capots (1989), 45 Ohio St. 3d 324).

II. Discussion

On July 5, 2007, defendants James G. Beasley, Director of Transportation and the Ohio Department of Transportation filed their motion to dismiss under Civ. R. 12(B)(6) & 12(B)(1). Defendants argue that plaintiffs are not entitled to a writ of mandamus because "CCS cannot establish that it has a clear legal right to the relief requested" or "that ODOT is under a clear legal duty to appropriate the subject property" and that "once the EIS is approved by the FHWA and the final right of way alignment has been determined, and if the Director then declares that appropriation of the property is necessary, CCS (or its successor) will have an adequate remedy at law through the appropriation proceedings"; that "[t]he mere communication of an intention to appropriate in the future is not a substantial interference with a property right for which mandamus will lie"; that "[t]he Director has not made a finding of necessity for the CCS property in compliance with" O.R.C. 5519.01; that "ODOT has no authority to appropriate property until after the environmental document has been completed and approved by the FHWA" under 23 C.F.R. §771.113; that hardship acquisitions are discretionary; that the Court of

Claims and not the Common Pleas Court has jurisdiction over the claim for money damages; and that an appropriation action should be filed in Cuyahoga County Common Pleas Court.

In response, plaintiffs argue that they "allege all of the statutory elements necessary to seek a writ ordering ODOT Defendants to initiate a land appropriation lawsuit in Cuyahoga County" and that they have "properly pleaded their 'reverse condemnation' case against ODOT Defendants for ODOT Defendants' pro tanto taking of the CCS property"; that damages are ancillary to seeking a writ of mandamus and that "Plaintiffs have sufficiently put ODOT Defendants on notice for their damages associated with ODOT Defendants' pro tanto taking of the CCS property"; that defendants have "[i]mproperly attach[ed] a series of unverified exhibits to their motion to dismiss; that "CCS and Mr. Finley have an absolute right to seek a writ from the court" because "Mr. Findley remains the sole shareholder of CCS, and CCS remains owner of the CCS property"; that the ODOT defendants can only be sued in Franklin County under O.R.C. 5501.22; and that plaintiffs have sufficiently pled their claim for a pro tanto taking and have "alleged in their Complaint that ODOT's actions and omissions to act have eliminated any meaningful use by Plaintiffs of the CCS property."

In this regard, ODOT defendants' motion is warranted.

The Tenth District Court of Appeals has held as follows:

Relators claim no physical invasion of their property either directly or by adjacent activity, which physically denies or interferes with their use or

enjoyment of their property. The theory of appellants is that the announcement of a freeway project, involving the land upon which property is located, constitutes a *pro tanto* taking of their property where the appropriating authority fails to proceed with the project after an inordinate delay. Respondents contend that there is no legal duty to appropriate appellants' property, as the announcement of the intention to construct a freeway through a landowner's property does not constitute a *pro tanto* taking as there has been no physical encroachment upon the landowner's dominion and control over his property or his use thereof.

Respondents' motion to dismiss was properly granted. Section 19, Article I of the Ohio Constitution limits the right to compensation to cases where private property is taken for public use. The Supreme Court has held that no damages including consequential damages can be awarded unless there is a "taking." *Smith v. Erie Rd. Co.* (1938), 134 Ohio St. 135. In this case, the complaint alleges only the announcement of an intention to appropriate property. There has never been an order of appropriation. Consequently, there has not been a "taking."

This court has recently held that the mere expression or conveyance of the intent to take private property in the future is not such a substantial interference with private property as to constitute a "taking." See *J.P. Sand & Gravel Co. v. Director, Dept. of Transportation* (1976), Ohio App. 2d , (Case No. 75AP-577, rendered on June 8, 1976 [1976 Decisions, page 1704]).

In this case, the land has neither been appropriated nor has there been governmental activity adjacent to the property which has physically denied or interfered with the landowner's use and enjoyment of the property.

State ex. rel. Johnson v. Jackson (Franklin App., Aug. 9, 1977), No. 77AP-305, 1977 Ohio App. LEXIS 7405, at *2-4 (brackets in original); see J.P. Sand & Gravel Co. v. State (Franklin 1976), 51 Ohio App. 2d 83 (syllabus, para. 3) ("The mere expression or conveyance of an intent to take private property in the future is not such a substantial interference with such property as to constitute a 'taking.'"); City of Cincinnati v. Chavez Props.

(Hamilton 1996), 117 Ohio App. 3d 269, 275-76 (rejecting the argument "that the mere expression of the intent to take private property in the future, the enactment of legislation authorizing condemnation of property, or the filing of condemnation proceedings in and of itself constitutes a taking").

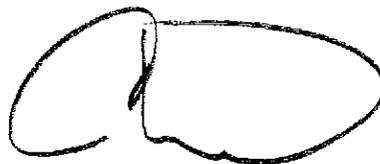
In the present case, plaintiffs' complaint alleges that "ODOT stated that based upon the redesigned alignment of the westbound bridge for the CIP and I-90, ODOT would now require acquisition of the CCS property"; that "ODOT advised that it anticipated initiation of right-of-way acquisition to commence in 2007"; that "[f]rom August 4, 2005, the date that ODOT confirmed its intention to acquire the CCS property by eminent domain, through the present, ODOT has effectively destroyed any potential for Plaintiff to use, redevelop, or sell the CCS property to any third-party consistent with the fair market value for the highest and best use of the CCS property"; that "ODOT's ongoing failure to acquire the CCS property by eminent domain has resulted in substantial interference and irreparable harm to Plaintiff's dominion and control of the CCS property"; that "the above-described acts and omissions of ODOT amounted to a pro t[al]nto taking of the CCS property without compensation to Plaintiff"; that "[a]s a direct and proximate result of ODOT's above-described failure to acquire the CCS property by eminent domain, Plaintiff has experienced significant economic hardship and associated economic damages"; and that "ODOT abused its power of eminent domain to the economic detriment of Plaintiff."

(Plaintiffs' complaint, paras. 33, 34, 46-48, 54.)

However, Jackson and similar cases have held that an announcement of an intention to appropriate property in the absence of an order of appropriation does not constitute a "taking" and have rejected the argument that making such an announcement and then failing to proceed with the project constituted a pro tanto taking. The Tenth District Court of Appeals' decision in Jackson remains good law and supports dismissal of plaintiffs' claims. Thus, defendants have no duty to appropriate the property; and in the absence of a duty to appropriate the property, mandamus would not be proper.

Also, regarding plaintiffs' arguments about evidentiary materials, deciding defendants' motion involved consideration of the pleadings and did not involve consideration of evidence.

Therefore, defendants Beasley's and ODOT's motion to dismiss is GRANTED. Counsel for defendants shall prepare an appropriate entry and submit the proposed entry to counsel for the adverse parties pursuant to Loc. R. 25.01. A copy of this decision shall accompany the proposed entry when presented to the Court for signature.



CHARLES A. SCHNEIDER, JUDGE

Copies to:

Frank A. Ray, Esq.
Janica A. Pierce, Esq.
Craig B. Paynter, Esq.
65 East State Street, Suite 1000
Columbus, Ohio 43215
Attorneys for Plaintiffs

Stephen H. Johnson, Esq.
Richard J. Makowski, Esq.
Principal Assistant Attorneys General
150 East Gay Street, 17th Floor
Columbus, Ohio 43215
Attorneys for Defendants Beasley and ODOT

Joseph T. Chapman, Esq.
150 E. Gay Street, 21st Floor
Columbus, Ohio 43215
Assistant Attorney General
Attorney for Defendants Ohio Department of Taxation
and Bureau of Workers' Compensation

Rachel Ary Mulchaey, Esq.
50 W. Broad Street, Suite 1200
Columbus, Ohio 43215
Attorney for Defendant Electrical Specialists, Inc.
dba The Superior Group

Jay B. Eggspuehler, Esq.
Jennifer B. Casto, Esq.
300 Spruce Street, Floor One
Columbus, Ohio 43215
Attorneys for Defendant SimplexGrinnell LP

Renee A. Bacchus, Esq.
Assistant Prosecuting Attorney
Justice Center-Court Tower
1200 Ontario Street, 8th Floor
Cleveland, Ohio 44113
Attorney for Defendant Cuyahoga County Treasurer

Stanley R. Gorom III, Esq.
Robert B. Port, Esq.
200 Public Square, Suite 3300
Cleveland, Ohio 44114
Attorneys for Defendant Marketing Holdings, LLC

Harry A. Flannery, Esq.
76 S. Main Street
Akron, Ohio 44308

Attorney for Defendants FirstEnergy Corp.
and The Cleveland Electric Illuminating Co.

Eil Manos, Esq.
Anthony J. Coyne, Esq.
Bruce G. Rinker, Esq.
55 Public Square, Suite 2150
Cleveland, Ohio 44113
Attorneys for Defendant Beautiful Signage LP

Key Bank, NA
127 Public Square
Cleveland, Ohio 44114
Defendant

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio ex rel. :
Cleveland Cold Storage et al., :

Plaintiffs-Appellants, :

v. :

James G. Beasley, Director, Ohio :
Department of Transportation et al., :

Defendants-Appellees. :

No. 07AP-736
(C.P.C. No. 07CVH06-7537)

(ACCELERATED CALENDAR)

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O P I N I O N

Rendered on March 31, 2008

Chester, Wilcox & Saxbe L.L.P., Frank A. Ray, and Janica A. Pierce, for appellants.

Marc Dann, Attorney General, Richard J. Makowski, and Stephen H. Johnson, for appellees.

APPEAL from the Franklin County Court of Common Pleas.

SADLER, J.

{¶1} Appellants, Cleveland Cold Storage, Inc. ("CCS") and Fred Finley ("Finley") (collectively "appellants"), filed this appeal seeking reversal of a decision by the Franklin County Court of Common Pleas granting a motion to dismiss, pursuant to Civ.R. 12(B)(6),

to appellees, the Ohio Department of Transportation ("ODOT") and Director James Beasley ("Beasley") (collectively "appellees"). For the reasons that follow, we affirm the trial court's judgment.

{¶2} The facts as alleged in the complaint are as follows. Finley is the president and sole shareholder of CCS. CCS is the owner of a building located at 2000 West 14th Street in Cleveland ("the CCS property"). In 2003, ODOT convened a committee for the purpose of considering the development of the Cleveland Innerbelt ("the Innerbelt Project"). As part of the study, ODOT identified properties that would be potentially impacted by the development. The CCS property was not included on the list of potentially impacted properties.

{¶3} Finley then began taking steps to redevelop the CCS property, intending to turn the CCS property into a mixed-use building, with commercial use on the ground floor and high-end residential condominiums on the upper floors. Finley hired an architectural firm to prepare a design for the property, signed a second firm to promote the redevelopment, and hired a third company to serve as a management firm over the redevelopment. Finley also took steps to have the Cleveland City Planning Commission change the zoning in the area in which the CCS property is located from an "industrial district" to a "general retail business use district," which allows the property to be used for residential purposes.

{¶4} On June 29, 2004, Finley corresponded with Cleveland Mayor Jane Campbell and appellees asking for confirmation that ODOT would not be seeking to acquire the CCS property by eminent domain for construction of the Innerbelt Project. By letter dated July 12, 2004, appellees confirmed that completion of the Innerbelt Project

would not require acquisition of the CCS property. Finley then began work on the planned redevelopment of the CCS property.

{¶5} In a letter dated August 4, 2005, appellees informed Finley that as the result of a redesign of the Innerbelt Project, appellees would need to acquire the CCS property. The letter stated that appellees anticipated beginning the process of acquiring the property in 2007, and invited appellants to demonstrate hardship for advanced acquisition of the property. Appellants submitted a request for advance acquisition of the property based on hardship, but appellees have not taken steps to initiate that acquisition.

{¶6} On August 27, 2005, purportedly due to economic hardship imposed by appellees planned acquisition of the CCS property, CCS filed Chapter 11 bankruptcy in the United States Bankruptcy Court, Northern District of Ohio. The Chapter 11 bankruptcy proceeding was subsequently converted to a Chapter 7 bankruptcy proceeding.

{¶7} Appellees performed an appraisal on the CCS property and, based on that appraisal, made an offer to the bankruptcy trustee to purchase the property for \$1,900,000. Appellants arranged to have another appraisal to be performed to determine the value of the CCS property based on appellants' redevelopment plan for the property. That appraisal concluded that the value of the property was between \$4,425,000 and \$4,450,000. On November 21, 2006, the bankruptcy trustee concluded that sale of the CCS property was not feasible, and discharged and closed the bankruptcy case.

{¶8} Appellants then filed this action seeking a writ of mandamus directing appellees to initiate immediate eminent domain proceedings to acquire the CCS property, and damages arising from the delay in initiation of such proceedings. Appellees filed a

motion to dismiss the action pursuant to Civ.R. 12(B)(6) and 12(B)(1). The trial court granted the motion, and appellants filed this appeal, alleging three assignments of error:

FIRST ASSIGNMENT OF ERROR

In its August 10, 2007, decision which granted Appellees' motion to dismiss, the trial court erred by finding that Appellants' Complaint, a petition for a writ of *mandamus*, failed to state a claim upon which relief can be granted.

SECOND ASSIGNMENT OF ERROR

In its August 10, 2007, decision which granted Appellees' motion to dismiss, the trial court erred by considering extrinsic evidence beyond the scope of Civ.R. 12(B)(6), which confines review only to allegations of the pleadings in Appellants' Complaint.

THIRD ASSIGNMENT OF ERROR

In its August 10, 2007, decision which granted Appellees' motion to dismiss, the trial court erred by failing to find that allegations in Appellants' Complaint adequately describe Appellees' actions and inaction in this matter which constitute a *pro tanto* "taking" of Appellants [sic] privately owned real property by Appellee Ohio Department of Transportation.

{¶9} Appellants' first and third assignments of error are interrelated, and will therefore be addressed together. In order to establish the right to a writ of mandamus, the party seeking the writ must show: (1) that the relator has a clear legal right to the relief sought, (2) that the respondent is under a clear legal duty to perform the requested act, and (3) that the relator has no plain and adequate remedy in the ordinary course of law. *State ex rel. Ohio Gen. Assembly v. Brunner*, 114 Ohio St.3d 386, 2007-Ohio-3780, 872 N.E.2d 912.

{¶10} In order for a court to grant a motion to dismiss, pursuant to Civ.R. 12(B)(6), it must appear that, accepting all of the allegations of the complaint as true, it appears beyond doubt that the complaining party can prove no set of facts entitling that party to

the relief sought. *O'Brien v. Univ. Community Tenants Union* (1975), 42 Ohio St.2d 242, 71 O.O.2d 223, 327 N.E.2d 753. Consequently, a complaint seeking a writ of mandamus is generally not appropriate for dismissal under Civ.R. 12(B)(6) where the complaint sufficiently alleges the existence of a legal duty and the lack of an adequate remedy at law, and it appears that the relator seeking the writ may prove some set of facts that would warrant issuance of the writ. *State ex rel. Boggs v. Springfield Local School Dist. Bd. of Edn.*, 72 Ohio St.3d 94, 1995-Ohio-202, 647 N.E.2d 788.

{¶11} Appellants' complaint states, in relevant part:

46. From August 4, 2005, the date that ODOT confirmed its intention to acquire the CCS property by eminent domain, through the present, ODOT has effectively destroyed any potential for [appellants] to use, redevelop, or sell the CCS property to any third-party consistent with the fair market value for the highest and best use of the CCS property established by the time of ODOT's letter of August 4, 2005.

47. ODOT's ongoing failure to acquire the CCS property by eminent domain has resulted in substantial interference and irreparable harm to [appellants'] dominion and control of the CCS property since [appellants are] unable to use the CCS property for any gainful purpose, [are] unable to redevelop the CCS property, [are] unable to sell the CCS property for a reasonable value, and [are] unable to recoup [appellants'] investment through planned redevelopment of the CCS property.

48. Effective August 4, 2005, the above-described acts and omissions of ODOT amounted to a *pro tanto* [sic] taking of the CCS property without compensation to [appellants], which gives rise to a legal duty imposed on ODOT to acquire the CCS property by eminent domain on an immediate basis.

49. For the permanent and complete taking of the CCS property by ODOT, [appellants seek] an order from this Court which compels ODOT to immediately initiate eminent domain proceedings to acquire the CCS property for its fair market value.

{¶12} An action seeking issuance of a writ of mandamus is the appropriate means for a property owner to compel public authorities to institute proceedings to appropriate property where the property owner is alleging that an involuntary taking of private property has occurred. *State ex rel. Coles v. Granville*, 116 Ohio St.3d 231, 2007-Ohio-6057, 877 N.E.2d 968, citing *State ex rel. Shemo v. Mayfield Hts.*, 95 Ohio St.3d 59, 2002-Ohio-1627, 765 N.E.2d 345. In order to establish a taking, the property owner must show a substantial or unreasonable interference with a property right, which may involve an actual physical taking of the property, or deprivation of an intangible interest in the property. *State ex rel. OTR v. Columbus*, 76 Ohio St.3d 203, 1996-Ohio-411, 667 N.E.2d 8; *Smith v. Erie RR. Co.* (1938), 134 Ohio St. 135, 11 O.O. 571, 16 N.E.2d 310. Depriving a property owner of any valuable use of the owner's property can constitute a pro tanto, or partial, taking of the property that is subject to the constitutional protections against taking property without just compensation. *OTR*, supra, quoting *Mansfield v. Balliett* (1902), 65 Ohio St. 451, 63 N.E. 86.

{¶13} Appellants' petition and complaint alleges that appellees' actions here constitute a substantial interference with their ownership and dominion over the CCS property, and alleges that these actions constitute a pro tanto taking of the property. However, the action described in the complaint that appellants alleged constituted a taking of the CCS property was not an actual physical interference with the CCS property, but rather was ODOT's statement of its intention to acquire the CCS property as part of the Innerbelt Project at some point in the future.

{¶14} This court has held that "the mere expression or conveyance of an intent to take private property in the future * * * is not such a substantial interference with private

property as to constitute a 'taking.' " *J.P. Sand & Gravel Co. v. State* (1976), 51 Ohio App.2d 83, 5 O.O.3d 239, 367 N.E.2d 54. We reiterated this holding in *State ex rel. Johnson v. Jackson*, Franklin App. No. 77AP-305, 1977 Ohio App. LEXIS 7405, holding that dismissal is appropriate where a petition seeking a writ of mandamus alleges only an expression of intent to acquire property in the future.

{¶15} Applying *J.P. Sand & Gravel* and *Johnson*, dismissal of appellants' petition and complaint was warranted, because the representations made by ODOT constituted only a statement of intention to acquire the CCS property in the future, and therefore did not constitute a "taking" requiring ODOT to institute appropriation proceedings. Appellants seek to distinguish *Johnson*, arguing that the situation here differs because appellants sought and received personal assurances from ODOT regarding whether ODOT would be acquiring the CCS property, and that appellants acted on those assurances by investing significant funds in redevelopment of the property. The distinctions urged by appellants may relate to the value of the property when ODOT does initiate proceedings to acquire the CCS property, but ODOT's subsequent change to the initial plans does not itself constitute a "taking" giving rise to a duty to institute appropriation proceedings. Moreover, we note that even if these distinctions did provide a basis not to follow *Johnson*, *J.P. Sand & Gravel* did involve affirmative efforts on the part of the property owner to ensure that there was no intention to acquire the property at issue, and therefore the same distinctions would not apply.

{¶16} Accordingly, the trial court did not err when it dismissed appellants' petition and complaint for failure to state a claim for which relief can be granted pursuant to Civ.R. 12(B)(6). Therefore, appellants' first and third assignments of error are overruled.

{¶17} In their second assignment of error, appellants argue that the trial court erred when it considered evidentiary materials outside the pleadings in deciding appellees' Civ.R. 12(B)(6) motion. Generally, a court considering a Civ.R. 12(B)(6) motion cannot consider matters outside the pleadings without converting the motion into a motion for summary judgment under Civ.R. 56 and providing the parties with an opportunity to submit additional evidentiary materials.

{¶18} In this case, the trial court specifically stated that it did not consider any matters outside the pleadings in reaching its decision. Our review of the pleadings verifies that dismissal was appropriate based solely on the allegations of the pleadings, and without regard to any evidentiary materials not contained in the pleadings. Therefore, appellants' second assignment of error is overruled.

{¶19} Having overruled appellants' three assignments of error, we affirm the judgment of the trial court.

Judgment affirmed.

McGRATH, P.J., and BRYANT, J., concur.

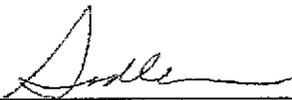
IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio ex rel. :
Cleveland Cold Storage et al., :
 :
Plaintiffs-Appellants, :
 :
v. : No. 07AP-736
 : (C.P.C. No. 07CVH06-7537)
 :
James G. Beasley, Director, Ohio : (ACCELERATED CALENDAR)
Department of Transportation et al., :
 :
Defendants-Appellees. :

JUDGMENT ENTRY

For the reasons stated in the opinion of this court rendered herein on March 31, 2008, appellants' assignments of error are overruled, and it is the judgment and order of this court that the judgment of the Franklin County Court of Common Pleas is affirmed. Costs shall be assessed against appellants.

SADLER, McGRATH and BRYANT, JJ.

By  _____
Judge Lisa L. Sadler

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