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

TEXAS EASTERN TRANSMISSION, LP,	:	**CASE NO. 2:14-CV-02550**
	:	
Plaintiff,	:	**JUDGE WATSON**
	:	
-vs-	:	
	:	
3.2 ACRES, *et al.*,	:	
	:	
Defendants.	:	
	:	

MEMORANDUM OF DEFENDANTS ROGER AND LANA BARACK (OWNERS OF "3.1"/"4.4" ACRES IN SAINT CLAIRSVILLE, OHIO, IN OPPOSITION TO PLAINTIFF'S DECEMBER 16, 2014 MOTION FOR IMMEDIATE POSSESSION

Plaintiff Texas Eastern Transmission's December 16 Motion for, *inter alia,* "Immediate possession" must be denied because (1)such an immediate taking would violate the Ohio Constitution's prohibition on "quick-takings" for non-road projects other than roads; and (2) that prohibition which is not preempted by the text of the Natural Gas Act, Fed. R. Civ. P. 71.1 or any other applicable federal law.

I. The Ohio Constitution denies Plaintiff "quick-take" authority.[1]

Beyond roads, Section 19, Article I of the Ohio Constitution requires "compensation," and this "compensation" must be determined by a jury, and not by the self-interested appropriator, pre-taking.

In the seminal case governing this matter, *City of Worthington v. Carskadon,* the Supreme Court of Ohio addressed the following issue: "[t]he precise question raised in this appeal is the validity of eminent domain ordinances which provide for taking possession of private property for public use prior to the determination of the value thereof by a jury in instances other than those specifically provided for in Section

[1] These Defendants have reviewed the December 19 Memorandum Contra of a then-uncertain conglomerate of Defendants, filed by Counsel Michael Braunstein. That Memorandum is accurate on all fronts, and this Memorandum is intended to supplement the arguments posited therein.

19, Article I of the Ohio Constitution."[2] There, identically to here, "[t]he quick take [attempt] provides that an appropriating authority may file its petition for appropriation, make a deposit of the value of the property as determined by it and then make an immediate entry on the property and use of such property prior to the determination of the amount of compensation to which the owner is entitled. This is the same procedure as is provided under the Uniform Eminent Domain Act."[3] The Court concluded, without consternation, "The 'quick take' by the city, i.e. an immediate entry and seizure of private property prior to any jury verdict, was illegal and unconstitutional," explaining "The Ohio Constitution permits immediate entry in time of public exigency and for the purpose of public roads. This case involved only a drainage ditch."[4]

More recently, in *Octa v. Octa Retail, LLC,* an Ohio appellate court further explained "in all other cases [than roads] where private property is taken for public use, compensation must first be assessed by a jury and paid to the owner in that amount or secured by a deposit before the agency takes possession."[5] The Court therefore concluded that the resolution before it was "silent regarding any exigent circumstances for rebuilding the road for which the Ohio Constitution specifically authorizes the "quick take" procedure. Accordingly, based on the resolution, the village must comply with the appropriation procedures to cure blight and cannot use the 'quick take' appropriation procedures."[6] Likewise, in *Cassady v. City of Columbus*, an Ohio appellate court found invalid a City of Columbus use of a "quick take" proceeding to appropriate a sewer easement across the plaintiffs' property.[7]

Moreover, *"private"* appropriators have no constitutional powers *superior to* "public" appropriators, and the Ohio Supreme Court's precedents suggest exactly the opposite. While Article XIII of the Ohio Constitution provides for appropriation by private parties, it contains no express textual grant of "quick-take" authority, and has never been held to authorize such authority. Such an interpretation would be highly paradoxical, given the Ohio Supreme Court's proclamations in *Norwood v. Horney*:

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2 18 Ohio St.2d 222 (1969).
3 Id.
4 Id.
5 2008 -Ohio- 4505.
6 Id.
7 31 Ohio App.2d 100, 286 N.E.2d 318 (1972).

> It is axiomatic that the federal and Ohio constitutions forbid the state to take private property for the sole benefit of a private individual, *O'Neil v. Summit Cty. Bd. of Commrs.*(1965), 3 Ohio St.2d 53, 57; *Vanhorne's Lessee v. Dorrance* (1795), 2 U.S. (2 Dall.) 304, even when just compensation for the taking is provided. *Kelo,* 545 U.S. 469 ("it has long been accepted that the sovereign may not take the property of *A* for the sole purpose of transferring it to another private party *B,* even though *A* is paid just compensation"). See, also, *Prestonia Area Neighborhood Assn. v. Abramson* (Ky.1990), 797 S.W.2d 708, 711 (naked and unconditional government seizure of private property for private use is repugnant to our constitutional protections against the exercise of arbitrary power and fundamental unfairness). A *sine qua non* of eminent domain in Ohio is the understanding that the sovereign may use its appropriation powers only upon necessity for the common good. *Buckingham v. Smith* (1840), 10 Ohio 288, 297 (eminent domain "is founded on the superior claims of a whole community over an individual citizen; but then in those cases only where private property is wanted for *public use,* or demanded by the *public welfare* " [emphasis sic]). As we explained in *Cooper,* the exercise of sovereignty in eminent-domain cases is predicated on the notion that such a taking can be permitted only "for the use and benefit of the people," which is "distinct from government interest, profit, or concern." *Cooper,* 4 Ohio at 290. "It is only this great and common benefit to all the people alike that creates a necessity authorizing and justifying the seizure * * *.'"[8]

Meanwhile, for at least a century, the Court has affirmed that the grant of eminent domain authority is to be strictly construed in favor of the private property owner."[9]

The Ohio Constitution's limits are reflected and verified by Ohio's enabling statutes. Notably, R.C. 1723.01 grants limited appropriation authority for private pipelines. The extent of this Section's constitutionality remains in question in the wake of the Ohio Supreme Court's constriction of "public use" in *Norwood v. Horney;* but in any event, R.C. 1723.01 fails to authorize "quick-take," authority, and R.C. 1723.02 then implicitly withholds it, though providing "the appropriation referred to in section 1723.01 of the Revised Code shall be made in accordance with sections 163.01 to 163.22 of the Revised Code." Divisions (A) and (B) of R.C. 163.06 authorize "quick take" only for a "public agency," as opposed to a "private agency," such as Plaintiff (R.C. 163.01(B) defines "private agency" as "any corporation * * * that is not a public agency * * * ."). Further no "quick-take" authority beyond the maintenance, repair, and construction of roads is specifically articulated therein. R.C. 163.09(B) then specifically contemplates "approval by a state or federal regulatory authority of an appropriaton," but mandates that in such a

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[8] 110 Ohio St.3d 353, 853 N.E.2d 1115, at 1131, Paragraph 43 (2006).

[9] *Pontiac Improvement Co. v. Bd. of Commrs. of Cleveland Metro. Park Dist.* (1922), 104 Ohio St. 447.

circumstance "if the Court determines the matters in favor of the agency, the court shall set a time for the assessment of compensation by a jury * * *."

II. The Ohio Constitution's prohibitions on "quick-take" are applicable here.

The Ohio Constitution's prohibitions on quick-take are not preempted by the Natural Gas Act, Fed. R. Civ. P. 71.1, or any other applicable federal law, under any established preemption doctrine. The Supremacy Clause, as interpreted and applied by the United States Supreme Court, demands that state law give way to federal law in just two circumstances: (1) States are precluded from regulating conduct in a field that Congress, acting within its proper authority, has determined must be regulated by its exclusive governance; and (2) state laws are preempted when they conflict with federal law, which occurs where "compliance with both federal and state regulations is a physical impossibility," and those instances where the challenged state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress,"[10]

In undertaking preemption analysis, courts should assume that "the historic police powers of the States" are not superseded "unless that was the clear and manifest purpose of Congress."[11] The Supreme Court robustly addressed the reach of federal preemption in the context of state protections in *Wyeth v. Levine*. There, a state protection, through common law cause of action, was not preempted because the relevant federal law did not give the pharmaceutical company defendant a right that the state-law judgment took away, and it was possible for Wyeth to comply with both federal law and the Vermont-law/judgment at issue. The federal statute and regulations neither prohibited the stronger warning label required by the state judgment, nor insulated the defendant from the risk of state-law liability. With no "direct conflict" between the federal and state law, then, the state-law judgment was not preempted.

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[10] See, respectively, *Gade v. National Solid Wastes Management Assn.*, 505 U.S. 88, 115 (1992); *Florida Lime & Avocado Growers, Inc. v. Paul*,373 U.S. 132, 142–143 (1963); *Hines*, 312 U.S., at 67, 61 S.Ct. 399.
("What is a sufficient obstacle is a matter of judgment, to be informed by examining the federal statute as a whole and identifying its purpose and intended effects").

[11] *Wyeth v. Levine*, 555 U.S. 555, 565 (2009).

Here, neither the NGA nor Fed. R. Civ. P. 71.1 preempt Ohio's prohibition on quick-take for non-road projects. *First*, neither act expressly authorizes quick-take or overrides state constitutional prohibitions on quick-take, despite Congress's full knowledge of the concept (quick takings have been in the Ohio Constitution since at least 1851, and as the Ohio Supreme Court noted in *Worthington* in 1968, the concept has been part of the "Uniform Eminent Domain Act."). Under recognized methods of statutory construction, Congressional failure to explicitly embrace such a known commodity demonstrates a deliberate rejection of the desire to extinguish this important state constitutional right, and crown private parties with quick take authority.

Second, each federal statute specifically allows for state procedures to play a role in condemnation actions. 15 U.S.C. 717f(h) states "The practice and procedure in any action [to acquire through eminent domain] or proceeding for that purpose in the district court of the United States shall conform as nearly as may be with the practice and procedure in similar action or proceeding in the courts of the State where the property is situated." Fed. R. Civ. P. 71.1(k) states "This rule governs an action involving eminent domain under state law. But if state law provides for trying an issue by jury--or for trying the issue of compensation by jury or commission or both - - that law governs."

Third, neither federal act is in conflict with a state's requirement of just compensation, determined by a jury, prior to taking of private property: Plaintiff is capable of condemning Defendants' properties *without* quick-take, and in fact, expedited proceedings are sanctioned under both Ohio and federal laws. The fact that the taking may not occur as expeditiously as Plaintiff may like is not a function of impossibility: it is instead a function of Plaintiff's own tastes, preferences, and choices.

At the end of the day, there is no conflict on the face of the applicable state and federal laws; nor is there physical impossibility. As many of the Justices have explained through *Wyeth* and elsewhere, this Court should be reluctant to read into any federal statute words that simply are not there.[12]

[12] See *Arizona v. U.S.* 132 S.Ct. 2492 (2012) (Scalia Dissenting on other grounds: "“purposes and objectives” theory of implied pre-emption is inconsistent with the Constitution because it invites courts to engage in freewheeling speculation about congressional purpose that roams well beyond statutory text. See *Wyeth*, 555 U.S., at 604, 129 S.Ct. 1187 (opinion

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been served on Plaintiff and co-Defendants on January 5, 2014.

Respectfully submitted,

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concurring in judgment); see also *Williamson v. Mazda Motor of America, Inc.*, 131 S.Ct. 1131, 1133–1135 (2011) (opinion concurring in judgment); "Under the Supremacy Clause, pre-emptive effect is to be given to congressionally enacted laws, not to judicially divined legislative purposes." See *Wyeth, supra,* at 604, 129 S.Ct. 1187 (THOMAS, J., concurring in judgment). "Thus, even assuming the existence of some tension between Arizona's law and the supposed 'purposes and objectives' of Congress, I would not hold that any of the provisions of the Arizona law at issue here are pre-empted on that basis."