ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE EX REL. GERALD O.E. NICKOLI AND ROBIN L.B. NICKOLI, et al.,	:	
Relators,	:	Case No. 2009-0026
v.	:	Original Action in Mandamus
ERIE METROPARKS, et al.,	:	
Respondents.	:	

RELATORS' MOTION FOR RECONSIDERATION

Bruce L. Ingram (0018008)
(Counsel of Record)
Joseph R. Miller (0068463)
Thomas H. Fusonic (0074201)
Vorys, Sater, Seymour and Pease LLP
52 East Gay Street
P.O. Box 1008
Columbus, OH 43216-1008
Tel: (614) 464-6480
Fax: (614) 719-4775
blingram@vorys.com
jrmiller@vorys.com
thfusonic@vorys.com

Attorneys for Relators

Thomas A. Young (0023070)
(Counsel of Record)
Porter, Wright, Morris & Arthur LLP
41 South High Street
Columbus, Ohio 43215
Tel.: (614) 227-2137
Fax: (614) 227-2100
tyoung@porterwright.com

John D. Latchney (0046539)
Tomino & Latchney, LPA
803 East Washington Street, Suite 200
Medina, Ohio 44256
Tel.: (330) 723-4656
Fax: (330) 723-5445
jlatchney@brightdsl.net

Attorneys for Respondents Erie MetroParks and Board of Park Commissioners, Erie MetroParks

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Pursuant to Supreme Court Rule of Practice XI, Section 2, Relators respectfully move this Court for reconsideration of its February 25, 2010 decision ("Decision") to deny their alternative writ. The grounds for this Motion are set forth in detail in the accompanying Memorandum in Support. At its crux, however, Relators seek this Court to reconsider its holding that the Relators' takings claims are time-barred, as that holding overrules over 125-years of this Court's precedent. Relators respectfully submit that they believe this Court did not fully consider the impact its decision would have on the limitations period and tolling of that period for all invasion of real property claims subject to Ohio Revised Code § 2305.09. In addition, the Relators submit that this Court did not fully consider the application of the federal continuing violations doctrine to toll the Relators' takings claims. Finally, Relators Gerald Nickoli and Robin Nickoli submit that in finding that their takings claim was time-barred because the trail opened to the public in 2003, the Court overlooked their affidavits, which indicated that as to their property, Respondents (collectively "Erie MetroParks" or "MetroParks") have never opened the trail on a portion of the Nickolis' property over which they exercise dominion and control. Accordingly, the Relators respectfully request that the Court reconsider its decision and permit Relators' takings claims to be decided on their merit.

Respectfully submitted,

Bruce L. Ingram (0018008)*(Counsel of Record)*
Joseph R. Miller (0068463)
Thomas H. Fusonie (0074201)
Vorys, Sater, Seymour and Pease LLP
52 East Gay Street, P.O. Box 1008
Columbus, OH 43216-1008
Tel: (614) 464-6480; Fax: (614) 719-4775
Attorneys for Relators

MEMORANDUM IN SUPPORT OF MOTION FOR RECONSIDERATION

Introduction

In *Sexton v. City of Mason* (2008), 117 Ohio St.3d 275, 279-80, 2008-Ohio-858, 883 N.E.2d 1013, this Court affirmed that for invasions of real property, R.C. § 2305.09's four-year limitation period remains tolled through the 21-year prescriptive period when the invasion consists of a permanent structure or when the tortfeasor retains the ability to rectify the situation through its ongoing control of the situation or property. In doing so, this Court merely applied precedent it established more than one hundred and twenty-five years ago:

> This court determined that the trespass was a continuing one and that the statute of limitations had not expired. [*Valley Ry. Co. v. Frantz* (1885), 43 Ohio St. 626, 4 N.E. 88] at 628.... This court first discussed an ordinary trespass, which typically occurs when a defendant enters another person's land:
>
> 'When a man commits an act of trespass upon another's land, and thereby injures such other at once and to the full extent that such act will ever injure him, he is liable at once for this one act and all its effects; and the time of the statute of limitations runs from the time of such act of trespass. To this extent only is the case of *Kansas Pacific Railway v. Mihlman* [(1876)], 17 Kan. 224 [1876 WL 947], cited here, as the court found that the trespass upon complainant's land was a single completed act. And the same is true of the case of *Williams v. Pomeroy Coal Company*, 37 Ohio St. 583 [1882 WL 23].' Id. at 625-626, 4 N.E. 88.
>
> This court then discussed how a defendant's completed act undertaken on another person's land can sometimes be a continuing trespass:
>
> **'But where the act of trespass is a permanent trespass, as the erection of buttresses to support a turnpike road (as in *Holmes v. Wilson, 10 Ad. & El. 503*) or the erection and maintenance of a permanent building (as in *Thompson v. Gibson, 7 M. & W. 456*), it may be said to be a continuing trespass or nuisance for which a cause of action accrues, and may be brought at any time until, by adverse use or possession, the trespasser has enforced an adverse claim that has ripened, and has become a presumptive right or a valid estate.'** Id. at 626, 4 N.E. 88.

Sexton, at ¶¶ 29-33 (emphasis added).

With its February 25, 2010 Decision ("Decision"), the Court has overruled the above over one hundred and twenty-five years of precedent – that the erection of a permanent structure, such as a recreational trail, including its stone markers, permanent park benches, turnarounds and permanent signage,[1] constitutes a continuing invasion of property for which a cause of action may be brought at any time until the prescriptive 21-year period has run.

As a result, the Relators have been deprived of just compensation – landowners who relied upon the Court's one hundred and twenty-five years of precedent. And with due respect to the Court, it has denied the landowners just compensation despite that the Fifth Amendment expresses a "principle of fairness and not a technical rule of procedure enshrining old or new niceties regarding 'causes of action'-when they are born, whether they proliferate, and when they die[,]" *U.S. v. Dickinson* (1947), 331 U.S. 745, 749, and despite the fact the United States Constitution is "intended to preserve practical and substantial rights, not to maintain theories." *Davis v. Mills* (1904), 194 U. S. 451, 457.

Alternatively, this Court has overruled another 125-year old precedent regarding the tolling of bringing claims related to the invasion of real property during the period of ongoing unlawful or tortious conduct by the invading party that, if stopped, will rectify the situation. *Sexton* again provides the most recent articulation of this precedent. After 2003, MetroParks did not stop its unlawful invasion of the Relators' property. It continued to occupy, control and exercise dominion over the Relators' property without acknowledging Relators' property rights and right to just compensation. It did not simply open the trail in 2003 and then abandon any control over it. Nor did its opening of the trail in 2003 mean that its subsequent use and control

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[1] Relators set forth in their affidavits filed at Tabs 1 through 19 to their Presentation of Evidence the construction of permanent structures on the recreational trail placed there by MetroParks. Those affidavits also described the continued conduct by MetroParks evidencing its ongoing control of the Relators' property.

of the property all of a sudden became lawful. Yet, at any point, it can rectify the situation by abandoning its control and possession of the Relators' property or initiating appropriation actions to compensate the Relators for taking their property. In finding that MetroParks' continued and ongoing actions in exercising control over the Relators' property constitutes merely the effects of the single act of opening the trail in 2003, the Court overruled *Sexton* and its predecessors.

At a minimum, even if the Court will on reconsideration affirm its overruling of one hundred and twenty-five years of precedent, fairness, especially when dealing with constitutional rights, should permit the Relators' claims to proceed to a ruling on their merits; not have their claims cast aside because of a sudden reversal of precedent.

Finally, as to Relators Gerald O.E. Nickoli and Robin L.B. Nickoli, the Court should reconsider its decision that their claim is barred because the trail opened to the public in 2003. A portion of their property occupied and controlled by Erie MetroParks has to this date never been open to the public. Instead, Erie MetroParks placed a structure, a barricade, on this portion of the Nickolis' property and deprived them of direct access to their river bottom land. *See* Relators' Presentation of Evidence, Tab 1, Affidavit of Gerald O.E. Nickoli, at ¶¶ 6-7 and Tab 2, Affidavit of Robin L.B. Nickoli, at ¶¶ 6-7. For this additional reason, the Nickolis request that their claim proceed to its merits.

The Relators respectfully request that this Court reconsider its decision and proceed to rule on the merits of Relators' claims that their property has been taken by Respondent without just compensation.

Argument

I. Relators Timely Filed Their Complaint Under State Law.

A. The Ongoing Existence Of The Trail And/Or The Possession, Control and Dominion Over The Trail Is A Continuous Taking Under State Law Tolling R.C. § 2305.09's Limitations Period.

1. A Physical Taking Can Be Continuous So As To Toll The Limitations Period.

a. The Construction and Continued Existence Of The Trail Tolls The Limitations Period.

As established in the introduction, under century-old case law, the Relators' takings claims should not be considered time-barred. There is no distinction between the buttresses or the erection of a permanent building and MetroParks' construction of a recreational trail and its appurtenances, stone markers, turnabouts, permanent signs in the ground, permanent park benches, and other permanent trail structures.

By treating takings claims as akin to a tort against real property, the General Assembly has unmistakably recognized that takings claims for statute of limitations purposes are subject to tolling pursuant to established concepts in tort law of trespass and nuisance. *Sexton v. City of Mason* (2008), 117 Ohio St.3d 275, 279-80, 2008-Ohio-858, 883 N.E.2d 1013 (citing and quoting extensively *Valley Ry. Co. v. Frantz* (1885), 43 Ohio St. 626, 4 N.E. 88). Where trespasses and nuisances are continuing, the limitations period (now codified in R.C. § 2305.09) is tolled until the tortious conduct ceases. Id. at 275, 280, 284. In *Sexton*, this Court held that continuing trespasses "occur [] when there is **some continuing or ongoing allegedly tortious activity attributable to the defendant.**" Id. at 282 (emphasis added). Relying on *Valley Ry.* and appellate decisions, this Court reasoned that an important factor in determining if tortious activity is ongoing is whether the tortfeasor retains control over the property. Id. at 280-82. The

Court also cited to *State v. Swartz* (2000), 88 Ohio St.3d 131, 723 N.E.2d 1084, a decision which held that for criminal prosecution for unlawfully obstructing or impeding a passage of a stream, as long as the nuisance "...remains, and is within the control of the actor, the nuisance constitutes a continuing course of conduct tolling the limitations period." Id. at 282-83. These holdings apply with even greater force to a structure controlled by the tortfeasor or condemnor on the actual property affected.

Sexton affirmed that the construction of a structure on a property constitutes a continuous trespass for purposes of tolling the limitations period. Consequently, this Court by finding that the construction of the trail and additional trail structures did not toll the limitations period until the prescriptive period lapsed overruled *Sexton* and its predecessor cases. Because of the drastic overruling of precedent, this Court should reconsider its Decision.

b. The Ongoing Unlawful Conduct Of MetroParks Tolls The Limitations Period.

Further, even if the construction of the trail and trail structures alone does not toll the limitations period until the prescriptive period has expired, the ongoing unlawful conduct by MetroParks on the trail should under the same 125-year old precedent. Just because the trail opened in 2003 cannot mean that MetroParks' ongoing use and control over the Relators' property do not constitute unlawful acts. Examining both *Valley Ry.* and *Swartz* reveals that with its Decision in finding that MetroParks' conduct after opening the trail constitutes merely ill effects of its opening of the trail, this Court has overruled those cases.

In *Valley Ry.*, a railway constructed a dam and channel on its own land that diverted the stream's natural channel. 43 Ohio St. at 625. In doing so, it turned the course and current of the river against and over the plaintiff's property. Id. The railway constructed the dam and channel in 1874, but the plaintiff did not commence an action for damages until 1881. Id. The railway

asserted that the action was time-barred as it was filed more than four years after the railway had changed the stream so that it flowed against the plaintiff's land. Id. This Court held that the action was not time-barred. Id. at 628. In doing so, it concluded that when an owner,

> puts in action or directs a force against or upon, or that affects, another's land . . . and [if] such force if so continued, is continued by the act of such owner and actor...it may be regarded as a continuing trespass or nuisance; and each additional damage thereby caused is caused by him, and is an additional cause of action; and, until such continued trespass or nuisance by adverse use ripens into and becomes a presumptive right and estate in the former, the latter may bring his action.

Id. at 627.

The Court then applied this rule of law to the facts and found that the railway's conduct as alleged in the petition stated a cause of action for a continuous trespass or nuisance. Id. at 628. It emphasized that after the railway company diverted the stream and cut the new channel, it continued to own the land upon which it diverted the stream and continued to control and direct the stream. Id. Notably, the Court also imposed a time limitation on the continuing violation claim – the prescriptive period of 21 years. Id. at 626. This made sense because at that point trespass or nuisance becomes a presumptive property right in the affected property.

Similarly, in *Swartz*, the Court held that an applicable statute of limitations for unlawfully obstructing or impeding the passage of a navigable waterway was tolled so long as the criminal actor remained in control of the nuisance causing the obstruction. 88 Ohio St.3d at 134-35. The defendant in *Swartz* in 1992 had erected a concrete bridge and twenty-four inch culvert over a stream that ran across his property. Id. at 131. The bridge and culvert caught debris during heavy downpours that caused repeated flooding of a neighbor's property. Id. at 131-32. The continued existence of the bridge and culvert "created a recurring condition of flooding." Id. at 135. During the period of recurring flooding, defendant "allegedly continued to maintain control

over the bridge and culvert to cause damage to [the neighbor's] property." Id. Based on the complaint of the neighbor, in 1998, the State charged the defendant for obstructing a navigable waterway. Id. at 132. The defendant moved to dismiss the complaint as barred by a two-year statute of limitations that applied to criminal obstruction of navigable waterways. Id. The trial court granted the motion to dismiss and the State appealed. Id.

On appeal, the State acknowledged the two-year limitations period, but argued that a new offense occurred each time the neighbor's property is flooded. Id. at 133. The court of appeals affirmed, holding that the tortious act was completed when he constructed the bridge and culvert in 1992 or in 1995 when the neighbor tried to find out why the water was flooding his property and contacted the county engineer. Id. This Court disagreed. Id. Relying on *Valley Ry.*, the Court found that the defendant's conduct constituted a continuing course of conduct that tolled the limitations period. Id. at 133-35. As in *Valley Ry.*, the Court emphasized that the defendant was alleged to have maintained control over the bridge and culvert and allegedly continued to allow the bridge and culvert to cause the flooding of his neighbor's property. Id. at 134-35.

In addition, the Court has overruled *Sexton* as to the tolling of the limitations period when the tortfeasor has the ability to rectify the situation. In *Sexton*, the Court made clear that a tortfeasor's ongoing conduct or retention of control to rectify the situation is the critical factor in determining whether R.C. § 2305.09's limitations period should be tolled. The rationale for tolling the limitations period for a continuous trespass and nuisance claim, that the defendant maintains the ability to "rectify the situation" applies equally to physical takings. *See Sexton*, 2008-Ohio-858, at n.2. The government could acknowledge its taking and pay just compensation to rectify its physical invasion. Likewise, it could take steps to end the physical invasion. Considering these possibilities, consistent with *Sexton*, the limitations period should be

tolled for a physical takings claim where the taking is ongoing and the government can still rectify the situation. Indeed, each day the public entity exerts control over the property without paying just compensation should be "an additional cause of action" against it. *Cf.*, *Valley Ry.*, 43 Ohio St. at 88; *Swartz*, 88 Ohio St.3d at 134-35 ("'Where one creates a nuisance, and permits it to remain, so long as it remains it is treated as a continuing wrong, and giving rise, over and over again, to causes of action.'") (quoting *Kansas Pacific Ry. Co. v. Mihlman* (1876), 17 Kan. 224, 231) .

However, with the Court's Decision, *Sexton*'s rule of law has been cast aside. No longer does the tortfeasor's control or ability to rectify the situation of a physical invasion of real property determine whether R.C. § 2305.09's statute of limitations has tolled. Instead, with the Decision, it appears that the opening of a recreational trail, or the completion of constructing a building, bridge or culvert is the single act that starts the running of the statute of limitations -- exactly, the opposite conclusion of *Sexton*, *Valley Ry.*, and *Swartz*. Those decisions make clear that the building of a culvert, bridge, etc. that causes continuous harm that can be rectified by the tortfeasor tolls the statute of limitations. With its Decision, those cases have now been overruled by this Court. The Court could not have intended to overrule 125-years of precedent.

In the alternative, with its decision, the Court has created an untenable distinction between off-site continuing course of conduct that is continuous (21 year limitations period) and on-site continuing course of conduct, dominion and control (four year limitations period). That distinction is constitutionally infirm, creating unreasonable distinctions between the importance of the constitutional right of just compensation of some landowners (those affected

by off-site conduct causing a taking) and that right of others (those affected by on-site conduct causing a taking). This Court should reconsider creating such a distinction.[2]

Finally, this Court's decision cannot be read to distinguish the tolling of R.C. § 2305.09's limitations period for trespass versus takings. Given that R.C. § 2305.09 applies to both trespass and takings, there is no distinction between those claims for purposes of when the limitations period is tolled. The lack of such a distinction confirms that the Decision has overruled *Sexton* and its predecessor decisions.

In fact, creating a distinction between trespass and takings claims that relegates takings claims to second-class property rights is constitutionally infirm. Just compensation is an "inviolable right" and constitutional mandate. *Norwood v. Horney* (2006), 110 Ohio St. 3d 353, 2006-Ohio-3799, at ¶ 68. The right to obtain it should not be second-rate as compared to a landowner's right to damages for property injuries caused by a private actor. Tolling the limitations period for mandamus actions related to physical takings where the government retains control of the property or the ability to stop the take ensures that the right to just compensation is not relegated to a second-class right. Indeed, doing so would create a situation where an owner subject to a private citizen constructing and operating a bike path for private use on the owner's

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[2] A finding that Relators' takings claims are continuous and toll the limitations period does not at all eviscerate R.C. § 2305.09(E) for physical takings. Takings can be temporary, and, thus, the control by the government of the situation is brief. An example is a takings for a temporary easement near a highway for a temporary construction workspace as the Ohio Department of Transportation ("ODOT") improves the highway. Once the improvements are complete, ODOT relinquishes control of the site and the taking ceases. If ODOT did not compensate the landowner for the temporary taking, the landowner would have four years from the date ODOT relinquished control of the site to initiate a mandamus action for just compensation. Another example is when a contractor for ODOT operates and/or parks heavy construction equipment on portions of landowners' parking lots during roadway improvement work that impairs access and causes substantial damage to the lots, as the contractor did in *State ex rel. Blank v. Beasley* (2009), 121 Ohio St.3d 301, 2009-Ohio-835, 903 N.E.2d 1196, ¶¶ 2, 31. The landowners would have only four years from the date the contractor removed the equipment from the property to obtain compensation.

property has twenty-years from the date the bike path opened to bring a trespass action, but the Relators, having their property taken without compensation for a recreational trail, had only four years to bring their mandamus action.

Further, under the Court's Decision, Erie MetroParks can expand the scope of its take within the area seized with impunity. For example, it could build a snack bar or gazebo on property it has already seized from the Relators for its recreational trail and the Relators have no recourse because this Court has determined that their takings claims emanate from a single event – the opening of the trail in 2003. Likewise, it could turn the area seized on one of the Relators' property into a parking lot for the trail. The Decision indicates that these acts would be merely the effects of the single act of opening the trail in 2003. Whereas, in stark contrast, similar conduct by a trespasser would toll the limitations period for bringing a trespass action. Thus, for these reasons any attempt at distinction between trespass and takings claims for determining the tolling of R.C. § 2305.09's limitations period cannot be one the Court intended to create, but with its Decision, it has. For this additional reason, the Relators respectfully request the Court reconsider its decision.

B. The Relators' Federal Constitutional Right To Just Compensation Has Been Impermissibly Denied By An Error In Applying The Federal Continuous Violation Doctrine.

In addition, Relators believe the Court did not fully consider the federal continuous violations doctrine. That doctrine is "rooted in general principles of common law and is independent of any specific action." *Hensley v. City of Columbus* (C.A.6, 2009), 557 F.3d 693, 697. The Sixth Circuit has found continuous violations to exist when: (1) the defendants engage in continuing wrongful conduct; (2) the injury to the plaintiffs accrues continuously; and (3) had the defendants at any time ceased their wrongful conduct, further injury would have been

avoided. Id. In fact, the United States Court of Appeals for the Sixth Circuit has ruled that the continuing violations doctrine can apply to physical takings. *McNamara v. City of Rittman* (C.A.6, 2007), 473 F.3d 633, 639-40; *see also Hensley*, 557 F.3d at 697-98 (recognizing that *McNamara* found a continuous violation for a physical takings claim).

In *McNamara*, the Sixth Circuit determined that the initial drilling of multiple wells and continuous operation of those wells by the City constituted a continuous violation because if the operations were stopped the plaintiffs' aquifer would be replenished. Id. at 635, 639-40. Finding a continuous violation, the Sixth Circuit affirmed the dismissal of the claim solely because the landowner had not first pursued Ohio's mandamus proceedings. Id. at 639-40. The Sixth Circuit's reasoning for finding a continuous violation, that the government maintained the control to rectify the situation, i.e., by operating or stopping the operation of the wells, is similar to this Court's analysis for continuous trespasses and nuisances.

Under the Sixth Circuit's continuous violations holdings and standard, this Court has denied the Relators' federal Constitutional right to just compensation. This Court's reliance on *Ohio Midland, Inc. v. Ohio Dept. of Transp.* (C.A. 6 2008), 286 Fed.Appx. 905 and *Broom v. Strickland* (C.A. 6 2009), 579 F.3d 553, 555 is misplaced. The Sixth Circuit decided *Hensley* after the *Ohio Midland, Inc.* decision. *Hensley* makes a clear distinction between ongoing conduct, i.e., the continued operation of wells and continuing control to rectify the situation versus a one-time demolition of a ramp and the refusal to rebuild it by the Ohio Department of Transportation as at issue in *Ohio Midland* and Ohio's lethal injection protocols at issue in *Broom*, which the plaintiff complained were a continuing violation every day the protocols were in place. How is the ongoing exercise of control and dominion over property, as set forth in the affidavits of Relators the same as a single action of destroying a ramp and the refusal to rebuild it

or the application of lethal injection protocols? Likewise, how can the ongoing exercise of control and dominion over property be the same as a single action of discrimination as in two other cases cited in the Court's Decision, *Ward v. Caulk* (C.A. 9 1981), 650 F.2d 1144, 1147 and *Tennebaum v. Caldera* (C.A. 6 2002), 45 Fed.Appx. 416, 419-420? In none of the cases this Court cites to support denying the Relators' their constitutional right to just compensation did the plaintiffs establish ongoing and new acts of unlawful conduct. Simply because MetroParks opened the trail in 2003 does not mean that its subsequent use of the trail became lawful. Indeed, this Court in 2007, in *Coles v. Granville* (2007), 116 Ohio St.3d 231, 2007-Ohio-6057, held that not only MetroParks' construction, but its "use" of the relators' private property for a recreational trail constituted a taking. 2007-Ohio-6057, ¶¶ 49, 58.

Here, the evidence establishes the Relators met the federal standard as set forth in *Hensley*. Erie MetroParks has not paid them just compensation yet it occupies and controls their property. The federal Constitution makes that unlawful, if not, also the Ohio Constitution. The Relators continue to be injured by the conduct, as they continue to be deprived of control and possession of their property and continue to be denied just compensation for the taking of their property. Finally, if MetroParks abandoned their taking, further injury would stop. The Relators would have control and possession of their property back. Equally, if MetroParks compensated the Relators justly for the taking, the injury would stop.

C. The Nickolis' Claim Is Not Time-Barred.

With its Decision, this Court determined that the Relators' takings claims had to be brought four years after the recreational trail was opened to the public in 2003. As to the Nickolis, Erie MetroParks has never opened the trail on a portion of their property MetroParks has seized and occupied. Instead, it has barricaded that portion of the Nickolis' property,

depriving them of direct access to their river bottom land. Erie MetroParks never refuted the Nickolis' affidavit testimony on this point. Consequently, the events therefore comprising the taking of this portion of the Nickolis' property have not been completed as MetroParks has yet to complete the construction of the trail on the Nickolis' property, and thus, their takings claims should not be time-barred.

Conclusion

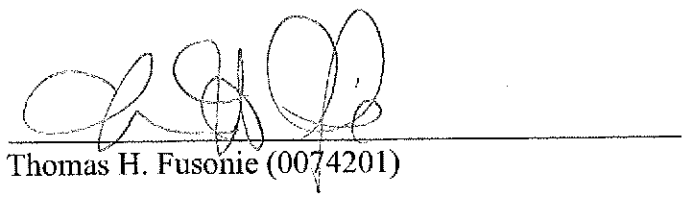
Just compensation is a fundamental and "inviolable right", *Norwood*, 110 Ohio St. 3d 353 at ¶ 68. To preserve that right, this Court should err on the side of the landowners and reconsider its decision that the Relators' claims accrued by 2003 and instead, permit their claims to be determined on the merits.

Respectfully submitted,

Bruce L. Ingram (0018008)*(Counsel of Record)*
Joseph R. Miller (0068463)
Thomas H. Fusonie (0074201)
Vorys, Sater, Seymour and Pease LLP
52 East Gay Street, P.O. Box 1008
Columbus, OH 43216-1008
Tel: (614) 464-6480; Fax: (614) 719-4775
Attorneys for Relators

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing was served this 4th day of March, 2010 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)