

**IN THE SUPREME COURT OF OHIO**

STATE OF OHIO, ex rel.	)	CASE NO. 2009-0026
GERALD O.E. NICKOLI, et al.,	)	
	)	Original Action in Mandamus
Relators,	)	
	)	
ERIE METROPARKS, et al.,	)	
	)	
Respondents.	)	

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**MOTION OF RESPONDENTS FOR JUDGMENT ON THE PLEADINGS**

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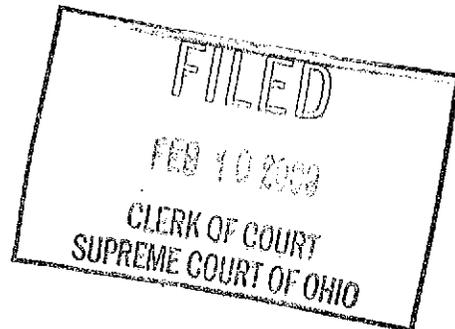
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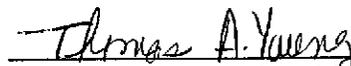


## MOTION OF RESPONDENTS FOR JUDGMENT ON THE PLEADINGS

Pursuant to Civ.R. 12(C), Respondents Erie MetroParks and Respondent Board of Park Commissioners, Erie MetroParks (“Respondent Board”; hereinafter Respondent Erie MetroParks and Respondent Board will be jointly referred to as “Respondents”) move for judgment on the pleadings dismissing the Complaint herein with prejudice. The bases of this Motion are that even after construing the material allegations in the Complaint, with all reasonable inferences to be drawn therefrom, in favor of Relators as true, Relators can prove no set of facts in support of their claims that would entitle them to relief.

A Memorandum in Support of Motion is attached hereto, and the contents of such Memorandum in Support of Motion are hereby incorporated by reference in this Motion.

Respectfully submitted,



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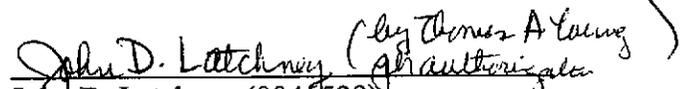
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## MEMORANDUM IN SUPPORT OF MOTION

This mandamus action involves portions of the Huron River Greenway (the “Greenway”), a multi-use bicycle and hiking trail constructed and operated by Respondents in Erie County, Ohio. The Greenway is located on a railroad right-of-way (the “Railroad Corridor”) which presently does not contain a railroad. Respondent Board and the predecessor railroad companies who used the Railroad Corridor have been in exclusive possession and control of such Corridor for the past approximately 130 years. Part or all of the Railroad Corridor may occupy real estate formerly used by the Milan Canal Company (the “Canal Company”) to construct and maintain a canal.

Relators claim that part of the Greenway is constructed on real estate owned by them, and hence Respondents are required to institute appropriation actions to compensate Relators for the value of such real estate (hereinafter such real estate will be referred to as “Relators’ Claimed Real Estate”).<sup>1</sup> As opposed to Respondents’ and its predecessor railroad companies’ 130 years of possession and control of the Railroad Corridor, Relators claim title to Relators’ Claimed Real Estate exclusively through recent deeds from the trustee of a testamentary trust which owned the assets of the Canal Company. In other words, Relators claim title to real estate which they assert was formerly owned by the Canal Company.

As will be demonstrated below, the pleadings herein and the doctrine of collateral estoppel establish that the only real estate ever owned by the Canal Company were two tracts of real estate, that both of these tracts are subject to a valid 99-year lease, renewable forever, entered into in 1881 and renewed in 1980, and that Respondent Board is the current lessee under such lease. Relators admit in their Complaint that no part of Relators’ Claimed Real Estate is

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<sup>1</sup> For purposes of this Motion, Relators’ allegations that part of the Greenway is located on Relators’ Claimed Real Estate must be taken as true. However, Respondents do not presently know whether such allegations are true or not, and hence if this Motion is denied Relators will have to prove such allegations.

located on either of the two tracts of real estate which were previously owned by the Canal Company. Consequently, it is clear that the deeds by which Relators claim title to Relators' Claimed Real Estate conveyed absolutely no interest in any real estate to any of the Relators.

Given the fact that Relators do not own Relators' Claimed Real Estate, this mandamus action, which seeks an order that Respondents institute appropriation actions to acquire such Real Estate, must be dismissed with prejudice because Relators cannot show that Respondents have a clear legal duty to institute such appropriation action and Relators cannot show that they have a clear legal right to require Respondents to institute such appropriation actions.

## FACTS

### **The Canal Company, The 1881 Lease And Respondents' Rights In The Railroad Corridor**

In 1827, the Ohio General Assembly enacted a law creating the Canal Company. 25 Ohio Laws 94 (copy attached to the Answer as Exhibit 1). The Canal Company was formed “for the purpose of constructing a navigable canal from Merry’s mill pond in Milan, in the county of Huron, to such point of the Huron River as shall be found most eligible, and a tow path on either or both sides of said river, from said point to Lake Erie; . . . .”<sup>2</sup> Id., Section 1 (hereinafter the canal authorized by this legislation will be referred to as the “Milan Canal”). The Canal Company eventually acquired land for the Milan Canal from Ebeneser Merry (the land acquired by the Canal Company from Ebeneser Merry will be referred to as the “Merry Tract”) and from Kneeland Townsend (the land acquired by the Canal Company from Kneeland Townsend will be referred to as the “Townsend Tract”, and the Merry Tract and the Townsend Tract will be jointly referred to as the “Merry/Townsend Tracts”). Complaint, ¶9; Answer of Respondents (“Answer”), ¶9. Copies of the two deeds by which the Canal Company acquired the

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<sup>2</sup> In 1827, Milan, Ohio was in Huron County. By 1881 Milan, Ohio was in Erie County.

Merry/Townsend Tracts are attached as Exhibits E and F to Relators' Memorandum in Support of their Complaint for a Writ of Mandamus ("Relators' Memo in Support of Complaint") filed herein.

On July 12, 1881, the Canal Company, as lessor, entered into a lease (the "1881 Lease" or the "Lease") with the Wheeling and Lake Erie Railroad Company, an Ohio corporation ("W&LE-Ohio"), as lessee. A copy of the 1881 Lease, which is recorded in Lease Records Volume 2, pages 26-28, Recorder's Office, Erie County, Ohio, is attached as Exhibit 2 to the Answer.

The 1881 Lease began by reciting that in April of 1877, the directors of the Canal Company gave the consent and authorization of the Canal Company to W&LE-Ohio to locate a railroad on and to occupy for the purpose of constructing and operating such railroad the real estate owned by the Canal Company, which was described as follows:

Situated in the Townships of Milan and Huron in said County of Erie and State of Ohio being all the land with all the rights and appurtenances thereof owned by said Milan Canal Company within the bounds of a strip of land One Hundred and Fifty (150) feet in width commencing at the southerly end of the canal Basin of said Milan Canal Company near the intersection of Main and Union Streets in the Village of Milan in said Erie County Ohio and running thence in a northerly direction to the mouth of the Huron River in the Village of Huron in said Erie County and which strip of land is bounded on the west by a line distant Fifty (50) feet from and running north parallel with the central line of the Rail Road of the Wheeling and Lake Erie Rail Road Company as now surveyed, located and being constructed between said Villages of Milan and Huron and which said strip of land is bounded on the east by a line distant One Hundred (100) feet from and running north parallel with the said central line of said Rail Road as surveyed the east and west lines of said strip of land being One Hundred and Fifty (150) feet apart and running north parallel with each other and with the central line of said Rail Road from the said place of beginning to the said mouth of Huron River. Also all of the so-called Dry Dock and all of the said canal Basin and all of the upper and lower Locks of said Canal with all the grounds and privileges connected

therewith in addition to what is included in the said strip of land above described the said Dry Dock containing about 1 ½ acres and the said canal Basin containing about Five and 45/100 acres of land be the same more or less.<sup>3</sup>

The 1881 Lease further recited that since April of 1877, W&LE-Ohio “has been and now is in the exclusive and undisputed possession [of the Canal Corridor] under license and authority of the Directors of the Milan Canal Company and under their promise and agreement to lease or convey said [Canal Corridor] to [W&LE-Ohio] in due form of law.” The Lease concluded by leasing the Canal Corridor to W&LE-Ohio, its successors and assigns, for a term of 99 years, renewal forever, at a specified annual rent.

As stated in *Erie MetroParks Bd. of Park Commrs. v. Key Trust Co. of Ohio, N.A.*, 6<sup>th</sup> Dist. E-02-009 and E-02-011, 2002-Ohio-4887, ¶9: “[I]t is undisputed that during the next 100 years [after the execution of the 1881 Lease], the railroad [W&LE-Ohio] and its successor railroad companies maintained and operated a line on the leased corridor”.<sup>4</sup> In 1980, the 1881 Lease was renewed for another 99 years. Complaint, ¶11; Answer, ¶11.

W&LE-Ohio was eventually merged into Norfolk and Western Railway Corporation (“Norfolk”). Complaint, ¶10; Answer, ¶10. In 1990, Norfolk deeded its interests in the Railroad Corridor, which included Norfolk’s interest as lessee under the 1881 Lease, to Wheeling and Lake Erie Railway Company, a Delaware corporation (“W&LE-Delaware”). Complaint, ¶13;

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<sup>3</sup> For the remainder of this Memorandum, this description will be referred to as the “1881 Lease Description.” The 1881 Lease Description described the entire length of the Milan Canal authorized by 25 Ohio Laws 94, from Milan, Ohio to the mouth of the Huron River in Huron, Ohio, which is on Lake Erie. For the remainder of this Memorandum, the real estate described by the 1881 Lease Description will be referred to as the “Canal Corridor.” It is not clear that the Canal Corridor and the Railroad Corridor are exactly the same real estate, and hence if this Motion is denied, evidence may be required to show the relationship between the Canal Corridor and the Railroad Corridor.

<sup>4</sup> This decision is one of the two appellate court decisions in the “*Key Trust* litigation” defined and described below. A copy of this decision is attached as Exhibit D to Relators’ Memo in Support of Complaint.

Answer, ¶13. A copy of the deed (the “1990 W&LE Deed”) from Norfolk to W&LE-Delaware is attached as Exhibit 6 to the Answer.<sup>5</sup>

In 1995, W&LE-Delaware executed a deed (the “1995 Respondent Board Deed”) by which it conveyed its rights in the Railroad Corridor to Respondent Board, subject to W&LE-Delaware’s right to run and maintain a railway over such Corridor. Complaint, ¶14; Answer, ¶14. A copy of the recorded 1995 Respondent Board Deed is attached as Exhibit 7 to the Answer. This Deed transferred to Respondent Board all of the rights in the Railroad Corridor W&LE-Delaware acquired from Norfolk by the 1990 W&LE Deed, including the lessee’s rights under the 1881 Lease. Complaint, ¶14; Answer, ¶14.

#### **The Disposition Of The Canal Company’s Real Estate**

The Canal Company was dissolved in 1904 and its assets were sold to Stephen A. Lockwood. Complaint, ¶12; Answer, ¶12. Attached to the Answer as Exhibit 3 is a copy of the petition (the “Canal Company Dissolution Petition”) which instituted Case No. 9702 in the Court of Common Pleas of Erie County, Ohio; this case (the “Canal Company Dissolution Action”) sought the dissolution of the Canal Company and the sale of its property. Attached to the Answer as Exhibit 4 is a copy of the July 27, 1904 Journal Entry filed in the Canal Company Dissolution Action; this Journal Entry ordered the sale of the Canal Company’s real estate by the Receiver (the “Canal Company Dissolution Receiver”) appointed in the Canal Company Dissolution Action. Attached to the Answer as Exhibit 5 is a copy of the October 24, 1904 Deed (the “Receiver’s Deed”) by which the Canal Company Dissolution Receiver conveyed the Canal Company’s real estate to Stephen A. Lockwood. Exhibit 5 discloses that the Receiver’s Deed

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<sup>5</sup> This Deed contains numerous references to recorded instruments, including but not limited to the 1881 Lease, by which Norfolk and W&LE-Ohio claimed rights to the Railroad Corridor.

has been recorded in Deed Book Volume 79, pages 239-241, Recorder's Office, Erie County, Ohio.

These documents from the Canal Company Dissolution Action demonstrate that the only real estate which the Canal Company purported to own when it was dissolved was the real estate described in this 1881 Lease Description, and that that real estate was subject to the Lease:

- In describing the real estate owned by the Canal Company when the Canal Company Dissolution Petition was filed, the Petition used the 1881 Lease Description and expressly stated that such real estate was subject to the 1881 Lease;
- The July 27, 1904 Journal Entry ordered the Canal Company Dissolution Receiver to sell the Canal Company's real estate, which was again described by using the 1881 Lease Description and which again stated that such real estate was subject to the 1881 Lease; and
- The Receiver's Deed conveyed to Stephen A. Lockwood the Canal Company's real estate, again described by using the 1881 Lease Description and again expressly stating that such real estate was subject to the 1881 Lease.

The interests acquired by Stephen A. Lockwood pursuant to the Receiver's Deed were the Canal Company's ownership rights in whatever real estate was covered by the 1881 Lease and the lessor's rights under the Lease. These interests eventually devolved to Key Trust Company of Ohio, N.A., as trustee for the testamentary trust of Verna Lockwood Williams (hereinafter Key Trust Company of Ohio, N.A., in its capacity as trustee for the testamentary trust of Verna Lockwood Williams, will be referred to as "Key Trust"). Complaint, ¶12; Answer, ¶12.

### **The Key Trust Litigation**

After the interests acquired by Stephen A. Lockwood pursuant to the Receiver's Deed devolved to Key Trust, and after the lessee's rights under the 1881 Lease had been transferred to

Respondent Board, Key Trust asserted that the Lease was terminated due to various alleged breaches of the Lease by the lessee, including abandonment of the use of the leased property for railroad purposes and non-payment of rent, and that therefore the real estate that had devolved to Key Trust was no longer subject to the Lease. These assertions caused Respondent Board to file a declaratory judgment action (the “*Key Trust* litigation”) originally docketed as *Erie MetroParks Bd. of Park Commrs. v. Key Trust of Ohio, N.A.*, Erie County, Ohio Court of Common Pleas Case No. 99-CV-442. Complaint, ¶16; Answer, ¶16. Respondent Board was the plaintiff in the *Key Trust* litigation, and eventually all Relators herein other than Relator Cheryl Lyons, along with Key Trust and others, were named as defendants.<sup>6</sup> Complaint, ¶18; Answer, ¶18.

Attached to the Answer as Exhibit 8 is a copy of the Amended Complaint in the *Key Trust* litigation. The demand in that pleading shows that the relief requested by Respondent Board pertained exclusively to the 1881 Lease: the relief sought was a declaratory judgment that the Lease was in full force and effect, that Respondent Board was the lessee under the Lease, that any rights of defendants in the real estate they claimed were subject to the Lease, and that the Lease permitted Respondent Board to improve and use such real estate as a recreational trail.<sup>7</sup>

The Amended Complaint did not challenge the titles of any of the defendants in the *Key Trust* litigation to Canal Corridor real estate which such defendants claimed to own. The

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<sup>6</sup> Respondent Board attempted to name as defendants in the *Key Trust* litigation Key Trust and all persons who claimed title to any portion of the Canal Corridor through Key Trust or through any grantees from Key Trust. The caption of the Complaint herein and paragraph 4 of the Complaint indicate that Relator Cheryl Lyons claims to own a portion of Relators’ Claimed Real Estate jointly with Relator Michael P. Meyer. However, Exhibit A-7 attached to Relators’ Memo in Support of Complaint is a copy of the deed by which Relator Michael P. Meyer allegedly acquired title to a portion of Relators’ Claimed Real Estate. Relator Cheryl Lyons is not a party to that deed, and that is apparently the reason she was not named as a defendant in the *Key Trust* litigation.

<sup>7</sup> The demand constantly referred to the “Property,” which was described in paragraph 1 of the Complaint as “certain real property more particularly described in the [1881] Lease \*\*\*”

declaratory judgment action simply sought a declaration that the 1881 Lease was valid and that any ownership interests of the defendants in Canal Corridor real estate were subject to the Lease.

A copy of the Answer and Counterclaim of the defendants in the *Key Trust* litigation is attached to the Answer as Exhibit 9. A review of that pleading discloses that none of those defendants (which include all the Relators herein except Relator Cheryl Lyons) claimed title to real estate not covered by the 1881 Lease. Instead, that pleading recognized the Lease but asserted it no longer encumbered defendants' Canal Corridor real estate because it had been terminated for various alleged breaches.

The *Key Trust* litigation engendered two trial court decisions and two appellate court decisions. Copies of the two appellate decisions are attached as Exhibits C and D to Relators' Memo in Support of Complaint. A copy of the first trial court decision is attached as Exhibit 11 to the Answer, and a copy of the second trial court decision is attached as Exhibit 12 to the Answer. A review of these decisions disclose that as a result of the *Key Trust* litigation, the following judicial determinations were made: Respondent was the lessee under the 1881 Lease; the Lease had not been forfeited or abandoned, but instead was in full force and effect; use of the real estate by Respondent Board as part of the Greenway was consistent with the Lease; the Lease only covered real estate which was owned by the Canal Company as of the date the Lease was executed; the only real estate owned by the Canal Company as of the date the Lease was executed were the Merry/Townsend Tracts; and therefore the Lease only covered real estate formerly in the Merry Tract or in the Townsend Tract.<sup>8</sup>

As these decisions indicate, the final outcome of the *Key Trust* litigation was judgment in favor of plaintiff-Respondent Board and against defendants on both plaintiff-Respondent Board's

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<sup>8</sup> As will be explained below, the decisions in the *Key Trust* litigation concerning the real estate covered by the 1881 Lease were somewhat confusing, and such confusion was not settled until this Court's decision in *State ex rel. Coles v. Granville*, 116 Ohio St. 3d 231, 2007- Ohio 6057.

Amended Complaint and on defendants' Counterclaim. Relators attempt to portray themselves as the victors in the *Key Trust* litigation. Nothing could be further from the truth. Relators, in their capacity as defendants in *Key Trust*, advanced two main arguments in that action: first, that the 1881 Lease covered the entire Canal Corridor, from Milan to Lake Erie; and, second, that the Lease was terminated. Relators lost on both issues.

The *Key Trust* litigation did not discuss the validity of the titles to real estate claimed by any of the defendants in that action, including the validity of Relators' titles to Relators' Claimed Real Estate. The validity of those titles simply was not an issue in the *Key Trust* litigation. However, by holding that the only real estate owned by the Canal Company in 1881 were the Merry/Townsend Tracts, the *Key Trust* litigation established the grounds for the present Motion: a person claiming title through the Canal Company to real estate which is not part of those Tracts has title to nothing.

***State ex rel. Coles v. Granville***

In *State ex rel. Coles v. Granville*, Ohio Supreme Court Case No. 2006-1259, a number of persons who had been defendants in the *Key Trust* litigation, claiming that they were owners of portions of the Canal Corridor and that part of the Greenway was constructed on their property, filed an original action in mandamus in this Court seeking an order compelling Respondent Board to institute appropriation actions with respect to such property. The Relators in *Coles* were different from the Relators in the present case, and the real estate allegedly owned by the Relators in *Coles* was not the same as the real estate allegedly owned by the Relators herein.

None of the real estate allegedly owned by the Relators in *Coles* was within the boundaries of the Merry Tract or the Townsend Tract. *State ex rel. Coles v. Granville*, 116 Ohio

St.3d 231, 2007-Ohio-6057, 877 N.E.2d 968, at ¶15. The *Key Trust* litigation had established that to the extent that any of the real estate allegedly owned by the Relators in *Coles* was subject to the 1881 Lease, Respondent Board was entitled to construct and maintain the Greenway on such real estate. Therefore, a primary issue in *Coles* concerned exactly what had been decided in the *Key Trust* litigation with respect to what real estate was actually subject to the 1881 Lease (hereinafter the real estate actually subject to the 1881 Lease will be referred to as the “Leased Real Estate”).

The two trial and two appellate decisions in the *Key Trust* litigation were confusing on this issue. All four decisions stated that the 1881 Lease only covered real estate owned by the Canal Company at the time it entered into the Lease, and that the only such real estate were the Merry/Townsend Tracts. However, both trial court decisions attached the same Exhibit A as a description of the property covered by the 1881 Lease. That Exhibit described such property as being the Merry/Townsend Tracts, “which lands have a northerly boundary at Lock No. 1 of the old Milan Canal, which lock was located immediately north of Mason Road \*\*\* at or near the intersection of the Milan Canal with the Huron River, and extending southerly to the Canal’s turning basin in the city of Milan, Ohio” (hereinafter the area within this quoted language will be referred to as the “North-South Boundary Area”). Both appellate decisions in the *Key Trust* litigation affirmed the trial court’s determination of the real estate covered by the 1881 Lease without criticism of Exhibit A attached to both trial court decisions.<sup>9</sup>

The real estate allegedly owned by the Relators in *Coles*, although outside the Merry/Townsend Tracts, appeared to be located within the North-South Boundary Area. Not

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<sup>9</sup> The inclusion of the North-South Boundary Area in Exhibit A to the second trial court opinion in the *Key Trust* litigation also clearly concerned the defendants therein, which included most of the Relators in *Coles* and herein. As this Court stated in *Coles, supra*, at ¶43, such inclusion prompted defendants in *Key Trust* to argue in the second appeal that the trial court had expanded the Leased Real Estate beyond the Merry/Townsend Tracts.

surprisingly, therefore, Respondent Board argued in *Coles* not that Relators therein did not have good title to the real estate they claimed to own, but instead that the *Key Trust* litigation had established that any real estate within the North-South Boundary Area was subject to the 1881 Lease and that therefore the real estate claimed by the *Coles*' Relators was subject to the 1881 Lease. *Coles*, ¶¶38, 39.

In *Coles*, this Court ended the confusion as to what had been decided in the *Key Trust* litigation concerning the scope of the Leased Real Estate by holding that that litigation established that the Lease only covered real estate formerly within the Merry/Townsend Tracts. In other words, this Court concluded in *Coles* that the *Key Trust* litigation determined that real estate located within the North-South Boundary Area but outside the Merry/Townsend Tracts was not part of the Leased Real Estate. *Coles*, ¶¶40-48. Respondents herein are, of course, not challenging that conclusion.<sup>10</sup>

As noted above, the real estate allegedly owned by the Relators in *Coles* was not within the boundaries of the Merry/Townsend Tracts, and therefore this Court held in *Coles* that the 1881 Lease did not give Respondent Board any rights to such real estate. Having ruled against Respondent Board on the scope of the 1881 Lease, this Court in *Coles* granted the writ of mandamus sought by Relators therein.<sup>11</sup>

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<sup>10</sup> As a result of the *Key Trust* litigation, as clarified by *Coles*, the Leased Real Estate is not as extensive as the real estate described in the 1881 Lease Description. That is, the Leased Real Estate is not as extensive as the Canal Corridor.

<sup>11</sup> Since the decision in *Coles*, Respondents have been working in good faith to gather the extensive information they need and to make the determinations required to institute the appropriation actions required by such decision. That information and determinations include obtaining a survey and legal description of each of six different parcels of real estate, determining exactly how much of such real estate Respondents need for the Greenway, determining whether Respondents will seek fee title to such real estate or merely an easement, and obtaining appraisals of the interests to be appropriated. Respondents have made the required determinations and have obtained all the information other than the appraisals, and Respondents are in the process of obtaining such appraisals. Therefore, although no

## The Present Mandamus Action

Relators herein assert that they own Relators' Claimed Real Estate and that parts of the Greenway are located on such real estate. Consequently, Relators claim that Respondents must commence appropriation actions to compensate Relators for the taking of Relators' Claimed Real Estate for use as part of the Greenway.

All of the Relators other than Relators Richard and Carol Rinella claim title to their portions of Relators' Claimed Real Estate through deeds from Buffalo Prairie, Ltd. ("Buffalo Prairie"). Complaint, ¶17; Answer, ¶17. Buffalo Prairie, in turn, claims title to the real estate it purportedly conveyed to these Relators pursuant to a 2000 deed (the "Buffalo Prairie Deed") from Key Trust to Buffalo Prairie. *Id.* A full copy of the Buffalo Prairie Deed is attached to the Answer as Exhibit 13; a partial copy of the Buffalo Prairie Deed is attached as Exhibit G to Relators' Memo in Support of Complaint. There are several important aspects to the Buffalo Prairie Deed:

- It purports to convey from Key Trust to Buffalo Prairie "[a]ll of the right, title and interest [Key Trust] holds in the property of the former Milan Canal Company, including but not limited to the canal basin, locks, dry dock and tow path, and further described in the attached Exhibit A, which is incorporated as part of this deed";
- Exhibit A to such Deed, the exhibit which further describes the property being conveyed by the Buffalo Prairie Deed, is the 1881 Lease Description;
- Page one of such Deed contains the "Prior Deed Reference", which is clearly a reference to the deed by which Key Trust claims title to the real estate it is conveying. The "Prior Deed Reference" on the Buffalo Prairie Deed is "Vol. 78 Page 239", which is a reference to the Receiver's Deed. As noted above, the Receiver's Deed

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appropriation actions have yet been filed as a result of the decision in *Coles*, such actions should be commenced within the near future.

conveyed the Canal Company's ownership rights in property described by using the 1881 Lease Description, but subject to the Lease; and

- Such Deed contains five pages. The copy of the Buffalo Prairie Deed submitted by Relators as Exhibit G to Relators' Memo in Support of Complaint conveniently neglects to include the last two pages of that Deed. As shown by the complete copy of the Buffalo Prairie Deed attached to the Answer as Exhibit 13, the last two pages of that Deed is a copy of the Receiver's Deed.

It is therefore clear that the Buffalo Prairie Deed only conveyed the Canal Company's ownership interests in the Leased Real Estate; that Deed did not purport to nor did it convey any real estate not covered by the 1881 Lease.<sup>12</sup>

Relators Richard and Carol Rinella claim title to their portion of Relators' Claimed Real Estate by way of a deed from Key Trust to them. Complaint, ¶¶17; Answer, ¶¶17. A copy of the Deed (the "Rinella Deed") from Key Trust to Relators Richard and Carol Rinella is attached as Exhibit 14 to the Answer.<sup>13</sup>

As noted above, in the Buffalo Prairie Deed Key Trust asserted that its source of title was the Receiver's Deed. In the Rinella Deed, however, Key Trust asserted that its source of title was "by or through instrument, recorded in Volume 80, Page 453, County Recorder's Office, Erie County Probate Court Nos. 3147 and 8504 and Leases Volume 17 Page 307 . . . ." Attached

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<sup>12</sup> Both Key Trust and Buffalo Prairie were defendants in the Key Trust litigation. The Buffalo Prairie Deed was executed at a time when the defendants in the *Key Trust* litigation were asserting in *Key Trust* that the 1881 Lease was terminated. Had defendants prevailed on that assertion, defendants would own the Canal Company's interests in the Leased Real Estate free of the Lease. Therefore, neither Key Trust, Buffalo Prairie nor any other defendant in the *Key Trust* litigation contended in that litigation that Key Trust owned former Canal Company real estate in addition to the Leased Real Estate.

<sup>13</sup> The Rinella Deed was signed by Key Trust on September 8, 1999. That Deed purported to convey a specifically described portion of the Canal Corridor. However, the Buffalo Prairie Deed, which was signed by Key Trust on April 11, 2000, purported to convey all of the Canal Corridor to Buffalo Prairie; that is, it did not except that portion of the Canal Corridor later allegedly conveyed to Relators Richard and Carol Rinella. Relators have not explained this apparent discrepancy between these two Deeds.

to the Answer as Exhibit 15 is a copy of the 1906 deed recorded in Deed Book Volume 80, page 453, Recorder's Office, Erie County, Ohio. This deed evidences the conveyance by Stephen A. Lockwood to Emma L. Lockwood of the real estate acquired by Stephen A. Lockwood as a result of the Receiver's Deed. Therefore, the description used in the deed to Emma L. Lockwood to describe the real estate being conveyed to her was the 1881 Lease Description, and this deed expressly stated that such real estate was subject to the 1881 Lease.

Attached to the Answer as Exhibit 16 is a copy of the 1953 Assignment of Lease recorded in Lease Volume 17, pages 307-309, Recorder's Office, Erie County, Ohio. This document evidences the assignment of the 1881 Lease from the executor of the estate of Verna Lockwood Williams, appointed in Erie County, Ohio Probate Court Case No. 8504, to the trustee of the testamentary trust of Verna Lockwood Williams. This is, of course, the testamentary trust for which Key Trust was eventually appointed trustee.

It is therefore clear that the deed referred to in the Rinella Deed as one source of Key Trust's title to the real estate being conveyed was, like the "Prior Deed Reference" in the Buffalo Prairie Deed, a deed conveying the Canal Company's interests in the real estate covered by the 1881 Lease, but subject to the Lease. It is also clear that the Assignment of Lease referred to in the Rinella Deed merely assigned the lessor's rights in the Lease. Neither this deed nor this Assignment of Lease purported to convey any real estate other than real estate subject to the 1881 Lease.

Relators allege that Relators' Claimed Real Estate is "outside the boundaries of the" Merry/Townsend Tracts. Complaint, ¶35; Answer, ¶35. This is a critical allegation, as it means that none of the Relators' Claimed Real Estate is within the only real estate that the *Key Trust* litigation found was owned by the Canal Company when it executed the 1881 Lease.

In the Answer herein, Respondents have denied that Relators own Relators' Claimed Real Estate. Because the pleading herein and the doctrine of collateral estoppel establishes the accuracy of that denial, the Complaint must be dismissed.

### **ARGUMENT**

This case presents the Court with a situation in which Respondents are in possession of real estate which Relators claim to own. This is comparable to an action in ejectment under R.C. 5303.03, which provides a remedy for a person claiming the right to possess real estate which is in the possession of another. As succinctly stated in 37 Ohio Jurisprudence 3d (2002) 18, Ejectment, Section 6:

It is an axiomatic principle that the plaintiff in an action to recover real property must recover on the strength of the plaintiff's own title and not on the weakness of the adversary's. In other words, the plaintiff must show a better legal right to take possession than the defendant has to retain it. Possession is so far evidence of title that it will be protected until a better title is produced, and the defendant in possession cannot be ousted by a doubtful claim. Any doubt must be resolved in the defendant's favor.

Therefore, the issue in this case is not the validity of Respondents' possession of Relators' Claimed Real Estate, but whether Relators can show a superior right to the possession of such Real Estate.

### **CIV.R 12 (C) STANDARDS**

Civ.R. 12 (C) provides: "After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings." This case has just begun, no trial date has been set, and consequently this Motion is timely.

Dismissal of an action is proper under Civ.R. 12 (C) “where a court (1) construes the material allegations in the complaint, with all reasonable inferences to be drawn therefrom, in favor of the nonmoving party as true, and (2) finds beyond doubt, that the plaintiff could prove no set of facts in support of his claim that would entitle him to relief.” *State ex rel. Midwest Pride IV, Inc. v. Pontious* (1996), 75 Ohio St.3d 565, 570, 664 N.E.2d 931. As also stated in *Pontious*: “Thus, Civ.R. 12 (C) requires a determination that no material factual issues exist and that the movant is entitled to judgment as a matter of law.” *Id.*

A Civ.R. 12 (C) motion “permits consideration of the complaint and answer: ....” *Pontious*, 75 Ohio St.3d at 569. Exhibits attached to pleadings can also be used to determine a Civ.R. 12 (C) motion. *Curtis v. Ohio Adult Parole Authority*, 10<sup>th</sup> Dist. No. 04-AP-1214, 2006-Ohio-15, at ¶ 24. The present Motion relies on a number of exhibits attached to the Answer. Most of those exhibits are documents which were referred to in the Complaint herein but which were not attached thereto. The exhibits attached to the Answer consist of one piece of legislation enacted by the Ohio General Assembly in 1827, documents recorded in the Recorder’s Office, Erie County, Ohio, pleadings from the *Key Trust* litigation, and the two trial court decisions from that litigation.

### **MANDAMUS STANDARDS**

Numerous cases establish that there are three elements that must be satisfied before a writ of mandamus may issue. First, the relator must show that there is a clear legal duty on the part of the named respondent to do the act requested; second, there must be a showing by the relator that relator has a clear legal right to have the requested act performed; and, third, relator must not have a plain and adequate remedy in the ordinary course of law. *E.g., State ex rel. Bennett v. Bds. of Elections* (1990), 56 Ohio St.3d 1, 2-3, 564 N.E.2d 407. The relator in a mandamus action has

the burden of establishing a clear right to the relief sought. *State ex rel. York Internl. Corp. v. Indus. Comm.*, 107 Ohio St.3d 421, 2006-Ohio-17, 840 N.E.2d 195, at ¶ 20.

### **RIGHT TO DEMAND APPROPRIATION OF REAL ESTATE**

Relators claim they are entitled to a writ of mandamus compelling Respondents to institute appropriation actions with respect to Relators' Claimed Real Estate because Relators assert that they own such Real Estate and because Relators assert that Respondents have taken such Real Estate for use as part of the Greenway. Respondent Board is a park district created under R.C. Chapter 1545. Complaint, ¶ 7; Answer, ¶ 7. Pursuant to R.C. 1545.11, Respondent Board has the power to appropriate property in the manner provided by R.C. Chapter 163.

To be entitled to compensation in an appropriation action under R.C. Chapter 163, a person must be an "Owner", which is defined in R.C. 163.01(E) as "any individual, partnership, association, or corporation having any estate, title, or interest in any real property sought to be appropriated." This definition is a codification of the axiomatic rule that only a person who has a legally recognized interest in land taken for a public purpose is entitled to compensation for the value of such land. *Ohio Valley Advertising Corp. v. Linzell* (1957), 107 Ohio App. 351, 355, 152 N.E.2d 380, affirmed (1958), 168 Ohio St. 259.

As will now be demonstrated, the pleadings in this case and the doctrine of collateral estoppel establish that none of the Relators have any valid interest in Relators' Claimed Real Estate. Consequently Relators cannot maintain a mandamus action seeking to compel Respondents to appropriate such Real Estate.

### **RELATORS DO NOT OWN RELATORS' CLAIMED REAL ESTATE**

#### **A. The Pleadings Herein And The Doctrine Of Collateral Estoppel Demonstrate That Relators Do Not Own Relators' Claimed Real Estate**

The “Facts” section of this Memorandum demonstrates that the pleadings herein (which includes the exhibits to the Answer) establish that all of Relators’ deeds to Relators’ Claimed Real Estate have, in effect, a common grantor, Key Trust. The grantor in the Rinella Deed is Key Trust. The grantor in the quitclaim deeds to the other Relators is Buffalo Prairie. Buffalo Prairie claims to own the real estate conveyed by such deeds pursuant to the Buffalo Prairie Deed in which Key Trust is the grantor.

A grantor in a deed cannot convey better title than he has, and hence a grantee in a deed obtains no better title than his grantor had. *Lipps v. Lipps* (1949), 54 Ohio Law Abs. 425, 430, 87 N.E.2d 823. If a grantor does not own title to the real estate he purports to convey, his deed conveys nothing. *Coles, supra*, 116 Ohio St.3d 231, 2007-Ohio-6057, at ¶ 57. Therefore, if Key Trust did not own Relators’ Claimed Real Estate, Relators cannot own such Real Estate.

The “Facts” section of this Memorandum also demonstrates that the pleadings herein show that the only real estate owned by Key Trust was the real estate formerly owned by the Canal Company. Therefore, if the Canal Company never owned Relators’ Claimed Real Estate, Key Trust could not convey title to such Real Estate to anyone.

The identity of the real estate owned by the Canal Company and eventually by Key Trust is established by the pleadings herein and by the doctrine of collateral estoppel. In *Fort Frye Teachers Assn., OEA/NEA v. State Emp. Relations Bd.* (1998), 81 Ohio St.3d 392, 395, 692 N.E.2d 140, this Court stated: “The doctrine of issue preclusion, also known as collateral estoppel, holds that a fact or a point that was actually and directly at issue in a previous action, and was passed upon and determined by a court of competent jurisdiction, may not be drawn into question in a subsequent action between the same parties or their privies, whether the cause of action in the two actions be identical or different.” See, also, *State ex rel. Stacy v. Batavia Local*

*School Dist. Bd. of Ed.*, 97 Ohio St.3d 269, 2002-Ohio-6322, at ¶16, where this Court stated that “collateral estoppel prevents parties from relitigating in a subsequent case facts and issues that were fully litigated in a previous case.”

In the *Key Trust* litigation, it was conclusively determined that the only real estate owned by the Canal Company at the time it executed the 1881 Lease were the Merry/Townsend Tracts. The scope of the 1881 Lease was actually and directly at issue in and was passed upon and determined in the *Key Trust* litigation. Respondent Board and all other Relators other than Relator Cheryl Lyons were parties to the *Key Trust* litigation.<sup>14</sup> Consequently, the doctrine of collateral estoppel establishes for purposes of this mandamus action that at the time the Canal Company entered into the 1881 Lease, the only real estate it owned were the Merry/Townsend Tracts.

As Relators acknowledge on page two of Relators’ Memo in Support of Complaint, the Canal Company entered into the 1881 Lease after it had ceased operating. This acknowledgment, coupled with the established fact that the 1881 Lease covered all of the Canal Company’s real estate as of the date the Lease was executed, should be sufficient to infer that the Canal Company did not acquire any additional real estate after it entered into the Lease. Such inference is conclusively established by the pleadings herein. As noted in the “Facts” section of this Memorandum, the pleadings demonstrate that the Canal Company was dissolved by court action in 1904, that in that action the Canal Company stated that the only real estate it owned

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<sup>14</sup> Relator Cheryl Lyons, although not a party in the *Key Trust* litigation, is bound by the determinations made in that litigation. Collateral estoppel applies to a party in privity with a party to the prior action. *Thompson v. Wing* (1994), 70 Ohio St.3d 176, 183, 637 N.E.2d 917. A person is in privity with another if he or she “succeeds to an estate or an interest formerly held by another.” *Whitehead v. Gen. Tel. Co.* (1969), 20 Ohio St.2d 108, 254 N.E.2d 10 (¶ 2 of the syllabus). As noted in footnote 6, *supra*, Relator Cheryl Lyons is apparently now claiming an interest in real estate deeded by Buffalo Prairie solely to Relator Michael R. Meyer, who was a defendant in the *Key Trust* litigation. See Exhibit A-7 of Relators’ Memo in Support of Complaint.

was the real estate subject to the 1881 Lease, and that as a result of the dissolution of the Canal Company such real estate was conveyed by the Receiver's Deed to Stephen A. Lockwood. It is admitted in the pleadings that Key Trust is the successor to Stephen A. Lockwood's ownership interests acquired as a result of the dissolution of the Canal Company.

It was expressly determined in the first trial court opinion in the *Key Trust* litigation that the only real estate that devolved to *Key Trust* was the Canal Company's real estate, subject to the 1881 Lease. First trial court opinion (Answer, Exhibit 11), page 2. This determination was never challenged or altered in the *Key Trust* litigation. In fact, as noted above, none of the defendants in that litigation advanced an argument that the Canal Company and therefore Key Trust ever owned any real estate in addition to the real estate covered by the 1881 Lease: the defendants in the *Key Trust* litigation recognized that the only real estate the Canal Company ever owned was the real estate covered by the Lease, but they argued that the Lease was terminated and therefore the real estate formerly owned by the Canal Company and eventually by Key Trust was no longer subject to the Lease.

Pursuant to the pleadings herein and the doctrine of collateral estoppel, it is established that neither the Canal Company nor Key Trust ever owned any real estate other than the Merry/Townsend Tracts. Relators allege that none of Relators' Claimed Real Estate is on either the Merry Tract or the Townsend Tract. Consequently, the deeds by which Relators claim title to Relators' Claimed Real Estate transferred absolutely no interest in any real estate to them.

**B. The Validity Of Relators' Titles To Relators' Claimed Real Estate Was Not Determined In The *Key Trust* Litigation, And Hence Collateral Estoppel Does Not Prevent Respondents From Challenging Such Validity**

Relators contend on pages 1 and 2 of Relators' Memo in Support of Complaint that: "The Relators' unencumbered ownership of their respective Property was conclusively established in

[the *Key Trust* litigation], which this Court, in *State ex rel. Coles v. Granville*, 2007 – Ohio–6057

\* \* \* held had a preclusive effect concerning the Relators’ ownership of their respective Property”. Based on this contention Relators assume that res judicata bars Respondents from attacking in this action the validity of Relators’ titles to Relators’ Claimed Real Estate. Because the contention underlying this assumption is clearly wrong, the assumption is also wrong.<sup>15</sup>

For purposes of collateral estoppel, the issues that were determined in prior litigation must, obviously, be ascertained from the judicial decisions in such litigation. As stated in *Thompson v. Wing* (1994), 70 Ohio St.3d 176, 185, 637 N.E.2d 917: “For collateral estoppel to bar the relitigation of an issue, precisely the *same* issue must have previously been litigated and decided” (emphasis in original).

A reading of the four decisions in the *Key Trust* litigation will disclose that none of those decisions expressly determined the validity of titles to any real estate. Instead, the issue which was decided in that litigation and whose collateral estoppel effect is germane to the present case solely concerned what real estate was owned by the Canal Company and therefore subject to the 1881 Lease. *Key Trust* determined that the only real estate owned by the Canal Company when it entered into the 1881 Lease were the Merry/Townsend Tracts, and therefore only real estate which was in one of those two Tracts was subject to the Lease. With respect to real estate not in either of those two Tracts, such as Relators’ Claimed Real Estate, the *Key Trust* litigation merely

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<sup>15</sup> Both Relators and this Court in *Coles* refer to the “res judicata” effect of the *Key Trust* litigation. As explained in *Whitehead, supra*, 20 Ohio St.2d at 112, there are two aspects of res judicata: one aspect (claim preclusion) precludes a plaintiff from relitigating the same cause of action against the same defendant as was litigated in a prior lawsuit; the other aspect (collateral estoppel or issue preclusion) precludes the relitigation in a second action of an issue that has been actually and necessarily litigated and determined in a prior lawsuit based on a different cause of action. In *Coles*, when this Court referred to the res judicata effect of the *Key Trust* litigation, this Court was apparently referring to collateral estoppel, as the causes of action in the *Key Trust* litigation and in *Coles* were different. Likewise, when Relators refer to the res judicata effect of the *Key Trust* litigation in this case, they must be referring to collateral estoppel, as that litigation and the present action involve different causes of action.

determined that such real estate was not subject to the 1881 Lease, but it did not determine any other issues concerning the validity of title to such real estate.

In ¶55 of *Coles*, this Court stated:

Although the focus of the *Key Trust* cases was on the leased property, the board raised, and the court considered, whether the board owned any of the pertinent canal corridor property in fee in addition to its interests under the railroad lease. In its reply to the counterclaim filed in *Key Trust*, the board expressly claimed that it had a right to possess the land formerly used by the railroad through property it acquired by a quitclaim deed from a successor to the lessee, instead of simply through the lease itself. In the trial court's first judgment, the court specifically noted that one of the issues before it was whether the board of park commissioners had "acquired any ownership interest in the property at issue by virtue of a quitclaim deed from the Wheeling Railroad." The court ultimately resolved this issue in favor of the defendants, including relators, by holding that the board had no property interest in the land north of Lock No. 1. That judgment was not modified by the subsequent *Key Trust* proceedings.

These statements do not constitute a holding by this Court that the *Key Trust* litigation considered and determined the validity of the titles to Canal Corridor real estate claimed to be owned by the defendants in *Key Trust*. As the decisions in the *Key Trust* litigation show, the issue in that litigation was the identity of the real estate covered by the 1881 Lease, not the validity of defendants' titles. As stated in *Bd. of Commrs. v. Key Trust Co. of Ohio*, 145 Ohio App.3d 782, 788 (the first appellate decision in the *Key Trust* litigation):

With respect to appellants' [defendants'] first and second assignments of error, appellants maintain that the trial court should not have permitted appellee's [the Board's] attack on their title, since the complaint contained no notice of a claim against appellants' title. Again, appellants mischaracterize the proceedings. Appellee asked for a declaration of rights under the 1881 lease. The lease limited its conveyance to property owned by the canal

company. Thus, a determination of what property the canal company owned was in order. The exercise was not an attack on appellants' title; rather, it was necessary to determine the scope of the lease. Accordingly, appellants' first and second assignments of error are not well taken.

The "quitclaim deed" referred to in ¶55 of *Coles* is the 1995 Respondent Board Deed. Although the first trial court decision did state that one of the issues was whether Respondent Board had "acquired any ownership interest in the property at issue by virtue of" that Deed, it is clear from that decision that the "property at issue" was the property subject to the 1881 Lease, not property which was not covered by the Lease.

A review of the first trial court decision in *Key Trust* and the three subsequent decisions in that litigation will demonstrate that none of them made any determination as to the effect of the 1995 Respondent Board Deed on Respondents' interest in any real estate, other than to point out that the lessee's rights under the 1881 Lease were conveyed to Respondent Board by that Deed. Neither the first trial court decision in *Key Trust* nor any subsequent decision in that action ever held that Respondent Board did not have any property interest in the land north of Lock No. 1. All that *Key Trust* held with respect to such property was that Respondent Board did not have an interest in such property pursuant to the 1881 Lease, because such property was not part of the Leased Real Estate.

Likewise, a reading of the *Coles* opinion will disclose a total absence of any discussion or decision in that opinion that as a result of the *Key Trust* litigation the titles of Relators to the property at issue therein (which is not the same property as Relators' Claimed Real Estate) were valid as against any challenge. Instead, *Coles* merely held that because none of the real estate claimed by the *Coles* Relators was within the Merry Tract or the Townsend Tract, that real estate

was not encumbered by the 1881 Lease. There was no discussion and no decision in the *Coles* opinion that Relators therein had good title to the real estate they claimed to own.<sup>16</sup>

Because the validity of Relators' titles to Relators' Claimed Real Estate was never actually litigated and determined in *Key Trust* litigation, Respondents can challenge such validity in this action.

**BECAUSE THE PLEADINGS HEREIN AND THE DOCTRINE OF COLLATERAL ESTOPPEL DISCLOSE THAT RELATORS DO NOT OWN RELATORS' CLAIMED REAL ESTATE, THE COMPLAINT MUST BE DISMISSED**

Relators seek a writ of mandamus compelling Respondents to appropriate Relators' Claimed Real Estate. As demonstrated above, the pleadings in this action, coupled with the collateral estoppel effect of the *Key Trust* litigation, demonstrate that Relators do not own or have any interest in such Real Estate. Respondents obviously have no legal duty to appropriate property from a person who has no interest in such property, and just as obviously such a person has no right to have an appropriation action commenced. Consequently, the Complaint herein should be dismissed with prejudice.

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<sup>16</sup> Respondents recognize that they could have argued in the alternative in *Coles* that if this Court held that the real estate claimed by Relators therein was not part of the Leased Real Estate, then the Relators could not possibly have good title to such real estate. However, this Court has recently held that collateral estoppel simply does not apply to an issue which could have been, but was not, raised and decided in prior litigation. *State, ex rel. Davis v. Public Emp. Retirement Bd.*, 120 Ohio St.3d 386, 2008 – Ohio – 6254, ¶¶28, 30-32.

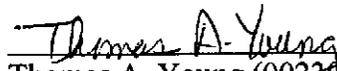
Respondents also recognize that in their Motion for Reconsideration filed in *Coles* after the *Coles* decision was announced, they alluded to an argument that because Key Trust only owned the Leased Real Estate, any conveyance by Key Trust of real estate which was not part of the Leased Real Estate conveyed nothing. This Court denied the Motion for Reconsideration in a one-line Entry which stated no reasons. This Entry cannot be the basis for any collateral estoppel argument, as it does show why the Motion for Reconsideration was denied. See 3 Moore, Federal Practice (2008), Paragraph 132.03[3][d], at 132-98 and the cases cited therein: "A decision that does not mention the specific issue in question is too vague to afford issue preclusive effect. If there is no showing with regard to the issues that were actually decided, there is no issue preclusion." As this Court is well aware, there are numerous reasons for overruling a motion for reconsideration other than the merits of the argument contained in such motion.

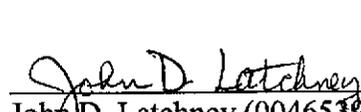
## CONCLUSION

Respondents and its predecessor railroad companies have been in possession of the entire Railroad Corridor, including Relators' Claimed Real Estate, for more than 130 years. Relators, on the other hand, claim title to Relators' Claimed Real Estate through deeds which clearly conveyed no interest in such Real Estate to them. Under such facts, Relators have no right to compel Respondents to appropriate Relators' Claimed Real Estate. Respondents are prepared to prove their rights in Relators' Claimed Real Estate against any person who presents a colorable claim to such Real Estate. Based on the pleadings herein and the doctrine of collateral estoppel, Relators are not such persons.

For the reasons stated herein, the Complaint should be dismissed with prejudice.

Respectfully submitted,

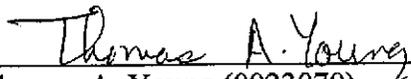
  
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Board of Park Commissioners, Erie MetroParks

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on the 10<sup>th</sup> day of February, 2009, he served a copy of the foregoing "Motion For Judgment On The Pleadings" and "Memorandum In Support Of Motion" on Bruce L. Ingram, Esq., VORYS, SATER, SEYMOUR & PEASE, 52 East Gay Street, Columbus, Ohio 43216-1008, counsel of record for Relators, by mailing said copy to him via ordinary United States mail, postage prepaid.

  
\_\_\_\_\_  
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