

In the  
**Supreme Court of Ohio**

STATE OF OHIO, EX REL.	:	
CLEVELAND COLD STORAGE, et al.	:	Case No. 08-0953
	:	
Plaintiffs-Appellants,	:	On Appeal from the
	:	Franklin County
v.	:	Court of Appeals,
	:	Tenth Appellate District
JAMES G. BEASLEY, DIRECTOR, et al.	:	
	:	Court of Appeals Case
Defendants-Appellees.	:	No.07AP-736

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**MEMORANDUM OPPOSING JURISDICTION OF APPELLEES  
JAMES G. BEASLEY, DIRECTOR OF TRANSPORTATION,  
AND THE OHIO DEPARTMENT OF TRANSPORTATION**

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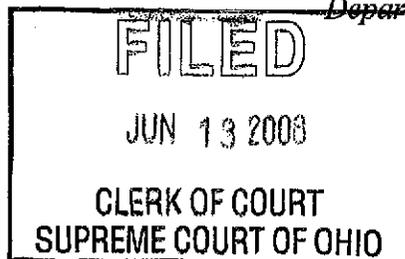
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## INTRODUCTION

Appellants Cleveland Cold Storage, Inc., and Fred Finley (collectively “CCS”) seek in this mandamus action to force the Ohio Department of Transportation (“ODOT”) to comply with a “clear legal duty” to compensate them for a taking. But no such duty exists because no such taking has occurred. In fact, at this point ODOT is *unable* to effect the taking for which CCS seeks compensation. CCS has therefore filed the wrong kind of action (mandamus) at the wrong time (before a taking has occurred).

CCS brought this mandamus action to compel ODOT to file a statutory eminent domain action to acquire the property in question in Cleveland. The CCS property sits in a proposed alignment for construction of a new westbound bridge on Interstate 90 as part of the Cleveland Innerbelt Project. No construction date for the new bridge has been established, and it is not expected to begin until sometime after 2011. ODOT cannot appropriate at this time because it has not obtained environmental approval for the project. As a result, ODOT lacks the legal authority right now to take the property. All ODOT has done is informed CCS of ODOT’s intent to acquire the property in the future.

Given that set of facts, the appeals court properly applied well-settled precedent in holding that a public agency’s mere act of communicating to a landowner the agency’s future intent to take the property in question does not constitute a substantial or unreasonable interference with a property right for which a mandamus remedy would be available. *State ex rel. Cleveland Cold Storage v. Beasley* (10th Dist.), 2008-Ohio-1516, ¶ 15 (“Op.”).

CCS has no right to the mandamus remedy it seeks here. ODOT does not have a clear legal duty to act, as ODOT is without lawful authority to appropriate the CCS property right now. CCS does not allege, nor can it prove, that ODOT engaged in any act which constitutes a physical taking or interference with their use of the property. CCS does not allege, nor can it

prove, that ODOT has not exercised any “dominion, use, or disposition” over their property that could constitute a substantial or unreasonable interference with CCS’s property rights, for which mandamus could lie.

This Court therefore should decline to exercise jurisdiction.

### **STATEMENT OF THE CASE AND FACTS**

The CCS building is a vacant multi-story cold storage warehouse located adjacent to Interstate 90 in downtown Cleveland, near the bridge over the Cuyahoga River. In 2003, ODOT announced plans to improve the I-90 Innerbelt in downtown Cleveland (“the Project”), which would include replacing the Cuyahoga River bridge. At the time of the initial public information meetings on the Project, the CCS building was not among the properties to be acquired. On August 4, 2005, ODOT informed CCS that due to a design change in the plans for the I-90 Cuyahoga River bridge, ODOT would need to acquire the CCS building after all. Specifically, the letter stated that, “based on refinements to the original assumptions, the proposed alignment of the new westbound bridge, as shown on the attached graphic (Innerbelt Alternatives, June 8, 2005), would require acquisition of the Cleveland Cold Storage building.”

On September 9, 2005, at the request of CCS’s attorney, ODOT initiated an advance acquisition of the CCS property on the grounds of hardship. Except for hardship cases, ODOT has no lawful authority to appropriate or purchase any property for the Project at this time. ODOT hired an appraiser to determine the fair market value of the CCS property. After the appraisal was completed, ODOT properly conveyed the offer to the bankruptcy trustee. The hardship acquisition could not be completed because the parties could not agree on the purchase price, and because CCS could not deliver title free and clear of all liens and encumbrances.

CCS filed a mandamus action claiming that ODOT had taken CCS's property and owed compensation. The sole basis for CCS's mandamus action was the ODOT's August 4, 2005 letter, informing CCS that an engineering change in the Project plans meant that ODOT would be acquiring the property to construct the new bridge.

ODOT moved to dismiss on the grounds that it had no clear legal duty to appropriate the CCS property, because it lacked lawful authority to immediately appropriate the property. ODOT further asserted that CCS was not clearly entitled to mandamus because the Tenth District Court of Appeals had twice held that merely communicating a future intent to appropriate real property is not a substantial interference with a property right that rises to the level of a taking. *J.P. Sand & Gravel Co. v. State* (1976), 51 Ohio App. 2d 83, ¶ 3 of the syllabus; *State ex rel. Johnson v. Jackson* (Aug. 9, 1977), Franklin App. No. 77AP-305, 1977 Ohio App. LEXIS 7405.

The appeals court affirmed the trial court's dismissal, holding that merely informing a landowner of a future intention to appropriate does not constitute a substantial or unreasonable interference with a property right. The appeals court straightforwardly applied the controlling precedent of *J.P. Sand & Gravel* and *Jackson* to confirm that a public authority does not effect a taking when it merely tells a landowner that it intends later to appropriate property. Op. ¶¶ 13-15.

#### **THIS QUESTION IS NOT OF GREAT OR GENERAL PUBLIC INTEREST**

##### **1. Existing precedent straightforwardly controls this case.**

The appeals court followed established precedent and held that ODOT's act of merely advising CCS of a future intention to appropriate did not constitute a substantial or unreasonable interference with CCS's property rights. Op. ¶15 (citing *J. P. Sand & Gravel Co.* and *Jackson*). That holding is consistent with this Court's case law.

Where there has been a physical taking of private property, or where there has been a substantial or unreasonable interference with a property right, mandamus will lie against the offending appropriating authority in accordance with long-standing principles of Ohio law. See *Mansfield v. Balliett* (1902), 65 Ohio St. 451; *Smith v. Erie RR* (1938), 134 Ohio St. 135, Syllabus ¶ 1. But where, as here, no taking has occurred, then there is no clear duty for a court sitting in mandamus to enforce.

**2. CCS's position undermines Ohio's statutory eminent domain procedures.**

During the pendency of this case, the General Assembly enacted 127 S.B. 7, which became effective on October 10, 2007. Among other things, S.B. 7 requires all appropriating agencies to deliver to the landowner a Notice of Intent to Acquire Property and Good Faith Offer to Purchase, no less than thirty (30) days before filing a petition for appropriation. R.C. 163.04. In addition, S.B. 7 expands on the prior law and formalizes the procedures for pre-appropriation negotiations. If, as CCS argues, providing written notice of a future intent to appropriate constitutes a pro tanto taking, then the appropriation would be a fait accompli as soon as the appropriating agency notifies the landowner that it needs the property. Under CCS's theory, by delivering the required notice of intent to appropriate, an appropriating agency would violate the landowner's federal and state constitutional rights by taking property without compensation. There could be no pre-appropriation negotiations and the statutory scheme created by S.B. 7 and R.C. Chapter 163 would be frustrated. This case—in which no taking is even authorized yet, much less has been effected—is not one in which a mandamus order should be used to frustrate an existing statutory scheme.

## ARGUMENT

### ODOT's Proposition of Law:

*The mere act by a public agency of state a future intent to appropriate property does not constitute a substantial or unreasonable interference with a property right for which mandamus would lie.*

**A. No taking has occurred that requires compensation.**

Contrary to CCS's assertions, this Court has thoroughly addressed the property law principles at issue in this case. It is well-settled in Ohio that, absent a physical invasion or intrusion upon a landowner's property, a landowner seeking to establish a taking must prove a "substantial or unreasonable interference with a property right." *State ex rel. OTR v. City of Columbus*, (1996) 76 Ohio St. 3d 203, 206-207 (citing *Smith v. Erie RR, supra*). An owner is to be compensated for a "substantial or unreasonable interference with a property right," if the appropriating agency exercises any "dominion, use or disposition over" the property. *Mansfield v. Balliett, supra*, at 471.

CCS concedes that ODOT has not physically occupied or intruded upon their property. CCS has not alleged that ODOT exercised any degree of "dominion, use, or disposition" over CCS's rights of ownership that could constitute a pro tanto taking, nor could CCS make such an allegation, given that ODOT has not exercised any degree of control over the property. It necessarily follows that ODOT has not substantially and unreasonably interfered with CCS's property rights.

The appeals court has correctly and repeatedly held that the mere communication of an intention to appropriate in the future is not a substantial or unreasonable interference with a property right for which mandamus will lie. "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.'" *J. P. Sand & Gravel Co., supra*, at syllabus ¶ 3; see also *Jackson, supra*.

CCS essentially seeks indirect or consequential damages to Mr. Finley's plans for future development of the CCS building. Injuries that are merely consequential or incidental do not rise to the level of a substantial or unreasonable interference with a property right for which mandamus will lie. *In re Approp. for Highway Purposes of Land of Altshuler* (1967), 12 Ohio App. 2d 169, 170-171.

None of the cases cited by CCS are to the contrary. CCS has not cited a single case, nor is ODOT aware of one, holding that a public agency effects a taking when it simply states that it intends later to appropriate public property. On the other hand, as explained above, the Tenth District has reached the opposite conclusion. CCS does not attempt to distinguish this case from the *J. P. Sand & Gravel Co.* and *Jackson* decisions. Nor does this Court's recent decision in *State ex rel. Shelly Materials, Inc. v. Clark County Board of Commissioners*, 115 Ohio St. 3d 337, 2007-Ohio-5022, speak to the issue. See CCS Memo. in Support of Jurisdiction at 2 (citing *Shelly Materials*). *Shelly Materials* involved a total regulatory taking of a mineral rights estate, whereas in this case the public agency has not yet effected a taking at all. Thus, there is a good reason why the Court did not address this circumstance in *Shelly Materials*.

**B. No clear legal duty exists to enforce through mandamus.**

The decision of whether or not to proceed with a hardship acquisition is dedicated entirely to the Director's discretion. And mandamus will not lie to compel a state agency to exercise discretionary authority in any particular way. *State ex rel. Crabtree v. Franklin Cty. Bd. of Health* (1997), 77 Ohio St.3d 247.

The Director attempted a hardship acquisition in this case, but it could not be completed. A hardship acquisition is a permitted voluntary sale in advance of a highway project. Like any other voluntary sale, there must a meeting of the minds on the essential terms of the sale

contract. In this case, a sale was not achieved because the parties could not agree on a purchase price, and because CCS could not deliver title free and clear of all liens and encumbrances. As CCS notes in its petition at ¶ 5, the CCS building is burdened by a long-term lease to Beautiful Signage. ODOT was not and is not willing to purchase the property subject to the lease. Therefore, a hardship purchase could not be completed in this case.

Unless the federal standards for an advance hardship acquisition are met, the Director is without lawful authority to appropriate the CCS property or even acquire it by voluntary purchase at this time, because the requisite environmental approval has not occurred. Before ODOT can appropriate property, the Director must issue a finding in accordance with R.C. 5519.01 that the CCS property is needed for the project. The Director cannot issue the finding of necessity until the project plans are finalized. And those plans are subject to further revision—and therefore remain non-final—until the Federal Highway Administration (“FHWA”) approves the environmental documents in accordance with National Environmental Policy Act of 1969, Pub. L. 91-190, 42 U.S.C. §§ 4321-4347. That approval remains pending. Thus, ODOT has no authority to appropriate or even voluntarily to purchase property (except for hardship) until after the environmental document has been completed and approved by the FHWA. 23 C.F.R. § 771.113.

If at some point a taking is effected—after the requisite environmental approval—then CCS will have an adequate remedy at law in the form of a run-of-the-mill takings appropriation action under R.C. Chapter 163. Mandamus is therefore not a proper remedy.

**CONCLUSION**

For the above reasons, this Court should decline jurisdiction.

Respectfully submitted,

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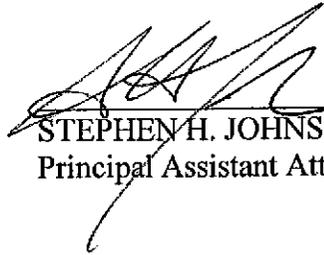
  
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**CERTIFICATE OF SERVICE**

This is to certify that a copy of the forgoing Memorandum in Opposition to Jurisdiction of Appellees James G. Beasley, Director of Transportation, and the Ohio Department of Transportation, was served upon the following this 13<sup>th</sup> day of June, 2008, by ordinary U.S.

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