

IN THE SUPREME COURT OF OHIO

ORIGINAL

STATE EX REL. GERALD O.E.  
NICKOLI AND ROBIN L.B. NICKOLI,  
et al.,

Relators,

v.

ERIE METROPARKS, et al.,

Respondents.

Case No. 2009-0026

Original Action in Mandamus

**RELATORS' MOTION FOR LEAVE TO FILE SUPPLEMENT TO  
PRESENTATION OF EVIDENCE**

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MetroParks*

FILED  
JUL 30 2009  
CLERK OF COURT  
SUPREME COURT OF OHIO

**RELATORS' MOTION FOR LEAVE TO FILE SUPPLEMENT TO  
PRESENTATION OF EVIDENCE**

Pursuant to S. Ct. Prac. R. XIV, Sec. 4, Relators, by and through their counsel, respectfully move this Court for leave to file a supplement to their presentation of evidence.

Relators seek a Writ of Mandamus to compel the Respondents (collectively "MetroParks") to commence appropriation actions within sixty (60) days of the issuance of a writ to compel Respondents to compensate Relators for the physical invasion and occupation of their land. Pursuant to this Court's April 8, 2009 Order and the April 17, 2009 Stipulation of the parties, the parties have filed their respective presentations of evidence and briefing, the latter of which was completed on June 24, 2009. This motion relates to evidence that has come into existence after that date.

To date, MetroParks has refused to comply with this court's mandate issued on November 20, 2007 in *Coles v. Granville* ("Coles"). MetroParks has not filed condemnation actions against any of the *Coles* relators as ordered by this court. As a result, most of the *Coles* relators filed a civil rights action in federal district court against MetroParks and certain MetroParks' current and former officials captioned *Edwin M. Coles, et al. v. Board of Park Commissioners, Erie MetroParks, et al.*, Case No. 3:08-cv-2968 (N.D. Ohio) ("Federal Action"). The Federal Action is pending.

MetroParks, on July 15, 2009, filed in the Federal Action a Combined Motion for Summary Judgment and Memorandum in Opposition to Plaintiffs' Motion for Summary Judgment (Exhibit A to the Affidavit of Thomas Fusonie, which is attached hereto as Exhibit 1). That filing by MetroParks, in addition to being an impermissible collateral attack on this Court's decision in *Coles*, demonstrates that MetroParks has willfully chosen to ignore this Court's

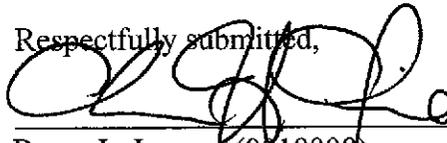
mandate because of its contempt for the outcome. MetroParks' willful disregard for this Court's order is highly relevant to the relief that Relators request in this case against MetroParks.

First, in this filing MetroParks refers to the involuntary seizures of the *Coles* Relators' property as merely "alleged takings." *Fusionie Aff.*, at Ex. A, pg. 1. There is nothing "alleged" about the *Coles* taking and the *Coles* decision could not be any more clear on this point. Seeking to excuse its contempt for this Court's mandate, MetroParks claims in the Federal Action that the *Coles* decision is "a clear mistake" and "obvious error" made through a "*metaphorical stroke of the keyboard.*" *Id.* at 5, 14, 28 (emphasis added). This filing demonstrates that MetroParks believes that *Coles* is illegitimate and therefore it has the right to ignore this Court's mandate. MetroParks' contempt for the *Coles* decision confirms that a specific, short deadline must be imposed upon MetroParks in this case, if a writ is issued, to initiate any appropriation actions ordered by this Court.

The evidence in this pleading is not cumulative of that previously submitted by the Relators. It was not until after the evidence submission and briefing deadlines passed in this case that MetroParks felt free to publicly attack the integrity of the *Coles* decision. MetroParks is not prejudiced by the submission of its Motion for Summary Judgment filed in the Federal Action. The argument and language chosen by MetroParks to describe this Court's decision in *Coles* speaks for itself. Therefore, Relators request that they be allowed to file MetroParks' Motion for Summary Judgment as a supplement to their presentation of evidence in this matter.

Relators respectfully request that this Court grant the foregoing Motion to allow the filing of a supplement to their presentation of evidence.

Respectfully submitted,



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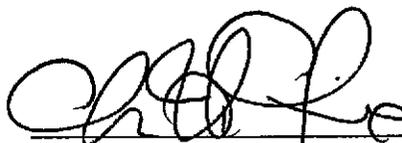
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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a true and accurate copy of the foregoing was served this 30<sup>th</sup> day of July, 2009 via regular U.S. Mail, postage prepaid, upon Thomas A. Young, Porter, Wright, Morris & Arthur LLP, 41 South High Street, Columbus, Ohio 43215 and John D. Latchney, Tomino & Latchney, LPA, 803 East Washington Street, Suite 200, Medina, Ohio 44256, counsel for Respondents Erie MetroParks and Board of Park Commissioners, Erie MetroParks.



Thomas H. Fusonie (0074201)

IN THE SUPREME COURT OF OHIO

STATE EX REL. GERALD O.E.  
NICKOLI AND ROBIN L.B. NICKOLI,  
et al.,

Relators,

v.

ERIE METROPARKS, et al.,

Respondents.

Case No. 2009-0026

Original Action in Mandamus

**AFFIDAVIT OF THOMAS FUSONIE**

STATE OF OHIO            )  
                                  ) ss:  
COUNTY OF FRANKLIN    )

My name is Thomas Fusonie, I am over the age of 21, and I am competent to make this affidavit. The facts stated herein are within my personal knowledge and are true and correct. I state as follows:

1. I am an associate attorney with the law firm of Vorys, Sater, Seymour and Pease, LLP, counsel for the Relators in this mandamus action. I am making this affirmation in support of the Relators' Motion for Leave to File Supplement to Presentation of Evidence in this matter.

2. Attached as Exhibit A is a true and accurate copy of Defendants Erie MetroParks and Board of Park Commissioners, Erie MetroParks' Combined Motion for Summary Judgment and Memorandum in Opposition to Plaintiffs' Motion for Summary Judgment in the case captioned *Edwin M. Coles, et al. v. Board of Park Commissioners, Erie MetroParks, et al.*, Case No. 3:08-cv-2968 (N.D. Ohio), which was served on me through the Northern District of Ohio's

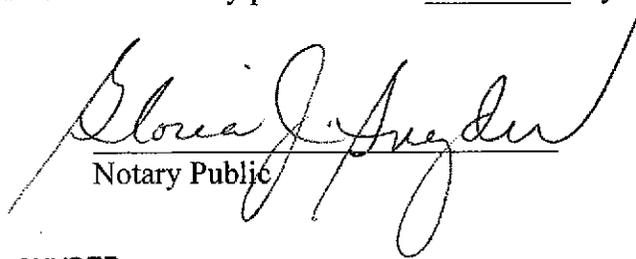


electronic case filing system on July 15, 2009.

**FURTHER AFFIANT SAYETH NAUGHT.**

  
\_\_\_\_\_  
Thomas Fusonje

Sworn to before me and subscribed in my presence this 30<sup>th</sup> day of July, 2009.

  
\_\_\_\_\_  
Notary Public



**GLORIA J. SNYDER**  
Notary Public, State of Ohio  
My Commission Expires  
December 18, 2013

IN THE UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF OHIO  
WESTERN DIVISION

EDWIN M. COLES, et al.	)	CASE NO. 3:08-cv-2968
	)	
Plaintiffs,	)	JUDGE JAMES G. CARR
	)	
v.	)	<b>DEFENDANT ERIE METROPARKS</b>
	)	<b>COMBINED MOTION FOR SUMMARY</b>
BOARD OF PARK COMMISSIONERS,	)	<b>JUDGMENT AND MEMORANDUM IN</b>
ERIE METROPARKS, et al.	)	<b>OPPOSITION TO PLAINTIFFS' MOTION</b>
	)	<b>FOR SUMMARY JUDGMENT</b>
Defendants.	)	
	)	

Now come Defendants Erie MetroParks ("EMP") and the EMP Board who, pursuant to Fed. R. Civ. Proc. 56(b), hereby move the Court for summary judgment on Plaintiffs' Complaint on the ground that Defendants are entitled to judgment as a matter of law. A combined Memorandum in Support is attached hereto and incorporated herein by reference.

Respectfully submitted,

*s/ John D. Latchney*

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Attorneys for all Defendants



**COMBINED MEMORANDUM IN SUPPORT OF EMP'S MOTION FOR  
SUMMARY JUDGMENT AND MEMORANDUM IN OPPOSITION TO  
PLAINTIFFS MOTION FOR PARTIAL SUMMARY JUDGMENT**

**I. INTRODUCTION**

The present case involves the same parties and the same alleged takings that were the subject of *Coles v. Granville*, United States District Court for the Northern District of Ohio, Western Division Case No. 3:03CV7595 ("*Coles I*"). *Coles I* was dismissed by this Court because it was not ripe: an Ohio mandamus action seeking the initiation of appropriation proceedings is a reasonable, certain and adequate state-court remedy for Plaintiffs to present their takings claims, and pursuant to *Williamson Cty. Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985), such claims are not ripe until Plaintiffs have initiated such a mandamus action and have been denied compensation. *Coles I*, 2005 WL 137, 139 (Jan. 24, 2005 N.D. Ohio) (copy attached to Plaintiffs' Summary Judgment Motion as Exhibit F). That decision was affirmed on appeal. *Coles v. Granville*, 448 F.3d 853 (6<sup>th</sup> Cir. 2006).

After the dismissal of *Coles I*, Plaintiffs filed a mandamus action in the Ohio Supreme Court and obtained a writ of mandamus ordering EMP to commence appropriation proceedings with respect to the property at issue herein. EMP is complying with the Ohio Supreme Court's order. Because Plaintiffs have not been denied compensation for the takings they complain of, their claims of takings without just compensation are entirely unfounded and must be dismissed.

The test for whether a taking has occurred is really a three-part inquiry. First, does the state provide a reasonable, certain, and adequate provision for obtaining compensation? Based upon the Sixth Circuit's decision in *Coles v. Granville*, 448 F.3d

853 (6<sup>th</sup> Cir. 2006), the answer is yes—a petition for a writ of mandamus to compel the governmental body to commence appropriation proceedings.

Second, assuming ownership is proven, has the owner availed themselves of the provision for obtaining compensation? Given that Plaintiffs petitioned for and received a writ of mandamus in *State ex rel. Coles v. Granville*, 116 Ohio St.3d 231 (2007), Plaintiffs have satisfied this element.

Third, having utilized the state procedure, has the owner of the property been “rebuffed” in the effort to receive just compensation. If the answer is “no,” then the matter is not ripe and the case should be dismissed pending further proceedings in state court.

In the case *sub judice*, after the Ohio Supreme Court’s November 21, 2007 decision in the *Coles* mandamus action, EMP has not refused to pay compensation. To the contrary, once the Ohio Supreme Court decided (and denied) Erie MetroParks’ Motion for Reconsideration, at its February 13, 2008 meeting, EMP passed a resolution authorizing legal counsel to proceed with the necessary steps to commence appropriation proceedings regarding the successful relators’ property. Obviously, Plaintiffs herein are dissatisfied with the pace at which EMP has proceeded in taking the statutorily mandated pre-requisites under Ohio Revised Code Chapter 163; thus, the within lawsuit.

Of course, the question arises had EMP, for example, filed the appropriation action in June 2008, would Plaintiffs’ action lie in this Court? How about November 2008? What if EMP commences an appropriation action in September 2009? Where is the line drawn when there is a delay in commencing appropriation proceedings? In other words, when does a matter transform from non-ripe status to ripe status? The United

States Supreme Court has not adopted a “bright line” test based upon a particular period of time; however, at least in Ohio, there is a simple and ready answer why a delay in commencing appropriation proceedings does not constitute a “taking.”

In various decisions, the Ohio Supreme Court has held that by virtue of either statute or, by default, the Ohio Constitution, owners who have had property taken by the government are entitled to interest on their money from the date of the taking. As such, Ohio law provides a reasonable, certain, and adequate remedy for property owners whose receipt of compensation is delayed.<sup>1</sup> Assuming *arguendo* that the right to compensation is established by the November 21, 2007 decision in the *Coles* mandamus action, Plaintiffs would be entitled to interest from that date forward based upon whatever value an Erie County jury would assign each property in the appropriation proceeding.

Notwithstanding the fact that the Ohio Supreme Court has mandated interest on property taken, the delay in the commencement of appropriation proceedings by EMP does not, in and of itself, constitute a separate “taking” for two reasons.

First, both the United States Supreme Court and Ohio Supreme Court have long recognized that the only persons who are entitled to just compensation are the persons who owned the property at the time of the taking. Relative to Plaintiffs herein, at the time of the taking in 1998 or 1999, Key Trust owned the property south of Mason Road/Lock No. 1 (hereafter the “South Property”). Relative to the *Coles* Plaintiffs’ property north of Mason Road/Lock No. 1 (hereafter referred to as the “North Property”), from August 18, 1998 until November 20, 2007, Erie MetroParks reasonably believed the

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<sup>1</sup> Presumably, the Sixth Circuit’s decision in *Coles v. Granville*, 448 F.3d 843 (6<sup>th</sup> Cir. 2006), operates as either law of the case or issue preclusion as to whether Ohio provides “a reasonable, certain, and adequate” remedy. Indeed, Plaintiffs’ lawsuit is an inherent collateral attack on that decision.

Coles did not own the property because in a quiet title action, the Erie County Common Pleas Court, in Case No. 97-CV-296, issued a favorable decision to EMP and the Railroad stating the Coles did not own the property.<sup>2</sup>

Second, where there is a dispute regarding ownership of property, the government has no obligation to initiate appropriation proceedings. As explained in greater detail herein, as between Plaintiffs and EMP, the ownership issues were not resolved until November 21, 2007 when the Court issued the decision in the *Coles* mandamus action.

In sum, Defendant EMP asserts that this matter is not ripe because EMP has taken (or is in the process of doing so) the necessary actions to commence appropriations and has not refused to pay Plaintiffs compensation. Ohio law is crystal clear that for a delay in initiating appropriation proceedings, interest must be paid to the property owners. Lastly, the delay itself has not been long enough to constitute a taking and Plaintiffs cannot demonstrate that the delay is the result of "bad faith." Based upon the facts and law presented herein, Defendant EMP is entitled to summary judgment and, correlatively, Plaintiffs' Motion for Partial Summary Judgment must be denied.

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<sup>2</sup> Essentially, in the *Coles* mandamus action, the Ohio Supreme Court reversed that 10 year old decision and determined that the Coles were the owners based upon a clear mistake on the Court's part. Despite the Court's finding that Key Trust owned only what Ebeneser Merry and Kneeland Townsend owned, which consisted entirely of the South Property, and despite the fact that the Coles property in question was the North Property, the Court erroneously concluded that the Coles had acquired the 66 foot wide railroad corridor subsequent to the common pleas court's 1998 decision through a conveyance from Key Trust. The problem was that Key Trust did not own any of the North Property and, therefore, conveyed nothing. Erie MetroParks attempted to have the Court correct this mistake through a Motion for Reconsideration, but unfortunately, the Court refused to correct this obvious error and the Motion was denied.

## II. STATEMENT OF FACTS

### A. In 1995, EMP purchases property from the Railroad.

On or about October 13, 1995, W&LE-Delaware [hereafter “the Railroad”] and EMP entered into a written Agreement (the “Use Agreement”) which gave EMP (1) a permanent right to possess and use the Railroad Corridor; and (2) an option to obtain a deed [Railroad Corridor Deed] upon payment of \$214,000 to the Railroad. Declaration of Stephen Dice (the “Dice Declaration”), the former Executive Director of EMP, and Exhibit thereto.

Subsequently, EMP exercised its right under the Option, paid the \$214,000 required by the Use Agreement, and recorded the Railroad Corridor Deed.<sup>3</sup> *Id.* At a public meeting conducted on August 16, 1995, the EMP Board unanimously authorized the expenditure of the \$214,000. *Id.* Less than a month after the Use Agreement was entered into, EMP published a rule pursuant to R.C. 1545.09 and 1545.99 closing the Railroad Corridor to the public and threatening to fine up to \$500 anyone who violated the rule. *Id.*

### B. In 1997, the Coles Plaintiffs file a quiet title action against EMP and the Railroad regarding the North Property and lose.

In 1997, plaintiffs Edwin and Lisa Coles filed a complaint in the Erie County Common Pleas, Case No. 97-CV-296, against the Railroad and EMP alleging title to a 0.80 acre parcel of property, which represents the portion of the Railroad Corridor which

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<sup>3</sup> Although not entirely accurately stated as to what transpired, Plaintiffs reference this 1995 event in their Complaint at ¶49.

runs through their residential property. This residential property is the North Property (and not part of the Key Trust property later deeded to Plaintiffs).

In its' Judgment Entry, the court stated: "*This action involves the issue of title* to an 0.80 Acre Parcel of land in Huron, Ohio ("the 0.80 Acre Parcel"). *Plaintiffs claim title* to the 0.80 Acre Parcel and an additional 9.53 acres pursuant to a deed dated August 5, 1986 from Thomas G. Reel and Gilbert Hoffman, d.b.a. River Bend Development, recorded in Volume 528, page 284 of Erie County Records (the "Coles Deed").\*\*\*

The deed for the North Property contained the following exception:

Except from the above parcel a 66 foot wide parcel now or formerly owned by the Norfolk and Western Railroad being approximately 0.80 acres, leaving 9.53 acres more or less but subject to all legal highways, easements, restrictions or other documents of record.

See Judgment Entry filed August 17, 1998 and journalized August 18, 1998 appended hereto. The Erie County Common Pleas Court concluded "In this case, there is **no ambiguity** in the description employed by the Coles Deed. It is apparent and the Court finds **as a matter of law** that the 0.80 Acre Parcel is specifically excepted from the property conveyed to Plaintiffs, that the **Plaintiffs are not owners thereof**, and therefore not the real parties in interest." JE at 2 (emphasis added).

Not surprisingly, after achieving this victory, EMP believed, by virtue of the Railroad Corridor Deed, that it owned that 66 foot wide strip. Correlatively, given the Court's apparently clear statement of non-ownership by the Coles Plaintiffs, there would have been nothing for EMP to appropriate.

**C. In late 1998, EMP begins developing the Recreational Trail.**

By November of 1998, EMP was working on the Railroad Corridor to construct the Greenway. Dice Declaration. By the end of 1998, if not earlier, EMP had occupied, possessed, used and exercised exclusive domain and control over the Railroad Corridor. *Id.*

The Greenway was eventually constructed and opened to the public. The Greenway is a public 66-foot wide biking/hiking trail which is located on the Railroad Corridor. Dice Declaration.

Plaintiffs allege that "Beginning in or around 1999, MetroParks took possession of the entire former railroad corridor from the Village of Milan, Ohio to the City of Huron Ohio, including property owned by the Plaintiffs. MetroParks, directly or through paid agents and employees, then constructed a recreational trail over the former railroad line without the consent of Plaintiffs." Complaint ¶50. In other words, consistent with EMP's presentation of evidence, Plaintiffs have admitted and acknowledged that the taking occurred at least as early as 1999.

**D. EMP files the Declaratory Judgment Action in the Erie County Common Pleas Court (the *Key Trust* case), Case No. 99-CV-442.**

In 1999, EMP filed a declaratory judgment action against the Key Trust Co. of Ohio concerning a dispute over the leasehold interest held by the Railroad. On July 24, 2000, each of the Plaintiffs herein were among named as defendants in the case and will be referred to as Plaintiffs for ease of discussion.

Boiled down to its essence, during the trial of the matter, EMP attempted to show the Milan Canal was three miles long and ran to the mouth of the Huron River while the Plaintiffs spent the entire Trial trying to demonstrate their grantor's (Key Trust)

ownership interest in the Milan Canal Company property was 6 miles long, 150 feet wide, and ran from the Village of Milan to Lake Erie.

In the trial court's November 7, 2000 Judgment Entry ("JE"), the trial court notes that there were four issues tried to the court:

One issue before the Court is the validity of a lease ("Lease") originally entered into by the predecessors-in-interest to the parties herein, the owner/lessor, Milan Canal Company and the lessee Wheeling & Lake Erie Railroad Company ("Wheeling Railroad").

The second issue before the Court is whether [EMP] has acquired any ownership interest in the property at issue by virtue of a quitclaim deed from the Wheeling Railroad.

The third issue the Court has been asked to decide is whether [EMP] has gained any interest in the property at issue by adverse possession.

The fourth issue before the Court has been asked to decide is the extent of the property covered by the Lease.

The Judgment Entry contains "Findings of Fact." Among the Findings were that "The Milan Canal Property consisted of a roughly **three mile long corridor of property** the northern terminus being known as Lock No. 1, which was located where the Milan Canal joined the Huron River on property now owned by Wikel Farms, Ltd., just north of Mason Road, in Section 2, Milan Township, Erie County, Ohio. Neither Kneeland Townsend nor Ebeneser Merry conveyed to the Milan Canal Company any interest in real property north of Lock No. 1." JE at 3-4 (emphasis added). Essentially, this describes the boundary line between the South Property and North Property referred to *supra*. The same JE contains "Conclusions of Law" which state that

The description of the Leased Property in the Lease unambiguously describes it as consisting of all lands then owned by the Milan Canal Company within a 150 foot wide corridor from approximately the intersection of Maine and Union Streets in the

Village of Milan northerly to the north of the mouth of the Huron River. The only lands owned by the Milan Canal Company [and, ergo, Key Trust as well] at the time the Lease was executed lay within the boundaries of the Kneeland Townsend and Ebeneser Merry property, *neither of which lay north of Lock No. 1*. Therefore, the Leased Property extends from the southern terminus of the old Milan Canal at or near the southerly end of the Milan Canal basin in the Village of Milan to its northerly terminus at the Huron River at the former location of Lock No. 1 on the premises now owned by Wikel Farms, Ltd. immediately north of Mason Road in Section 2, Milan Township, Erie County.” *Id.* at 6.

The trial court found that the Lease had been materially breached the Wheeling Railroad when it failed to pay rent and abandoned the corridor for the purpose of operating a railroad and, therefore, the Lease was void. “Judgment was entered in favor of Defendants and against Plaintiff, *except as to the issue of the extent of the Lease.*” Petition Exhibit 11, JE at 6 (emphasis added). Both sides appealed the trial court’s decision.

**E. The Appeal in the Erie County Court of Appeals.**

On appeal, the Sixth District rejected Plaintiffs’ arguments<sup>4</sup> and, relative to the validity of the Lease, ruled in favor of EMP and remanded the case. On remand, the trial court issued a ruling which permitted the property to be improved and used as a parkway and recreational trail. JE at 7. Based upon the Court’s statement in the JE that “The Milan Canal Property consisted of a roughly **three mile long corridor of property...**” EMP believed that the Lease covered the South Property.

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<sup>4</sup> Regarding the errors asserted by Plaintiffs herein in state court, the Sixth District then found that “None of these assignments of error are well-taken.” Specifically addressing Relators’ argument concerning the property description, the court of appeals opined that “The only competent, credible evidence presented at trial was that the canal company obtained property solely from Townsend and Merry. On such evidence, we cannot say that the trial court’s decision to limit the lease to such property was unsupported by the evidence.” *Bd. of Park Comm’rs v. Key Trust Co.*, 145 Ohio App.3d at 787-788.

After having argued that Key Trust's property [acquired from the Milan Canal Company] covered six miles, and after having lost the argument that the Lease was invalid, Plaintiffs switched tactics and in the second appeal argued that the effect of the trial court's legal description was to "convey a leasehold interest to Metroparks in approximately two miles of corridor property." When the Court of Appeals affirmed the judgment in favor of EMP, EMP believed the Court was also agreeing/confirming that "The Milan Canal Property consisted of a roughly **three mile long corridor of property....**" And, again, there would be no reason to commence appropriation proceedings if EMP was entitled to possession by virtue of a Lease over that three miles.

**F. Plaintiffs file the first federal lawsuit in this Court--*Coles I*.**

On October 7, 2003, in Case No. 03-07595, Plaintiffs filed a complaint in this Court against EMP and then Director-Secretary Jon Granville alleging, *inter alia*, a "taking" of their property without just compensation. On January 24, 2005, this Court dismissed Plaintiffs' claim without prejudice based upon, *inter alia*, ripeness grounds.

**G. Plaintiffs appeal *Coles I* and this Court's dismissal is upheld in *Coles v. Granville*, 448 F.3d 853 (6<sup>th</sup> Cir. 2006).**

On May 22, 2006, the Sixth Circuit affirmed this Court's decision that Plaintiffs' takings claim was not ripe. The decision is significant because, for the first time, the Sixth Circuit recognized that Ohio has a reasonable, certain, and adequate remedy. In effect, the Sixth Circuit overruled *Kruse v. Village of Chagrin Falls*, 74 F.3d 694 (6<sup>th</sup> Cir. 1996).

**H. Plaintiffs file the Petition for a writ of mandamus in *State ex rel. Coles v. Granville* and, on November 21, 2007, win on the primary claim and lose on the secondary claim.**

During the Ohio Supreme Court case, Plaintiffs raised two separate issues. One of those arguments militates against their “takings” claim in this case.

1. Plaintiffs argued EMP did not have the statutory authority to commence appropriation proceedings because Plaintiffs weren't interested in compensation, they were interested in the Recreational Trail not existing at all.

As a threshold matter and by way of background, Plaintiffs claim in this lawsuit that all they have wanted all along is compensation and EMP has refused to provide it. However, the Coles Plaintiffs, who have spearheaded all of this litigation, have passed up opportunities to obtain compensation through a straightforward purchase of any property rights by EMP. For example, despite EMP's apparent clear cut victory in the quiet title action in Case No. 97-CV-269, as the Ohio Supreme Court notes in its opinion, “*Shortly after* the Coleses received their farm and home<sup>5</sup> parcels from Key Trust in 1999, they received a letter from respondent Jonathan R. Granville, the Director-Secretary of Erie MetroParks. Granville stated that the board was interested in acquiring the Coleses' ownership interests in the canal and railroad corridor.”<sup>6</sup> EMP simply wanted to eliminate any uncertainty regarding title. If the Coles were truly interested in compensation for whatever property interests they had, then why didn't they just quitclaim whatever rights they had in the railroad corridor to Erie MetroParks in exchange for money?

In their alternate mandamus claim, Plaintiffs argued in part that the board of park commissioners lacked authority to acquire property by appropriation because the Erie

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<sup>5</sup> This was one of the clear factual errors the Court made in the mandamus action. As noted in Case No. 97-CV-296, the Coles obtained their “home” property pursuant to a deed dated August 5, 1986 from Thomas G. Reel and Gilbert Hoffman, d.b.a. River Bend Development, recorded in Volume 528, page 284 of Erie County Records (the “Coles Deed”). Obviously, Plaintiffs did not acquire this property for Key Trust in 1999.

<sup>6</sup> *State ex rel. Coles*, 116 Ohio St.3d at 234.

MetroParks District was established after April 16, 1920. The Court decided that an analysis of Plaintiffs argument was warranted because if it is correct, Plaintiffs appropriation claim must fail.

It seems incongruous for Plaintiffs to complain that they have been seeking compensation all long in this case while objecting to EMP's right to even commence appropriation proceedings in the Ohio Supreme Court case. Why were Plaintiffs making this argument?

This battle continued for two simple reasons. First, the Coles and some other like-minded owners along the former canal/railroad corridor did not want the recreational trail to exist—the proverbial “not in my backyard.” Not surprisingly, Plaintiffs continued to argue, through the Ohio Supreme Court case, that EMP did not even have a statutory right to exercise eminent domain proceedings. If EMP, a creature of statute, had no statutory authority to effect a taking of property for public use, then if Plaintiffs won, there would be no recreational trail.

Second, as the Coles Plaintiffs acknowledge in their Motion for Partial Summary Judgment, after acquiring whatever property Key Trust had (only the noncontiguous properties of Kneeland Townsend and Ebeneser Merry properties), the Coles (in their own names or in the name of “Buffalo Prairie”) turned around and sold those interests to various property owners along the former canal/railroad corridor.

Some of those owners who purchased property interests from the Coles or Buffalo Prairie received nothing from the property conveyance because Key Trust (the Milan Canal Company's successor in interest) did not own anything outside the Townsend and

Merry tracts. In other words, the Coles had a personal incentive to continue the litigation because some people purchased nothing more than the proverbial pink elephant.

Ultimately, the Ohio Supreme Court established a general principle of law which would apply beyond the particular case before the Court, *i.e.* that “the board of park commissioners is authorized under R.C. 1545.11 to appropriate property for the construction and use of a recreational trail, and a mandamus claim to compel the board to commence an appropriation proceeding is viable as long as relators establish an involuntary taking of their property by the board.” *State ex rel. Coles v. Granville*, 116 Ohio St. 3d at 237.

2. Having decided that metroparks formed after April 16, 1920 have the statutory right to eminent domain, the Court issued a writ of mandamus ordering EMP to commence appropriation actions regarding Plaintiffs’ property.

On November 21, 2007, Plaintiffs obtained the writ. Relative to Plaintiffs’ property, the Court determined EMP must commence appropriation proceedings.

**I. EMP files a Motion for Reconsideration, which is denied.**

In an effort to correct a clear and obvious error in the Court’s decision, EMP filed a limited Motion for Reconsideration. See Appendix hereto. On January 23, 2008, the Court denied the Motion without opinion. *State ex rel. Coles v. Granville*, 116 Ohio St. 3d 1481; 2008 Ohio 153; 879 N.E.2d 787 (2008).

**J. EMP takes the actions required as a precondition to commencing appropriation proceedings concerning Plaintiffs’ property.**

After the Motion for Reconsideration was denied, at the Board’s next meeting on February 13, 2008, the Board authorized then legal counsel, Baumgartner & O’Toole, to proceed with the appropriation of Plaintiffs’ property. Dice Declaration.

The Board has hired a surveyor, who has prepared legal descriptions of the property to be appropriated. *Id.* The Board has also hired a title company to review the chain of title to such property. *Id.* That step has been completed. *Id.*

Finally, the Board has retained an appraiser to determine the fair market value of the property to be appropriated. *Id.* This is a necessary pre-requisite to filing an appropriation action under R.C. § 163.04(C). *Id.*

When it was apparent that the assigned tasks were not being completed in timely fashion, in an effort to move the pre-appropriation proceedings along, the Board decided to engage new legal counsel and a new appraiser. *Id.*

A Resolution was prepared by Mr. Dice for presentation to the Board of Park Commissioners for their regular meeting on the 10<sup>th</sup> day June 2009. The Board Resolution re-affirmed the Board's commitment to proceed with appropriation proceedings relative to the property owned by Plaintiffs. *Id.*

### III. LAW AND ARGUMENT

#### WHY DEFENDANT EMP AND THE BOARD ARE ENTITLED TO SUMMARY JUDGMENT ON PLAINTIFFS' COMPLAINT

##### A. Plaintiffs' "Takings" Claim Should be Dismissed as Not Ripe.

As the United States Supreme Court declared in *Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375, 377, 114 S. Ct. 1673, 128 L. Ed. 2d 391 (1994):

Federal courts are courts of limited jurisdiction. They possess only that power authorized by Constitution and statute, see *Willy v. Coastal Corp.*, 503 U.S. 131, 136-137, 112 S.Ct. 1076, 1080, 117 L.Ed.2d 280 (1992); *Bender v. Williamsport Area School Dist.*, 475 U.S. 534, 541, 106 S.Ct. 1326, 1331, 89 L.Ed.2d 501 (1986), which is not to be expanded by judicial decree, *American Fire & Casualty Co. v. Finn*, 341 U.S. 6, 71 S.Ct. 534, 95 L.Ed.702 (1951). It is to be presumed that a cause lies outside this limited jurisdiction, *Turner v. Bank of North America*, 4 U.S. (4 Dall.) 8,

11, 1 L.Ed. 718, 4 Dall. 8 (1799), and the burden of establishing the contrary rests upon the party asserting jurisdiction, *McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178, 182-183, 56 S.Ct. 780, 782, 80 L.Ed. 1135 (1936).

As such, "Article III courts have an independent obligation to determine whether subject matter jurisdiction exists." *Airline Professionals Association of Intern. Broth. of Teamsters, Local Union No. 1224, AFL-CIO v. Airborne, Inc.*, 332 F. 3d 983, 986 (6th Cir. 2003) (citing *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 231, 110 S.Ct. 596, 107 L. Ed.2d 603 (1990)). Satisfying the ripeness doctrine is an important element of the "case" or "controversy." *Reno v. Catholic Soc. Servs., Inc.*, 509 U.S. 43, 57 n.18, 113 S.Ct. 2485, 125 L. Ed.2d 38 (1993). "Requiring that plaintiffs bring only ripe claims helps courts 'avoid[] . . . premature adjudication.'" *Airborne*, 332 F.3d at 987 (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 148-49, 87 S. Ct. 1507, 18 L. Ed. 2d 681 (1967)). "Determining whether a claim is ripe involves evaluating 'both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration.'" *Airborne*, 332 F. 3d at 988 (quoting *Abbott Labs.*, 387 U.S. at 149)).

As the Sixth Circuit has repeatedly held, "ripeness is a determination as to subject matter jurisdiction." *Gabhart v. City of Newport, Tenn.*, 2000 U.S. App. LEXIS 4146 (6<sup>th</sup> Cir. 2000), citing *Bigelow v. Michigan Dep't. of Natural Resources*, 970 F.2d 154, 157 (6<sup>th</sup> Cir. 1992). The issue of ripeness is a **question of law**. *Ardire v. Rump*, 1993 U.S. App. LEXIS 17220 (6<sup>th</sup> Cir. 1993), citing *Bannum, Inc. v. City of Louisville, Ky.*, 958 F.2d 1354, 1362 (6<sup>th</sup> Cir. 1992). "Ripeness is more than a mere procedural question; it is determinative of jurisdiction. If a claim is unripe, federal courts lack subject matter jurisdiction and the complaint must be dismissed." *River City Capital, L.P. v. Board of County Commissioners, Clermont County, Ohio*, 491 F.3d 301, 309 (6th Cir. 2007);

*Arnett v. Myers*, 281 F.3d 552, 562 (6th Cir. 2002). In essence, the legal issue is whether the landowner's lawsuit asserting federal constitutional claims is premature.

Plaintiffs' Section 1983 claims are obviously based upon the alleged taking of private property without just compensation in violation of the Fifth Amendment to the United States Constitution. However, both the Supreme Court and the Sixth Circuit Court of Appeals have clearly held that a Section 1983 action for a takings claim is not ripe until the property owner has utilized state procedures and been denied compensation.

In *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985), the Supreme Court held that the Takings Clause "does not proscribe the taking of property; it proscribes taking without just compensation." *Id.* at 194. In *Williamson*, the Supreme Court held:

The second reason the taking claim is not yet ripe is that respondent did not seek compensation through the procedures the State has provided for doing so.

\*\*\*

If the government has provided an adequate process for obtaining compensation, and if resort to that process "yields just compensation" then the property owner "has no claim against the Government" for a taking. [citation omitted]

\*\*\*

The...property owner has not suffered a violation of the Just Compensation Clause until the owner has unsuccessfully attempted to obtain just compensation through procedures provided by the State for obtaining such compensation[.]

\*\*\*

[T]he State's action is not "complete" in the sense of causing a constitutional injury "unless or until the state fails to provide an adequate post-deprivation remedy for the loss." [citation omitted] Likewise, because the Constitution does not require pre-taking compensation, and is instead satisfied by a reasonable and adequate provision for obtaining compensation after the taking, the State's action here is not "complete" until the State fails to provide adequate compensation for the taking.

473 U.S. at 194-195.

The Court in *Williamson County* went on to hold that the property owner had not utilized state procedures, and therefore, its claim was not ripe:

[A] property owner may bring an inverse condemnation action to obtain just compensation for an alleged taking of property[.]

\*\*\*

Respondent has not shown that the inverse condemnation procedure is unavailable or inadequate, and until it has utilized that procedure, its taking claim is premature.

\*\*\*

In sum, respondent's claim is premature, whether it is analyzed as a deprivation of property without due process under the Fourteenth Amendment, or as a taking under the Just Compensation Clause of the Fifth Amendment.

473 U.S. at 196-200. The critical lesson to be derived from *Williamson* is that prior to exercising jurisdiction over a takings case, a federal court must first inquire into whether or not the relevant state compensation procedures are "reasonable, certain, and adequate." *River City Capital, L.P. v. Board of Cty Commrs., Clermont Cty.*, 491 F.3d 301, 307, citing *McNamara*, 473 F.3d at 638 (citing *Williamson*, 473 U.S. at 194).

**B. The Sixth Circuit's decision in *Coles v. Granville*, 448 F.3d 853 (6<sup>th</sup> Cir. 2006), operates as law of the case or issue preclusion as to whether Ohio provides a reasonable, certain, and adequate remedy.**

In *Kruse v. Village of Chagrin Falls*, 74 F.3d 694, 700 (6<sup>th</sup> Cir. 1996), the Sixth Circuit held that a person alleging a physical taking of his property by an Ohio state actor was not required to seek a writ of mandamus from an Ohio court compelling the state actor to commence an appropriation action before filing a federal lawsuit alleging a violation of the Takings Clause of the federal Constitution, because at the time of the *Kruse* decision it was not clear that Ohio mandamus relief provided a reasonable, certain and adequate remedy for such person to obtain just compensation for the taking. Ten years later, however, in a case involving the same parties to and the same takings in the

present case, the Sixth Circuit in effect overruled *Kruse*, holding that Ohio mandamus relief had developed to the point where now it did provide a reasonable, certain and adequate provision for obtaining compensation for a taking. *Coles v. Granville*, 448, F.3d 583, 860-65 (6<sup>th</sup> Cir. 2006). This case has expressly held that after the Sixth Circuit's decision in *Coles I*: "The decision in *Kruse* is not...controlling." *Lytle v. Potter*, 480 F. Sup.2d 986, 989 (N.D. Ohio 2006).

Plaintiffs seem to want to mount a collateral attack on the Sixth Circuit's decision in *Coles v. Granville* because inherent in their lawsuit is the premise that Ohio does not provide a reasonable, certain, and adequate remedy. Subsequent to *Coles*, the Sixth Circuit has rejected attempts by property owners to challenge the *Coles* holding:

Just as condemnation practice "provide[s] little guidance" to the question of whether § 1983 Appellants are entitled to a jury, § 1983 remedies provide little guidance to determining whether condemnation proceedings are adequate. The only inquiry we should make is whether Ohio's proceedings can adequately provide just compensation for takings. This circuit has previously held that Ohio's *scheme* is adequate. In *Coles v. Granville*, we recognized that "Ohio has reasonable, certain, and adequate procedures for plaintiffs to pursue compensation for an involuntary taking." 448 F.3d 853, 865 (6<sup>th</sup> Cir. 2006) (internal quotation marks omitted). Appellants provide no cogent argument as to why we should revisit this holding.

*Crosby v. Pickaway Cty. Gen. Health Dist.* 2008 U.S. App. LEXIS 24822; 2008 Fed. Appx. 0747N (6<sup>th</sup> Cir. 2008). There's no reason to re-visit *Coles* in this case either.

From the language used in the decisions, something more than delay in providing compensation is required before a takings claim will ripen. Where a state provides an adequate procedure for seeking just compensation, a property owner cannot claim that the takings clause has been violated until he has used and been denied just compensation. *Williamson* 473 U.S. at 195 (emphasis added). The Fifth Amendment does not proscribe

the taking of property; it proscribes taking without just compensation. Thus, even after a taking, the government has not violated the U.S. Constitution until it *refuses* to compensate the owner. A federal court may therefore hear a takings claim only after two criteria are met: (1) the plaintiff must demonstrate that he or she received a final decision from the relevant government, and (2) the plaintiff must have sought compensation through the procedures the state has provided for doing so. *Hensley v. City of Columbus*, 557 F.3d 693 (6th Cir. Ohio 2009). Stated another way, "if the state has made available some "reasonable, certain and adequate provision for obtaining compensation," then the claim is not ripe until the claimant has attempted to use this "adequate procedure" and **has been rebuffed**. *Buckles v. Columbus Mun. Airport Auth.*, 90 Fed. Appx. 927, 929 (6th Cir. 2004) citing *Williamson*. at 194 (internal quotation marks omitted)(quoting *Reg'l Rail Reorganization Act Cases*, 419 U.S. 102, 124-25, 42 L. Ed. 2d 320, 95 S. Ct. 335 (1974))(emphasis added).

In the use of the language running through these cases, "denied, refused, rebuffed," it is apparent that a "takings" case ripens when the government simply manifests that it will simply not pay the property owners just compensation. That's not the case here.

After the Motion for Reconsideration was denied, at the Board's next meeting on February 13, 2008, the Board authorized then legal counsel, Baumgartner & O'Toole, to proceed with the appropriation of Plaintiffs' property. Dice Declaration.

Pursuant to R.C. § 163.05(A), the first step in the process was for the Board to hire a surveyor. *Id.* This had to be done to establish legal descriptions of the property to be appropriated. *Id.*

The second step was for the Board to hire a title company to review the chain of title. *Id.* That step has been completed. *Id.*

The third step in the process is for an appraiser to determine the fair market value of the property to be appropriated. *Id.* This was a necessary pre-requisite to filing an appropriation action under R.C. § 163.04(C). *Id.*

When it was apparent that the assigned tasks were not being completed in timely fashion, in an effort to move the pre-appropriation proceedings along, the Board decided to engage new legal counsel and a new appraiser. *Id.*

A Resolution was prepared by Mr. Dice for presentation to the Board of Park Commissioners for their regular meeting on the 10<sup>th</sup> day June 2009. The Board Resolution re-affirmed the Board's commitment to proceed with appropriation proceedings relative to the property owned by Plaintiffs. *Id.* The appraisals were just completed. *Id.*

Plaintiffs have not been denied just compensation. Promptly after completing the appraisals required by R.C. § 163.04(C), EMP will attempt to acquire the property interests it needs from Plaintiffs by offering Plaintiffs the appraised value of such interests, together with interest from the date of taking. Such interest is required by Ohio law. “[W]here the property owner is not compensated simultaneously with the taking of possession, the compensation *must* include an amount (interest) in addition to the value of the property as of the date of taking for valuation purposes, for the delay in making payment.” *City of Norwood v. Cannava*, 45 Ohio St.3d 238, 240; 543 N.E.2d 802 (1989)(emphasis added). “Stated differently, where the property owner is not compensated simultaneously with the taking of possession, the compensation must

include an amount (interest) in addition to the value of the property as of the date of taking for valuation purposes, for the delay in making payment.” *Id.* at 240, citing, *inter alia*, *United States v. Thayer-West Point Hotel Co.* (1947), 329 U.S. 585. By statute, As the Ohio Supreme Court stated in *Norwood*, “Pursuant to Ohio Rev. Code § 163.17, the date of taking for awarding interest is the date the appropriating authority takes physical possession of the appropriated property.” *Cannava*, at Syllabus ¶ 2.

The Ohio Supreme Court has further opined that even in the absence of a statutory entitlement to interest, the right to interest is derived from the Ohio Constitution.

In the absence of any statutory provisions controlling the subject, the rules in respect to interest must be derived from the constitutional provision requiring just compensation to be made for property taken. Where damages are assessed for property which has already been lawfully appropriated to public use, interest should be allowed from the time of the appropriation, or entry on the property. \* \* \* As his just compensation is withheld from him, though necessarily, he should have an equivalent for such withholding, and that, in law, is legal interest. This is just to the owner.”

*State ex rel. Steubenville Ice Co. v. Merrell*, 127 Ohio St. 453, 455, 189 N.E. 116 (1934).

This case has never been overruled and remains good law in Ohio. If EMP and Plaintiffs cannot agree to the amount to be paid, appropriation actions will then be filed.

Furthermore, as noted in the Statement of Facts, Plaintiffs goal was not “just compensation.” In *State ex rel. Coles*, Plaintiffs asked the Court to declare that EMP did not have the statutory authority to exercise eminent domain proceedings regarding their properties. Had they succeeded, the recreational trail would no longer exist.

Plaintiffs strategy is also reflected in the original *Coles* lawsuit in this Court, Case No. 03-07595. Keep in mind, EMP purchased all of the Railroad’s interests for \$214,000. In April of 2000, a group of thirty (30) property owners purchased all of Key

Trust's interests in the former Milan Canal Company (via the Verna Lockwood Trust) property for \$186,000.

Notwithstanding the fact that the entire Railroad Corridor, by virtue of what ready, willing, and able buyers were willing to pay, had an apparent market value of somewhere between \$186,000 and \$214,000, the disgruntled property owners who did not want the recreational trail at all did not want or demand reasonable compensation.

Relative to Plaintiffs' former co-Plaintiff Wikel, as the Sixth Circuit observed:

\*\*\*Wikel Farms is currently involved in an appropriation action brought by Erie County Metroparks against Wikel Farms in state court, which involves portions of Wikel Farms' property along the old Milan Canal. Metroparks initiated that action in 1999 and, pursuant to Ohio law, deposited \$20,000 in escrow at the onset of litigation, which is Metroparks' estimated valuation of the disputed property. Wikel Farms places a much higher valuation on the property, that of \$500,000.

*Coles*, 448 F.3d at 855-856. The strategy is apparent in Wikel's demand for compensation, *i.e.* each owner demand so much money that EMP cannot afford to purchase the property.

**C. Since it was not determined that Plaintiffs owned the property until the Plaintiffs succeeded in the *State ex rel. Coles v. Granville* mandamus action in November 2007, EMP had no obligation to commence appropriation proceedings any earlier.**

1. Only the owner at the time of possession/taking has a right to compensation and that right does not pass to subsequent owners.

In *United States v. Dow*, 357 U.S. 17, (1958), which involved a "takings" claim against the federal government, the Court explained that "Dow can prevail only if the 'taking' occurred while he was the owner. For it is undisputed that '[since] compensation is due at the time of taking, the owner at that time, *not the owner at an earlier or later*

date, receives the payment.' *Danforth v. United States*, 308 U.S. 271, 284; cf. *United States v. Dickinson*, 331 U.S. 745." *Id.*, 357 U.S. at, 20-21. As such, the Court reasoned

Although in both classes of "taking" cases -- condemnation and physical seizure -- title to the property passes to the Government only when the owner receives compensation, see *Albert Hanson Lumber Co. v. United States*, 261 U.S. 581, 587, or when the compensation is deposited into court pursuant to the Taking Act, see *infra*, the passage of title does not necessarily determine the date of "taking." The usual rule is that if the United States has entered into *possession* of the property prior to the acquisition of title, it is the former event which *constitutes the act of taking*. It is that event which gives rise to the claim for compensation and fixes the date as of which the land is to be valued and the Government's obligation to pay interest accrues. See *United States v. Lynah*, 188 U.S. 445, 470-471; *United States v. Rogers*, 255 U.S. 163; *Seaboard Air Line R. Co. v. United States*, 261 U.S. 299. The *owner at the time the Government takes possession* "rather than the owner at an earlier or later date, is the one who has the claim and is to receive payment." *23 Tracts of Land v. United States*, *supra*, at 970.

*Dow*, 357 U.S. at 21-22 (emphasis added). Thus, the Court in *Dow* concluded "We hold, contrary to the Court of Appeals, that the 'taking' did not occur in 1946 when the Government filed its declaration of taking, but rather when the United States entered into possession of the land in 1943. It follows that the landowners in 1943 were entitled to receive the compensation award and that Dow is not entitled to recover in this action."

Ohio has the same rule of law.<sup>7</sup> In *Steinle v. Cincinnati*, 142 Ohio St. 550, 555, 53 N.E.2d 800, "the general rule is the right to damages for the taking of the land or for injury to land is the one who owns the land when the taking or injury occurs, and does not ordinarily pass to a subsequent grantee." Accord: *Hatfield v. Wray*, 140 Ohio

<sup>7</sup> The date of taking of private property for public use is the date of an appropriation trial or the date the appropriator exercises possession and control over such property. *Evans v. Hope*, 12 Ohio St.3d 191 (1984), *Dir. of Highways v. Olrich*, 5 Ohio St.2d 70 (1966), Syllabus ¶ 3.

App.3d 623, 629, 748 N.E.2d 612; *Palazzolo v. Rhode Island*, 533 U.S. 606, 628, 121 S.Ct. 2448, 2463, 150 L.Ed.2d 592, 614 (“In a direct condemnation action, or where a State has physically invaded the property without filing suit, the fact and extent of the taking are known. In such an instance, it is a general rule of the law of eminent domain that any award goes to the owner at the time of the taking, and that *the right to compensation does not pass to a subsequent purchaser.*”)(emphasis added).

2. The government does not have an obligation to commence appropriation proceedings where ownership of the property in question is in dispute.

Ohio Revised Code Chapter 163 provides that to be entitled to compensation in an appropriation action, 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.” Consistent with the requirement that a person be an owner, the Federal Circuit, citing a United States Supreme Court precedent, has held that *without undisputed ownership* of the property *at the time of the takings*, a claimant *cannot* maintain a suit alleging that the government took his property without just compensation. *Cavin v. United States*, 956 F.2d 1131, 1134 (Fed. Cir. 1992), citing *United States v. Dow*, 357 U.S. 17, 20-21, 2 L.Ed.2d 1109, 78 S.Ct. 1039 (1958); *Lacey v. United States*, 219 Ct.Cl. 551, 595 F.2d 614, 619 (Ct.Cl. 1979).

In the Sixth Circuit’s decision in *Coles v. Granville*, 448 F.3d 843 (6<sup>th</sup> Cir. 2006), the Court seemed to recognize that until this dispute over who owned the property was adjudicated, there could be no “takings” claim:

If Defendants are correct, and the property Plaintiffs put at issue in this case was adjudicated as within Metroparks' leasehold interest by the Ohio courts, then *res judicata* would prevent us from reaching a different conclusion than that reached by the Ohio courts on this very same issue, and Plaintiffs' case (with the

exception of Wikel Farms) was properly dismissed. If Plaintiffs are correct, however, in their belief that the property at issue here was not adjudicated as within Metroparks' leasehold interest, then Plaintiffs claims' to this Court **devolve to new takings allegations**. That is, Plaintiffs allege Defendants are unconstitutionally taking Plaintiffs' property by invading lands beyond the scope of Metroparks' leasehold interests. As discussed *infra*, before seeking relief in federal courts, plaintiffs alleging an unconstitutional taking by a local government entity must first seek compensation for the taking through state measures. Because Plaintiffs in the instant action have not done this, Plaintiffs' case is not yet ripe for review.

*Id.*, 448 F.3d at 860 (emphasis added).

3. Application of the foregoing principles in the case *sub judice*.

- a. *At the time of the original physical taking, Plaintiffs have admitted they did not own the South Property, but rather they acquired it from Key Trust while the Declaratory Judgment Action was pending.*

Of course, at the time the South Property was physically taken/possessed by EMP in late 1998 or early 1999, Key Trust was ostensibly the owner of the South Property. Indeed, Plaintiffs acknowledge that when EMP filed the litigation against Key Trust, they did not own the South Property, but acquired it while the litigation was pending:

During the pendency of the Key Trust litigation, Key Trust conveyed property formerly owned by the canal company to Edwin and Lisa Coles and Buffalo Prairie. Complaint ¶ 51; Answer ¶ 51 (Plaintiffs' Motion for Partial Summary Judgment at 3).

While the litigation was pending, Buffalo Prairie (which was formed and controlled by the Coles) then began conveying portions of the South Property to numerous landowners including Bickley and Jones (who are Plaintiffs herein). *Id.*

Simply put, Plaintiffs takings claim and right to compensation cannot be premised upon the original taking via physical possession of the South Property in 1998 or 1999

because they did not own that Property at the time the taking occurred. Rather, Plaintiffs' taking claim must be premised upon a subsequent event.

*b. Ownership of the South Property was not finally adjudicated until November 21, 2007.*

As explained in the preceding section, since Plaintiffs did not own the South Property at the time of the original physical taking by EMP in 1998 or 1999, any claim to compensation cannot be premised upon that discrete singular act. Instead, Plaintiffs claim of a taking and corresponding entitlement to compensation must be premised upon a "new" taking of their property. As explained in further detail *infra*, only after the Ohio Supreme Court finally adjudicated the dispute between the Parties over whether the South Property consisted of a three mile long Leased corridor versus the two miles non-contiguous Leased corridor, did the matter "devolve into a new taking" subject to compensation by EMP.

*c. Ownership of the North Property remained in dispute until November 21, 2007.*

In 1997, plaintiffs Edwin and Lisa Coles filed a complaint in the Erie County Common Pleas, Case No. 97-CV-296, against the Railroad and EMP alleging title to a 0.80 acre parcel of property, which represented the portion of the railroad corridor which ran through their property. This residential property is the North Property (and not part of the Key Trust property later deeded to Plaintiffs). The deed for the North Property contained the following exception:

Except from the above parcel a 66 foot wide parcel now or formerly owned by the Norfolk and Western Railroad being approximately 0.80 acres, leaving 9.53 acres more or less but subject to all legal highways, easements, restrictions or other documents of record.

See Judgment Entry filed August 17, 1998 and journalized August 18, 1998 appended hereto. The Erie County Common Pleas Court concluded “In this case, there is **no ambiguity** in the description employed by the Coles Deed. It is apparent and the Court finds **as a matter of law** that the 0.80 Acre Parcel is specifically excepted from the property conveyed to Plaintiffs, that the **Plaintiffs are not owners thereof**, and therefore not the real parties in interest.” JE at 2 (emphasis added).

It wasn't until November 21, 2007 that the Ohio Supreme Court in the *Coles* mandamus action, with a metaphorical stroke of the keyboard, reversed that 1998 decision and held that Edwin and Lisa Coles did own the property even though the grantor specifically excepted it from the deed of conveyance. In other words, despite EMP paying the Railroad \$214,000 for its property rights in the Railroad Corridor, the Court took those property rights away from EMP and gave it to the Coles Plaintiffs.

EMP may now have to compensate the Coles in an appropriation proceeding for the North Property it already owned because the Ohio Supreme Court made a clear error in its decision and refused to correct it. Indeed, despite the Court's finding that Key Trust owned only what Ebeneser Merry and Kneeland Townsend owned, which consisted entirely of the South Property, and despite the fact that the Coles property in question Case No. 97-CV-296 was entirely the North Property, the Court erroneously concluded that the Coles had acquired the 66 foot wide railroad corridor subsequent to the common pleas court's August 18, 1998 decision via a conveyance from Key Trust. The problem was that Key Trust did **not own** any of the North Property and, therefore, Key Trust (and its successors in interest—*i.e.* the Coles themselves and/or Buffalo Prairie) could not have conveyed anything because it only owned what was in the original Merry and

Townsend tracts. Erie MetroParks attempted to have the Court correct this error through a Motion for Reconsideration, but unfortunately, the Motion was denied.

In any event, given that a court of competent jurisdiction had determined on August 18, 1998 that the Coles Plaintiffs did not own the North Property (the 66 feet wide strip of land expressly excepted from their deed), and given that the Coles Plaintiffs had not appealed that decision<sup>8</sup>, based upon the foregoing law, EMP certainly had no obligation to commence appropriation proceedings before November 21, 2007.

**D. Plaintiffs' Complaint is otherwise barred by the statute of limitation.**

For all § 1983 actions, federal courts apply the state personal injury statute of limitations. *Swartz v. Eastman & Smith*, 1999 U.S. App. LEXIS 24333, \*3-4 (6th Cir. Ohio Sept. 28, 1999), citing *Wilson v. Garcia*, 471 U.S. 261, 280, 85 L.Ed.2d 254, 105 S.Ct.1938 (1985). In the *en banc* decision in *Browning v. Pendleton*, 869 F.2d 989 (6th Cir. 1989), the Sixth Circuit held that a two-year statute of limitations applies to § 1983 actions arising in Ohio. Accord: *Nadra v. Mbah*, 119 Ohio St.3d 305, 312, 2008 Ohio 3918 at ¶31; 893 N.E.2d 829 (Ohio 2008)(“Therefore, we hold that R.C. 2305.10 is Ohio's general statute of limitations for personal injury **applicable to all claims under Section 1983, Title 42, U.S.Code**, filed in state court.”)(emphasis added).

The foregoing two-year statute of limitation has been applied in alleged takings cases as well. In *McNamara v. City of Rittman*, 473 F.3d 633, 637 (6th Cir. Ohio 2007), the Sixth Circuit, determined that the statute of limitations for a federal takings claim was two years. Likewise, in *Hensley v. City of Columbus*, 557 F.3d 693, the Court observed “Here, both parties agree that the applicable statute of limitations is only two years, Ohio

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<sup>8</sup> “No appeal was taken from the 1998 judgment.” *State ex rel. Coles*, 116 Ohio at 232.

Rev. Code § 2305.10, and that it 'starts to run when the plaintiff knows or has reason to know of the injury which is the basis of the action.'" *Id.* at 697 (6th Cir. Ohio 2009), citing *McNamara*, 473 F.3d at 639. A federal civil rights claim accrues when a plaintiff *knows or has reason to know* of the injury that is the basis of the plaintiff's action. *Sevier v. Turner*, 742 F.2d 262, 273 (6th Cir. 1984)(emphasis added).

Cases on physical takings hold that the statute of limitations begins to run when the government comes into physical possession of the plaintiff's land. *United States v. Dow*, 357 U.S. 17, 21, 2 L.Ed.2d 1109, 78 S.Ct. 1039 (1958); see also *Casitas Mun. Water Dist. v. United States*, 556 F.3d 1329, 1332 (Fed. Cir. 2009). As the Court explained in *Lingle v. Chevron U.S.A. Inc.*, a physical takings analysis is appropriate where there is "direct government appropriation or physical invasion of private property." 544 U.S. 528, 537, 125 S.Ct. 2074, 161 L.Ed.2d 876 (2005)(further explaining that physical takings analysis is appropriate where the government action is the "functional equivalent of a practical ouster of the owner's possession"). "Whether a physical taking is permanent or temporary is irrelevant to the application of the statute of limitations because the accrual date is the same for both." *Kemp v. United States*, 65 Fed. Cl. 818, 823; 2005 U.S. Claims LEXIS 164 (Fed. Ct.Cl. 2005).

In *Kemp*, the plaintiff claimed that the National Park Service had taken the plaintiff's property and had allowed the public to traverse and use her land without her permission or acquiescence. After noting the foregoing law concerning the accrual of the cause of action, the Court rejected the argument that each crossing of her property constituted a separate act of taking

Moreover, the crossing of her land by each successive pedestrian did *not* constitute a recurring taking. Only the original act

permitting the public access was considered compensable taking, especially given that plaintiff was well aware that the government had taken her land in 1980 when the public was allowed to traverse it.

*Id.*, 65 Fed. Cl. at 822.

Relative to Plaintiffs in the case *sub judice*, Plaintiffs claim to have been aware that in 1999, EMP took “complete, dominion, control, and possession” of approximately six miles of the former canal corridor extending from the Village of Milan, Ohio to the Ohio Department of Natural Resources Dupont Marsh Nature Preserve, including property owned by the Landowners, and constructed a recreational trail on the former corridor.” Plaintiffs’ Motion for Partial MSJ at 2-3 and Declarations cited therein. Additionally, Plaintiffs acknowledge that in 1999, EMP initiated a declaratory judgment action in the Erie County Common Pleas Court and they were made Parties to same.

Relative to the Southern Property, since Key Trust owned that property, it was the only party entitled to compensation for any taking of the Southern Property. See Section C herein, *supra*. Setting aside that problem, since Plaintiffs knew or should have known of the Southern Property being physically invaded in 1999, they had two years to file an action alleging a “taking” under 42 U.S.C. § 1983. Since Plaintiffs did not do so, their claim arising from that original physical taking is time-barred.

Relative to the Northern Property, the Coles Plaintiffs are the only property owners who are Parties to the within action who are asserting a takings claim. By virtue of their having filed a quiet title action, Erie County Common Pleas Court Case No. 97-CV-296, concerning the exact same property, Plaintiffs knew as early as 1997 that EMP was asserting ownership of the Northern Property. Thus, the Coles Plaintiffs claim is also barred by the two-year statute of limitation applied in cases under 42 U.S.C. § 1983.

In 2009, based upon similar prior litigation evidence and certain other admissions of the plaintiffs, the Sixth Circuit found “takings” claims to be time-barred:

So when did the plaintiffs have reason to know of their injury? The district court concluded that, as a factual matter, the plaintiffs had reason to know the basis of their injuries before 1994 for two main reasons. First, most of the plaintiffs were parties to a 1992 state suit arising out of these same facts, so we can fairly say most plaintiffs knew by then. Second, "based on evidence submitted by defendants, and not disputed by plaintiffs, all of the plaintiffs, including those that did not file suit until 1995 or later, knew or had reason to know of their injury by the end of 1991." *Hensley v. City of Columbus*, 2007 U.S. Dist. LEXIS 73178, at \*13 (S.D. Ohio Oct. 1, 2007). Because plaintiffs present us with no evidence that this conclusion was clearly erroneous, we must accept it, and thus their claims ripened at the latest by 1991 or 1992, so the two-year statute of limitations has run out.

*Hensley v. City of Columbus*, 557 F.3d 693, 697 (6th Cir. Ohio 2009). In sum, all of the Plaintiffs’ federal takings claims premised upon the original physical taking in 1999 are time-barred (and were even before Plaintiffs filed their original lawsuit in this Court back on October 7, 2003).

The net effect of the expiration of the statute of limitations means that Plaintiffs “takings” claims must derive from other than the original physical taking in 1999. In this particular case, the source of such claims can only be by virtue of the fact that EMP lost the *State ex rel. Coles* case on November 21, 2007. In other words, it’s that decision and only that decision which establishes a “taking.” At this juncture, the Court’s decision is more akin to a regulatory taking, *i.e.* by operation of law, as opposed to the time-barred physical taking. However, since Ohio has a reasonable, certain, and adequate procedure, it would seem that Plaintiffs would have to utilize that procedure *and* be denied or rebuffed in receiving compensation. That has not occurred in this case.

**RELATIVE TO COUNT II, DEFENDANT EMP IS ENTITLED TO JUDGMENT AS A MATTER OF LAW**

**There is no private constitutional remedy, nor a direct civil cause of action for damages under the Ohio Constitution.**

Ostensibly, Complaint Count II attempts to assert a claim only against Defendant

EMP. Indeed, Plaintiffs allege the following:

73. MetroParks' taking of Plaintiffs' private property for public use as a recreational trail has deprived and will continue to deprive Plaintiffs of rights and privileges afforded to Plaintiffs under and protected by the Ohio Constitution.
74. MetroParks' actions in taking Plaintiffs' private property for public use as a recreational trail without just compensation constitutes a taking of Plaintiffs' property without just compensation in violation of Article I, § 19 of the Ohio Constitution.
75. As a direct and proximate result of MetroParks' actions, Plaintiffs suffered harm and were otherwise damaged.

Ohio does not provide a direct action for damages for an alleged violation of the Ohio Constitution, Article I, Section 19. *See Provens v. Stark Cty. Bd. of Mental Retardation & Dev. Disabilities*, 64 Ohio St.3d 252, 594 N.E.2d 959 (1992), where the Ohio Supreme Court concluded that the trial and appellate courts “properly decided that there was no private constitutional remedy for the plaintiff-appellant’s claims and that **the Ohio Constitution itself does not provide for a civil damage remedy.**” *Id.*, 64 Ohio St.3d at 261, 594 N.E. 2d at 966 (emphasis added). The Eighth District reached the same conclusion in *PDU, Inc. v. Cleveland*, 2003 Ohio 3671 (8<sup>th</sup> Dist.), discr. app. over’d, 100 Ohio St.3d 1485 (2003). Rather, mandamus is the appropriate action to compel public authorities to institute appropriation proceedings where an involuntary taking of private

property is alleged. *State ex rel. Preschool Dev., Ltd. v. City of Springboro* (2003), 99 Ohio St.3d 347.

Defendant EMP cannot be liable for damages under the Ohio Constitution, Article I, Section 19. Thus, to the extent Plaintiffs attempt to seek damages for an alleged violation of the Ohio Constitution, such a cause of action does not exist.

**RELATIVE TO COUNT III, EMP IS ENTITLED TO JUDGMENT AS A MATTER OF LAW**

- A. Plaintiffs fail to state a conspiracy claim under 42 U.S.C. § 1985 because they are missing two necessary elements: (1) an allegation of racial or other class based animus; and (2) the underlying violation of a constitutional right.**

For the sake of brevity, EMP incorporates by reference the legal argument contained in Section A of the Individual Defendants' Motion for Summary Judgment at page 19, but holds in abeyance EMP's argument concerning the intracorporate conspiracy doctrine until the Court has made a determination concerning the purely legal arguments of the Defendants (which require no discovery).

- B. Assuming *arguendo* a conspiracy claim even exists under 42 U.S.C. § 1985, it would be barred by the two-year statute of limitation for such claim.**

For all § 1983 and § 1985 actions, federal courts apply the state personal injury statute of limitations. *Swartz v. Eastman & Smith*, 1999 U.S. App. LEXIS 24333, \*3-4 (6th Cir. Ohio Sept. 28, 1999). Accordingly, EMP incorporates by reference the legal argument contained in this Motion regarding expiration of the statute of limitation at pages 31-34 herein.

**IV. CONCLUSION**

Based upon the applicable law, as applied to the facts of this case, Plaintiffs' Motion for Partial Summary Judgment should be denied, Defendants' Motion for Summary Judgment should be sustained and this action should be dismissed.

Respectfully submitted,

*s/ John D. Latchney*

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Attorneys for Defendants Board of Park  
Commissioners, Erie Metroparks, Steve  
Dice, Jonathan Granville, Tom Dusza,  
Micah Vawters, Kurt Landefeld, Kevin  
Zeiber, Fred Deering, and Fred Nottke

**CERTIFICATE OF SERVICE**

Counsel for Plaintiffs have been notified of this filing via the U.S. District Court's ECF System at the e-mail addresses listed on the system on this 15<sup>th</sup> day of July 2009.

*s/ John D. Latchney*

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John D. Latchney (0046539)

IN THE UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF OHIO  
WESTERN DIVISION

EDWIN M. COLES, et al.	)	CASE NO. 3:08-cv-2968
	)	
Plaintiffs,	)	JUDGE JAMES G. CARR
	)	
v.	)	DECLARATION OF STEPHEN D. DICE
	)	
BOARD OF PARK COMMISSIONERS,	)	
ERIE METROPARKS, et al.	)	
	)	
Defendants.	)	

Now comes Stephen D. Dice who respectfully declares as follows:

1. I have knowledge of the facts contained in this Declaration, based either on personal knowledge or on knowledge contained in documents in the possession of Erie MetroParks.
2. I am the Executive Director/Secretary of Erie MetroParks ("EMP"). I have held that position since December 3, 2007.
3. This case involves the Huron River Greenway (the "Greenway"), which is a 66-foot wide public biking/hiking trail located in Erie County, Ohio which is owned, maintained and operated by Erie MetroParks ("EMP").
4. The Greenway is located on a former railroad corridor (the "Railroad Corridor").

5. At a public meeting conducted on or about August 16, 1995, the Board of Park Commissioners of EMP (the "Board") authorized the expenditure of up to \$225,000 to purchase the Railroad Corridor.

6. On or about October 13, 1995, Wheeling & Lake Erie Railway Company, a Delaware Company, and the Board entered into a Use Agreement (the "Use Agreement") which gave EMP (1) a permanent right to possess and use the Railway Corridor and (2) an option to obtain a deed to the Railroad Corridor upon payment of the \$214,000 price specified in the Use Agreement. EM paid the \$214,000 and exercised the option to obtain a deed to the Railroad Corridor. That deed has been recorded.

7. Less than a month after the Use Agreement was entered into, EMP published a rule pursuant to R.C. 1549.09 and 1549.99 closing the Railroad Corridor to the public and threatening to fine up to \$500 anyone who violated the rule. By November of 1998, if not sooner, EMP was working on the Railroad Corridor to construct the Greenway.

8. At its regular monthly meeting on February 13, 2008, which was the Board's next regular monthly meeting after January 23, 2008, the Board approved the initiation of appropriation proceedings with respect to Plaintiffs' properties to be appropriated and retained Baumgartner & O'Toole as legal counsel for that purpose.

9. Subsequently, the Board hired a surveyor to prepare legal descriptions of Plaintiffs' properties to be appropriated. Such legal descriptions had to be prepared before an appraiser could determine the value of such properties. Such legal descriptions have been prepared.

10. A title company was hired to review the chain of title to Plaintiffs' properties to be appropriated. The title reviews have been completed.

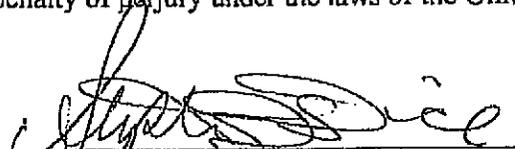
11. The Board also engaged an appraiser to establish the fair market value of Plaintiffs' properties to be appropriated.

12. When it was apparent that assigned tasks were not being completed in timely fashion, in an effort to move the pre-appropriation proceedings along, the Board decided to engage new legal counsel and a new appraiser.

13. The new appraiser has been working on the appraisals and it is my understanding that they should be complete within the next several weeks.

14. A Resolution was adopted by the Board on or about June 10, 2009, re-affirming the Board's commitment to proceed with appropriation proceedings relative to the properties owned by Plaintiffs. A true and genuine copy of that Resolution is attached hereto.

I declare the above to be true under penalty of perjury under the laws of the United States of America.

  
Stephen D. Dice

ERIE METROPARKS  
BOARD OF PARK COMMISSIONERS

RESOLUTION 1995-25  
Proposed August 16, 1995

Re: ACQUISITION OF REAL PROPERTY INTERESTS

The Board of Park Commissioners of Erie MetroParks, Erie County, Ohio, met in regular public session at 10:00 a.m. on the 16th day of August, 1995, at the Station House of The Coupling Reserve of Erie MetroParks with the following members present:

Starr Truscott, Kevin J. Zeiher, Frederick H. Deering

WHEREAS, Erie MetroParks has previously authorized its Director-Secretary to take such necessary steps to acquire certain real property interests from the Wheeling & Lake Erie Railway Company, and

WHEREAS, the Wheeling & Lake Erie Railway company has indicated its desire to enter into a voluntary and binding sale of certain real property interests located in Erie County, Ohio, and

WHEREAS, Erie MetroParks is likewise desirous of acquiring such real property interests,

NOW, THEREFORE, BE IT RESOLVED

that the Board of Park Commissioners hereby authorizes the purchase of real property interests now vested in the Wheeling & Lake Erie Railway Company and the Director-Secretary is hereby authorized to negotiate and enter into a final, binding agreement with the Wheeling & Lake Erie Railway Company to acquire by deed, easement, license and other legal or equitable means of conveyance certain real property interests located in Erie County and commonly known as the Wheeling & Lake Erie Railway line and consisting of a linear corridor of approximately 6.1 miles, more or less, at a price not to exceed \$225,000, according to such terms and conditions as shall be set forth in a certain purchase agreement which shall be approved by legal counsel as to substance and as to form.

A motion to adopt the preceding Resolution 1995-25 was made by Park Commissioner *Kevin J. Zeiher* and seconded by Park Commissioner *Frederick H. Deering*.

The roll being called, the above Resolution was officially adopted with two affirmative votes as indicated below and is effective immediately.

7444

Commissioner Truscott	<u>Nay</u>
Commissioner Zelher	<u>Aye</u>
Commissioner Deering	<u>Aye</u>

Thereupon the Commissioners declared by a majority vote that said resolution be adopted as provided by law.

Witness my hand this 16th day of August, 1995.

ATTEST: *Jonathan Granville*  
Jonathan Granville, Director-Secretary

APPROVED: *Starr Truscott*  
Starr Truscott, Chairman

7445

**ERIE METROPARKS**

*Board of Park Commissioners*

Resolution 2009-18

Proposed June 10, 2009

**RE:        DECLARING THE INTENT OF THE BOARD OF PARK COMMISSIONERS OF ERIE METROPARKS TO CONTINUE WITH APPROPRIATION ACTION AS ORDERED BY THE SUPREME COURT OF THE STATE OF OHIO IN STATE EX REL. COLES v. GRANVILLE, SUPREME COURT OF OHIO, NO. 2006-1259**

**WHEREAS,** the Supreme Court of the State of Ohio ordered Erie MetroParks to initiate appropriation action as part of the above referenced case

**WHEREAS,** Erie MetroParks has through a private surveyor completed the survey of the designated parcels

**WHEREAS,** Erie MetroParks has through a private title company completed title searches of the designated parcels

**WHEREAS,** Erie MetroParks has through a private appraiser initiated appraisal of the designated parcels

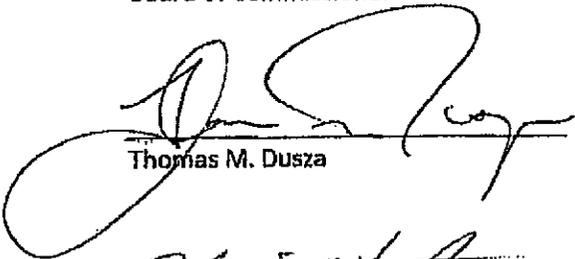
**THEREFORE BE IT RESOLVED** by the Board of Park Commissioners of Erie MetroParks that the appropriation action continue and that funds are set aside to complete the appropriation action as ordered by the Supreme Court of the State of Ohio

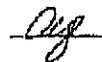
The above Resolution stands approved and adopted on this 10<sup>th</sup> day of June, 2009, and is effective immediately.

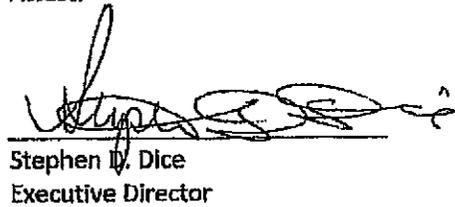
Board of Commissioners:

Roll:

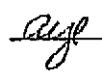
Attest:

  
\_\_\_\_\_  
Thomas M. Dusza

  
\_\_\_\_\_  
ay

  
\_\_\_\_\_  
Stephen D. Dice  
Executive Director

  
\_\_\_\_\_  
Micah A. Vawters

  
\_\_\_\_\_  
ay

6/10/09  
\_\_\_\_\_  
Adopted Date

  
\_\_\_\_\_  
Kurt O. Landefeld

  
\_\_\_\_\_  
ay

6/10/09  
\_\_\_\_\_  
Effective Date

IN THE ERIE COUNTY COURT OF COMMON PLEAS  
ERIE COUNTY, OHIO

95 AUG 17 AM 10:51  
LEED

EDWIN M. COLES, et al.	)	CASE NO. 97-CV-296
	)	
Plaintiffs	)	JUDGE JOSEPH E. CIRIGLIANO
	)	
-vs-	)	JUDGMENT ENTRY
	)	
THE WHEELING & LAKE ERIE	)	
RAILWAY COMPANY, et al.	)	
	)	
Defendants	)	

This matter came on for consideration by the Court pursuant to a motion to dismiss the Complaint, filed by counsel for Defendant Erie MetroParks on the ground that the Complaint fails to state a claim upon which relief can be granted, for the reason that Plaintiffs, Edwin M. Coles and Lisa A. Coles, are not the real parties in interest, Plaintiffs' counsel filed a memorandum opposing the motion to dismiss the Complaint.

This action involves the issue of title to an 0.80 Acre Parcel of land in Huron, Ohio (the "0.80 Acre Parcel"). Plaintiffs claim title to the 0.80 Acre Parcel and an additional 9.53 acres pursuant to a deed dated August 5, 1986 from Thomas G. Reel and Gilbert Hoffman, d.b.a. River Bend Development, recorded in Volume 528, Page 284 of Erie County Records (the "Coles Deed"). The Coles Deed contains a legal description for 10.33 acres of land, followed by the following provision:

"Except from the above parcel a 66 foot wide parcel now or formerly owned by the Norfolk and Western Railroad being approximately 0.80 acres, leaving 9.53 acres more or less but subject to all legal highways, easements, restrictions or other documents of record."

JOURNAL 380/986

AUG 18 1998

Thus the Coles Deed specifically excepted the 0.80 Acre Parcel from the aggregate 10.33 acre legal description. While it is true that when a court considers a Civ. R. 12(B)(6) motion to dismiss, the court must presume all factual allegations of the complaint are true, and must make all reasonable inferences in favor of the non-moving party, it is also true that construction of a deed is a matter of law for the court. "Where there is no ambiguity in the description the construction of the terms employed is a matter of law, independent of the intention of the parties." *Walsh v. Ringer* (1826), 2 Ohio 327, 334. In this case, there is no ambiguity in the description employed by the Coles Deed. It is apparent and the Court finds as a matter of law that the 0.80 Acre Parcel is specifically excepted from the property conveyed to Plaintiffs, that the Plaintiffs are not the owners thereof, and are therefore not the real parties in interest.

The Plaintiffs attempt to avoid the express language of the Coles Deed by alleging that the exclusion of the 0.80 Acre Parcel from the Coles Deed is the result of a mutual mistake, and request reformation of the Coles Deed. However, an action to reform a deed on the ground of mistake is subject to the ten year statute of limitations provided for in O.R.C. Section 2305.14, and the cause of action accrues upon execution of the instrument. *Bryant v. Swetland* (1891), 48 Ohio St. 194; *Sams v. Nalan* (Ross Cty. 1987), unreported, 1987 WL 13947. Plaintiffs' Complaint was filed on March 17, 1997. The Coles Deed was executed on August 5, 1986. Because more than ten years have elapsed since the execution of the Coles Deed, Plaintiffs' cause of action for reformation is time barred.

For the foregoing reasons, the Court rules that the Complaint fails to state a claim upon which relief can be granted, and the Complaint is dismissed.

IT IS SO ORDERED.

*Joseph E. Cirigliano*  
\_\_\_\_\_  
JUDGE JOSEPH E. CIRIGLIANO

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IN THE COMMON PLEAS COURT OF ERIE COUNTY, OHIO

BOARD OF PARK COMMISSIONERS,  
ERIE METROPARKS,

Plaintiff

-vs-

KEY TRUST COMPANY OF OHIO, NA  
TRUSTEE OF THE TESTAMENTARY  
TRUST OF VERNA LOCKWOOD  
WILLIAMS, et. al.,

Defendants

CASE NO. 99 CV 442

Judge Joseph E. Cirigliano

JUDGMENT ENTRY

FILED  
COMMON PLEAS COURT  
ERIE COUNTY, OHIO  
2002 FEB 22 PM 1 1/2  
BARBARA J. JOHNSON  
CLERK OF COURTS

This matter is before the Court on remand by the Erie County Court of Appeals (Court of Appeals Case No. E-00-068), a discretionary appeal to the Ohio Supreme Court not having been allowed (Supreme Court Case No. 01-1927).

Two issues were presented for decision. The first issue was the continuing validity of a lease (the "Lease") originally entered into between the predecessors-in-interest to the parties herein, the Milan Canal Company, as lessor, and the Wheeling & Lake Erie Railroad Company ("Wheeling Railroad"), as lessee. The second issue was the extent of the property covered by the Lease.

J433/941

3/31/02

### Findings of Fact

The Lease, originally signed on July 12, 1881, and recorded in Volume 2, Pages 26, 27 and 18 of Erie County Lease Records, was entered into evidence by stipulation. Pursuant to the Lease, the Milan Canal Company leased to Wheeling Railroad certain land (the "Leased Property"), which is described in the attached Exhibit A. The term of the Lease is 99 years, renewable forever, and the annual rent is Fifty Dollars (\$50.00). The Lease requires the Leased Property to be used "for public transportation and travel." The Lease further provides that the Leased Property is to revert to the lessor "on the failure of said lessees to so maintain and operate said Railroad for public transportation and travel and on the abandonment thereof for railway purposes, or on the failure of for six months to pay said annual rent . . . ." However, the Lease does not contain an express waiver of the common law requirement that the lessor demand payment of rent before declaring a forfeiture of the Lease. The Lease was renewed for its second 99-year term in 1979.

In 1904, the Milan Canal Company was dissolved and its assets purchased by Stephen Lockwood. Stephen Lockwood's interest in the Lease and the Leased Property eventually devolved to Key Trust Company of Ohio, NA, Trustee of the Testamentary Trust of Verna Lockwood Williams ("Key Trust").

Wheeling and Lake Erie Railway Company ("Wheeling Railway") acquired Norfolk Southern's interest in the rail corridor, and, in October, 1995, Wheeling Railway transferred its interest in the Leased Property to Plaintiff by quit-claim deed, which was recorded on June 1, 1998.

In the year 2000, during the pendency of this case, Defendant Key Trust, transferred all of its right, title, and interest as successor-in-interest to the original lessor, to the remaining Defendants.

Train service on the Leased Property was discontinued not later than 1986 and perhaps as early as 1982. In 1988, Norfolk and Western Railway Company ("N&W"), predecessor to Norfolk Southern Corporation ("Norfolk Southern"), filed a Notice of Exemption with the Interstate Commerce Commission for permission to discontinue train service along an 8.3 mile corridor including the Leased Property. Such permission was granted.

It is undisputed that the lessee failed to pay annual rental for the Leased Property after 1989, until a check for \$300.00 was transmitted to Key Trust in September 1995. The payment was rejected. It is also undisputed that no demand for rent was ever made by the lessor.

Having assessed the credibility of the witnesses who testified at trial and the reliability of the documents submitted into evidence, the Court finds that the Milan Canal Company, the predecessor in title to Defendant Key Trust, acquired its real property interests to construct the canal (the "Milan Canal Property") solely by way of two instruments and no others:

- (a) A conveyance from Kneeland Townsend dated May 10, 1838, recorded May 29, 1852, in Volume 10 of Deeds, Page 23 of Erie County Records (the "Townsend Conveyance"); and

(b) A conveyance from Ebeneser Merry dated April 21, 1838, recorded October 29, 1852, in Volume 10 of Deeds, Page 25 of Erie County Records (the "Merry Conveyance").

The Milan Canal Property consisted of a roughly three mile long corridor of property the northern terminus being known as Lock No. 1, which was located where the Milan Canal joined the Huron River on property now owned by Wikel Farms, Ltd., just north of Mason Road, in Section 2, Milan Township, Erie County, Ohio. Neither Kneeland Townsend nor Ebeneser Merry conveyed to the Milan Canal Company any interest in real property north of Lock No. 1.

The only lands owned by the Milan Canal Company at the time the Lease was executed lay within the boundaries of the Kneeland Townsend property and the Ebeneser Merry property, neither of which lay north of Lock No. 1.

#### Conclusions of Law

It is axiomatic that a seller cannot transfer any greater interest in land than that which the seller possesses. In the instant case, Wheeling Railroad had a leasehold interest in the Leased Property, which is evidenced by Exhibit A. The Court hereby finds the Lease was a valid lease. Further, the Court finds that the Lease, which was for a term of 99 years and renewable forever, did not confer a fee simple estate under Ohio law to the Wheeling Railroad, because it was aware that its interest could be forfeited to the lessor upon its breach of the lease covenants. Therefore, the fee

simple remains in the lessor, its heirs, devisees, or assigns. See Rawson v. Brown (1922), 104 Ohio St. 548; and Quill v. R.A. Investment Corporation (1997), 124 Ohio App.3d 653.

The description of the Leased Property in the Lease unambiguously describes it as consisting of all lands then owned by the Milan Canal Company within a 150 foot wide corridor from approximately the intersection of Maine and Union Streets in the Village of Milan northerly to the north of the mouth of the Huron River. The only lands owned by the Milan Canal Company at the time the Lease was executed lay within the boundaries of the Kneeland Townsend property and the Ebeneser Merry property, neither of which lay north of Lock No. 1. Therefore, the Leased Property extends from the southern terminus of the old Milan Canal at or near the southerly end of the Milan Canal basin in the Village of Milan to its northerly terminus at the Huron River at the former location of Lock No. 1 on premises now owned by Wikel Farms, Ltd. immediately north of Mason Road in Section 2, Milan Township, Erie County.

It is axiomatic in Ohio jurisprudence that the law abhors a forfeiture. Wheatstone Ceramics Corp. v. Turner (1986), 32 Ohio App.3d 21, 23, citing Ensel v. Lumber Ins. Co. of New York (1913), 88 Ohio St. 269, 281.

Contracts incorporate the law applicable at the time of their creation. 11 Williston on Contracts (1999), 203, Section 30.19. The common law of Ohio at the time the Lease was executed required that, in order to show a forfeiture of a leasehold estate, the lessor had to prove that a demand for payment of rent had been made when due. Smith v. Whitbeck (1862), 13 Ohio St. 471. The

Lease contained no express waiver of this common law requirement, and the evidence was unrefuted that no demand for payment of rent had been made. Since no forfeiture may be had absent demand, the lapse in annual rent payments does not constitute an irreparable breach of the Lease.

The Lease requires the Leased property to be used "for public transportation and travel," and further provides that the Leased Property is to revert to the lessor "on the failure of said lessees to so maintain and operate said Railroad for public transportation and travel and on the abandonment thereof for railway purposes." The transformation of a railroad right-of-way to a recreational trail is a permissible use of such property. Rieger v. Penn Central Corp., (May 21, 1985), Greene App. No. 85-CA-11, unreported. Both serve a public purpose related to public transportation and travel. Id., citing Minnesota Dept. of Wildlife v. State of Minnesota (Minn. 1983), 329 N.W.2d 543, 546-547, certiorari denied (1983), 463 U.S. 1209. Consequently, the proposed use of the Leased Property is consistent with the requirements of the Lease. Furthermore, the transitional period between the uses is not so great as to constitute a failure to "maintain and operate" the Leased Property for such uses so as to constitute a breach of the Lease. This is especially so absent a demand from the lessor for performance.

To constitute abandonment of a railroad right-of-way, there must be a "nonuser together with an intention to abandon." Rieger, supra, citing Schenck v. Cleveland, Cincinnati, Chicago and St. Louis Railway Co. (1919), 11 Ohio App. 164, 167. The intention must be shown by unequivocal and decisive acts indicative of abandonment. Id.; see, also, Roby v. New York Central (1984), 142 N.Y. 176, 181. The filing of a Notice of Exemption with the Interstate Commerce Commission for

permission to discontinue train service was evidence, but not conclusive. Contradictory to the filing was undisputed evidence that when Norfolk Southern transferred this spur to Wheeling Railway, Norfolk Southern reserved a portion of the corridor for the future installation of fiber-optic cable. Moreover, Wheeling Railway's grant to Plaintiff reserves a future right to construct and operate another rail line in the corridor. Both of these acts constitute "railway purposes," and both indicate an intention to pursue future use of the property for such purposes. Far from the "unequivocal and decisive" acts indicative of abandonment necessary to prove an intent to abandon, these reservations are antithetical to such an intent.

The Court therefore rules that:

1. The extent of the Leased Property is as set forth in Exhibit A hereto.
2. The lessees have not abandoned the Leased Property.
3. The Lease is still in full force and effect and encumbers the Leased Property.
4. Plaintiff is the current lessee and the holder of the lessee's rights under the Lease.
5. Plaintiff is entitled to the sole occupancy and use of the Leased Property.
6. Any rights of Defendants in the Leased Property are subject to the rights of Plaintiff as lessee of the Leased Property.
7. The Lease permits the Plaintiff to improve and use the Leased Property as a parkway and/or recreational trail and purposes incidental and/or related thereto.

8. There is currently outstanding the sum of Six Hundred Fifty Dollars (\$650.00) as delinquent rent under the Lease. Plaintiff has deposited with the clerk of courts the sum of One Thousand Dollars (\$1,000.00), representing thirteen years' past due rent and future rent for seven years. Such deposit shall be released to Defendants upon motion of Defendants advising the Court to whom such rent is to be paid. Defendants shall keep Plaintiff advised in writing as to where future installments of rent are to be directed. If Defendants do not timely notify Plaintiff to whom future rent is to be paid and the address at which rent is to be paid, then Plaintiff may deposit future rent with the Clerk of Courts, until further notice.
9. Only those Defendants who hold an interest in the Leased Property are entitled to any portion of the rent under the Lease or to the benefit of any of the rights of the lessor under the Lease.

Judgment on Plaintiff's Complaint and on Defendants' Counterclaim is rendered in favor of Plaintiff and against Defendants.

Costs to Defendants.

IT IS SO ORDERED.

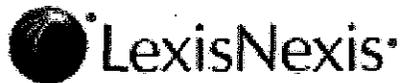
  
\_\_\_\_\_  
Judge Joseph E. Cirigliano

cc: Abraham Lieberman  
Dennis O'Toole Peggy Kirk  
Randall Strickler Anthony Logan  
Darrel Bilancini Jeffrey Rengel

EXHIBIT A

All those lands within a one hundred fifty (150) foot wide corridor conveyed to the Milan Canal Company by Kneeland Townsend and Ebeneser Merry by instruments dated May 10, 1838 and April 21, 1838, respectively, and recorded, respectively on May 29, 1852, in Volume 10 of Deeds, Page 23 of Erie County Records and October 29, 1852, in Volume 10 of Deeds, Page 25 of Erie County Records, which lands have a northerly boundary at Lock No. 1 of the old Milan Canal, which lock was located immediately north of Mason Road on lands now owned by Wikel Farms, Ltd. 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.

January 28, 2002  
G:\Wells17\17064\Judgment 5.rptd



LEXSEE 1993 U.S. APP. LEXIS 17220

**DONNA ARDIRE AND PHILIP ARDIRE, Plaintiffs-Appellants, v. MICHAEL RUMP, JOHN MAXEY, RICHARD LANCASHIRE, JEFFREY NEVERMAN, WESTLAKE CITY PLANNING COMMISSION, AND CITY OF WESTLAKE, Defendants-Appellees.**

No. 92-4204

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

1993 U.S. App. LEXIS 17220

June 30, 1993, Filed

**NOTICE:** [\*1] NOT RECOMMENDED FOR FULL-TEXT PUBLICATION. SIXTH CIRCUIT RULE 24 LIMITS CITATION TO SPECIFIC SITUATIONS. PLEASE SEE RULE 24 BEFORE CITING IN A PROCEEDING IN A COURT IN THE SIXTH CIRCUIT. IF CITED, A COPY MUST BE SERVED ON OTHER PARTIES AND THE COURT. THIS NOTICE IS TO BE PROMINENTLY DISPLAYED IF THIS DECISION IS REPRODUCED.

**SUBSEQUENT HISTORY:** Reported as Table Case at: 996 F.2d 1214, 1993 U.S. App. LEXIS 22102.

**PRIOR HISTORY:** United States District Court for the Northern District of Ohio. District No. 88-00085. Matia, District Judge.

**JUDGES: BEFORE:** MILBURN and NORRIS, Circuit Judges; and WISEMAN, District Judge. \*

\* Honorable Thomas A. Wiseman, Jr., United States District Judge for the Middle District of Tennessee, sitting by designation.

**OPINION BY: PER CURIAM**

**OPINION**

PER CURIAM. Plaintiffs Philip Ardire and Donna Ardire, husband and wife, appeal from the dismissal

without prejudice of their action filed pursuant to 42 U.S.C. § 1983 against the City of Westlake, Ohio, its planning commission, and four individual members of the commission challenging the denial of a property division on the ground that their constitutional claims are not ripe for a decision. On appeal, the issue is whether the district court erred in determining that none of the Ardires' constitutional [\*2] claims are ripe for consideration. For the reasons that follow, we affirm.

I.

A.

The Ardires are the owners of a piece of property located at 25808 Central Ridge Road in the City of Westlake, Cuyahoga County, Ohio. The parcel contains approximately 2.551 acres of land and has frontage on both Center Ridge Road and Newbury Drive. The parcel is rather long and narrow and one end of it intersects with a major street, Center Ridge Road. A smaller street, Newbury Drive, dead ends into the opposite end of the parcel.

The front part of the Ardires' property is zoned for multi-family use, and the back part is zoned for single-family dwellings. In 1985, the Ardires submitted an application to the Westlake Planning Commission requesting a split of the property into two separate parcels. The front parcel, Lot A, would contain 0.7543 acres of land having frontage on Center Ridge Road

along with an existing two-family house. Lot A would be zoned for multi-family use. The Ardires had a pending contract to sell this portion of their lot subject to approval of the property split by the planning commission.

The back part of the Ardires' property, Lot B, would contain 1.7967 acres with [\*3] frontage on Newbury Drive. It would be zoned for single-family use, and the Ardires planned to build a single-family home for their own use on Lot B.

The Westlake Planning Commission unanimously disapproved the requested property division on March 4, 1985. The Ardires, who were not present at the meeting of the planning commission, were represented by counsel who made a general introduction of their application. The director of planning for the commission then pointed out that on the original city plan from the 1960's it had been contemplated that Newbury Drive, which ended at the back of the Ardires' property, would be extended through the back end of their lot and then curve through an adjoining lot to meet another road, Williams Drive. The city director noted that he believed the city should have reserved the Ardires' lot for a critical street opening, but he was unable to find any record of such a reservation. The director then suggested that the planning commission pass a resolution that evening making such a reservation of the Ardires' property.

In addition, the commission also discussed the fact that if the Ardires carried through with their plans, the back portions of similar [\*4] long lots on either side of their property would be landlocked and that the existing dead end street, Newbury Drive, exceeded the permissible length for a cul-de-sac. There was further discussion among the board members that if the property division was approved, the Ardires could request a building permit for the back part of their lot, forcing the city to decide within ninety days whether it wished to buy the property. However, if the division was disapproved, the Ardires would be unable to apply for a building permit because there was an existing two-family home on the undivided parcel.

As we stated earlier, the planning commission unanimously disapproved the requested property division. The minutes of the commission noted that the disapproval was based primarily on the fact that the property was set aside for a critical street opening. However, as noted above, no such reservation of the Ardires' property had been made.

The Westlake Planning Commission is the sole and exclusive agency which decides single property splits for the City of Westlake, Ohio. Under the relevant provisions of Westlake city ordinances, no further administrative action or review was required by the Westlake [\*5] City Council for the denial of the single property split.

As provided for by Ohio Revised Code § 2506, the Ardires appealed the planning commission's decision to the Common Pleas Court of Cuyahoga County, Ohio, which affirmed the decision of the Westlake Planning Commission on March 14, 1991. A further appeal was taken to the Ohio Court of Appeals for the Eighth District, which reversed the decision of the lower court in favor of the planning commission on February 4, 1993, while this appeal was pending. Specifically, the state court of appeals found that the planning commission's denial of the single property split was arbitrary, unreasonable, and capricious and was not supported by the preponderance of reliable, probative, and substantial evidence. The state court of appeals further concluded that because the entire decision by the planning commission was based on hunches, it was an abuse of discretion. Apparently, the City of Westlake plans to appeal that ruling to the Supreme Court of Ohio. In addition, the Ardires filed an action for money damages in the Common Pleas Court of Cuyahoga County; however, they voluntarily dismissed this action without prejudice on January 13, 1987.

[\*6] B.

In 1988, the Ardires filed a complaint and amended complaint in the district court seeking monetary and injunctive relief under *42 U.S.C. § 1983*. They alleged that the action of the Westlake Planning Commission constituted violations of equal protection, substantive and procedural due process, and a taking without just compensation in violation of the *Fifth and Fourteenth Amendments of The Constitution of the United States*. The Ardires' complaints also included pendent state law claims; namely, intentional and/or negligent state torts.

The complaint survived Westlake's motion to dismiss on statute of limitations grounds. However, the district court then sua sponte requested that the parties brief the issue of ripeness. After consideration of the briefs, the district court concluded that none of the Ardires' constitutional claims were ripe for review and dismissed them without prejudice on October 7, 1992. The Ardires' pendent state claims were also dismissed without

prejudice. This timely appeal followed.

## II.

The district court's finding on the issue of ripeness is a question of law subject to de novo review. *See Bannum, Inc. v. City of Louisville, Ky.*, 958 F.2d 1354, 1362 (6th Cir. 1992). [\*7]

### A.

In a case alleging a taking of property without just compensation, the Supreme Court has determined that two different elements must be satisfied to render the claim ripe for consideration in the federal courts. First, the challenged decision must be final, and second, the plaintiffs must have utilized state procedures for obtaining compensation. *See Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 87 L. Ed. 2d 126, 105 S. Ct. 3108 (1985). In that case, which alleged only a taking claim, the Court found that neither requirement was satisfied because the plaintiff could have requested a variance from the zoning requirements and could have filed an action for inverse condemnation to seek compensation.

In this case, the plaintiffs have satisfied the first criteria for ripeness in that they had received a final decision from the planning commission on their requested property split. There was no way that the plaintiffs could seek a variance which would allow them to build a home on the back portion of their property and still satisfy the planning commission's desire to put [\*8] a road through the same portion of their property. Relying on the Supreme Court's decision in *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 341, 91 L. Ed. 2d 285, 106 S. Ct. 2561 (1986), defendants assert that this claim is not ripe for review because the Ardires could have altered their request for a single property split; i.e., by varying the length of the cul-de-sac at the back of their lot in order to make it acceptable to the Westlake Planning Commission. However, this argument is misplaced as there was no way that the Ardires could have adjusted and resubmitted their plan in a form satisfactory to the commission. The Ardires wished to use the back portion of their lot to build a dwelling; however, the commission desired to keep the back portion of the lot in an unimproved state because of the possibility that a road might be built across the back portion of the lot.

Defendants also argue that the decision of the

Westlake Planning Commission was not a final administrative decision because the Ardires did not apply for a building permit for the back portion of their lot. However, this argument ignores [\*9] the fact that the Ardires could not apply for a building permit after their requested property split was denied because they were not permitted to have more than one existing house on the undivided parcel.

In order for the taking claim to be ripe under the second criteria for ripeness, the Ardires must also demonstrate that state remedies for compensation are inadequate. In order to do so, the remedies available must be used and the compensation denied. *Silver v. Franklin Tp., Bd. of Zoning Appeals*, 966 F.2d 1031, 1034-35 (6th Cir. 1992). "If a State provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the *Just Compensation Clause* until it has used the procedure and been denied just compensation." *Williamson*, 473 U.S. at 195. The case is not "ripe" because "the State's action is not 'complete' until the State fails to provide adequate compensation for the taking." *Id.*

The Supreme Court has made it clear that it is not the exhaustion of the review procedures for the final administrative decision itself that is required; it is exhaustion [\*10] of the procedures for compensation that is required for "ripeness." *See id. at 194 n.13.* Thus, the Ardires were not required to have exhausted the appeal under Ohio Rev. Code § 2506, which, as noted, was recently decided by the Ohio Court of Appeals for the Eighth District. Rather, Ohio law provides a procedure for obtaining compensation for a governmental taking; namely, an action in mandamus under Ohio Rev. Code § 2731 to force the city to commence eminent domain proceedings. *See Silver*, 966 F.2d 1031, 1034-35 (6th Cir. 1992); *Four Seasons Apartment v. City of Mayfield Heights, Ohio*, 775 F.2d 150, 151-52 (6th Cir. 1985); *Akron-Selle Co. v. City of Akron*, 49 Ohio App. 2d 128, 359 N.E.2d 704, 705 (Ohio App. 1974).

The Ohio courts historically have granted relief to private property owners where there has been a taking of private property. *Kermetz v. Cook-Johnson Realty Corp.*, 54 Ohio App. 2d 220, 376 N.E.2d 1357, 1361 (Ohio App. 1977). The appropriate action afforded the [\*11] property owner has been by way of an original action in mandamus, and such an action has been held to be the proper one to be brought against a municipality which

1993 U.S. App. LEXIS 17220, \*11

has taken private property. *Id.* "Where the taking of property is by the state, the property owner's redress must be by mandamus to compel the appropriation of the property so taken." *Id.* (citing 19A Ohio Jurisprudence 2d 599, Eminent Domain, Section 397). Moreover, where the actions of the state or municipality could be interpreted as a substantial interference or domination of the private property, "a pro tanto" taking as opposed to an absolute or permanent taking, the action for mandamus lies in the same manner as a mandamus action brought for a permanent taking. *Id.* at 1359-60. In this case, it is undisputed that the Ardires have not pursued Ohio's just compensation remedy as they have not sought mandamus to compel the City to commence eminent domain proceedings, known in Ohio as appropriation proceedings.

Finally, the compensation remedy in Ohio is a two-step process. First, as noted above, the appropriate remedy is an original action in mandamus in the Common Pleas Court to compel state or municipal officials [\*12] to begin an appropriation (eminent domain) proceeding, and the second step is the appropriation proceeding in the Common Pleas Court, where a jury assesses the value of the damages for the property taken. *Kermetz*, 376 N.E.2d at 1359. In their brief, the Ardires contrast the two-step process for just compensation available in Ohio with the single-step inverse condemnation action available in Tennessee. *Williamson*, 473 U.S. at 196. Under Tennessee law, a private property owner can obtain just compensation through an inverse condemnation proceeding, a single procedure, where the "taking" is the result of restrictive zoning regulations. *Id.* However, as noted above, the Ohio just compensation procedure is a two-step process, the mandamus action to compel an eminent domain proceeding and the appropriation proceeding to determine damages. The Ardires assert that if the doctrine of "ripeness" is applied, they as property owners in Ohio will have to fight two legal battles to obtain just compensation, thereby incurring more costs, expenses, and attorneys fees than would a private [\*13] property owner in Tennessee. Consequently, the Ardires assert that applying the "ripeness" doctrine will have a "chilling effect" on the assertion of private property rights in Ohio. Reply brief, p. 12. However, the issue before the district court was whether the Ardires have exhausted Ohio's procedures for just compensation for the "taking" of private property, not the efficiency or cost effectiveness of Ohio's compensation procedures vis-a-vis the

compensation procedures utilized by any other state or jurisdiction. Therefore, the district court did not err in concluding that plaintiff's claim of taking without just compensation is not "ripe" for review.

#### B.

In the alternative, the Ardires argue that their procedural due process claim is a separate claim which is ripe for review, particularly with regard to the front portion of their property, which would have been sold pursuant to a conditional contract if their property split application had been approved. They rely on this court's decision in *Nasierowski Brothers Investment Company v. City of Sterling Heights*, 949 F.2d 890, 894-95 (6th Cir. 1991), which held that the plaintiff's claim of the [\*14] denial of procedural due process was ripe for review. However, *Nasierowski* is clearly distinguishable from this case because the plaintiff alleged only that he was deprived of procedural due process when he was not afforded a public hearing to challenge the zoning reclassification of his property, and he did not allege an unconstitutional "taking" of his property under the *Fifth* and *Fourteenth Amendments*. *Id.* at 893.

Moreover, this court distinguished the decision in *Nasierowski* in *Bigelow v. Michigan Department of Natural Resources*, 970 F.2d 154 (6th Cir. 1992). *Bigelow*, like the present case, involved claims of the denial of due process and "taking" without just compensation. The court in *Bigelow* found that all of the plaintiffs' claims arose from a common nucleus of facts and were ancillary to the taking claim. Therefore, the claims were subject to the "ripeness" requirement. Specifically, in *Bigelow* we stated:

The circumstances in this case, however, are quite different from those in *Nasierowski*, and weigh heavily in favor of subjecting the plaintiffs' procedural due process claim to the [\*15] same ripeness requirements as the other claims.

\* \* \*

Until the state courts have ruled on the plaintiffs' inverse condemnation [just compensation] claim, this court cannot determine whether a taking has occurred, and thus cannot address the procedural due process claim with a full understanding of

1993 U.S. App. LEXIS 17220, \*15

the relevant facts. Furthermore, addressing the plaintiffs' procedural due process claim at this stage of the proceedings would allow future plaintiffs effectively to circumvent the ripeness requirement for takings claims simply by attaching a procedural due process claim to their complaint.

*Id.* at 159-60.

Similarly, in this case, until the Ardires have utilized the available state procedures for obtaining just compensation, it is not possible to determine the economic impact of the alleged denial of procedural due process. *See Williamson*, 473 U.S. at 191. Accordingly, the district court did not err in finding that the procedural due process claim was not ripe for review.

Furthermore, plaintiffs' procedural due process claims may have been subject to dismissal on other grounds. If the [\*16] Westlake Planning Commission's decision on the proposed property split was completely discretionary, then the Ardires had no protected interest that would state a procedural due process claim. *See G.M. Engineers and Associates, Inc. v. West Bloomfield Tp.*, 922 F.2d 328, 331 (6th Cir. 1990). The relevant portion of Westlake's planning and platting code indicated that the commission could disapprove a property division on the grounds that it would not be properly integrated with adjoining subdivisions or does not comply with the planning principles of the city. J.A. p. 111. This would appear to vest the planning commission with a good deal of discretion. Furthermore, in reversing the decision of the planning commission, the Ohio Court of Appeals for the Eighth Circuit concluded that the commission abused its discretion in denying plaintiff's application for a property split.

Conversely, if the planning commission lacks discretion and must grant the application for a simple property split under certain conditions, then the doctrine of *Parratt v. Taylor*, 451 U.S. 527, 68 L. Ed. 2d 420, 101 S. Ct. 1908 (1981), [\*17] applies, and the plaintiffs must prove that state corrective procedures are inadequate in order to state a procedural due process claim. *G.M. Engineers*, 922 F.2d at 332; *Four Seasons*, 775 F.2d at 151-52. In this case, the Ardires have obtained judicial review of the planning commission's decision in the state court and at this point in time the commission's decision has been reversed. Thus, it would not appear that the state's corrective procedures are inadequate.

### C.

Finally, because we have concluded that the Ardires' constitutional federal claims are not "ripe" for review, the district court did not err in dismissing their pendent state law claims without prejudice. *See United Mine Workers of Am. v. Gibbs*, 383 U.S. 715, 725-27, 16 L. Ed. 2d 218, 86 S. Ct. 1130 (1966).

### III.

In summary, although the Ardires had obtained a final decision on their proposed property division, their constitutional claims were not ripe for review because they had not utilized state procedures for obtaining compensation. Because all of their constitutional claims were ancillary [\*18] to their taking claim, the argument that the due process claim was separate and therefore ripe for consideration must fail. Finally, the Ardires' pendent state law claims were also subject to dismissal because none of their constitutional claims was "ripe" for review. Accordingly, the district court's dismissal of the Ardires' action without prejudice is AFFIRMED.



LEXSEE 2008 U.S. APP. LEXIS 24822

**BRADLEY W. CROSBY, ROSE M. CROSBY, MONTY A. CUMMINGS, CATHY J. CUMMINGS, JEREMIAH S. RAYBURN, Plaintiffs-Appellants, v. PICKAWAY COUNTY GENERAL HEALTH DISTRICT, PICKAWAY COUNTY, GLENN REESER, JOHN STEVENSON, ULA JEAN METZLER, Defendants-Appellees.**

No. 06-3869

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

08a0747n.06; 303 Fed. Appx. 251; 2008 U.S. App. LEXIS 24822; 2008 FED App. 0747N (6th Cir.)

December 8, 2008, Filed

**NOTICE:** NOT RECOMMENDED FOR FULL-TEXT PUBLICATION. SIXTH CIRCUIT RULE 28(g) LIMITS CITATION TO SPECIFIC SITUATIONS. PLEASE SEE RULE 28(g) BEFORE CITING IN A PROCEEDING IN A COURT IN THE SIXTH CIRCUIT. IF CITED, A COPY MUST BE SERVED ON OTHER PARTIES AND THE COURT. THIS NOTICE IS TO BE PROMINENTLY DISPLAYED IF THIS DECISION IS REPRODUCED.

**PRIOR HISTORY: [\*\*1]**

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO.

*Crosby v. Pickaway County Gen. Health Dist.*, 2007 Ohio 6769, 2007 Ohio App. LEXIS 5913 (Ohio Ct. App., Pickaway County, Dec. 14, 2007)

**COUNSEL:** For BRADLEY W. CROSBY, JEREMIAH S. RAYBURN, ROSE M. CROSBY, MONTY A. CUMMINGS, CATHY J. CUMMINGS, Plaintiffs - Appellants: Steve J. Edwards, Grove City, OH.

For PICKAWAY COUNTY GENERAL HEALTH DISTRICT, Defendant - Appellee: Angela M. Courtwright, Gregory D. Brunton, Reminger Co., Columbus, OH.

For PICKAWAY COUNTY, GLENN REESER, JOHN

STEVENSON, ULA JEAN METZLER, Defendants - Appellees: Mark D. Landes, Isaac, Brant, Ledman & Teetor, Columbus, OH.

**JUDGES:** BEFORE: BOGGS, Chief Judge; GIBBONS, Circuit Judge; and BELL, District Judge. \*

\* The Honorable Robert Holmes Bell, Chief Judge of the United States District Court for the Western District of Michigan, sitting by designation.

**OPINION BY: BOGGS**

**OPINION**

[\*252] BOGGS, Chief Judge. Landowners Bradley Crosby, Rose Crosby, Monty Cummings, Cathy Cummings, and Jeremiah Rayburn (collectively "Appellants") sued Pickaway County General Health District ("Health District") and Pickaway County and its Commissioners, arguing that the Health District's decision to revoke a permit to install a sewage system on their land was a regulatory taking subject to the *Just Compensation Clause of the United States Constitution*. [\*\*2] The Appellants also alleged that the County and Commissioners were responsible for the Health District's decision to revoke the permits. The district court granted summary judgment to the County and Commissioners, concluding that they were not the parties responsible for

303 Fed. Appx. 251, \*252; 2008 U.S. App. LEXIS 24822, \*\*2;  
2008 FED App. 0747N (6th Cir.)

the action claimed to violate Appellants' constitutional rights. The district court granted summary judgment to the Health District on the grounds that Appellants' takings claim was unripe. The landowners now appeal, and we affirm in part, vacate in part, and remand to district court.

I

In the spring of 2003, Bradley and Rose Crosby jointly purchased a plot of real property along Hoover Road within Harrison Township in Pickaway County that was designated as Lot 5 in the Hoover Farm Subdivision ("Lot 5"). Around the same time, Monty Cummings, Cathy Cummings, and Jeremiah Rayburn jointly purchased the adjoining lot, Lot 4. The Appellants intended to build single-family houses, which they would then sell.

On March 25, 2003, prior to the purchases, Four Star Development Company ("Four Star"), the then-owner of the lots, filed a "Sewage System Applicant/Permit" application with the Health District, requesting to install a [\*\*3] sewage system on Lots 4 and 5. After receiving Four Star's application, the Health District evaluated the site and listed its requirements for the proposed sewage systems, including the size of the septic tank and leach bed for each lot. Appellants allege that, in reliance on the Health District's evaluation, each group of owners built a single-family house on their respective lots.

On March 19, 2004, after Appellants had completed construction but before the septic tanks and leach beds had been installed, the Health District sent Appellants a letter suspending its prior approval of the sewage system permits, explaining that the County had been experiencing problems with surface water affecting sewage systems and stating that before permits would be issued, Appellants needed to present a drainage plan for Lots 4 and 5. Shortly thereafter, Appellants submitted a drainage plan, which the Health District reviewed and rejected as inadequate. The Health District explained that the "plans submitted [would] still affect the neighbors" and would "likely create a larger problem for your lots and other lots." The Health District stated that "further corrective [\*253] measures or [new] plans will be [\*\*4] needed before a septic system can be installed."

On September 28, 2004, instead of submitting a second drainage plan, Monty Cummings attended a regular public meeting of the Board of Health, the entity

that governs the Health District, and requested permission to install a septic system on Lot 4. The Board of Health adopted a resolution denying his request.

To date, the Appellants have not submitted a second drainage plan. Accordingly, the Health District has not approved the permits for installation of the septic tanks and leach beds, and the two single-family houses on Lots 4 and 5 remain vacant.

On October 8, 2004, Appellants filed a complaint in the United States District Court for the Southern District of Ohio against the Health District, Pickaway County, and three county commissioners in their official capacity, 1 Glenn Reeser, 2 John Stevenson, and Ula Jean Metzler (collectively "Commissioners"). The federal complaint alleged two claims under 42 U.S.C. § 1983. First, the Appellants alleged that the defendants violated their substantive and procedural due process rights by "suspending or revoking their permit after defendants had issued said permit and [Appellants] had relied on [\*\*5] said permit in constructing a house for resale." Second, the Appellants alleged that the defendants deprived the Appellants of their property without just compensation by revoking the permits and thereby "depriving [Appellants] of the opportunity to resell said houses."

1 Appellants' brief explains that the Commissioners were named parties to make sure that the County was "properly sued."

2 The complaint originally listed Robert Haffe, who since has been replaced by Glenn Reeser.

On July 20, 2005, Appellants also filed a complaint against the same defendants 3 in the Pickaway County Court of Common Pleas, asking the court to issue a writ of mandamus ordering the Health District to "institute condemnation proceedings in accordance with *Chapter 163 of the Ohio Revised Code*." The facts as described in the state court complaint were substantially identical to those described in the federal complaint with the exception that the state court complaint, unlike the federal complaint, alleged that "Plaintiffs have requested Defendants to compensate them for this taking and Defendant[s have] refused to do so." 4

3 This complaint listed Glenn Reeser and not Huffer.

4 There is no evidence in the record [\*\*6] before this court that the Appellants ever made such a request.

303 Fed. Appx. 251, \*253; 2008 U.S. App. LEXIS 24822, \*\*6;  
2008 FED App. 0747N (6th Cir.)

Meanwhile, in the federal proceedings, Pickaway County and the Commissioners filed a motion for summary judgment on November 14, 2005. On November 29, 2005, the Health District also filed a motion for summary judgment. Appellants filed a single memorandum in opposition to both summary judgment motions. The district court accordingly addressed both motions in a single opinion and order issued on May 12, 2006. The district court held that the County was not responsible for suspending approval of Appellants' sewage applications, nor could it be held vicariously liable. It thus granted the County and Commissioners' motion for summary judgment. The district court then granted summary judgment to the Health District, holding that Appellants' claims were unripe because they had not yet been denied just compensation. The district court also dismissed the Appellants' due process claims, holding that they were ancillary to the takings [\*254] claims, and therefore similarly unripe. The judgment was entered on May 16, 2006.

On May 22, 2006, less than ten days after the judgment was entered, Appellants moved for relief from the federal court [\*\*7] judgment pursuant to *Rule 60(b) of the Federal Rules of Civil Procedure*. On June 8, 2006, before the court had addressed the motion, Appellants filed a notice of appeal of the district court's May 12, 2006, opinion and order.

Thereafter in state court, on June 27, 2006, the Pickaway County Court of Common Pleas entered a decision granting summary judgment to the County and Commissioners, explicitly agreeing with the district court's opinion that "[t]he entity responsible for suspending approval of [Appellants'] applications . . . was neither Defendant Pickaway County nor Defendant Commissioners." *Crosby v. Pickaway County Gen. Health Dist.*, No. 2005-CI-352, slip op. at 3 (Pickaway County Ct. Com. Pl. June 27, 2006) (internal quotation marks omitted) (omission in original). Three months later, on October 5, 2006, in a separate decision and order, the Court of Common Pleas granted the Health District's motion for summary judgment. *Crosby v. Pickaway County Gen. Health Dist.*, No. 2005-CI-352 (Pickaway County Ct. Com. Pl. Oct. 5, 2006). The state court acknowledged that Cummings had received a final order from the Health District when, at the September 28, 2004, public meeting, the Board [\*\*8] adopted a resolution denying his request for a sewage permit. *Id.*, slip op. at 3-4. However, it concluded that "Plaintiff

Crosby failed to request a hearing on the conditional suspension of the sewage system permit and, thus, never received a final order of the Board." *Id.*, slip op. at 5. The state court then dismissed the takings claims of all Appellants on the grounds that Cummings did not pursue the proper administrative remedy--appealing the Health District decision--and that the other parties had never even received an appealable final decision. On November 3, 2006, Appellants filed a notice of appeal of the state court decision.

Back in federal court, on October 18, 2006, while the district court was still considering Appellants' *Rule 60(b)* motion, Appellants filed a supplemental motion notifying the district court that the state court had issued a decision. On December 12, 2006, the district court denied Appellants' motion to set aside the judgment. Its opinion and order made no reference to the state court decision. Under *Fed. R. App. P. 4(a)(4)(B)(ii)*, a "party intending to challenge an order disposing of" a motion for relief from judgment "must file a notice of appeal, or [\*\*9] an amended notice of appeal -- in compliance with *Rule 3(c)*." The record shows no evidence that Appellants ever filed such a notice.

Seven months later, in July 2007, the Appellants filed their brief in support of their appeal of the federal district court decision.<sup>5</sup> On December 14, 2007, the Ohio Court of Appeals issued a decision in the Appellants' state court action, affirming the lower court's dismissal of Appellants' complaint for a writ of mandamus on the grounds that the Appellants' action was unripe because they had failed to exhaust their administrative remedies. *Crosby v. Pickaway County Gen. Health Dist.*, No. 06CA27, 2007 Ohio 6769, 2007 WL 4395154 (Ohio Ct. App. Dec. 14, 2007). On January 3, 2008, Appellants moved this court to take judicial notice of the Ohio Court of Appeals decision.

<sup>5</sup> Appellants addressed the issue of the district court's denial of its *Rule 60(b)* as if they had properly appealed it. Oddly, the County and Commissioners did not point out the procedural deficiency but responded by addressing the merits of Appellants' arguments.

[\*255] We affirm the district court's grant of summary judgment to Pickaway County and its Commissioners. We vacate the grant of summary judgment to the [\*\*10] Health District and remand to the district court on the grounds that the Appellants' takings

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claim has since ripened because the state court has denied them compensation, and that claim can now be resolved by the district court. We affirm the grant of summary judgment to the Health District on the substantive due process claim.

## II

We review a grant of summary judgment de novo, *Williams v. Ford Motor Co.*, 187 F.3d 533, 537-38 (6th Cir. 1999), under the familiar standard of *Fed. R. Civ. P. 56(c)* and *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986).

### A. Pickaway County and Commissioners

The Appellants assert that the County "played a substantial role in the revocation of [Appellants'] permits." (Appellants' Br. 35). They assert two arguments for the County's liability. First, they argue that the County Prosecuting Attorney, the County, and the County Engineer's office were part of a committee that was formed to investigate the problems of ponding surface water; and it was the committee that decided to suspend the sewage permit. (Appellants' Br. 33). Second, they argue that the permits "were suspended . . . on the advice of the Pickaway County Prosecutor," *ibid.*, and that when Appellants appealed [\*\*11] directly to the Board of Health at the public meeting, the Board denied their request on the advice of the County Prosecutor. The Appellants give no argument as to why the Commissioners are liable.

The Appellants brought their takings and due process claims pursuant to 42 U.S.C. § 1983, which provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

The Supreme Court held in *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978),

that municipalities cannot, in general, be held vicariously liable under § 1983:

[T]he language of § 1983, read against the background of [its] legislative history, compels the conclusion that Congress did not intend municipalities to be held liable unless action pursuant to official municipal policy of some nature caused a constitutional tort. In [\*\*12] particular . . . a municipality cannot be held liable *solely* because it employs a tortfeasor--or, in other words, a municipality cannot be held liable under § 1983 on a *respondeat superior* theory.

*Id.* at 691.

For a "policy" to give rise to liability under § 1983, "it is not enough . . . merely to identify conduct properly attributable to the municipality." *Bd. of the County Comm'rs v. Brown*, 520 U.S. 397, 404, 117 S. Ct. 1382, 137 L. Ed. 2d 626 (1997).

The plaintiff must also demonstrate that, through its *deliberate* conduct, the municipality was the "moving force" behind the injury alleged. That is, a plaintiff must show that the municipal action was taken with the requisite degree of culpability and must demonstrate a direct [\*256] causal link between the municipal action and the deprivation of federal rights.

*Ibid.*

While in general a plaintiff must prove a "direct causal link" between municipal action and deprivation, the Supreme Court has identified a narrow exception as to when a municipality may be held vicariously liable for an official's action. In *Pembaur v. City of Cincinnati*, the Court held that "municipal liability under § 1983 attaches where--and only where--a deliberate choice to follow a course of action is made from [\*\*13] among various alternatives by the official or officials responsible for establishing final policy with respect to the subject matter in question." 475 U.S. 469, 483, 106 S. Ct. 1292, 89 L. Ed. 2d 452 (1986).

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To proceed on their claim, the Appellants must identify either: (1) a direct causal link that would confer direct liability on the County and Commissioners; or (2) action on the part of municipal employees that amount to a "final policy" that promoted or condoned constitutional wrongs.

### 1. Direct liability

The Health District is a creature of Ohio law. *Ohio Rev. Code § 3709.01*. Each health district is governed by a board of health consisting of five members, four of whom are appointed by a body known as the district advisory council. *Ohio Rev. Code §§ 3709.02(A), 3709.03(A)*. By law, the district advisory council has sixteen members, only one of whom is a commissioner, and only this commissioner is a county employee. The council has only one regular meeting a year, at which it makes the necessary appointments to the board of health, receives and considers the annual or special reports from the board of health, and makes recommendations to the board of health or to the department of health in regard to matters for the [\*\*14] betterment of health and sanitation within the district or for needed legislation. *Ohio Rev. Code § 3709.03(A)*. The County and Commissioners thus have only the slightest of connection to the Health District. The district court was therefore correct to conclude that the County and Commissioners could not be liable because there was "no causal link between those defendants and the suspension of approval of Appellants' applications."

### 2. Indirect liability

The Appellants also allege that the County can be held liable under *Pembaur* because the Health District relied on the advice given by two Pickaway County employees: the County Engineer and the County Prosecutor.

The question is whether either the Engineer's or the Prosecutor's advice amounted to an assertion of "final policy." *Pembaur*, 475 U.S. at 482-83. "[W]hether a particular official has final policymaking authority is a question of state law." *Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701, 737, 109 S. Ct. 2702, 105 L. Ed. 2d 598 (1989) (internal quotation marks omitted).

#### a. The County Engineer

The Appellants provide absolutely no argument that

the advice given by the Engineer amounted to official policy. Ohio law does not confer any such authority. *Ohio Rev. Code § 315.08* [\*\*15] (describing the duties of the County Engineer). Appellants' only attempt at an argument is their claim that the County Engineer was part of the committee formed in spring 2004 to investigate the problems of ponding surface water. (Appellants' Br. 33). This is clearly not enough to confer liability on the County.

#### [\*257] b. The County Prosecutor

The Appellants' argument concerning the County Prosecutor, though slightly better articulated, also fails. The Appellants rely heavily on *Pembaur*. In *Pembaur*, a sheriff attempted to execute an arrest warrant for several of *Pembaur's* employees at *Pembaur's* place of business. *Pembaur* refused to allow the police to enter. The sheriff contacted the county prosecutor, who in turn "instructed" the sheriff to "go in and get" the employees. *Pembaur*, 475 U.S. at 472-73. The police then used an axe to chop down the door in order to execute the arrest warrants. *Pembaur* sued under § 1983, arguing that the police violated his *Fourth Amendment* rights. The Court held that *Pembaur's* rights had been violated because the *Fourth Amendment* prohibits police, absent exigent circumstances, from searching an individual's home or business without a search warrant even to execute [\*\*16] an arrest warrant for a third person. Having acknowledged a violation of rights, the only question was whether the municipality could be held liable under § 1983. The Court ultimately held that it could, basing its decision on the fact that the county prosecutor authorized the sheriff to take the illegal actions. Because the county prosecutor "was acting as the final decisionmaker for the county," the sheriff's action represented the municipality's official policy. *Id.* at 485.

The facts of *Pembaur* are far different from those in the case at hand. The record shows that Prosecutor Gene Long was only an *advisor* to the Health District. The Appellants argue that Long was acting in more than an advisory role and point to certain portions of Dallas Hettinger's and Denise Minor's deposition testimony as evidence. The relevant portion of Minor's testimony is as follows:

Q. I'm going to hand you [the notes from the September 28, 2004 regular public meeting of the Board of Health] and you

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can take a look at it. It's a two-page document.

...

Q. In here, it mentions the Pickaway County Prosecutor Gene Long and his advice and I believe earlier you said you met with-- or you spoke with the prosecutor; [\*\*17] is that correct?

A. Yes.

Q. And that was Mr. Long?

A. Yes.

Q. And did he give you certain advice?

A. Yes.

...

Q. Did you rely on his advice--

A. Yes.

Q. --in taking--could you tell me what his advice was to you?

Ms. Courtwright: Objection.

Mr. Holloway: Objection, privileged. Don't answer the question.

Q. We have sort of touched this but I wanted to give you an opportunity to say--why exactly, in your mind, was--were the permits suspended?

A. Public health issues.

The relevant portion of Hettinger's testimony is:

Q. When you say, "Per prosecutor Gene Long," what role did the prosecutor, Gene Long, have in this?

A. Denise Minor, the [H]ealth Commissioner, and I discussed this with Gene Long to discuss what proceedings we would need to take in order to do this suspended permit.

...

Q. I'm not going to ask you what went on in the meetings. I'm asking you for what you did in this case. Did you rely on the advice Mr. Long gave you in [\*258] taking the actions to suspend the permits?

A. I discussed it with the Health Commissioner. We evaluated what the situation was with the rules and then we took that information to the prosecutor for advice on how to proceed.

Q. But I guess my question is, whatever advice he [\*\*18] gave you--I don't want to know what it is, but whatever advice he gave you did you rely on that in suspending the permits?

Mr. Holloway: Objection. Go ahead and answer the question.

A. Yes.

The Appellants' argument that Long, like the prosecutor in *Pembaur*, "was acting as the final decisionmaker for the county" is unconvincing. Though the record does not detail the exact nature of Long's advice, there is nothing in the record to suggest that his advice related to the Board's (and through it, the Health District's) evaluation of Lots 4 and 5 or to its decision that the installation of septic tanks and leach beds posed "public health issues." What the record does demonstrate is that: (1) it was the "public health issues" that motivated the Board to revoke the permits; (2) these same issues led the Board to deny Cummings's request for an issuance of a permit at its public meeting; and (3) Long's advice in these matters was sought only after the Board had formed its opinion regarding the health concerns. The record also suggests that the Board sought Long's advice regarding how to *execute* its decision to revoke the permit. Long's role in this matter is clearly different from that of the [\*\*19] prosecutor in *Pembaur*. There, the prosecutor instructed the police to take action; here the Board decided to take action and asked the prosecutor for advice on how it could best execute its decision.

Our circuit has not directly addressed the distinction between an attorney's role in creating policy and in giving

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legal advice, but the Fifth Circuit has examined the issue, concluding that these roles are distinct and that only the former role may give rise to municipal liability. In *Bennett v. Slidell*, 728 F.2d 762, 769 (5th Cir. 1984) (en banc), the Fifth Circuit rejected a claim against a city based upon the actions of the city attorney, even though it affirmed the personal liability of the attorney. *Id.* at 765. In that case, the city attorney deliberately delayed his review of the plaintiff's liquor license application for a nightclub and then advised the city council to delay the application as well. Allegedly, the attorney was influenced by the city auditor, who had a personal stake in the matter. Despite the fact that the attorney was personally liable, the Fifth Circuit held that the attorney did not have "policymaking authority" because he was "employed only to give legal advice." [\*\*20] *Id.* at 769. The court emphasized that under Louisiana law, only the city council has the authority to issue liquor licenses. *Ibid.*

Similarly, Ohio law clearly distinguishes between the role of the County Prosecutor and that of the Health District. Under Ohio law, "the prosecuting attorney of the county constituting all or a major part of such district shall act as the legal advisor of the board of health." *Ohio Rev. Code § 3709.33*. It is the Health District (acting through the Board of Health), however, that makes the ultimate decision to grant or deny sewage permits. *Ohio Rev. Code § 3718.02 (A)(3)(d), (5)*. Regardless of whether the Board listened to the advice of county officials such as the County Prosecutor or County Engineer, the record displays no evidence that the Health District abdicated its ultimate decisionmaking authority or handed over such authority to the County, its Commissioners, or any other county employee. As such, [\*\*259] neither the County, its Commissioners, nor any other county employee can be the source of any official policy that resulted in the suspension or denial of Appellants' sewage permits. The district court was therefore correct to grant summary judgment to these [\*\*21] defendants, and we accordingly affirm the district court's decision and order on this point.

#### **B. Pickaway County Health District**

The district court granted summary judgment to the Health District on the grounds that Appellants' claims were unripe. Federal courts have jurisdiction only over those suits that present an actual "case" or "controversy." U.S. Const. art. III, § 2; *see also Raines v. Byrd*, 521 U.S.

811, 818, 117 S. Ct. 2312, 138 L. Ed. 2d 849 (1997). "No principle is more fundamental to the judiciary's proper role in our system of government than [this] constitutional limitation of federal-court jurisdiction." *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 37, 96 S. Ct. 1917, 48 L. Ed. 2d 450 (1976) (citing *Flast v. Cohen*, 392 U.S. 83, 95, 88 S. Ct. 1942, 20 L. Ed. 2d 947 (1968)). Ripeness is not just a procedural question, but one that is determinative of jurisdiction. *Arnett v. Myers*, 281 F.3d 552, 562 (6th Cir. 2002). As the Court has made clear in several decisions:

[A] claim that the application of government regulations effects a taking of a property interest is not ripe until the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue.

*Williamson County Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 186, 105 S. Ct. 3108, 87 L. Ed. 2d 126 (1985) [\*\*22] (collecting cases).

Furthermore, a state's action in a takings claim "is not 'complete' in the sense of causing a constitutional injury" until the property owner has used the proper state procedures and the state has failed to provide just compensation for the taking. *Id.* at 195. The only situation in which Appellants are exempted from this requirement of seeking state remedies is if they can demonstrate that available state procedures are inadequate. *Ibid.*

Appellants argue that *Williamson County* is no longer good law. As evidence of this, they cite the concurring opinion of Chief Justice Rehnquist in *San Remo Hotel, L.P. v. City and County of San Francisco*:

Finally, *Williamson County's* state-litigation rule has created some real anomalies, justifying our revisiting the issue. For example, our holding today ensures that litigants who go to state court to seek compensation will likely be unable later to assert their federal takings claims in federal court. And, even if preclusion law would not block a litigant's claim, the *Rooker-Feldman* doctrine might, insofar as *Williamson County* can be read to

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characterize the state courts' denial of compensation as a required element of the *Fifth Amendment* [\*\*23] takings claim. As the [majority opinion] recognizes, *Williamson County* all but guarantees that claimants will be unable to utilize the federal courts to enforce the *Fifth Amendment's* just compensation guarantee.

545 U.S. 323, 351, 125 S. Ct. 2491, 162 L. Ed. 2d 315 (2005) (Rehnquist, J., concurring) (internal citations omitted). Appellants also point to two cases outside this circuit: *Kottschade v. City of Rochester*, 319 F.3d 1038 (8th Cir. 2003), and *Wilkinson v. Pitkin County Bd. of County Comm'rs*, 142 F.3d 1319 (10th Cir. 1998). In *Kottschade*, the court acknowledged that "[t]he requirement that all state remedies be exhausted, and the barriers to [\*\*260] federal jurisdiction presented by res judicata and collateral estoppel that may follow from this requirement, may be anomalous." 319 F.3d at 1040-41. But it concluded that "[n]onetheless, *Williamson* controls the instant case." *Id.* at 1041. Likewise, the *Wilkinson* court noted its "concern that *Williamson's* ripeness requirement may, in actuality, almost always result in preclusion of federal claims, regardless of whether reservation is permitted." 142 F.3d at 1325 n.4. It nevertheless concluded that *Williamson County* was still good law. *Ibid.*

These three cases do nothing to undercut [\*\*24] the validity of *Williamson County*. The Supreme Court's majority decision in *San Remo* is predicated on *Williamson County*. Moreover, the Court has not yet accepted Chief Justice Rehnquist's invitation to reexamine *Williamson County's* exhaustion requirement. Until it does so, *Williamson County* remains good law.

Thus, to proceed on their takings claim, Appellants must demonstrate that: (1) the Health District reached a final decision; and (2) either they used the proper state proceedings and the state denied them just compensation or they were exempt from using those state proceedings because they were inadequate. While the decision of the Health District was arguably final at the time the district court issued its opinion, the Appellants had not availed themselves of the state procedures, nor did they demonstrate the required inadequacy. Therefore, the district court was correct to conclude, at that time, that the Appellants' claims were unripe.

Nevertheless, on October 5, 2006, after the district court issued its decision, the Ohio Court of Common Pleas granted the Health District's motion for summary judgment and denied the Appellants' petition for a writ of mandamus. *Crosby*, No. 2005-CI-352. [\*\*25] That decision was subsequently affirmed on December 14, 2007, by the Ohio Court of Appeals. *Crosby*, 2007 Ohio 6769, 2007 WL 4395154.

Because "ripeness is peculiarly a question of timing, it is the situation now rather than the situation at the time of the District Court's decision that must govern." *Reg'l Rail Reorganization Act Cases*, 419 U.S. 102, 140, 95 S. Ct. 335, 42 L. Ed. 2d 320 (1974); see also *Buckley v. Valeo*, 424 U.S. 1, 114-18, 96 S. Ct. 612, 46 L. Ed. 2d 659 (1976); *Stewart v. Hannon*, 675 F.2d 846, 850 (7th Cir. 1982).

#### I. Final Decision

Though the determination of finality is informed by state law, it is ultimately a mixed question of fact and law that must be decided under the standards of federal law.

*Williamson County* prong-one ripeness is a factual determination,<sup>6</sup> taking into account all relevant statutes, ordinances, and regulations, that the decisionmaker has arrived at a final determination with respect to the permit applicant's use of her property, and that that determination is one which will allow a court to determine whether a regulatory taking has taken place.

[\*\*261] *DLX, Inc. v. Kentucky*, 381 F.3d 511, 525 (6th Cir. 2004).

<sup>6</sup> Though the court uses the term "factual," we should not interpret this to mean that finality is a pure question of fact. Of course, [\*\*26] questions of fact may arise; for example, there might be a dispute over whether a party actually sought a variance. In those cases, a court may very well be unable to decide the issue without first submitting the question to a finder of fact. Nevertheless, the ultimate determination of finality is itself is a question of law determined by the court. In the case at hand, there is no dispute over the circumstances surrounding Appellants' attempts to receive a permit, and therefore we review the

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district court's determination of finality based on the undisputed facts de novo.

As the Supreme Court has explained:

*Williamson County's* final decision requirement "responds to the high degree of discretion characteristically possessed by land-use boards in softening the strictures of the general regulations they administer." *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725, 738, 117 S. Ct. 1659, 137 L. Ed. 2d 980 (1997). While a landowner must give a land-use authority an opportunity to exercise its discretion, once it becomes clear that the agency lacks the discretion to permit any development, or the permissible uses of the property are known to a reasonable degree of certainty, a takings claim is likely to have ripened.

*Palazzolo v. Rhode Island*, 533 U.S. 606, 620, 121 S. Ct. 2448, 150 L. Ed. 2d 592 (2001); [\*\*27] see also *DLX, Inc.*, 381 F.3d at 525-26 (describing the inquiry into state law).

Appellants must give the administrative authority the "opportunity to exercise its discretion"; however, once "the permissible uses of the property are known to a reasonable degree of certainty," the decision should be considered final. *Palazzolo*, 533 U.S. at 620. In *Palazzolo*, the Supreme Court distinguished ripe takings cases from those that "challenged a land-use authority's denial of a substantial project, leaving doubt whether a more modest submission or an application for a variance would be accepted." *Ibid*. Our circuit has interpreted this to mean that "a zoning determination cannot be deemed final until the plaintiffs have applied for, and been denied, a variance." *Seguin v. City of Sterling Heights*, 968 F.2d 584, 587 (6th Cir. 1992) (citing *Williamson County*, 473 U.S. at 187-88). Nevertheless, the Supreme Court also cautioned that "[g]overnment authorities, of course, may not burden property by imposition of repetitive or unfair land-use procedures in order to avoid a final decision." *Palazzolo*, 533 U.S. at 621 (citing *Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 698, 119 S. Ct. 1624, 143 L. Ed. 2d 882 (1999)).<sup>7</sup>

7 We [\*\*28] emphasize the particular roles of federal and state courts in determining finality because the state court also made a determination of the "finality" of the Health District's decision under an Ohio state law that requires would-be Appellants to receive a "final" order or decision before pursuing a writ of mandamus. The state court concluded that Monty Cummings (and presumably his co-owners, Cathy Cummings and Jeremiah Rayburn) had received a final order but that the Crosbys had not, basing its determination on the fact that: (1) Cummings had, at the September 28, 2004, meeting of the Board of Health, received an official resolution denying his request for a sewage permit; and (2) the Crosbys had not sought any review of the Health District's decision. Although the district court and state court came to different conclusions about "finality," the district court was not obliged to adopt the state court's definition of finality nor was the state court obliged to defer to the district court's earlier determination of the matter. The reason is that the two standards of "finality" are actually distinct legal inquiries. Thus, there is no need to delve into the complicated subjects of issue [\*\*29] preclusion, comity, or deference.

The district court did not explicitly analyze Ohio law in making its factual determination regarding finality. For example, the court did not note that the Health District provided both a process of review and an opportunity to request a variance; nor did it note that Appellants failed to avail themselves of those remedies. Appellants' April 2004 drainage plan, submitted after the suspension of their health permit, was also rejected by the Health District. Though the district court did not clearly state this, it seems that it analogized the submission of a drainage plan to a request for a variance. Evoking the [\*\*262] language of *Palazzolo*, the court observed that, "[t]heoretically, Plaintiffs could submit plans *ad infinitum* only to be told that each plan was unacceptable, but that Defendant Health District was willing to consider yet another plan." As noted above, a single rejected variance request is enough to satisfy *Williamson County* finality. *Seguin*, 968 F.2d at 587. Thus, the court did not err in concluding that the rejected drainage plan is also enough to satisfy the first prong of *Williamson County*.

## 2. State Proceedings

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Both parties agree that the applicable [\*\*30] state procedure for seeking just compensation is a writ of mandamus seeking an order compelling the government to initiate an appropriation action, as authorized by *Chapter 163 of the Ohio Revised Code*. See *Levin v. City of Sheffield Lake*, 70 Ohio St. 3d 104, 1994 Ohio 385, 637 N.E. 2d 319, 322-23 (Ohio 1994). At the time the district court was considering Appellants' federal takings claim, Appellants had initiated such action, but the state court had not yet issued a decision. In order to avoid dismissal of their federal claims, Appellants argued that the state proceedings were irrelevant because under the inadequacy exception of *Williamson County* they were not actually required to pursue those remedies. The district court was unconvinced by the inadequacy argument and held that Appellants' federal claims were unripe because the state court had not issued a decision denying them compensation. Subsequently, the state court dismissed Appellants' complaint for mandamus. The Appellants brought this argument to the attention of the district court by filing a supplement to their previous *Rule 60(b)* motion for relief from judgment. In denying the Appellants' *Rule 60(b)* motion, the district court did not mention the state [\*\*31] court decision.

On appeal before this court, Appellants assert two parallel lines of argument. First, they argue that the district court erred in holding that the state proceedings were adequate. Second, Appellants argue that the district court erred in denying their *Rule 60(b)* motion. There is no evidence in the record that Appellants appealed the denial of their *Rule 60(b)* motion; thus, Appellants' second argument is not properly before this court. See, e.g., *Green v. Union Foundry Co.*, 281 F.3d 1229, 1233 (11th Cir. 2002) (declining to consider the district court's ruling on post-judgment motion that was not properly appealed). Nor are we convinced by the Appellants' argument that the state proceedings were irrelevant because they were exempt from pursuing them under the inadequacy exception of *Williamson County*.

In general, the second prong of *Williamson County* requires that property owners first seek and be denied compensation in state court proceedings. This requirement is waived if the property owner can show that the state court proceedings are inadequate. *Williamson County*, 473 U.S. at 195. Appellants argue that Ohio's proceedings are inadequate because Appellants "cannot recover [\*\*32] all of their damages in an appropriation action under state law," but they

would be able to "collect . . . damages in federal court that are not allowed in state court." (Appellants' Br. 38, 41). This argument is specious.

Appellants estimate the value of their allegedly taken property to be \$ 345,000. In addition to this, they also seek consequential damages "due to delay" in the amount of \$ 280,000. (Appellants' Br. 39-40). They also demand \$ 50,000, which is the interest on incurred construction loans, utilities, insurance, and real estate taxes during the period of time after the permits [\*\*263] were revoked. Appellants argue that under Ohio law they can recover only the value of the property and not any consequential damages. Assuming that Appellants are correct in asserting that Ohio law prevents them from collecting these kind of consequential damages in an appropriation proceeding, this fact is irrelevant because Appellants are also barred from collecting those damages in federal court. The Supreme Court has consistently held that consequential damages are not available in § 1983 takings cases. See, e.g., *United States v. General Motors Corp.*, 323 U.S. 373, 379-80, 65 S. Ct. 357, 89 L. Ed. 311 (1945) ("We are not [\*\*33] to be taken as departing from the [case law] laid down, which we think sound. . . . [D]amage to . . . rights of ownership does not include losses to [one's] business or other consequential damage."); *United States v. 50 Acres of Land*, 469 U.S. 24, 33, 105 S. Ct. 451, 83 L. Ed. 2d 376 (1984) ("This view is consistent . . . with our prior holdings that the *Fifth Amendment* does not require any award for consequential damages arising from a condemnation.").

Just as condemnation practice "provide[s] little guidance" to the question of whether § 1983 Appellants are entitled to a jury, § 1983 remedies provide little guidance to determining whether condemnation proceedings are adequate. The only inquiry we should make is whether Ohio's proceedings can adequately provide just compensation for takings. This circuit has previously held that Ohio's *scheme* is adequate. In *Coles v. Granville*, we recognized that "Ohio has reasonable, certain, and adequate procedures for plaintiffs to pursue compensation for an involuntary taking." 448 F.3d 853, 865 (6th Cir. 2006) (internal quotation marks omitted). Appellants provide no cogent argument as to why we should revisit this holding. The district court held that though the Health District [\*\*34] had issued a final decision in regard to their property, Appellants had not sought and been denied compensation for the alleged regulatory taking. The district court did not err in these

303 Fed. Appx. 251, \*263; 2008 U.S. App. LEXIS 24822, \*\*34;  
2008 FED App. 0747N (6th Cir.)

determinations, and thus did not err in dismissing Appellants' § 1983 claims for an uncompensated taking as unripe under *Williamson County*.

The district court's determination was correct at the time of its decision, but circumstances have since changed with the state court rulings. Although the Ohio Court of Appeals based its decision on Appellants' failure to exhaust administrative remedies and was not a decision on the merits, its resolution of the mandamus petition provides the requisite denial of compensation through state procedures. See *DLX, Inc.*, 381 F.3d at 518-19 (holding that administrative exhaustion is not required to establish prong-two ripeness under *Williamson* in a § 1983 takings case). Appellants' claim is now ripe. We therefore vacate the grant of summary judgment to the Health District and remand for further proceedings.

### C. Due Process Claims

Finally, we address the Appellants' due process claims. Appellants' procedural due process claim is uncontroversially ancillary to their takings [\*\*35] claim. As such, it is subject to the requirements of *Williamson County* ripeness. *Arnett*, 281 F.3d at 562-63 ("Procedural due process and equal protection claims that are ancillary to taking claims are subject to the same *Williamson* ripeness requirements . . ."). Because the takings claims have since ripened, Appellants' procedural due process claims have also ripened. See *DLX, Inc.*, 381 F.3d at 518-19. We accordingly vacate the district court's decision on this point and remand for further proceedings.

[\*264] As for Appellants' substantive due process claims, they argue that there was "no rational basis for Defendants' conduct in revoking [Appellants'] permits" and that these actions were "arbitrary and capricious" to the degree that they constituted a violation of substantive due process. (Appellants' Br. 49). Appellants provide a mere paragraph of argument and rely on a single case, *Warren v. City of Athens*, 411 F.3d 697 (6th Cir. 2005), in support of their position.

*Warren*, however, is not particularly helpful because the court in that case held that "given the law, the facts, and the [appellants'] own arguments and characterization of their claims, we cannot conclude that the City violated [\*\*36] the [appellants'] substantive due process rights." *Id.* at 708. This court must conclude the same.

Where a substantive due process attack is made on state *administrative* action, the scope of review by the federal courts is extremely narrow. To prevail, a plaintiff must show that the state administrative agency has been guilty of "arbitrary and capricious action" in the *strict* sense, meaning "that there is no rational basis for the . . . [administrative] decision."

*Pearson v. Grand Blanc*, 961 F.2d 1211, 1221 (6th Cir. 1992) (omission and alteration in original) (quoting *Stevens v. Hunt*, 646 F.2d 1168, 1170 (6th Cir. 1981)). This is a highly deferential standard, and one that Appellants have not met.

Appellants argue that "there is no evidence in the record that there was ever any ponding . . . where the septic tanks and leach beds could have been installed." (Appellants' Br. 50). This is a gross mischaracterization of the record, which includes nearly a thousand pages of deposition testimony and affidavits<sup>8</sup> that clearly demonstrate that the Health District's decision was quite rationally related to its legitimate concerns with public health and safety. Accordingly, we affirm the district [\*\*37] court's decision as to its determination that Appellants suffered no violation of their rights to substantive due process.

<sup>8</sup> See, e.g., the deposition of Health District's expert witness, Thomas A. McCrate, and the accompanying photographs demonstrating flooding in areas adjacent to Lots 4 and 5. McCrate explains how information regarding lots 4 and 5 can be extrapolated by comparing the water level displayed in the photographs with topographical maps.

### III

Though we vacate the district court's decision in part, we note that the Appellants have made this case unnecessarily complex. They instigated federal proceedings before attempting to go through the required state court channel. Then, instead of staying the federal action, they stubbornly pushed forward only to have their federal claims dismissed as being unripe. Appellants then moved for relief from the federal court judgment, but did not give the district court a chance to rule on that motion before appealing to our court. Shortly thereafter, the Ohio state court dismissed Appellants' claims as unripe on the

303 Fed. Appx. 251, \*264; 2008 U.S. App. LEXIS 24822, \*\*37;  
2008 FED App. 0747N (6th Cir.)

grounds that they had failed to pursue the required administrative proceedings. Appellants turned back to the district court, **[\*\*38]** even though they had already appealed the case to this court, and asked the district court to take notice of the state court decision. The district court subsequently denied Appellants' *Rule 60(b)* motion. Instead of appealing the denial of the motion, Appellants continued with their appeal of the district court's underlying decision, improperly tacking on their

arguments in regard to the district court's deposition of their 60(b) motion. Regardless of whether Appellants' takings claims **[\*265]** are now ripe, the district court was correct, at the time, to decide that those claims unripe. We remand because those claims have since ripened; nevertheless, we do not condone the Appellants' apparent strategy of bouncing their claims off both state and federal courts.



LEXSEE 2000 U.S. APP. LEXIS 4146

**WYNDHAM H. GABHART, Plaintiff-Appellant, v. CITY OF NEWPORT,  
TENNESSEE, Defendant-Appellee.**

**No. 98-6181**

**UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT**

*2000 U.S. App. LEXIS 4146*

**March 10, 2000, Filed**

**NOTICE:** [\*1] NOT RECOMMENDED FOR FULL-TEXT PUBLICATION. SIXTH CIRCUIT RULE 28(g) LIMITS CITATION TO SPECIFIC SITUATIONS. PLEASE SEE RULE 28(g) BEFORE CITING IN A PROCEEDING IN A COURT IN THE SIXTH CIRCUIT. IF CITED, A COPY MUST BE SERVED ON OTHER PARTIES AND THE COURT. THIS NOTICE IS TO BE PROMINENTLY DISPLAYED IF THIS DECISION IS REPRODUCED.

**SUBSEQUENT HISTORY:** Reported in Table Case Format at: *2000 U.S. App. LEXIS 10533*.

**PRIOR HISTORY:** ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TENNESSEE. 98-00234. Hull. 8-25-98.

**DISPOSITION:** AFFIRMED.

**COUNSEL:** For WYNDHAM H. GABHART, Plaintiff - Appellant: David B. Hill, Newport, TN.

Wyndham H. Gabhart, Plaintiff - Appellant, Pro se, Del Rio, TN.

For CITY OF NEWPORT TENNESSEE, Defendant - Appellee: John C. Duffy, Watson, Hollow & Reeves, Knoxville, TN.

**JUDGES:** Before: MERRITT and MOORE, Circuit Judges, and HEYBURN, \* District Judge.

\* The Honorable John G. Heyburn II, United States District Judge for the Western District of Kentucky, sitting by designation.

**OPINION BY: KAREN NELSON MOORE**

**OPINION**

**KAREN NELSON MOORE, Circuit Judge.** This case concerns a zoning dispute between plaintiff-appellant Wyndham H. Gabhart and defendant-appellee the City of Newport, Tennessee (hereinafter "City"). Gabhart owns property in Cocke [\*2] County, Tennessee, which he has subdivided and wishes to sell at auction. The City seeks to ensure that Gabhart does not sell his property until he complies with the City's subdivision planning requirements. Gabhart brought suit in federal district court to enjoin the City from interfering with the sale of his property.

In this appeal, Gabhart challenges the district court's order refusing to issue a stay of subsequently-filed state court proceedings involving the same issues and dismissing his federal suit on ripeness grounds. Because neither Gabhart's takings claim nor his equal protection claim is ripe, the district court properly dismissed his action. Accordingly, we **AFFIRM** the judgment of the district court.

I

In 1994, Wyndham Gabhart purchased two tracts of land totaling over ten acres in Cocke County, Tennessee,

along the French Broad River. Gabhart made plans to subdivide the land into twenty-one building lots; he had the plat approved by the Cocke County Planning Commission and recorded. Gabhart obtained a permit from the Army Corps of Engineers and constructed a concrete boat landing ramp between the two tracts of land. A gravel road runs across Gabhart's property [\*3] to the boat dock ramp and provides access to all twenty-one lots. In 1998, Gabhart made arrangements with a local auction company to sell the subdivided lots at auction on July 4, 1998. On June 26, the Newport City Attorney, William O. Shults, informed the auction company that the gravel road running across Gabhart's property had to be blacktopped according to Newport Regional Planning Commission regulations, that the City would accept a cash bond in lieu of performance, and that the City would stop the auction if Gabhart did not comply.

On June 30, 1998, Gabhart filed a complaint in the United States District Court for the Eastern District of Tennessee. Gabhart's complaint, which was styled a "Petition for Permanent Injunction," sought to prohibit the City from enforcing compliance with certain subdivision planning requirements of the Newport Regional Planning Commission, specifically the blacktopping requirement. Gabhart's complaint alleged a violation of his *Fourteenth Amendment* rights, although the specific basis is not clear.<sup>1</sup>

<sup>1</sup> Although Gabhart invoked federal court diversity jurisdiction pursuant to 28 U.S.C. § 1332, Gabhart's complaint is based on federal, not state, law. The district court's jurisdiction was therefore proper under 28 U.S.C. § 1331.

[\*4] Before the City filed an answer in federal district court, it filed a complaint in the Chancery Court for Cocke County, Tennessee, on July 2, 1998. The City's complaint alleged that Gabhart had failed to comply with the Newport Regional Planning Commission regulations and that, should the auction proceed without such compliance, the City would be immediately and irreparably harmed. The City sought a temporary order restraining Gabhart's July 4 auction and any sale of the subject land until such time as Gabhart complied with the platting and other Commission regulatory requirements. The state court granted the restraining order on the same day.

The City answered Gabhart's federal complaint on

July 16, 1998. In its answer, the City denied that the requirements of the Newport Regional Planning Commission violated Gabhart's constitutional rights and averred that Gabhart's federal claims were not ripe, since he had not sought judicial review in state court. Gabhart filed a reply to the City's answer, stating that his constitutional claim was based on the "Taking Clause" and "The Doctrine of Restraint Without Representation" as well as the *Fourteenth Amendment*. J.A. at 46 (Reply).

On [\*5] August 21, 1998, Gabhart filed a motion in federal district court seeking a stay of the state court proceedings. On August 25, the district court denied Gabhart's motion for a stay of the state court proceedings and dismissed his federal court action. The district court explained:

The Court will not interfere with the Chancery Court proceedings because the question of which planning commission has jurisdiction over the plaintiff's real estate development is already in the appropriate court. While the plaintiff may eventually have a *Fifth Amendment* action against the City of Newport, it is premature at this time. Mr. Wyndham [sic] has made no showing that the state's inverse condemnation procedure is inadequate or unavailable. See: *Williamson Planning Commission v. Hamilton Bank*, 473 U.S. 172, 87 L. Ed. 2d 126, 105 S. Ct. 3108 (1985).

J.A. at 30 (D. Ct. Order). It is from this order that Gabhart has timely appealed, and we have jurisdiction pursuant to 28 U.S.C. § 1291.

## II

Ripeness is a determination as to subject matter jurisdiction. *see Bigelow v. Michigan Dep't of Natural Resources*, 970 F.2d 154, 157 (6th Cir. 1992), [\*6] and we review de novo the district court's dismissal of claims on this basis, *see Kruse v. Village of Chagrin Falls*, 74 F.3d 694, 697 (6th Cir.), *cert. denied*, 519 U.S. 818, 136 L. Ed. 2d 31, 117 S. Ct. 71 (1996).

## A

The district court, characterizing Gabhart's action as one brought pursuant to 42 U.S.C. § 1983 and alleging a

violation of the *Takings Clause of the Fifth Amendment*, dismissed the action on ripeness grounds. The district court cited in support the Supreme Court's decision in *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172, 87 L. Ed. 2d 126, 105 S. Ct. 3108 (1985).

In *Williamson County*, respondent Hamilton Bank owned a tract of land that it was developing as a residential subdivision. See *id.* at 175. After the Williamson County (Tennessee) Regional Planning Commission disapproved Hamilton Bank's proposed plat, Hamilton Bank sued the Commission in federal district court, alleging that the Commission's application of various zoning laws and regulations to its property effected a taking without just compensation in violation [\*7] of the *Fifth Amendment*. See *id.* at 175. The Supreme Court held that Hamilton Bank's takings claim was not ripe, based on two separate reasons.

First, the Court explained that "a claim that the application of government regulations effects a taking of a property interest is not ripe until the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue." *Id.* at 186. The Court reasoned that an administrative agency's position regarding how it will apply the regulation at issue is not final if the property owner has not yet submitted to the agency a plan for development or requested a variance from the applicable regulation. See *id.* at 186-87. In *Williamson County*, Hamilton Bank had submitted a plan for developing its property, which was disapproved, but had not sought variances that would have allowed it to develop the property according to its proposed plat. See *id.* at 187-88. The Court therefore concluded that Hamilton Bank's claim was not ripe.<sup>2</sup>

2 Responding to Hamilton Bank's argument that it should not be required to exhaust administrative remedies because its suit was predicated upon 42 U.S.C. § 1983, the Court explained:

The question whether administrative remedies must be exhausted is conceptually distinct, however, from the question

whether an administrative action must be final before it is judicially reviewable. While the policies underlying the two concepts often overlap, the finality requirement is concerned with whether the initial decisionmaker has arrived at a definitive position on the issue that inflicts an actual, concrete injury; the exhaustion requirement generally refers to administrative and judicial procedures by which an injured party may seek review of an adverse decision and obtain a remedy if the decision is found to be unlawful or otherwise inappropriate.

*Williamson County*, 473 U.S. at 192-93 (citations omitted).

[\*8] The *Williamson County* Court held that "[a] second reason the taking claim is not yet ripe is that respondent did not seek compensation through the procedures the State has provided for doing so." *Id.* at 194. The Court explained that the *Fifth Amendment* proscribes only takings without just compensation, so that no constitutional violation occurs until the state denies that compensation. Therefore, if a state provides an adequate procedure for seeking just compensation, a property owner may not claim a violation of the *Takings Clause* until the owner has unsuccessfully utilized the procedure. See *id.* at 195. The *Williamson County* Court explained that Tennessee law did provide such a procedure. *Id.* at 196-97.

*Williamson County* clearly compels the conclusion that Gabhart's *Fifth Amendment* takings claim is not ripe. First, the City's decision is not final because Gabhart has failed both to submit his plat to the Newport Regional Planning Commission and to seek a variance from the regulations. Moreover, Gabhart's claim is not ripe because he has not sought compensation through the State of Tennessee's inverse condemnation [\*9] procedures. As the *Williamson County* Court explained, Tennessee law provides for inverse condemnation suits, see *TENN. CODE ANN. § 29-16-123* (1980), and the Tennessee courts have interpreted the statute to allow for recovery in inverse condemnation for unreasonable

restriction of the use of property by enactment of a zoning law, see *Davis v. Metropolitan Gov't of Nashville & Davidson County*, 620 S.W.2d 532, 534 (Tenn. Ct. App. 1981).<sup>3</sup>

3 Furthermore, although a futility exception to the final decision requirement exists, Gabhart cannot claim that it would be futile to pursue any of the measures just discussed. In *Bannum, Inc. v. City of Louisville*, 958 F.2d 1354 (6th Cir. 1992), we explained that finality requires only that "the actions of the [administrative body are] such that further administrative action by [the property owner] would not be productive." *Id.* at 1362-63. In the instant case, Gabhart has failed even to submit his plat for approval, and it is far from clear that the pursuit of administrative remedies would not be productive.

**[\*10] B**

Although the district court treated Gabhart's complaint as if it stated a claim only under the *Takings Clause*, the complaint can fairly be read to assert a claim based on the *Equal Protection Clause of the Fourteenth Amendment*, as well. However, we have held that the final decision requirement of *Williamson County* also applies to equal protection challenges to zoning regulations. See *Bannum, Inc. v. City of Louisville*, 958 F.2d 1354, 1362 (6th Cir. 1992) (deciding that *Williamson County's* finality analysis is equally applicable to claims of equal protection); see also

*Bigelow v. Michigan Dep't of Natural Resources*, 970 F.2d 154, 158-59 (6th Cir. 1992) ("We interpret *Bannum* as requiring the plaintiffs in this case to meet the same standard of finality for both their equal protection and takings claims.").

Because Gabhart has not submitted his plat for approval or sought available variances, no final decision regarding the applicability of the regulations to his property has been made. Under the law of this circuit, therefore, Gabhart's equal protection claim is not ripe and should likewise have been dismissed.<sup>4</sup>

4 Read forgivingly, Gabhart's complaint may also be understood to assert procedural and substantive due process claims. However, at oral argument Gabhart's counsel stated that Gabhart's action is based only on the *Takings Clause* and the *Equal Protection Clause*.

**[\*11] III**

We conclude that Gabhart's takings and equal protection claims are premature and accordingly **AFFIRM** the judgment of the district court. Gabhart must first obtain a final decision from the Newport Regional Planning Commission before challenging the subdivision planning requirements in federal court. Additionally, in order to present a cognizable takings claim, Gabhart must first seek compensation through the State of Tennessee's inverse condemnation procedures.



46 of 74 DOCUMENTS

**Dorothy Hensley, et al., Plaintiffs, v. City of Columbus, et al., Defendants.**

**Case No. 2:99-CV-00888**

**UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO, EASTERN DIVISION**

**2007 U.S. Dist. LEXIS 73178**

**October 1, 2007, Filed**

**PRIOR HISTORY:** Hensley v. City of Columbus, 433 F.3d 494, 2006 U.S. App. LEXIS 479 (6th Cir. Ohio, 2006)

**COUNSEL:** [\*1] For Dorothy Hensley, Anthony Scavo, Mary Scavo, Carolyn Ehlen, Charles Gregg Ehlen, Billy Lepper, Victoria Lepper, Douglas Sager, Michael Sennett, William Mobley, Louanne Mobley, Kenton Suver, Patricia Suver, Tony Povich, James nm Lee, Don nm Smith, Walter Wilke, Donald Rowe, Edward Doersam, Robert Roshon, Meagan Roshon, Diane Lee, Susan Plouse, Bradley Plouse, Henry Plouse, Robert Kertzinger, Patricia Kertzinger, Kent Greenhall, Esther Smith, Plaintiffs: Steve J. Edwards, LEAD ATTORNEY, Grove City, OH.

For City of Columbus, Defendant: Daniel Wilson Drake, Jennifer S Gams, LEAD ATTORNEYS, Columbus City Attorney's Office, Columbus, OH.

For Kokosing Construction Company Inc, c/o Brian Burgett, Defendant: Douglas Paul Holthus, Kevin P Foley, LEAD ATTORNEYS, Reminger & Reminger Co., LPA - 2, Columbus, OH.

For Tata Excavating Inc, Defendant: Kenneth Eugene Harris, LEAD ATTORNEY, Harris Turano & Mazza, Columbus, OH.

For Contract Dewatering Services Inc, S/A CY Schaffner, Defendant: Carl Andrew Anthony, LEAD ATTORNEY, Freund Freeze & Arnold, Columbus, OH.

For City of Columbus, Cross Claimant: Daniel Wilson Drake, LEAD ATTORNEY, Jennifer S Gams, Columbus City Attorney's Office, Columbus, OH.

For [\*2] Kokosing Construction Company Inc, Cross Defendant: Douglas Paul Holthus, LEAD ATTORNEY, Reminger & Reminger Co LPA, Columbus, OH.

**JUDGES:** GEORGE C. SMITH, JUDGE. Magistrate Judge Abel.

**OPINION BY:** GEORGE C. SMITH

**OPINION**

**OPINION AND ORDER**

Plaintiffs assert that Defendants' dewatering for sewer construction caused Plaintiffs' wells to become dry, resulting in a taking of property without just compensation in violation of the Fifth and Fourteenth Amendments to the Constitution. Defendants move for summary judgment, arguing that the statute of limitations and the doctrine of *res judicata* bar Plaintiffs' claims (Doc. 61). For the reasons that follow, the Court GRANTS Defendants' Motion.

#### **I. BACKGROUND**

The parties stipulate the relevant facts for purposes of litigating summary judgment only.

Plaintiffs are individual citizens of the State of Ohio. They own and live on residential real property along Morse Road in Columbus, Ohio. All of the plaintiffs had wells on their property from which they obtained ground water for drinking and other domestic needs.

Defendants are the City of Columbus and several private entities. In 1990, Defendants arranged to extend a sewer line in the area of Plaintiffs' property. The plan for extending [\*3] the sewer required Defen-

dants to pump ground water out of the area to dry a trench and allow Defendants to install pipe for the sewer. This activity began on November 1, 1990, and was completed by mid-1991. For purposes of the summary judgment proceeding only, Defendants stipulate that their dewatering activities caused Plaintiffs' wells to become dry.

Plaintiffs filed a civil action in state court on August 21, 1992, seeking damages for "unreasonable harm" resulting from the dewatering, under *Cline v. American Aggregates Corp.*, 15 Ohio St. 3d 384, 387, 15 Ohio B. 501, 474 N.E.2d 324 (1984), which relied on the Restatement of Torts (Second) § 858 to create a tort claim for violations of the "reasonable use" doctrine for groundwater. Plaintiffs did not seek equitable relief to compel Defendants to institute a reverse condemnation action, and Plaintiffs did not expressly assert that the dewatering was a taking that required compensation under either the federal or Ohio constitutions. The state trial court denied Plaintiffs' motion for class certification on November 10, 1993, and Plaintiffs appealed. The Ohio appellate court affirmed, and the Ohio Supreme Court declined jurisdiction. The case was remanded to the trial [\*4] court, and on August 10, 1995, Plaintiffs voluntarily dismissed the action, but re-filed their complaint in a new action on the same day.

The trial court granted the Defendants' summary judgment motion on January 31, 1997. Plaintiffs appealed. The Ohio court of appeals affirmed as to the dismissal of the City of Columbus as a defendant on the basis of immunity, but reversed as to the other defendants, finding that they could not be sued for the alleged harm under *Cline* because the defendants were neither proprietors nor grantees for purposes of Restatement of Torts (Second) § 858. The Ohio Supreme Court issued a decision on April 22, 1998, declining to hear the appeal.

While the state court action was pending, the City of Columbus provided some of the Plaintiffs with trucked-in water. Plaintiffs did not pay for the water. Plaintiffs generally aver that the water the City provided was not adequate for their needs, and that as a result of their wells becoming dry, they were unable to shower as they wished, do laundry, water gardens, or clean their homes. Plaintiffs also spent varying sums of money in attempts to obtain water from their wells.

On September 15, 1999, Plaintiffs filed a new [\*5] Complaint with this Court, alleging a federal takings claim and a procedural and substantive due process claim. On September 18, 2000, Defendants filed a Motion for Summary Judgment, arguing that there has been no taking of property, and that the statute of limitations and *res judicata* bar Plaintiffs' claims (Doc. 25). On May 23, 2002, this Court granted Defendants' Motion for

Summary Judgment, holding that Plaintiffs' constitutional claims could not stand because Plaintiff's had no property interest in groundwater (Doc. 43). Having so held, this Court found it unnecessary to address the Defendants' statute of limitations and *res judicata* arguments. *Id.*

Plaintiffs appealed that decision to the Sixth Circuit Court of Appeals. The Sixth Circuit heard the appeal on December 4, 2003. On February 20, 2004, the Sixth Circuit panel filed an order certifying the following question of law to the Supreme Court of Ohio: "Does an Ohio homeowner have a property interest in so much of the groundwater located beneath the land owner's property as is necessary to the use and enjoyment of the owner's home?" On December 21, 2005, the Ohio Supreme Court answered the question affirmatively, holding that [\*6] "Ohio homeowners have a property interest in the groundwater underlying their land and [ ] governmental interference with that right can constitute an unconstitutional taking." *McNamara v. City of Rittman*, 107 Ohio St. 3d 243, 2005 Ohio 6433, 838 N.E.2d 640 (2005). The Sixth Circuit, finding that issue dispositive of the issues appealed, remanded the case to this Court without addressing the statute of limitations and *res judicata* arguments. *Hensley v. City of Columbus*, 433 F.3d 494, 496 (6th Cir. 2006).

Upon remand from the Sixth Circuit Court of Appeals, this Court issued an order allowing the parties to file supplemental briefs on statute of limitations and *res judicata* by November 15, 2006 (Doc. 50). Plaintiffs' counsel moved to stay the briefing schedule pending the Sixth Circuit Court of Appeals' decision in *McNamara v. City of Rittman*, Sixth Circuit Case No. 02-3965. (Doc. 52). The Sixth Circuit issued its decision in *McNamara v. City of Rittman* on January 8, 2007. See, *McNamara v. City of Rittman*, 473 F. 3d 633 (6th Cir. 2007). The parties have completed their briefing and Defendants' motion is now ripe for this Court's review.

## II. SUMMARY JUDGMENT STANDARD

The standard governing summary judgment is set forth [\*7] in Fed. R. Civ. P. 56(c), which provides:

The judgment sought shall be rendered forthwith if the pleadings, Depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

Summary judgment will not lie if the dispute about a material fact is genuine; "that is, if the evidence is such that a reasonable jury could return a verdict for the non-moving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). Summary judgment is appropriate, however, if the opposing party fails to make a showing sufficient to establish the existence of an element essential to that party's case and on which that party will bear the burden of proof at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986); see also *Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 588, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986).

When reviewing a summary judgment motion, the Court must draw all reasonable inferences in favor of the non-moving party, and must refrain from making credibility determinations or weighing the evidence. *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150-51, 120 S. Ct. 2097, 147 L. Ed. 2d 105 (2000). [\*8]<sup>1</sup> The Court disregards all evidence favorable to the moving party that the jury would not be required to believe. *Id.* Stated otherwise, the Court must credit evidence favoring the non-moving party as well as evidence favorable to the moving party that is uncontroverted or unimpeached, if it comes from disinterested witnesses. *Id.*

1 *Reeves* involved a motion for judgment as a matter of law made during the course of a trial under Fed. R. Civ. P. 50 rather than a pretrial summary judgment under Fed. R. Civ. P. 56. Nonetheless, standards applied to both kinds of motions are substantially the same. One notable difference, however, is that in ruling on a motion for judgment as a matter of law, the Court, having already heard the evidence admitted in the trial, views the entire record, *Reeves*, 530 U.S. at 150. In contrast, in ruling on a summary judgment motion, the Court will not have heard all of the evidence, and accordingly the non-moving party has the duty to point out those portions of the paper record upon which it relies in asserting a genuine issue of material fact, and the court need not comb the paper record for the benefit of the non-moving party. *In re Morris*, 260 F.3d 654, 665 (6th Cir. 2001). [\*9] As such, *Reeves* did not announce a new standard of review for summary judgment motions.

The Sixth Circuit Court of Appeals has recognized that *Liberty Lobby*, *Celotex*, and *Matsushita* have effected "a decided change in summary judgment practice," ushering in a "new era" in summary judgments. *Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1476 (6th Cir. 1989). The court in *Street* identified a number of

important principles applicable in new era summary judgment practice. For example, complex cases and cases involving state of mind issues are not necessarily inappropriate for summary judgment. *Id.* at 1479.

Additionally, in responding to a summary judgment motion, the non-moving party "cannot rely on the hope that the trier of fact will disbelieve the movant's denial of a disputed fact, but must 'present affirmative evidence in order to defeat a properly supported motion for summary judgment.'" *Id.*, quoting *Liberty Lobby*, 477 U.S. at 257. The non-moving party must adduce more than a scintilla of evidence to overcome the summary judgment motion. *Id.* It is not sufficient for the non-moving party to merely "show that there is some metaphysical doubt as to the material facts." *Id.*, quoting *Matsushita*, 475 U.S. at 586.

Moreover, [\*10] "[t]he trial court no longer has a duty to search the entire record to establish that it is bereft of a genuine issue of material fact." *Id.* at 1479-80. That is, the non-moving party has an affirmative duty to direct the court's attention to those specific portions of the record upon which it seeks to rely to create a genuine issue of material fact. *In re Morris*, 260 F.3d 654, 665 (6th Cir. 2001).

### III. DISCUSSION

Defendants rely on two arguments in support of their joint motion for summary judgment in this case. First, Defendants argue Plaintiffs' claims are barred by the statute of limitations. Second, Defendants argue that Plaintiffs' claims are barred by the doctrine of *res judicata*. The Court will first address the Defendants' statute of limitations argument.

#### A. Statute of Limitations

Plaintiffs assert that the facts of this case give rise to claims for takings of property without just compensation under the Fifth and Fourteenth Amendments to the U.S. Constitution, and that Defendant City of Columbus acted under color of law and deprived Plaintiffs of their property right to continue to receive water service without due process. (2d Am. Compl. P 24). Defendants argue that Plaintiffs' [\*11] claims are barred by the statute of limitations. (Def.'s Mot. for Summ. J. at 7-10). The Court agrees that Plaintiffs' claims are time-barred.

The parties agree that the applicable statute of limitations, based upon Ohio Revised Code § 2305.10, is two years. (See Def's Mot. for Summ. J. at 7 and Pl.'s Memo. in Opp. at 5; see also *Lawson v. Shelby County*, 211 F.3d 331, 336 (6th Cir. 2000) ("The statute of limitations for federal civil rights claims is the appropriate state statute of limitations.") (citations omitted)). The two-year period "starts to run when the plaintiff knows or has reason to

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know of the injury which is the basis of his action." *McNamara*, 473 F.3d at 639 (citing *Kuhnle Brothers, Inc. v. County of Geauga*, 103 F.3d 516, 520 (6th Cir. 1997) (internal quotation marks omitted)).

Defendants argue that Plaintiffs' claims were ripe, and the two-year statute of limitations began running, by mid-1991, when the dewatering operations were completed, and Plaintiffs knew or should have known of their alleged injuries. (Def.'s Mot. for Summ. J. at 7). Plaintiffs counter that under *Williamson City Planning v. Hamilton Bank*, 473 U.S. 172, 105 S. Ct. 3108, 87 L. Ed. 2d 126 (1995), their federal takings claims had not [\*12] accrued, and the statute of limitations did not begin to run, until Plaintiffs brought a state law tort claim against Defendants. (Pl.'s Memo. in Opp. at 3-4). Thus, a threshold question for this Court is when did Plaintiffs' claims become ripe.

In *Williamson*, the U.S. Supreme Court held that federal takings claims are not ripe until state compensation procedures, if existing and adequate, have been complied with. 473 U.S. at 195. The Supreme Court explained:

The recognition that a property owner has not suffered a violation of the Just Compensation Clause until the owner has unsuccessfully attempted to obtain just compensation through the procedures provided by the State for obtaining such compensation is analogous to the Court's holding in *Parratt v. Taylor*, 451 U.S. 527, 101 S. Ct. 1908, 68 L. Ed. 2d 420 (1981). There, the Court ruled that a person deprived of property through a random and unauthorized act by a state employee does not state a claim under the Due Process Clause merely by alleging the deprivation of property. In such a situation, the Constitution does not require predeprivation process because it would be impossible or impracticable to provide a meaningful hearing before [\*13] the deprivation. Instead, the Constitution is satisfied by the provision of meaningful postdeprivation process. Thus, the State's action is not "complete" in the sense of causing a constitutional injury "unless or until the State fails to provide an adequate postdeprivation remedy for the property loss." *Hudson v. Palmer*, 468 U.S. 517, 532, n. 12, 104 S. Ct. 3194, 3203, n. 12, 82 L. Ed. 2d 393 (1984). Likewise, because the Constitution does not require pretaking compensation, and

is instead satisfied by a reasonable and adequate provision for obtaining compensation after the taking, the State's action here is not "complete" until the State fails to provide adequate compensation for the taking.

*Id.*

*Williamson* does not require, as Plaintiffs suggest, a plaintiff seeking to bring a federal takings action to conjure up state common law tort actions as a way to satisfy its requirements. Instead, *Williamson* requires this Court to determine whether or not Ohio's compensation procedures are "reasonable, certain, and adequate." *McNamara*, 473 F.3d at 638 (quoting *Williamson*, 473 U.S. at 194). The determination is "time-specific, because a state may have inadequate compensation procedures at one point [\*14] in time, but these may at a later date be rectified by statute (via the state legislature) or through evolution of the common law (via state courts)." *McNamara*, 473 F.3d at 638 (citing *Arnett v. Myers*, 281 F.3d 552, 563 (6th Cir. 2002)). The Court's task is made easy by the *McNamara* Court.

In *McNamara*, the Sixth Circuit was asked to determine whether or not the plaintiffs' takings claims were ripe for federal review. The Court relied on *Williamson's* holding that takings claims "are not ripe for federal court review until state compensation procedures, assuming they exist and are adequate, have been exhausted . . ." *McNamara*, 473 F.3d at 637. The Court found that prior to *Levin v. City of Sheffield Lake*, 70 Ohio St. 3d 104, 1994 Ohio 385, 637 N.E.2d 319 (Ohio 1994),<sup>2</sup> "Ohio's compensation procedures in takings cases were decidedly not adequate." *Id.* at 638. Because the *McNamara* plaintiffs were aware of the alleged deprivation prior to *Levin*, the Court found their takings claims were immediately ripe for federal court review. *Id.* at 638-639. Consequently, the Court held that the *McNamara* plaintiffs' claims were time-barred when the plaintiffs filed them in federal court in 2000, more than two-years past the statute [\*15] of limitations. *Id.* at 639.

2 *Levin* made the availability of a mandamus action explicit in Ohio. See also, *Coles v. Granville*, 448 F.3d 853, 864 (6th Cir. 2006) ("[T]he 1994 *Levin* decision from the Ohio Supreme Court . . . was the genesis of the modern recognition of the mandamus action to force appropriation proceedings . . .").

The Plaintiffs in the instant case, like the *McNamara* plaintiffs, were aware of the alleged deprivation prior to *Levin*. Plaintiffs clearly knew of the injury which formed the basis for their takings action no later than 1992, when

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they filed their state court action. And, based upon the evidence submitted by Defendants, and not disputed by Plaintiffs, all of the plaintiffs, including those that did not file suit until 1995 or later, knew or had reason to know of their alleged injury by the end of 1991. (*See generally* Def's Mot. for Summ. J and Exhibits). At this time, there were no "reasonable, certain, and adequate" state procedures available to takings claimants in Ohio. *See McNamara*, 473 F.3d at 638. Accordingly, those claims were ripe for federal review no later than 1992. Because the claims were ripe in 1992, the applicable two-year statute of limitations [\*16] ran before 1999, when Plaintiffs first filed in federal court. Consequently, this Court finds that Plaintiffs' takings claims are time-barred.

Likewise, Plaintiffs' due process claims, which are based on the same underlying facts, are time-barred. *See McNamara*, 473 F.3d at 639. The Court need not conduct a separate ripeness analysis for Plaintiffs' due process claim. *See Arnett v. Myers*, 281 F.3d 552, 562 (6th Cir. 2002) ("Procedural due process and equal protection claims that are ancillary to taking claims are subject to the same Williamson ripeness requirements.") and *McNamara*, 473 F.3d at 639, n.2 (noting that where a due process claim is not "independent of an underlying takings claim, ripeness analysis for the takings claims necessarily subsumes ripeness analysis for the due process claim"). Accordingly, Plaintiffs' due process claims, like their takings claims, were ripe for federal review no

later than 1992. Consequently, the Court finds that, like the takings claims, Plaintiffs' due process claims are time-barred by the applicable two-year statute of limitations.

#### **B. Res Judicata**

As an alternative basis for summary judgment, Defendants argue that the doctrine of *res judicata* bars [\*17] Plaintiffs' claims. Having determined that Plaintiffs' claims are barred by the applicable statute of limitations, however, the Court finds it unnecessary to address Defendants' *res judicata* arguments.

#### **IV. CONCLUSION**

For all of the foregoing reasons, the Court **GRANTS** Defendants' Motion for Summary Judgment (Doc. 61).

The Clerk shall remove this case from the Court's pending cases list.

The Clerk shall remove Document 61 from the Court's pending motions list.

**IT IS SO ORDERED.**

/s/ **GEORGE C. SMITH, JUDGE**

**UNITED STATES DISTRICT COURT**

65 Fed. Cl. 818, \*; 2005 U.S. Claims LEXIS 164, \*\*

**JANE PATIENCE KEMP, Plaintiff, v. THE UNITED STATES, Defendant.**

**No. 04-65 L**

**UNITED STATES COURT OF FEDERAL CLAIMS**

**65 Fed. Cl. 818; 2005 U.S. Claims LEXIS 164**

**June 15, 2005, Filed**

**HEADNOTES**

Taking; Motion to Dismiss; Statute of Limitations; Accrual of Physical Taking at Time of Physical Possession.

**COUNSEL:** [\*\*1] Karen J. Budd-Falen, Cheyenne, WY, for plaintiff.

Devon M. Lehman, with whom was Kelly A. Johnson, Acting Assistant Attorney General, United States Department of Justice, Environment and Natural Resources Division, Washington, DC, for defendant. Debra Hecox, United States Department of Interior, Lakewood, CO, of counsel.

**JUDGES:** EMILY C. HEWITT, Judge.

**OPINION BY:** EMILY C. HEWITT

**OPINION**

[\*819] *OPINION*

Before the court is Defendant's Motion to Dismiss Plaintiff's Second Amended Complaint and Memorandum in Support Thereof (Def.'s Mot.), Plaintiff's Response in Opposition to Defendant's Motion to Dismiss Plaintiff's Second Amended Complaint (Pl.'s Resp.) and Defendant's Reply Brief in Support of Its Motion to Dismiss Plaintiff Second Amended Complaint (Def.'s Reply). For the following reasons, defendant's motion is GRANTED.

**I. Background**

Plaintiff Jane Patience Kemp alleges that the United States effected a temporary taking of her property by a 1980 Act of Congress that expanded the boundaries of the Rocky Mountain National Park (RMNP). [Second] Amended Complaint (Compl.) P 1. Pursuant to an Act of December 22, 1980, Pub. L. No. 96-560, § 111(a), 94 Stat. 3265 (1980), the United States [\*\*2] increased the size of the National Park "by acquiring property that belonged to private property owners, including approxi-

mately 29.55 acres of private property owned by plaintiff." *Id* Plaintiff complains that the United States "used plaintiff's property for public [purposes]" from December 1980 until December 1999 when "plaintiff sold the property to a private third party." *Id* PP 10-11. Plaintiff states that, during the nineteen years of property use by the United States, she and her mother, "her predecessor-in-interest[,] . . . retained title to the property . . . and paid taxes associated with the property." *Id*. [\*820] P 13. Plaintiff complains that she did not receive "any compensation" for the public use of her property. *Id* P 14.

1 The Court disregards references to the ownership of the property by plaintiff's mother because the property was owned by plaintiff at the time of the taking. Pl.'s Resp. at 2 (stating that plaintiff received title from her mother on December 23, 1977).

Defendant [\*\*3] has moved to dismiss plaintiff's second amended complaint. *See* Rule 12(b)(1) of the Court of Federal Claims (RCFC). Defendant argues that the court lacks jurisdiction to hear plaintiff's claim because the claim is time-barred. Def.'s Mot. at 1.

**II. Discussion**

**A. Motion to Dismiss for Lack of Subject Matter Jurisdiction**

**1. Jurisdiction**

The jurisdiction of the Court of Federal Claims is set forth in 28 U.S.C. § 1491, which states that "the United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort." 28 U.S.C. § 1491(a)(1) (2000). The timeliness of an action also determines jurisdiction under 28 U.S.C. § 2501. *See Alder Terrace, Inc. v. United States*, 161 F.3d 1372, 1377 (Fed. Cir. 1998) ("burden of establishing jurisdiction, including jurisdictional timeliness, must be carried by [plaintiff] [\*\*4] in

the underlying suit]). "Every claim of which the United States Court of Federal Claims has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first accrues." 28 U.S.C. § 2501 (2000). Section 2501 imposes a limitation on the jurisdiction of the Court such that the court lacks jurisdiction to hear time-barred claims. *See Alder Terrace*, 161 F.3d at 1377. "The 6-year statute of limitations on actions against the United States is a jurisdictional requirement attached by Congress as a condition of the government's waiver of sovereign immunity and, as such, must be strictly construed." *Hopland Band of Pomo Indians v. United States*, 855 F.2d 1573, 1576-77 (Fed. Cir. 1988).

## 2. Standard of Review

Dismissal of a claim for lack of subject matter jurisdiction is governed by Rule 12(b)(1) of the Rules of the United States Court of Federal Claims. RCFC 12(b)(1). "The requirement that jurisdiction be established as a threshold matter . . . is 'inflexible and without exception.'" *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94-95, 140 L. Ed. 2d 210, 118 S. Ct. 1003 (1998) (quoting *Mansfield, C. & L. M. R. Co. v. Swan*, 111 U.S. 379, 382, 28 L. Ed. 462, 4 S. Ct. 510 (1884)). [\*\*5] When considering a motion to dismiss for lack of jurisdiction, the court assumes that all well-pleaded facts alleged in the complaint are true and draws all reasonable inferences in favor of plaintiff. *Scheuer v. Rhodes*, 416 U.S. 232, 236, 40 L. Ed. 2d 90, 94 S. Ct. 1683 (1974), *overruled on other grounds by Davis v. Scherer*, 468 U.S. 183, 82 L. Ed. 2d 139, 104 S. Ct. 3012 (1984); *Boyle v. United States*, 200 F.3d 1369, 1372 (Fed. Cir. 2000) (grant of motion to dismiss requires reviewing court to "accept all well-pleaded factual allegations as true and draw all reasonable inferences in [plaintiff's] favor"); *Henke v. United States*, 60 F.3d 795, 797 (Fed. Cir. 1995) (in deciding motion to dismiss, court "obligated to assume all factual allegations to be true and to draw all reasonable inferences in plaintiff's favor"). Plaintiff bears the burden of proving, by a preponderance of the evidence, that the court has jurisdiction to hear an alleged claim. *Toxgon Corp. v. BNFL, Inc.*, 312 F.3d 1379, 1383 (Fed. Cir. 2002) (citing *Harris v. Provident Life & Accident Ins. Co.*, 26 F.3d 930, 932 (9th Cir. 1994) ("The burden of establishing federal jurisdiction [\*\*6] falls on the party invoking [it].")(quotations and citations omitted)); *Reynolds v. Army & Air Force Exch. Serv.*, 846 F.2d 746, 748 (Fed. Cir. 1988) ("Once the [trial] court's subject matter jurisdiction was put in question it [is] incumbent upon [plaintiff] to come forward with evidence establishing the court's jurisdiction.").

[\*821] The court is mindful that a takings claim is not to be dismissed without careful consideration of possible bases for relief. In particular the court agrees with plaintiff that:

"although according to case law, the plaintiff bears the burden of establishing subject matter jurisdiction by a preponderance of the evidence, (citation omitted), a complaint should not be dismissed 'unless it is beyond doubt that the plaintiff can prove no set of facts which would entitle him to relief.'" [*Bagwell v. United States*, 21 Cl. Ct. 722, 725, quoting *Hamlet v. United States*, 873 F.2d 1414, 1416; *see also Ewald v. United States*, 14 Cl. Ct. 378, 382 (1988), quoting *Juda v. United States*, 6 Cl. Ct. 441, 450 (1984) ("Denial of a taking claim on the basis of the defense of limitations is warranted only when [\*\*7] the facts alleged demonstrate conclusively that such a decision is required as a matter of law.").

Pl.'s Resp. at 4-5.

## 3. Takings Claims: Physical v. Regulatory

Under the Fifth Amendment of the United States Constitution, private property cannot be taken "for public use, without just compensation." U.S. Const. amend. V. There are two classes of takings cases, physical and regulatory. *Yee v. City of Escondido*, 503 U.S. 519, 522-23, 118 L. Ed. 2d 153, 112 S. Ct. 1522 (1992). An unwanted physical occupation of an individual's property constitutes a physical taking. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 421, 73 L. Ed. 2d 868, 102 S. Ct. 3164 (1982). A permanent physical occupation is a taking per se, regardless of whether it serves the public interest. *Id.* at 426; *See also Kaiser Aetna v. United States*, 444 U.S. 164, 179-80, 62 L. Ed. 2d 332, 100 S. Ct. 383 (1979) ("We hold that the 'right to exclude,' so universally held to be a fundamental element of the property right, falls within this category of interests that the Government cannot take without compensation.").

A regulatory taking, on the other hand, occurs "when a regulatory or administrative action places such burdens on the ownership [\*\*8] of private property that essential elements of such ownership must be viewed as having been taken . . ." *Hendler v. United States*, 36 Fed. Cl. 574, 585 (1996), *aff'd*, 175 F.3d 1374 (Fed. Cir. 1999). If a landowner has not lost all economically viable use of its property, the court will consider other factors such as the extent the regulations interfere with investment-backed expectations. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1019 n.8, 120 L. Ed. 2d 798, 112 S. Ct. 2886 (1992); *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415, 67 L. Ed. 322, 43 S. Ct. 158 (1922) ("While

property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."). When a taking is found, the court has essentially determined that a single private owner should not bear the entire burden of a state regulatory action in the public interest. *Agins v. City of Tiburon*, 447 U.S. 255, 260, 65 L. Ed. 2d 106, 100 S. Ct. 2138 (1980). It is not a requirement that the property owner be excluded for a compensable regulatory taking to occur. *Ridge Line, Inc. v. United States*, 346 F.3d 1346, 1352 (Fed. Cir. 2003). Three factors are typically considered in determining whether [\*\*9] a regulatory action has deprived an owner of economically viable use of its property: the economic impact of the regulation, its interference with the plaintiff's investment-backed expectations, and the character of the government action. *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124, 57 L. Ed. 2d 631, 98 S. Ct. 2646 (1978); *Appollo Fuels, Inc. v. United States*, 381 F.3d 1338, 1349 (Fed. Cir. 2004) (discussing three relevant factors that can be used to determine the reasonableness of investment-backed expectations: "(1) whether the plaintiff operated in a 'highly regulated industry;' (2) whether the plaintiff was aware of the problem that spawned the regulation at the time it purchased the allegedly taken property; and (3) whether the plaintiff could have 'reasonably anticipated' the possibility of such regulation in light of the 'regulatory environment' at the time of purchase.").

#### 4. Plaintiff's Claim Is For a Physical Taking

Plaintiff states that her claim is for a physical taking. Pl.'s Resp. at 7 ("The Federal [\*822] Government's continuous physical use of the property for RMNP related purposes constitutes a physical taking for the public's use."). Plaintiff alleges that [\*\*10] on December 22, 1980, the National Park Service (NPS) began to allow "the public to traverse and use the land without Ms. Kemp's permission or acquiescence." *Id.* at 2-3. Plaintiff also claims that the physical taking in question was temporary. *Id.* at 5 ("Applicable to this case is when a temporary takings claim for a physical invasion accrues.").

The court agrees with plaintiff that her claim falls into the category of physical takings. Plaintiff's claim is therefore governed by the law of physical takings, rendering a regulatory takings analysis inapplicable. See *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning*, 535 U.S. 302, 323, 152 L. Ed. 2d 517, 122 S. Ct. 1465 (2002) ("The longstanding distinction between acquisitions of property for public use, on the one hand, and regulations prohibiting private use, on the other, makes it inappropriate to treat cases involving physical takings as controlling precedents for the evaluation of a claim that there has been a "regulatory taking," and vice versa.") (footnote omitted).

Plaintiff, however, relies on case law concerning temporary regulatory takings to support her claim for compensation. Pl.'s Resp. at 8-9. Plaintiff asserts that the [\*\*11] statute of limitations on her claims begins to run only when the temporary taking has ended, citing *Creppel v. United States*, 41 F.3d 627, 632 (Fed. Cir. 1994) (holding that the plaintiff's temporary takings claim accrued when the taking concluded upon issuance of the 1984 order to proceed with the original project). Unlike this case, however, *Creppel* involved a temporary regulatory taking. *Id.* at 631. In *Creppel*, a governmental order, later overturned, eliminated plaintiff's "expectation of land reclamation, causing the property's value to plummet." *Id.* at 632. The application of regulatory takings case law to the taking of Ms. Kemp's property is misplaced. See *Tahoe-Sierra Pres. Council*, 535 U.S. at 323.

Cases on physical takings hold that the statute of limitations begins to run when the United States comes into physical possession of the plaintiff's land. *United States v. Dow*, 357 U.S. 17, 21, 2 L. Ed. 2d 1109, 78 S. Ct. 1039 (1958) (holding that the government's physical entry onto plaintiff's land to lay pipe constituted the occurrence of the taking, not the filing of the taking three years later). When the taking is [\*\*12] effected by legislation, the taking accrues on the enactment of the legislation introducing the physical taking. *Fallini v. United States*, 56 F.3d 1378, 1382-83 (Fed. Cir. 1995) (holding that, in determining whether there has been a taking, the court looks to the date of the enactment of the statute requiring the Fallinis to provide water to wild horses). If a declaration of taking is filed by the government after the government has already taken physical possession of the property, the date of the taking is the date upon which the physical possession commenced and the owner was deprived of valuable property rights. *Dow*, 357 U.S. at 23; See also *Caldwell v. United States*, 391 F.3d 1226, 1235 (Fed. Cir. 2004) (holding that the Notice of Interim Trail Use marked the commencement of the government taking, not the later transfer of the easement by deed, because it halted "abandonment and the vesting of state law reversionary interests when issued").

#### 5. Takings Claims: Temporary v. Permanent

"The concept of permanent physical occupation does not require that in every instance the occupation be exclusive, or continuous and uninterrupted. [\*\*13] " *Hendler v. United States*, 952 F.2d 1364, 1377-79 (Fed. Cir. 1991) (holding that an order from the EPA, giving itself and the State of California the right to install and operate wells on plaintiff's property, could constitute a permanent physical taking). The *Hendler* court stated that "such activity, even though temporally intermittent, is not 'temporary.' It is a taking of the plaintiff's right to exclude, for the duration of the period in which the wells are on the property and subject to the Government's need

to service them." *Id.* at 1378. Whether a physical taking is permanent or temporary is irrelevant to the application of the statute of limitations because the accrual date is the same for both. *Caldwell*, [\*823] 391 F.3d at 1234-35 ("It is not unusual that the precise nature of the takings claim, whether permanent or temporary, will not be clear at the time it accrues.")<sup>2</sup>

2 Temporary and permanent regulatory takings "are not different in kind." *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 318, 96 L. Ed. 2d 250, 107 S. Ct. 2378 (1987). Both require compensation. *Id.* at 318-19. Liability for a temporary regulatory taking, like that for a permanent regulatory taking, is determined by applying the factors set forth in *Penn Central*. *Appolo*, 381 F.3d at 1351. In *Appolo*, the court could not find temporary takings liability for the uncertainty caused by the delayed regulation because the *Penn Central* analysis had already foreclosed a permanent takings claim. *Id.* at 1351-52 (rejecting a partial takings claim because lack of reasonable investment-backed expectations and an action protecting health and safety outweighed the economic injury).

[\*\*14] Temporary regulatory takings, a category of takings inapplicable here, generally arise in two circumstances: when the owner is "temporarily deprived . . . of all or substantially all economically viable use of their property" or when there is "extraordinary delay" in the regulatory process." *Walcek v. United States*, 44 Fed. Cl. 462, 467-68 (1999) (finding no temporary taking because the requirement of applying for a permit did not deprive plaintiffs of all economic use of their property and a one-year delay is not considered to be "extraordinary"); *Appolo*, 381 F.3d at 1351 ("If the delay is extraordinary, the question of temporary regulatory takings liability is to be determined using the *Penn Central* factors.").

#### 6. Plaintiff's Claim Is For a Permanent Physical Taking

Plaintiff alleges that the expansion of the National Park by congressional act "increased the park's size by acquiring property that belonged to private property owners, including approximately 29.55 acres of [plaintiff's] property." Compl. P 1. Plaintiff states that "upon the effective date of the Act, the United States utilized the property as its own and for public use as [\*\*15] part of the [National Park]." *Id.*

The Act of Congress alleged to have effected the taking is Public Law No. 96-560, 94 Stat. 3265 (Dec. 22, 1980). Section 111(a) of Public Law No. 96-560 provides that "the boundaries of Rocky Mountain National

Park . . . are revised as generally depicted on the map entitled 'Boundary Adjustments, Rocky Mountain National Park . . . .' All lands added or transferred by this Act to Rocky Mountain National Park . . . shall be subject to the laws and regulations applicable to the appropriate National Park or National Forest." Pub. L. No. 96-560. The effective date of this act was December 22, 1980. *Id.*

Plaintiff asserts that her claim involves a temporary taking because she was deprived of the full use of her property for "a fixed period of time." Pl.'s Resp. at 8. Plaintiff claims the fixed period began with the NPS' physical occupation of her land in 1980 and ended when Ms. Kemp sold the property in 1999. *Id.* Like the plaintiff in *Hendler*, however, Ms. Kemp offers no evidence that public use of her property ceased upon its sale to a third party; and, even if the taking were assumed to have ended, the court could not, as a matter of [\*\*16] law, view a nineteen year case as temporary. See *Hendler*, 952 F.2d at 1376 ("Nothing in the Government's activities suggests that the wells were a momentary excursion shortly to be withdrawn, and thus little more than a trespass.").

Plaintiff argues that the temporary taking must end before an owner can seek compensation, but that theory has been held invalid: even if the claim were properly viewed as a regulatory taking, the regulation that results in a taking does not have to cease for a finding of a temporary taking. *Bass Enters. Prod. Co. v. United States*, 133 F.3d 893, 895-96 (Fed. Cir. 1998) (holding that the fact that at some future point the Government would decide whether to condemn the Bass lease did not rule out the possibility of a temporary taking); *First English*, 482 U.S. at 320 ("It would require a considerable extension of [earlier Supreme Court] decisions to say that no compensable regulatory taking may occur until a challenged ordinance has ultimately been held invalid."). Limiting its decision to situations in which a taking has already been determined, the Supreme Court, in *First English*, held that when an [\*\*17] owner is deprived of all [\*824] use of their property by a temporary regulation, the Fifth Amendment requires payment for the value of the property taken during the existence of the regulation without having to wait for the regulation to be declared unconstitutional. *Id.* at 319 ("Invalidation of the ordinance or its successor ordinance after [a] period of time [the government's use of private property], though converting the taking into a 'temporary' one, is not a sufficient remedy to meet the demands of the Just Compensation Clause.").

As plaintiff acknowledges, however, this case is a physical taking. Pl.'s Resp. at 7. The Court in *Nollan v. California Coastal Commission* stated that "where individuals are given a permanent and continuous right to

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pass to and fro, so that the real property may continuously be traversed," a permanent physical taking has occurred. 483 U.S. 825, 832, 97 L. Ed. 2d 677, 107 S. Ct. 3141 (1987). Here, the taking accrued when the government legislation allowed RMNP to start using the land as its own and deprived Ms. Kemp of her right to exclude. See *Hendler*, 952 F.2d at 1374 (stating that the right to exclude is one of the most valuable rights [\*\*18] of property ownership).

#### 7. Other Possible Bases For Finding the Complaint Timely Filed

Although the authorities the court has cited indicate that Ms. Kemp's claim is barred by the statute of limitations because it was not filed within six years of the date the claim first accrued, (December 22, 1980, the date on which the government expanded the boundaries of the National Park and began to use Ms. Kemp's land), plaintiff asserts that the claim did not accrue until the temporary taking ended in 1999, when she sold her land to a third party. Pl.'s Resp. at 1-2. Plaintiff's argument resembles to some extent the argument of the plaintiff in *United States v. Dickinson*, although plaintiff does not cite the case in her brief. See *United States v. Dickinson*, 331 U.S. 745, 749, 91 L. Ed. 1789, 67 S. Ct. 1382 (1947) (reasoning that plaintiff's claim did not accrue until the flooding had stabilized and damages could be certain). Ms. Kemp claims that the statute of limitations could not run until the temporary taking had "stabilized." Pl.'s Resp. at 5, 9. Ms. Kemp argues that, until the property was sold, she had no way of knowing when the period as to which she was entitled to compensation would end. [\*\*19] Pl.'s Resp. at 8, 10.

In *Dickinson*, the Supreme Court held that "a taking by a continuous process of physical events" does not accrue until the situation becomes stabilized. *Dickinson*, 331 U.S. at 749 (concerning a governmentally-constructed dam that flooded and eroded the plaintiff's land over time, such that plaintiffs were unsure of the frequency of inundation and whether a permanent taking had in fact occurred). The court observed in *Dickinson* that, if a plaintiff is required to bring a suit within six years of the commencement of the taking, when damages are still compounding and uncertain, the plaintiff would risk inaccurate damages and "res judicata against recovering later for damage as yet uncertain." *Id.* Although she does not cite to the case, Ms. Kemp appears to be alleging that her situation is analogous to that of the plaintiffs in *Dickinson*, and that her claim did not accrue until her situation stabilized and the amount of damages were certain. Pl.'s Resp. at 10. Ms. Kemp also appears to argue that "stabilization" occurred only when she sold her land to a third party. Pl.'s Resp. at 8, 10.

*Dickinson*, however, has not been read to [\*\*20] cover any circumstances clearly analogous to those of plaintiff. Cf. *Fallini*, 56 F.3d at 1381-82 (holding that a takings claim against the United States was time-barred because plaintiffs were aware of the requirement to provide water to wild horses and the damages that resulted, though not "complete and fully calculable," were nonetheless apparent enough to indicate that a taking had occurred); *Hilkovsky v. United States*, 504 F.2d 1112, 1114, 205 Ct. Cl. 460 (Ct. Cl. 1974) (holding that an inverse condemnation suit was barred by the six-year statute of limitations: "because there has never been any doubt as to the Government intent to take the full interest of plaintiffs in their land, either by purchase, transfer, or condemnation, as directed by Congress, there is no reason to apply the [\*825] [Dickinson] wait-and-see-how-much-is-taken rule.").

*Dickinson* does not stand for the proposition that uncertainty of any kind will bar accrual of a claim. *Fallini*, 56 F.3d at 1382 ("It is not necessary that the damages from the alleged taking be complete and fully calculable before the cause of action accrues."). In *Fallini*, the Court of Appeals for the [\*\*21] Federal Circuit held that each successive drink a horse took did not constitute a recurring action; the only action that constituted a taking was the original act requiring that the Fallinis provide water to all wild horses. *Id.* at 1383. Similarly, the crossing by each successive pedestrian of Ms. Kemp's property does not constitute a recurring taking; only the original act permitting the public access is considered a compensable taking. See *id.* Furthermore, in *United States v. Dow*, the Supreme Court interpreted *Dickinson* as having a limited holding applying only to flooding. *Dow*, 357 U.S. at 27 ("The expressly limited holding in [Dickinson] was that the statute of limitations did not bar an action under the Tucker Act for a taking by flooding when it was uncertain at what stage in the flooding operation the land had become appropriated to public use."). Just as the plaintiffs in *Fallini* and *Dow* were held to have been well aware that horses were drinking their water (*Fallini*) and that the government had entered into physical possession of their property (*Dow*), Ms. Kemp was well aware that the government had taken her [\*\*22] land in 1980 when RMNP allowed the public to traverse it. Compl. PP 10-11; *Fallini*, 56 F.3d at 1382; *Dow*, 357 U.S. at 27.

"A claim accrues when all the events have occurred that fix the alleged liability of the Government and entitle the plaintiff to institute an action." *Alliance of Descendants of Texas Land Grants v. United States*, 37 F.3d 1478, 1481-82 (Fed. Cir. 1994) (finding the 1941 treaty which "released the United States from all liability for Texas land grant claims from Mexican citizens" was the government action giving rise to plaintiffs' takings claims

and triggering the running of the six-year statute of limitations). In the circumstances of this case, it might be possible to toll the statute of limitations by showing that the United States somehow concealed its acts such that plaintiff was unaware of them or that the injury to plaintiff was "inherently unknowable" at the date the claim accrued. *Cf. id.* at 1482-83 (finding that while claimants alleged they had no way to know they could obtain relief from the United States until Mexico denied them relief, the treaty specifically extinguished their rights [\*\*23] to seek compensation from the United States and plaintiffs were therefore aware of the action and its effects); *cf. Achenbach v. United States*, 56 Fed. Cl. 776, 779-80 (2003) (finding that takings claims against the Government for preventing American citizens living in the Philippines from traveling to the United States during World War II were time-barred because plaintiffs were aware of the harm at the time it occurred), *aff'd*, 112 Fed. Appx. 53, 2004 WL 2550427 (Fed. Cir. Nov. 2, 2004). Here, there is no allegation of concealment. The plain allegations of the complaint state that the government openly entered plaintiff's land in 1980. Compl. PP 10, 11.

Although not addressed as an argument by plaintiff, the court has considered the possibility that there is an analogy between Ms. Kemp's circumstances and those of the plaintiffs in *Banks v. United States*. See 314 F.3d 1304, 1310 (Fed. Cir. 2003) (holding that mitigation efforts by the government rendered plaintiffs' claims uncertain). The question before the court is whether in this case the government took any action that would have dissuaded Ms. Kemp from bringing her claim within [\*\*24] six years after December 22, 1980.

In this connection, the court has considered the text of Section 111(b) of Public Law 96-560, which states that "the Secretary of the Interior, with respect to lands added or transferred by this Act to Rocky Mountain National Park, . . . may acquire lands and interests in such lands, by donation, purchase with donated or appropriated funds, or by exchange." Act of December 22, 1980, Pub. L. No. 96-560, § 111(b), 94 Stat. 3265 (1980). Section 2201.1 of Title 43 of the Code of Federal Regulations sets forth the required elements for initiating an exchange, including a description of the lands involved and appraisals. 43 C.F.R. §§ 2201.1(c)(2), [\*\*826] (d) (2004). An agreement to initiate an exchange is not legally binding on either party. 43 C.F.R. § 2201.1(f) (2004). "Unless and until the parties enter into a binding exchange agreement, any party may withdraw from and terminate an exchange proposal or an agreement to initi-

ate an exchange at any time during the exchange process, without any obligation to reimburse, or incur any liability to, any party, person or other entity. 43 C.F.R. § 2200.0-6 (a) (2004) [\*\*25] .

Ms. Kemp's complaint, however, contains absolutely no suggestion that she has been persuaded by actions of the United States to delay in bringing this claim because the United States was undertaking actions which would eliminate the cause of the alleged taking. Here, the government was using plaintiff's land openly and continuously. Pl.'s Resp. at 2-3. The government's open and continuous use of plaintiff's land distinguishes this case from cases involving exchange regimes in aid of the creation of, for example, Voyageurs National Park and Point Reyes National Seashore. *Cf. Althaus v. United States*, 7 Cl. Ct. 688, 693 (1985) ("Plaintiffs do not allege a discrete, dispositive act of the government, which would make it relatively clear if a taking has occurred."); *Hilkovsky v. United States*, 504 F.2d 1112, 1115, 205 Ct. Cl. 460 (Ct. Cl. 1974) (complaining only of the length of time the government took to acquire property and not of any particular physical invasion). In *Althaus*, unlike this case, there was no indication that the land was physically occupied. *Althaus*, 7 Cl. Ct. at 693. However, wide publicity about the intention of the government [\*\*26] to include plaintiff's undeveloped property in Voyageurs National Park was noted by the court as having destroyed its value, thereby causing a taking to accrue. *Id.* at 695. *Hilkovsky* involved developed property; as in *Althaus*, no physical occupation of the property occurred. *Id.* at 1115. In this circumstance, the *Hilkovsky* court found no taking because a complaint over "the length of time that the government had been buying, trading for, or condemning theirs and others' lands within the boundaries of the National Seashore" was not enough to establish a taking. *Id.* Here, however, plaintiff clearly alleges a physical taking beginning in 1980. Compl. PP 10-11. The court finds plaintiff's claim time-barred.

### III. Conclusion

Because plaintiff's claim is time-barred, the court lacks jurisdiction to hear the action. Defendant's motion to dismiss is GRANTED. The Clerk of the Court is directed to dismiss the complaint. No costs.

IT IS SO ORDERED.

EMILY C. HEWITT

Judge



LEXSEE 1999 U.S. APP. LEXIS 24333

**LESTER SWARTZ, Shareholder, on behalf of the Rossford Trade Center, Inc.,  
Plaintiff-Appellant, v. EASTMAN & SMITH; MALCOM DON CARMIN;  
WILLIAMS, JILEK, LAFFERTY & GALLAGHER CO., L.P.A.; MICHAEL F.  
JILEK; JEFFREY TWYMAN; CHARLES KURFESS, Judge; RANDALL  
BASINGER, Judge; THE HOME INSURANCE COMPANY, Defendants-Appellees.**

No. 98-3090

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

*1999 U.S. App. LEXIS 24333*

September 28, 1999, Filed

**NOTICE:** [\*1] NOT RECOMMENDED FOR FULL-TEXT PUBLICATION. SIXTH CIRCUIT RULE 28(g) LIMITS CITATION TO SPECIFIC SITUATIONS. PLEASE SEE RULE 28(g) BEFORE CITING IN A PROCEEDING IN A COURT IN THE SIXTH CIRCUIT. IF CITED, A COPY MUST BE SERVED ON OTHER PARTIES AND THE COURT. THIS NOTICE IS TO BE PROMINENTLY DISPLAYED IF THIS DECISION IS REPRODUCED.

**SUBSEQUENT HISTORY:** Reported in Table Case Format at: *1999 U.S. App. LEXIS 33106*.

**PRIOR HISTORY:** Northern District of Ohio. 96-07796. Katz. 12-17-97.

**DISPOSITION:** Request for oral argument denied and the district court's judgment affirmed.

**COUNSEL:** LESTER SWARTZ, Plaintiff - Appellant, Pro se, Boynton Beach, FL.

For EASTMAN & SMITH, MALCOM DON CARMIN, Defendants - Appellees: Robert J. Gilmer, Jr., Margaret M. Sturgeon, Eastman & Smith, Toledo, OH.

For WILLIAMS, JILEK, LAFFERTY & GALLAGHER CO., L.P.A., MICHAEL F. JILEK, Defendants - Appellees: David M. Mohr, Drew R. Masse, Williams,

Jilek & Lafferty, Toledo, OH.

For JEFFREY TWYMAN, CHARLES KURFESS, Defendants - Appellees: Rebecca C. Sechrist, Ted B. Riley, Manahan, Pietrykowski, Bamman & Delaney, Toledo, OH.

For CHARLES KURFESS, RANDALL BASINGER, Defendants - Appellees: George D. Johnson, Elizabeth A. McCord, Montgomery, Rennie & Jonson, Cincinnati, OH.

For THE HOME INSURANCE COMPANY, Defendant [\*2] - Appellee: William G. Kroncke, Toledo, OH.

**JUDGES:** Before: BOGGS and DAUGHTREY, Circuit Judges; DONALD, District Judge. \*

\* The Honorable Bernice B. Donald, United States District Judge for the Western District of Tennessee, sitting by designation.

**OPINION**

**ORDER**

Lester Swartz, proceeding pro se, appeals a district court judgment dismissing his civil rights complaint filed pursuant to 42 U.S.C. §§ 1983, 1985, and 1986. This case

has been referred to a panel of the court pursuant to *Rule 34(j)(1), Rules of the Sixth Circuit*. Upon examination, this panel unanimously agrees that oral argument is not needed. *Fed. R. App. P. 34(a)*.

On December 31, 1996, Swartz, on his own behalf and as a shareholder on behalf of the Rossford Trade Center, Incorporated, filed a complaint against Eastman & Smith; M. Donald Carmin; Williams, Jilek, Lafferty & Gallagher Company, L.P.A.; Michael F. Jilek; Jeffrey Twyman; Charles Kurfess, Judge; Randall Basinger, Judge; and the Home Insurance Company. Swartz alleged that the defendants conspired to violate his civil rights during a legal malpractice action which he brought against Twyman and Kurfess in 1993. The legal malpractice [\*3] action was tried on January 5, 1993, and resolved in favor of Twyman and Kurfess following a jury verdict in their favor.

A magistrate judge filed a report recommending that the motions to dismiss filed by Basinger and Kurfess be granted and the motions for summary judgment filed by the remaining defendants be granted. Over Swartz's objections, the district court adopted the magistrate judge's report and recommendation in full and dismissed the case. Swartz filed a timely appeal challenging the district court's dismissal of his complaint as well as the district court's rulings with respect to several nondispositive pretrial matters. Swartz requests oral argument.

Upon de novo review, we conclude that the district court correctly granted the defendants' motions to dismiss and for summary judgment, as Swartz's complaint is barred by the statute of limitations. See *EEOC v. Prevo's Family Mkt., Inc.*, 135 F.3d 1089, 1093 (6th Cir. 1998); *Sistrunk v. City of Strongsville*, 99 F.3d 194, 197 (6th Cir. 1996), cert. denied, 520 U.S. 1251, 138 L. Ed. 2d 175, 117 S. Ct. 2409 (1997). For all § 1983 and § 1985 actions, federal courts apply the [\*4] state personal injury statute of limitations. See *Wilson v. Garcia*, 471 U.S. 261, 280, 85 L. Ed. 2d 254, 105 S. Ct. 1938 (1985). The appropriate statute of limitations for personal injury actions arising in Ohio is two years. See *Ohio Rev. Code Ann. § 2305.10* (Anderson 1998); *Kuhnle Bros. v. County of Geauga*, 103 F.3d 516, 519 (6th Cir. 1997); *LRL Properties v. Portage Metro Hous. Auth.*, 55 F.3d 1097, 1105 (6th Cir. 1995).

Swartz's complaint is based upon the defendants' conduct during the January 5, 1993 malpractice trial.

However, Swartz filed his complaint on December 31, 1996, more than two years after the alleged civil rights violations occurred. Therefore, Swartz's § 1983 and § 1985 claims are barred by the applicable two-year statute of limitations. See *Kuhnle Bros.*, 103 F.3d at 519; *LRL Properties*, 55 F.3d at 1105. The two-year statute of limitations has not been tolled by the provisions of *Ohio Rev. Code Ann. § 2305.16* (Anderson 1998), which prohibit the time during which a person is of unsound mind from being included within the limitations period. Swartz neither alleged that he [\*5] was adjudicated as being of unsound mind or confined in an institution or hospital as a result of an unsound mind nor offered any evidence of such an adjudication or confinement as required by § 2305.16. Furthermore, since Swartz's § 1985 claim is time-barred, an action under § 1986, which imposes liability upon one who fails to prevent a violation of § 1985, cannot be maintained. See 42 U.S.C. § 1986.

In addition, we find no error in the various pretrial rulings which Swartz challenges on appeal. First, the magistrate judge did not err by failing to hold a case management conference after recommending that the defendants' dispositive motions be granted. The failure to hold a case management conference did not preclude Swartz from conducting discovery and was unnecessary given the magistrate judge's recommendation. Second, the magistrate judge did not overstep her bounds by stating in her report and recommendation that the motion for summary judgment filed by Williams, Jilek, Lafferty & Gallagher Co., L.P.A. and Jilek "is therefore Granted." It is clear, when reviewing the entire report and recommendation in context, that the report is merely a recommendation [\*6] to the district court. Third, the district court did not err by failing to consider Swartz's verified amended complaint. Since Swartz attempted to amend his complaint after some of the defendants had filed responsive pleadings, he could not amend his complaint without leave of court or consent of the adverse parties. See *Fed. R. Civ. P. 15(a)*; *Keweenaw Bay Indian Community v. Michigan*, 11 F.3d 1341, 1348 (6th Cir. 1993).

Fourth, the district court's denial of Swartz's motion to disqualify the magistrate judge does not constitute an abuse of discretion. See *Green v. Nevers*, 111 F.3d 1295, 1303 (6th Cir.), cert. denied, 118 S. Ct. 559 (1997). Swartz's affidavit in support of his motion to disqualify merely offered conclusory, insubstantial allegations of

1999 U.S. App. LEXIS 24333, \*6

bias and was insufficient to support the magistrate judge's disqualification because the grounds for disqualification arise solely from the judge's association with the proceedings, rather than an extrajudicial source. *See 111 F.3d at 1303-04; United States v. Sammons, 918 F.2d 592, 599 (6th Cir. 1990)*. Because Swartz's motion and affidavit were deficient, [\*7] the magistrate judge was not required to immediately cease further participation in the proceedings. *See 28 U.S.C. § 144*.

Fifth, the district court properly took no action upon Swartz's "attorney misconduct grievances" because Swartz did not follow the proper procedure when filing his grievances. *See Rule 83.7, Local Rules of the U.S. District Court, N.D. of Ohio*. The district court also

properly denied Swartz's motion to initiate disciplinary action against attorney Mattimoe as it was insufficiently supported so as to justify such drastic action by the district court. Sixth, Swartz's motion to take judicial notice was properly denied by the district court. *See Fed. R. Evid. 201* Swartz's motion for judicial notice requests the district court to take judicial notice of various procedural rules, laws, and provisions of the Code of Judicial Conduct and does not involve adjudicative facts, as contemplated by *Fed. R. Evid. 201*.

Accordingly, the request for oral argument is denied and the district court's judgment is affirmed. *Rule 34(j)(2)(C), Rules of the Sixth Circuit*.