

IN THE SUPREME COURT OF OHIO

RICHARD ROHRS, *et al.*,

Appellants,

v.

RANDOLPH GERMANN, *et al.*,

Appellees.

CASE NO. 2013-1196

On Appeal from Henry  
County Court of Appeals  
Third Appellate District

Court of Appeals  
Case No. 7-12-21

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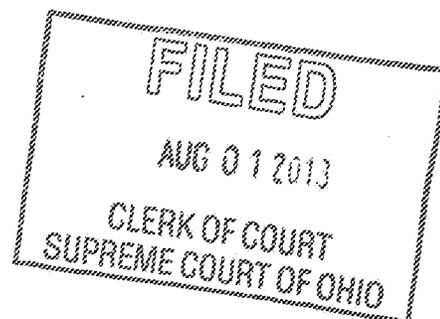
MEMORANDUM IN SUPPORT OF JURISDICTION BY AMICI CURIAE  
OHIO FARM BUREAU FEDERATION, INC. AND HENRY COUNTY  
FARM BUREAU, INC. ON BEHALF OF APPELLANTS

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## MEMORANDUM

### **STATEMENT OF INTEREST AND EXPLANATION OF WHY THIS CASE IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST AND INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION**

When the Ohio Farm Bureau Federation considers filing an amicus curiae brief in a case, the dispute must meet strict criteria. First, the subject matter of the case must affect a significant number of the 214,000 members of the Ohio Farm Bureau Federation. Second, the outcome of the case must have a statewide impact. This case meets both of the above criteria.

**A. The Ohio Farm Bureau Federation and Henry County Farm Bureau members have a significant interest in the protection of private property rights.**

In the opinion of the Ohio Farm Bureau Federation and its Henry County members, this case is one of great public interest with a high level of general interest among its membership. The Ohio Farm Bureau Federation is Ohio's largest general farm organization, with a core purpose of working together for Ohio's farmers and a mission of creating a partnership between farmers and consumers. Ohio Farm Bureau is a federation of 87 county farm bureau organizations, representing all 88 counties in Ohio. Henry County Farm Bureau is one of those member-counties which represents nearly 1,000 Henry County families, among the Ohio Farm Bureau's aforementioned total of 214,000 member families.

Ohio Farm Bureau members own and rent land throughout the state and use it to produce virtually every kind of agricultural commodity found in this area of the country. Ohio's number one industry remains food and agriculture, and Ohio Farm Bureau supports the farmers of all types and sizes that annually contribute more than \$105 billion to Ohio's economy. The Cleveland Plain Dealer *PolitiFact Ohio, John Kasich says agriculture is the "strongest industry in Ohio"* (2013) <http://www.politifact.com/ohio/statements/2012/dec/12/john-kasich/john-kasich-says-agriculture-strongest-industry-oh/> (last accessed July 30, 2012). The Ohio Farm

Bureau Federation is strongly committed to protecting the private property rights preserved by the Ohio and U.S. Constitutions, as it has done for more than 90 years.

Each year, the Ohio Farm Bureau Federation receives numerous complaints from its members about crop damage caused by road work and other public projects. Add to this the significant number of complaints received regarding drainage issues that impede a farmer's ability to produce a crop. While no one denies the need for road maintenance and public works, and Ohio Farm Bureau members especially support the provision of well-maintained roadways, when such public projects result in the taking of land or the loss of one's use and enjoyment of his land, or cause damage to crops or other personal property, the owners of such property interests are entitled to fair and just compensation under the U.S. and Ohio Constitutions. Ohio Farm Bureau member-developed policy supports that government entities compensate farmers and other landowners for property taken, as well as provide compensation for any rights of way that are impeded, inconveniences suffered, and damages that may occur to them and nearby property owners as a result of the government's taking of land. Ohio Farm Bureau Federation, *2012 State Policies*, Policy 411: Eminent Domain, at 52, Lines 8-10 (2013) available at <http://ofbf.org/policy-and-politics/policy-development>.

**B. Today's farmers rely heavily on leased land to grow crops and it is imperative that their property interests in leased land and crops be recognized when the land or crops are taken for public use, and that they be afforded standing to protect their interests.**

The economics of farming are far different today than even twenty or thirty years ago. Only a few decades ago the typical farmer would have owned most, or all, of the land he farmed. That is not the situation today. Since 1990, the value of farmland has skyrocketed, increasing

nearly 400% in just the last twenty years.<sup>1</sup> See United States Department of Agriculture National Agricultural Statistics Service, *Agricultural Land Values and Cash Rent*, (October 1, 1997), [http://usda01.library.cornell.edu/usda/nass/AgriLandVa//1990s/1997/AgriLandVa-10-01-1997\\_Land%20Values\\_Cash%20Rents.txt](http://usda01.library.cornell.edu/usda/nass/AgriLandVa//1990s/1997/AgriLandVa-10-01-1997_Land%20Values_Cash%20Rents.txt) (accessed July 25, 2013), see also United States Department of Agriculture National Agricultural Statistics Service, *Agricultural Land Values 2012 Summary*, 8, (August 2012) <http://usda01.library.cornell.edu/usda/current/AgriLandVa/AgriLandVa-08-03-2012.pdf> (accessed July 25, 2013). Just since 2009, the value of Ohio cropland alone has increased 28%.<sup>2</sup> See USDA, *Agricultural Land Values 2012 Summary*. This increase in the value of agricultural land has created a significant barrier for young farmers wishing to enter the industry.

Even well established farmers find it very difficult to expand their farming operation by purchasing land. Increasingly, agricultural land is simply not available for purchase. A study by the United States Department of Agriculture (USDA) Economic Research Service estimates that only 0.5% of the nation's farmland is sold in any given year, usually only due to retirement or death of a farmer. Nickerson, Cynthia, et al., United States Department of Agriculture, *Economic Information Bulletin Number 92: Trends in U.S. Farmland Values and Ownership* 9 (February 2012), available at [http://www.ers.usda.gov/media/377487/eib92\\_2\\_.pdf](http://www.ers.usda.gov/media/377487/eib92_2_.pdf) (accessed July 25, 2013). The scarcity of affordable agricultural land makes leasing arrangements the only practical alternative for a farmer wishing to enter the industry or expand an existing operation. The USDA Economic Research Service estimates that nationwide nearly 40% of farmland is rented or

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<sup>1</sup> Ohio farmland value in 1990 was reported by the National Agricultural Statistics Service as \$1,273/acre, while the same metric was reported in 2012 to be \$5,000/acre.

<sup>2</sup> In 2009, Ohio cropland was valued at \$3,900/acre. In 2012, Ohio cropland was valued at \$5,000/acre.

leased. *Id.* at 29-30. In Ohio, more than 6.3 million acres of Ohio's nearly 14 million acres of farmland were rented according to the 2007 Census of Agriculture, making an estimated 45% of all farmed land in Ohio rented from another owner. United States Department of Agriculture, *2007 Census of Agriculture: Ag Land Rented from Others, in Farms – Acres* (2007) <http://quickstats.nass.usda.gov/results/21F8D34A-9EAB-318E-91BF-CE64E3E14333> (accessed July 25, 2013), United States Department of Agriculture National Agricultural Statistics Service, *Farms, Land in Farms, and Livestock Operations 2012 Summary*, 9 (February 2013) <http://usda01.library.cornell.edu/usda/current/FarmLandIn/FarmLandIn-02-19-2013.pdf> (accessed July 29, 2013). As the use of leased land for farming increases, the protection of the farmer's interest in not only the leased land, but the crop growing on that leased land, becomes a significant concern for our members.

It is not an exaggeration to say that a crop farmer's entire livelihood is tied up in his crops and his land, whether that land be owned or leased. Moreover, there is no group of property owners more affected by road construction and road projects than farmers. In Ohio, farmland lies adjacent to thousands of miles of rural roads that are improved and maintained by every type of political subdivision, be it state, county, township or municipal authorities. As these political subdivisions serve the public welfare by repairing and maintaining the roads of the State, it is inevitable that adjacent land, and the farm crops growing on that land, will be affected. Where land and crops are damaged in the course of a public improvement, including a road improvement project, the fair and sensible protection of private property is an absolute necessity. The same is true when a landowner or leaseholder is deprived of the use and enjoyment of his owned or leased land due to a public improvement, including a road improvement project; the fair and sensible protection of private property is an absolute necessity.

In the instant case, the Third District Court of Appeals' decision effectively denies Appellants any meaningful opportunity to be compensated for the loss of Appellants' use of leased land and the damage to Appellants' crop, which were the direct, natural, and probable results of the county's actions. Any ruling by a court of appeals that undermines the cherished and fundamental protection of private property that is embodied in the Ohio Constitution, Article I, Section 19 and the Fifth Amendment to the U.S. Constitution should be carefully scrutinized by the Ohio Supreme Court. The Third District's decision in the instant appeal is just such a case.

### STATEMENT OF THE CASE AND FACTS

For purposes of this memorandum, the Ohio Farm Bureau Federation and the Henry County Farm Bureau adopt the Statement of the Case and Facts as set forth by the Appellants in their Memorandum in Support of Jurisdiction and incorporate the same by this reference as if fully rewritten herein.

### ARGUMENT

**Proposition of Law No. 1: A leaseholder of real property has standing to bring an action for inverse condemnation when a public improvement project causes flood waters to invade his leasehold and deprive him of the use and enjoyment of his leasehold interest.**

It has long been a fundamental principle in real property law that a leasehold interest is a property right in real property. *See Brenner v. Spiegle*, 116 Ohio St. 631, 634, 157 N.E. 491 (1927) ("That the execution of a lease constitutes a conveyance of an interest in real property is the almost universal judicial holding."); *see also* R.C. 1335.04 and 5301.01. If that property right is taken by the government for public use, the holder of the property right is entitled to compensation under the Fifth Amendment to the U.S. Constitution and the Ohio Constitution, Article I, Section 19. *See Alamo Land & Cattle Co., Inc. v. Arizona*, 424 U.S. 295, 303, 9 S.Ct.

910 (1976) (“It has long been established that the holder of an unexpired leasehold interest in land is entitled, under the Fifth Amendment, to just compensation for the value of that interest when it is taken upon condemnation by the United States.”); *Carroll Weir Funeral Home, Inc. v. Miller, In re Appropriation of Easement for Highway Purposes*, 2 Ohio St.2d 189, 191, 207 N.E.2d 747 (1965) (“A lessee has a property right in the leasehold and, in the absence of an agreement to the contrary, is entitled to compensation if it is appropriated by eminent domain.”).

Further, under the statutory scheme which controls appropriations in the state of Ohio, a leaseholder is clearly recognized as an “owner” which should be compensated when the government appropriates property using the statutory process. R.C. 163.01(E).<sup>3</sup> This Court has interpreted the language “any interest” to include those interests held by leaseholders, and determined that these interests remain intact even if the underlying landowner does not choose to challenge an appropriation or takings. *See State ex. rel. Horowitz v. Cuyahoga Court of Common Pleas, Probate Division*, 65 Ohio St.3d 323, 326-27; 603 N.E.2d 1005 (1992). This Court has also found that the General Assembly has afforded standing to a leaseholder in an appropriation proceeding independent of the landlord’s interest. *Id.* at 327.

Because a leaseholder’s interest is unmistakably recognized as a property interest entitled to protection under the Fifth Amendment to the U.S. Constitution and Ohio’s own statutory appropriation procedures, and this Court has previously held that leaseholders have standing in appropriation actions, there should be no question that such leaseholder has standing to bring an inverse condemnation action to protect his property interests, whether such claim is based on the Fifth Amendment to the U.S. Constitution or the Ohio Constitution, Article I, Section 19. Any

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<sup>3</sup> “‘Owner’ means any individual, partnership, association or corporation having *any* estate, title, or interest in any real property that is authorized to be appropriated by the agency in question, unless the context otherwise requires.” (emphasis added) R.C. 163.01(E).

other result would be illogical and would deprive citizens of these important constitutional protections.

By not allowing for a claim of taking through the writ of mandamus procedure by a leaseholder, the Third District's decision results in a contradiction whereby the government must consider the leaseholder's interest if going through the Chapter 163 appropriation process before the taking occurs, but can go scot-free without any concern for the effect of its actions on a leaseholder's interest in real property if no appropriation proceedings are self-initiated. In other words, if the government chooses to initiate an appropriation action on its own, the leaseholder's property interest will be recognized under Chapter 163 of the Ohio Revised Code and the leaseholder will be afforded standing to participate in the proceedings. If however the government chooses not to initiate an appropriation action and the leaseholder is forced to file a petition for a writ of mandamus to compel the government to initiate that appropriation action, that leaseholder would have no standing under the Third District's decision. Such a result cannot stand.

In the instant case, the county's actions caused the flooding of Appellants' leased land, which deprived them of the use and enjoyment of their property interest in that land. This physical taking of Appellants' property interest is compensable, and Appellants should have standing to pursue a writ of mandamus seeking compensation. The Ohio Farm Bureau respectfully submits that Appellants are guaranteed this right to fair and just compensation by the U.S. and Ohio Constitutions.

For these reasons, the Ohio Farm Bureau Federation urges the Court to accept this case for review and to eliminate the uncertainty created by the lower courts concerning a leaseholder's standing to bring an action for inverse condemnation under the Fifth Amendment

to the U.S. Constitution and the Ohio Constitution, Article I, Section 19 when a real property interest is invaded by government actors.

**Proposition of Law No. 2: A grower/owner of agricultural crops has standing to bring an action for inverse condemnation when a public improvement project causes flood waters to invade his field and damage or destroy his crop, thus depriving him of a private personal property interest.**

The Ohio Supreme Court has previously found that the Ohio Constitution, Article I, Section 19 makes no distinction between real and personal property. *Lucas v. Carney*, 167 Ohio St. 416, 424, 149 N.E. 2d 238, 244 (1958). Instead, the plain language provides that “[p]rivate property shall be held inviolate . . .” giving assurance that all property, both real and personal, shall not be taken by the government without compensation. Ohio Constitution, Article I, Section 19. In *Lucas*, after the county created new drainage improvements and built a county garage, significant flooding occurred on the property of Milton and Clara Lucas. *Lucas* at 417. The flooding also resulted in the destruction of private property stored on Milton and Clara’s land but owned by a third plaintiff, Harry Lucas. *Id.* at 418, 420. The Court found there was no distinction between real and personal property within the Ohio Constitution, Article I, Section 19, and therefore all three Lucas’ were entitled to have a jury impaneled to determine compensation due to them for the appropriation of their respective properties. *Id.* at 424, 426.

Similar to the personal property lost in *Lucas*, agricultural crops are private personal property of the grower, even if planted on leased land, and are compensable if taken by the government in the course of a public improvement project. *See* R.C. 1302.01(A)(8) (defining “goods” to “include[] the unborn young of animals and growing crops and other identified things attached to realty as described in section 1302.03 of the Revised Code.”).

The trial court in the instant case appears to have focused mainly on Appellants’ status as leaseholders of real property, and did not appear to have given any credence to Appellants’ status

as the owners of personal property, i.e. the tomato crop. The court of appeals affirmed the trial court's denial of a writ of mandamus without addressing the standing issue that was placed squarely before it. Accordingly, the Ohio Farm Bureau Federation urges the Court to accept this case for review and to confirm that private personal property is protected under the Fifth Amendment to the U.S. Constitution and the Ohio Constitution, Article I, Section 19.

**Proposition of Law No. 3: When a public improvement project causes flooding on private land restricting the owner or leaseholder's use and enjoyment of such land, the "public use" test is met even if the public appropriated no direct benefit from the flooding.**

An argument that the public receives no benefit from flooding caused by a public improvement project should not be well received by any court and should not preclude compensation when private property is flooded as a direct result of government action, and the landowner or leaseholder is deprived of the use and enjoyment of such private property.

In the instant case, the court of appeals stated in its decision that "the County appropriated no benefit from the damage caused by the July 2003 flooding . . ." *State ex rel. Rohrs v. Germann*, 3d Dist. No. 7-12-21, 2013-Ohio-2497, ¶54. The court of appeals also found that the Appellants "have failed to demonstrate that any injury incurred to their private property was done so by the County Engineer for public use or to accomplish a public use so as to constitute a taking under either the U.S. or Ohio Constitutions." *Id.* at ¶55. However, these findings contradict the County Engineer's statement that the reason concrete grout was poured into the catch basin and crossover culvert pipes was that "[t]aking this action prevents such pipe from becoming a potential impairment to the efficiency of the new drainage system and is a good engineering practice for the safety of the traveling public as it precludes and prevents any road hazard that could result from the collapse of any such corrugated pipe." Appellants' Exhibit 5, Affidavit of Randolph Germann at ¶6. In addition, the project allowed the berm to be widened and

eliminated the “ditch fall-off” as a possible hazard to motorists. *State ex rel. Rohrs, supra* at ¶36. The project was, in fact, characterized by the County Engineer and the court of appeals as a “road safety improvement project.” *Id.* at ¶5. Clearly, this describes a “public benefit” or “public use” from the overall project, as well as the specific decision to pour concrete grout into the catch basin and crossover pipe.

“Any direct encroachment upon land, which subjects it to a public use that excludes or restricts the dominion and control of the owner over it, is a taking of his property for which he is guaranteed a right of compensation by [Ohio Constitution, Article I, Section 19.]” *State ex rel. Doner v. Zody*, 130 Ohio St. 3d 446, 2011-Ohio-6117, 958 N.E.2d 1235 ¶59, quoting *City of Norwood v. Sheen*, 126 Ohio St. 482, 186 N.E. 102 (1933), paragraph one of the syllabus. When an encroachment of land by flooding is a direct result of a public improvement project, the private property owner whose land has been flooded should not have to somehow prove that the public received a benefit from the flooding itself. “There was, to be sure, no actual taking of the land itself, but there was direct encroachment upon the land which excluded and restricted the dominion and control of the owner over it until the condition was abated. This constituted legally a taking of the property for public use.” *City of Norwood v. Sheen, supra* at 487-88. The “public benefit” / “public use” character of the overall project should extend to the encroachment by flooding and the private property owner’s takings claim.

## CONCLUSION

The Ohio Supreme Court has a long history of protecting private property rights. The scope of property rights protection in Ohio was well summarized in a recent decision as follows:

The right of property is a fundamental right, and “[t]here can be no doubt that the bundle of venerable rights associated with property is strongly protected in the Ohio Constitution and must be trod upon lightly, no matter how great the weight of other forces.”

*State ex rel. Doner v. Zody*, 130 Ohio St. 3d 446, 2011-Ohio-6117, 958 N.E.2d 1235 ¶52, quoting *Norwood v. Horney*, 110 Ohio St. 3d 353, 2006-Ohio-3799, 853 N.E.2d 115, ¶38.

Contrary to this Court’s instruction to “tread lightly” on private property rights, the court of appeals has applied a heavy hand in denying Appellants any avenue of relief for the county’s destruction of their tomato crop and flooding of their leasehold. Such an outcome deserves the closest scrutiny by the Ohio Supreme Court to ensure that the private property protections of the Ohio and U.S. Constitutions are not cast aside in favor of protecting a government authority. Such decisions should not be allowed to stand without careful review by this state’s highest court. For this reason, the Ohio Farm Bureau Federation urges the Ohio Supreme Court to accept this case for review.

Respectfully submitted,



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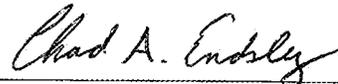
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## CERTIFICATE OF SERVICE

This is to certify that a true and accurate copy of the foregoing document was served this 1st day of August, 2013, via regular U.S. mail, postage prepaid, upon the following:

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