IN THE COURT OF COMMON PLEAS
WOOD COUNTY, OHIO
PROBATE DIVISION

CITY OF PERRYSBURG	:	Case No. 2015-9016A
	:	
Plaintiff,	:	Hon. David Woessner
	:	
v.	:	
	:	
MARY JO ROGERS	:	
	:	
Defendant.	:	

MOTION FOR PARTIAL JUDGMENT ON THE PLEADINGS, MOTION TO EXPEDITE AND MOTION TO STAY PENDING RESOLUTION

Now come Defendants Jerald & Phyllis Charles and Mary Rogers,[1] by and through counsel, and respectfully move this Honorable Court, pursuant to Civ. R. 12(C), for judgment on the pleadings as to the entirety of Plaintiff City of Perrysburg's takings claims, or in the alternative, for partial judgment on the pleadings as to Plaintiff's takings claims not related to the making or repairing of roads.[2] Further, because Perrysburg threatens to immediately seize and destroy the homeowners' properties, the homeowners respectfully request that this Court (1) expedite its consideration of this Motion; and (2) enjoin the City from seizing and destroying the homeowners' properties before a ruling on this Motion is rendered.

I. BACKGROUND

[1] These two defendants have been sued under different case numbers in different cases; however the allegations of the complaints filed against them are entirely identical. Likewise nine other property owners have been sued by the City in conjunction with this project. While those nine homeowners reside in the City of Perrysburg, the arguments herein regarding quick-take apply in full force on their behalf.

[2] Ohio courts regularly field *partial* motions. *Green v. Am. Bakers Ins. Co.*, 8th Dist. Cuyahoga No 66091, 1994 WL 568395 (considering an appeal from a denial of defendants' motion for partial summary judgment on the pleadings); *Carasalina, LLC v. Smith Phillips & Assoc.*, 10th Dist. Franklin No. 13AP-1027, 2014 WL 2573466 (considering an appeal from a grant of defendants' motion for partial summary judgment on the pleadings).

Defendants Jerald & Phyllis Charles and Mary Rogers reside on Ft. Meigs Road in Middleton Township, Ohio, beyond the city limits of Perrysburg, Ohio. They moved to the township in part to avoid the taxes, regulations, politics, traffic, and general busyness of the City of Perrysburg. But now, the City seeks to take their property.

First, it wishes to expand a busy high-speed road nearly to their door-steps, ripping out trees and bushes in the process.[3] Second, it insists that it has the power to move utilities even closer to their doorsteps.[4] And third, the City insists that it has the power to forcibly take the homeowners' properties to build extra-wide sidewalks, as well as an ambiguously-labeled "shared use path," even closer yet to their doorsteps.[5] All the while, the City has abstained from making any sincere efforts to voluntarily purchase the property it apparently covets, instead proclaiming from the outset that the homeowners land will simply be taken through force.[6]

To effectuate its plan to makeover and urbanize the homeowners' properties along Fort Meigs Road, the City has overlooked several critical facts. First, the properties of Defendants Charles and Rogers are located well beyond the outer limits of its eminent domain powers, in Middleton Township, Ohio.[7] Second, while the City seeks to use the "quick-take" authority articulated in R.C. 163.06 to immediately seize Defendants' properties,[8] it has no authority to do so for "other municipal purposes" and "other additional

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[3] See February 27, 2015 City of Perrysburg Letter to Tom Ashcraft, attached to Defendants' Answer as Defendant's Exhibit A (threatening Eminent Domain prior to any sincere efforts at voluntarily purchasing the property).

[4] Id.

[5] Id.

[6] See February 27, 2015 City of Perrysburg Letter to Tom Ashcraft, attached to Defendants' Answer as Defendant's Exhibit A (threatening Eminent Domain prior to any sincere efforts at voluntarily purchasing the property).

[7] See September 18, 2015 Verified Answer of Defendant Jerald Charles, at Paragraph 22.

[8] See Plaintiff's August 11, 2015 Complaint against Tom Ashcraft, at Paragraph 8 (the same allegation appears in each and every Complaint.

easements" such as extra-wide sidewalks and pedestrian pathways.[9] Third, Plaintiff's Complaints fail to draw any distinction between road and non-road uses, or between municipal and township defendants.

II. STANDARD OF REVIEW FOR JUDGMENT ON THE PLEADINGS

"[A] motion for judgment on the pleadings has been characterized as a belated Civ. R. 12(B)(6) motion for failure to state a claim upon which relief can be granted."[10] The standard of review for a motion for judgment on the pleadings pursuant to Civ. R. 12(C) is similar to the standard of review for a motion to dismiss pursuant to Civ. R. 12(B)(6).[11] The Court may dismiss under Civ. R. 12(C) if the Court finds that the nonmoving party can prove no set of facts in support of his claims that would entitle him to relief.[12]

However, under Civil Rule 12(C), the Court should consider both the complaint and the answer.[13] Further, pursuant to Civ. R. 10(C) and applicable Ohio case law, "when a document is attached to and incorporated by reference into a pleading, it may be considered as part of pleadings."[14] Consequently, the exhibits attached to the City's Complaint and the Defendants' verified answers are all before the Court and material to the adjudication of this Motion.

Finally, Civ. R. 12(C) motions are specifically for resolving questions of law.[15] In the instant matter, with the basic facts established in the pleadings, the analysis confronting the court is purely legal in character, raising the following issues: First, does a municipality maintain constitutional authority to seize property located in a township? Even if the Court were to believe so, does a city maintain any authority to

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9 See City of Perrysburg Resolutions stating the purposes of the takings, attached to Plaintiff's August 10, 2015 Complaint as "Exhibit A&B." See also Plaintiff's February 27, 2015 description of uses, attached to Defendants' Answer as Defendants' Exhibit A.

10 *Gawloski v. Miller Brewing Co.*, 96 Ohio App.3d 160, 163 (9th Dist. 1994).

11 *State ex rel. Midwest Pride IV, Inc. v. Pontious*, 75 Ohio St.3d 565, 569-70 (1996).

12 *Id.* at 570.

13 *Id.* at 569.

14 *See*, e.g., *Vail v. Plain Dealer Publishing Co.*, 72 Ohio St.3d 279 (1995); *See also* Civ. R. 10(C) ("Statements in a pleading may be adopted by reference in a different part of the same pleading or in another pleading or in any motion. A copy of any written instrument attached to a pleading is a part of the pleading for all purposes.").

15 *State ex rel. Midwest Pride IV, Inc. v. Pontious*, 75 Ohio St.3d 565, 569 (1996).

do so for the purpose of making sidewalks and "shared use paths" in that township? And even then, if the Court were to believe so, does the City maintain any authority to use the awesome and highly-restricted power of *quick-take* to accomplish this purpose?

This Court needn't look beyond established Ohio precedent to answer each of these inquiries in the negative.

III. LAW AND ANALYSIS

Plaintiff City of Perrysburg's very short Complaints in this matter each feature a number of critical legal infirmities that warrant partial if not full dismissal: pursuant to these Complaints, the City can prove no set of that would entitled it to relief; and as such Defendants are entitled to Judgment on the Pleadings.

First, the City lacks constitutional authority to forcibly appropriate property located in Middleton Township. *Second,* even if the City were to have such authority *as to making and repairing roads*, it most certainly lacks such authority for the purpose of installing extra-wide sidewalks at Defendants' doorsteps - - also in Middleton Township. *Third,* the City lacks authority to use *quick-take* within the township. *Fourth,* even if the City were to maintain quick-take authority for the purpose of making and repairing roads, it most certainly lacks such authority for the purpose of installing extra-wide sidewalks at Defendants' doorsteps - - whether in the township or even within Perrysburg city limits. *Finally,* the City's Complaint and the City's ordinances underlying the Complaint are each defective insofar as they seek to include within the scope of the City's quick-take authority public projects for which quick-take authority is unavailable.

The City threatens to irreparably destroy the Defendants' homesteads at any moment. Accordingly, the Defendants respectfully request that this Court expedite its consideration of this matter, and as it addresses the merits of the claims above, restrain the City from destroying the subject matter of the dispute.

A. This Court must strictly scrutinize the City's Takings Claims.

Due to the fundamental nature of private property rights, this Court must begin its analysis by strictly construing the City's claims in favor of the homeowners.

One of the faults of the 1802 Ohio Constitution identified by the drafters of the 1851 Ohio Constitution was that its clauses were deemed insufficient to properly protect the private property rights of landowners.[16] As a result, in the revision, the drafters changed the placement and rewrote the property clauses, and strengthened the eminent domain clause, and these protections were placed at the forefront of the constitution.[17]

Section 19, Article I states "Private property shall ever be held inviolate, but subservient to the public welfare."[18] In aggregating this provision with Section 1, Article I, "Ohio has always considered the right of property to be a *fundamental right*. There 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."[19] In 2006, the Ohio Supreme Court reaffirmed the principles governing eminent domain in Ohio since the middle of the nineteenth century:

> "The right of private property is an *original* and *fundamental* right, existing anterior to the formation of the government itself; the civil rights, privileges and immunities authorized by law, are *derivative*—mere *incidents* to the political institutions of the country, conferred with a view to the public welfare, and therefore *trusts* of civil power, to be exercised for the public benefit. * * * Government is the necessary burden imposed on man as the only means of securing the protection of his rights. And this protection—the primary and only legitimate purpose of civil government, is accomplished by protecting man in his rights of personal security, personal liberty, and private property. The right of private property being, therefore, an *original right,* which it was one of the primary and most sacred objects of government to secure and protect, is widely and essentially distinguished in its nature, from those exclusive political rights and special privileges * * * which are created by law and conferred upon a few * * *. The fundamental principles set forth in the bill of rights in our constitution, declaring the inviolability of private property, * * * were evidently designed to protect the right of private property as one of the primary and original objects of civil society * * *."[20]

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[16] *Moore v. Middletown* (2010), 2010-Ohio-2962 (Ringland, concurring and dissenting), citing Fischel, The Offer/Ask Disparity and Just Compensation for Takings: A Constitutional Choice Perspective, 15 International Rev.L. & Econ. 187, 197.

[17] *Moore v. Middletown* (2010), 2010-Ohio-2962 (Ringland, concurring and dissenting), citing 2 Liberty U.L.Rev. at 264.

[18] Section 19, Art. I, Ohio Constitution.

[19] *Norwood v. Horney* (2006), 110 Ohio St.3d 353,361-62, 853 N.E.2d 1115, 1129 (internal citations omitted).

[20] *Norwood v. Horney*, 2006-Ohio-3799, ¶¶ 33-38, 110 Ohio St. 3d 353, 361, citing *Bank of Toledo,* 1 Ohio St. at 632. (Emphasis in original).

* * *

> In light of these Lockean notions of property rights, see, e.g., Richard A. Epstein, Takings: Private Property and the Power of Eminent Domain (1985) 10–18, it is not surprising that the founders of our state expressly incorporated individual property rights into the Ohio Constitution in terms that reinforced the sacrosanct nature of the individual's "inalienable" property rights, Section 1, Article I, which are to be held forever "inviolate." Section 19, Article I. See, also, Section 5, Article XIII; Sections 4, 10, and 11, Article XVIII (requiring compensation for municipal appropriations of private property for public rights of way, utilities, and improvements).[21]
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> Ohio has always considered the right of property to be a fundamental right. There 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.[22]
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> Ohio Constitution may bestow on the sovereign a magnificent power to take private property against the will of the individual who owns it, it also confers an "inviolable" right of property on the people. When the state elects to take private property without the owner's consent, simple justice requires that the state proceed with due concern for the venerable rights it is preempting.[23]

These are lofty principles. However, they are more than just principles. To implement these principles in practice, the Ohio Supreme Court has repeatedly clarified that the power of eminent domain is to be strictly construed against the governmental entity attempting to take property. Where authority to appropriate is *not expressly and clearly provided, it is deliberately withheld*: "[C]ourts must ensure that the grant of authority is construed strictly and that any doubt over the propriety of the taking is resolved in favor of the property owner.[24]

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[21] *Norwood,* supra.

[22] *Norwood,* supra., citing *Reece v. Kyle* (1892), 49 Ohio St. 475, 484, 31 N.E. 747, overruled in part on other grounds, *Mahoning Cty. Bar Assn. v. Ruffalo* (1964), 176 Ohio St. 263, 27 O.O.2d 161, 199 N.E.2d 396; *Hatch v. Buckeye State Bldg. & Loan Co.* (P.C.1934), 32 Ohio N.P. (N.S.) 297, 16 Ohio Law Abs. 661; *In re Vine St. Congregational Church* (C.P.1910), 20 Ohio Dec. 573; *Caldwell v. Baltimore & Ohio Ry. Co.* (C.P.1904), 14 Ohio Dec. 375; *Kata v. Second Natl. Bank of Warren* (1971), 26 Ohio St.2d 210, 55 O.O.2d 458, 271 N.E.2d 292.

[23] *Norwood,* supra., citing *Cleveland v. Hurwitz* (P.C.1969), 19 Ohio Misc. 184, 192, 48 O.O.2d 384, 249 N.E.2d 562. See, generally, *Buchanan,* 245 U.S. 60, 38 S.Ct. 16, 62 L.Ed. 149; *Reckner v. Warner* (1872), 22 Ohio St. 275, 287–288.

[24] *Norwood v. Horney,* 2006-Ohio-3799, ¶ 71, 110 Ohio St. 3d 353, 375-76 (2006), citing *Pontiac Improvement Co.,* 104 Ohio St. at 453–454. See also *Britt v. City of Columbus* (1974), 38 Ohio St.2d 1, McQuillin, Municipal Corporations (3 ed.), 402, Section 32.67.

This matter features a classic case of the type of abuse that may escape review if this Court were to turn a blind eye and simply (and wrongly as a matter of law) draw all inference in favor of the City. With careful judicial scrutiny, however, it is clear that the City seeks to unconstitutionally overreach.

B. The City lacks constitutional authority to forcibly appropriate property located in Middleton Township.

"The powers of local self-government, granted to a municipality by Section 3 of Article XVIII of the Ohio Constitution, do not include the power of eminent domain beyond the geographical limits of the municipality."[25]

The City of Perrysburg has no authority to forcibly take private property located beyond its city limits, particularly for the purposes for which it seeks to take the property here.

i. Ohio Cities' power of Eminent Domain is limited.

Neither municipal "home rule" nor the municipal "police power" permits a municipality to take private property in townships beyond its borders. Municipalities derive their authority to act on these matters from Section 3, Article XVIII, "the Home Rule Amendment" to the Ohio Constitution. Section 3, Article XVIII, provides: "Municipalities shall have authority to exercise all powers of local *self- government* and to adopt and enforce *within their limits* such local police, sanitary and other similar regulations, as are not in conflict with general laws." (emphasis added). While the powers of local self-government are no-doubt broad, the Home Rule Amendment does not state "municipalities may do anything," and it therefore cannot be read as such: there must be a limiting principle consistent with its language. To this end, this Court has spoken clearly.[26]

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[25] *Britt v. City of Columbus* (1974), 38 Ohio St.2d 1, 309 N.E.2d 412, paragraph one of the syllabus; see, also, R.C. 163.63 ("any reference in the Revised Code to any authority to acquire real property by 'condemnation' or to take real property pursuant to the power of eminent domain is deemed to be an appropriation of real property pursuant to this chapter and any such taking or acquisition shall be made pursuant to this chapter").

[26] *Britt v. Columbus* (1974), 38 Ohio St.2d 1, 6 (emphasis added)("[t]his court has never framed an all-inclusive definition of the term 'all powers of local self-government' appearing in Section 3 of Article XVIII. In the context of specific cases before it, the term has been stated to mean '* * * such powers of government as, in view of their nature and the field of their operation, are local and municipal in character * * * the powers referred to are clearly such as involve the exercise of the functions of government, and they are local in the sense that they relate to the municipal affairs of the particular community,' 'the phrase 'all powers of local self-government' as used * * * [in Section 3] means the power of self-government in all matters of a purely local nature.'"). See also *State, ex rel. Toledo, v. Lynch* (1913), 88 Ohio St. 71, 97, 102

In *Beachwood v. Cuyahoga Cty. Bd. of Elections*, the Court explained as follows:

> The power of local self-government granted to municipalities by Article XVIII relates solely to the government and administration of the internal affairs of the municipality * * *. Where a proceeding is such that it affects not only the municipality itself but the surrounding territory beyond its boundaries, such proceeding is no longer one which falls within the sphere of local self-government but is one which must be governed by the general law of the state. To determine whether legislation is such as falls within the area of local self-government, the result of such legislation or the result of the proceedings thereunder must be considered. If the result affects only the municipality itself, with no extraterritorial effects, the subject is clearly within the power of local self-government and is a matter for the determination of the municipality.[27]

Later, in *Britt,* the Ohio Supreme Court applied the above limits more narrowly to the municipal power of eminent domain:

> The power of eminent domain is a power of local self-government under Section 3. It does not follow, however, that the power of eminent domain beyond the limits of a municipality, as opposed to the power of eminent domain within the municipality, is a power of local self-government. It is self-evident that the exercise of a power to condemn beyond a municipality transcends matters of 'purely local nature.'
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> The assertion, that the power of eminent domain by a municipality beyond its corporate limits, with the attendant right to physically invade other political subdivisions of the state, is a power of 'local self-government,' is clearly refuted by the decision of this court in *Beachwood v. Bd. of Elections* (1958), 167 Ohio St. 369, holding that detachment proceedings of a territory from a municipality is not a power of local self-government.

The Supreme Court reaffirmed these eminent domain limits in the 2010 case of *Clifton v. Blanchester,*[28] and again in the 2012 case of *Moore v. Middletown,* emphasizing that "Ohio law holds that a municipality has no authority to appropriate property outside its jurisdictional limits."[29]

ii. Ohio Townships cannot expand Cities' Eminent Domain Power.

N.E. 670, *Fitzgerald v. Cleveland* (1913), 88 Ohio St. 338, 344, 103 N.E. 512; *State, ex rel. Arey, v. Sherrill* (1944), 142 Ohio St. 574 53 N.E.2d 501.

27 *Beachwood v. Cuyahoga Cty. Bd. of Elections* (1958), 167 Ohio St. 369, 370-371, (emphasis added).

28 *Clifton v. Blanchester*, 2010-Ohio-2309, ¶ 28 aff'd, 2012-Ohio-780, ¶ 28, 131 Ohio St. 3d 287, 964 N.E.2d 414 ("In turn, because his property is located completely outside Blanchester's jurisdictional boundaries, the remedy Clifton seeks, which is essentially a claim for money damages resulting from an alleged appropriation by inverse condemnation, is unavailable as a matter of law. Therefore, since Clifton has no substantive right to the relief he sought to recover from Blanchester, we find he has no standing to sue.")

29 *Moore v. Middletown*, 2012-Ohio-3897, ¶ 27, 133 Ohio St. 3d 55 (2012).

The City, no doubt aware of its defective Complaint, seeks to pretend as though it could expand its eminent domain authority by seeking and obtaining "approval" from the township trustees of Middleton Township.[30] However, no Ohio *township* has the authority to expand any *city's* eminent domain powers.

Instead, "townships are creatures of the law and have only such authority as is conferred on them by law."[31] In turn, Ohio townships have no inherent or constitutionally granted police power, but instead, are "limited to that which is expressly delegated to them by statute."[32]

Indeed, Chapter 505 of the Ohio Revised Code contains a litany of authorization regarding the most seemingly-miniscule matters, thereby demonstrating that if a particular activity is not expressly authorized, the township may not engage in that activity. See R.C. 505.01, *et seq.* Amongst the many powers *not* granted to Ohio townships is the power to delegate the authority of eminent domain over private property located in a township - - an authority which townships themselves lack - - to Ohio cities.

Accordingly, Ohio courts have noted the unavailability of "cross-border" eminent domain, whether with or without the consent of other jurisdictions.

In *Board of Tp. Trustees v. Lambrix,* the Court explained that a township has no power to appropriate property except as explicitly granted by the legislature, and so a township within which there is a village does not enjoy the right to invade the sovereignty of such village and appropriate privately owned lands, *notwithstanding the consent of that village or the lack of objection to the appropriation procedure.*[33] The reciprocal is likewise true: a city may not invade the township to forcibly take private property, *notwithstanding the consent of that township.*

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30 See Exhibit C to Plaintiffs' Complaint, Middleton Township Resolution 15-715.

31 *State ex rel. Schramm v. Ayres* (1952), 158 Ohio St. 30, 33.

32 *W. Chester Twp. Bd. of Trustees v. Speedway Superamerica, L.L.C.,* Butler App. No. CA2006-05-104, 2007-Ohio-2844, ¶ 66; *Yorkavitz v. Bd. of Trustees of Columbia Twp.* (1957), 166 Ohio St. 349, 351, 142 N.E.2d 655.

33 *Board of Tp. Trustees v. Lambrix* (Summit 1978) 60 Ohio App.2d 295.

In short, Middleton Township may not grant the City of Perrysburg eminent domain authority of the private property of the township's residents any more than it may grant such authority to the state of Michigan or the nation of Canada. Until that private property is *annexed* into the City of Perrysburg, the City may not take it. Here, the City attempts a faux-annexation, without bothering to first follow the carefully-delineated statutory procedure for annexation. Such shortcuts, as a means to the end of violating fundamental property rights that must be strictly safeguarded, are entirely impermissible.

iii. No Ohio statute could grant the City extra-territorial quick-take authority.

"Courts decide constitutional issues only when absolutely necessary."[34] And here, the Court need only reach this constitutional issue if it finds that Perrysburg (1) is empowered by statute to effectuate the taking here; and (2) has strictly complied with the requirements of that statute. Because the City has failed in this regard, this Court may well be able to avoid the constitutional issue presented herein.

As an initial observation, the Ohio General Assembly lacks the constitutional authority to expand the constitutional boundaries of municipal eminent domain authority. That authority is (1) plenary and expansive when within a City's borders (subject to "public use" and "quick-take" limitations); and (2) enumerated and limited when beyond a City's borders.

When engaging in constitutional construction, courts have since 1824 abided by Chief Justice Marshall's canon that "Enumeration presupposes something not enumerated."[35] The People of Ohio did not confer unlimited extra-territorial eminent domain authority upon municipalities when they enacted Article 18 of the Ohio Constitution. Had they desired to do so, that Article could have included a clause that said so. Instead, through Article 18, Ohioans have enacted a comprehensive scheme clearly delineating the power of an Ohio city to appropriate property beyond its borders. Sections 4, 10, and 11 of that Article specifically identify and enumerate the instances in which a municipality may appropriate private property beyond its borders. None of these enumerations include the power to appropriate in cases such as this. Meanwhile,

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[34] See *State ex rel. Miller v. Brady,* 123 Ohio St.3d 255, 2009-Ohio-4942, 915 N.E.2d 1183, ¶ 11; *Smith v. Leis,* 106 Ohio St.3d 309, 2005-Ohio-5125, 835 N.E.2d 5, ¶ 54

[35] *Gibbons v. Ogden,* 22 U.S. 1 (1821).

Section 13 of that Article identifies the sole instances in which the legislature may expand municipal authority. There is no analogy to Section 13 for eminent domain.

Such and understanding is consistent with a basic view of Due Process: (1) non-residents cannot vote for the appropriating city's political leaders, and thus risk deprivation of their property without meaningful representation; and (2) Ohio has provided an entirely proper comprehensive system by which a municipality may acquire the same property while abiding by the Ohio Constitution's limits as well as Due Process concerns: that system is the annexation process carefully chronicled in R.C. 709. Through annexation, the City may bring the desired property within its borders, *and then* properly exercise eminent domain authority through its home rule authority. Likewise, a city is always free to acquire property beyond its borders through *voluntary agreement with the property owner.*

iv. No Ohio statute supplies the authority Perrysburg seeks here.

Given these realities, neither R.C. 163 nor R.C. 719 can be construed in a manner that renders it inconsistent with the Ohio Constitution. R.C. 1.47 dictates that "in enacting a statute, it is presumed that compliance with the constitutions of the state and of the United States is intended." To this end, the Ohio Supreme Court adheres to the sound principle that "if it is reasonably possible, validly enacted legislation must be construed in a manner 'which will avoid rather than * * * raise serious questions as to its constitutionality.'"[36]

Here, if this Court were to construe or apply R.C. 719 or R.C. 163 to empower Ohio cities to take property beyond their borders in excess of the means enumerated in the Ohio Constitution, such a construction would render R.C. 719 unconstitutional.

Second, "a court cannot presume that the legislature intended to enact a law that produces an unreasonable or absurd result. A court must construe the statute to avoid such an unreasonable or absurd

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[36] *Akron v. Rowland,* 67 Ohio St.3d 374, 380, quoting *Co-operative Legislative Commt. of the Transp. Bhds. & Bhd. of Maintenance of Way Emp. v. Pub. Util. Comm.* (1964), 177 Ohio St. 101, paragraph two of the syllabus.

result if the language of the statute fairly permits."[37] Purporting to expand the eminent domain authority of cities to take property in townships without first annexing the property is indeed an "absurd result," since the annexation process is carefully delineated, and since the Ohio Constitution specifically delegates narrow and defined extra-territorial eminent domain powers to cities.

This Court can apply applicable law without reaching the constitutional matters because the City of Perrysburg cannot derive additional eminent domain authority from R.C. 719.01 or R.C. 719.02: this project exceeds the scope of those statutes.

Those Sections purport to authorize Ohio cities to take private property beyond their borders for road improvement, and for certain types of utilities issues (See R.C. 719.01(A), (K), and (N)). However, neither of those sections or any other authorize cities to exercise eminent domain power to take private property for sidewalks, much less the amorphous undefined purposes to later be determined.

Here, the City's project is more than a road project, and the excess purposes of the project are not authorized by R.C. 719. As the pleadings make abundantly clear, the City's project includes, accordingly to the city itself, (1) "curbs and gutters, new drainage facilities, signing and pavement markings, new sidewalks as well as a new shared use path;"[38] and even further (2) vaguely described "additional easements," and property "for road and other municipal purposes."[39]

Because eminent domain authority is strictly construed against the governmental entity who seeks to take private property rather than negotiate for it, this project fails to meet the criteria of R.C. 719.01 and R.C. 719.02. Nor is there any authority for the proposition that a Court may *sever* the enabling municipal resolution(s) or the project itself in order "create" eminent domain powers where they do not exist. As such, the City of Perrysburg's Complaints against homeowners Jerald Charles and Mary Rogers fail to state a claim upon which relief can be granted, and must be dismissed.

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[37] *State ex rel. Cooper v. Savord* (1950), 153 Ohio St. 367, 92 N.E.2d 390, paragraph one of the syllabus.

[38] See Plaintiff's February 27, 2015 description of uses, attached to Defendants' Answer as Defendants' Exhibit A.

[39] See City of Perrysburg Resolutions stating the purposes of the takings, attached to Plaintiff's August 10, 2015 Complaint as "Exhibit A&B."

C. The City lacks constitutional authority to forcibly appropriate property through quick-take.

The City of Perrysburg claims the authority to take the homeowners' property immediately, prior to the constitutionally requisite determination of compensation, for the entirety of its project - - even clear non-road purposes. In doing so, it relies upon R.C. 163.06, which states, in pertinent part, as follows:

> (A) A public agency, other than an agency appropriating property for the purposes described in division (B) of this section, that **qualifies pursuant to Section 19 of Article I, Ohio Constitution,** may deposit with the court at the time of filing the petition the value of such property appropriated together with the damages, if any, to the residue, as determined by the public agency, and thereupon take possession of and enter upon the property appropriated. * * *
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> (B) **A public agency appropriating property for the purpose of making or repairing roads which shall be open to the public, without charge,** * * * may deposit with the court at the time of filing the petition the value of such property appropriated together with the damages, if any, to the residue, as determined by the public agency, and stated in an attached declaration of intention to obtain possession and thereupon take possession of and enter upon the property appropriated * * *.

Thus, Division (B) authorizes quick-take for the purposes of "making or repairing roads which shall be open to the public without charge," and nothing more; meanwhile, Division (A) authorizes quick-take for the same purposes as well as the exigencies specified in Section 19, Article I. The City does not specify which Division it believes grants it authority for the taking here. However, it is irrelevant: neither Division authorizes quick-take for "new sidewalks as well as a new shared use path,"[40] "additional easements," or "other municipal purposes."[41]

The Ohio Constitution unequivocally states that while private property is subservient to the public welfare, those rights are otherwise *inviolate*. Section 19, Article I provides for the immediate possession[42] of

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[40] See Plaintiff's February 27, 2015 description of uses, attached to Defendants' Answer as Defendants' Exhibit A.

[41] See City of Perrysburg Resolutions stating the purposes of the takings, attached to Plaintiff's August 10, 2015 Complaint as "Exhibit A&B."

[42] The terms "immediate possession" and "quick-take" are used interchangeably, and have the same meaning.

private property by the Sovereign only during *times of war*, *public exigency*, and when *necessary to make or repair public roads.*

In the seminal precedent 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 19, Article I of the Ohio Constitution."[43]

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."[44]

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."[45] The Court 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 . . . the village . . . cannot use the 'quick take' appropriation procedures."[46] 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.[47]

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43 18 Ohio St.2d 222 (1969).

44 Id.

45 2008 -Ohio- 4505.

46 Id.

47 31 Ohio App.2d 100, 286 N.E.2d 318 (1972).

Thus, Ohio law forbids immediate possession for "new sidewalks as well as a new shared use path,"[48] "additional easements," or "other municipal purposes."[49] It matters not that these other purposes may be envisioned *by the City* as part of an overall urbanization scheme or project. It also does not matter whether the City may view these other purposes as "related to" or "directly connected with" a road project. Immediate possessions is for "road," period, and nothing more.

This strict construction is driven home by the Court's decision in *Octa:* "Municipalities are allowed to appropriate private land for public use, but this power is not absolute and can be exerted only when procedures set forth in relevant statutes are strictly followed," and "the power conferred upon a municipal corporation to take private property for public use must be strictly followed."[50]

First, the Court explained that "R.C. 163.06(B) sets forth another "quick take" procedure [from that specified in Section 19, Article I] that allows an agency to take immediate possession of property after making a deposit of the assessed value of the property with the court. Like the constitutional provision, this "quick take" procedure is only available if the appropriated property is used 'for the purpose of making or repairing roads which shall be open to the public, without charge, or for the purpose of implementing rail service under Chapter 4981.'"[51] Second, the Court explained an axiom applicable here: "A municipality takes written action through its ordinances and resolutions. R.C. 719.04 provides that a 'legislative authority of a municipal corporation shall, whenever it is deemed necessary to appropriate property, pass a resolution declaring such intent, defining the purpose of the appropriation, and setting forth a pertinent description of the land and the estate or interest therein desired to be appropriated.' Similarly, R.C. 163.02(D)(2) requires that the 'instrument by which an agency acquires real property pursuant to this section shall include * * * [a]

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[48] See Plaintiff's February 27, 2015 description of uses, attached to Defendants' Answer as Defendants' Exhibit A.

[49] See City of Perrysburg Resolutions stating the purposes of the takings, attached to Plaintiff's August 10, 2015 Complaint as "Exhibit A&B."

[50] *Octa v. Octa Retail, L.L.C.*, 2008-Ohio-4505, ¶12, citing *Springfield v. Gross,* 164 Ohio App.3d 1, 840 N.E.2d 1123, 2005–Ohio–5527, ¶ 12; *City of Cincinnati v. Vester* (1930), 281 U.S. 439, 448, 50 S.Ct. 360, 74 L.Ed. 950.

[51] *Octa v. Octa Retail, L.L.C.*, 2008-Ohio-4505, ¶9.

statement of the purpose of the appropriation as provided with the appropriation petition.'"[52] Third, "R.C. 719.04 further mandates that, when appropriating property, a municipality must pass a resolution and that resolution must specifically state the purpose for the appropriation. Due to the nature of eminent domain proceedings, the resolution must be strictly construed. The stated purpose included in the resolution determines the nature of the taking and the applicable procedure that must be followed."[53] The *Octa* Court then concluded that while the Village was indeed "making or repairing a road," the Village's resolution was indicated other additional purposes, and it was not appropriate for the Court to attempt to disentangle this mix of purposes.[54]

Likewise here, Perrysburg Resolutions 11-2015 and 37-2015, each fail to distinguish between land to be taken for "the making and repairing of roads" and land to be taken for "other additional easements" "other municipal purposes," and "necessary municipal purposes" separate and apart from "the making and repairing of roads," such as sidewalks and paths.[55] Such resolutions fail to support Plaintiff's Complaint, which simply characterizes the case as one for *one consolidated taking of property for all purposes, irrespective of that purpose.* Neither the resolutions nor the Complaints supply sufficient basis for this Court to unwind permissible from impermissible purposes for effectuating quick-take.

In conclusion, the City seeks to take immediate possession of the homeowners' land for the purpose of sidewalks and other ambiguous purposes - - purposes for which there is quite clearly no right to immediate possession. On this front, Plaintiff's Complaints must be dismissed. However, because neither the Plaintiff's Complaints nor Perrysburg's Resolutions sufficiently distinguish between constitutional and unconstitutional purposes, so that certain claims or parts of the project may be severed, the City's Complaints must be dismissed in their entirety.

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52 Id., at Paragraph 11, citing 21 Ohio Jurisprudence 3d (2001) 169, Counties, Section 699.

53 Id., at Paragraph 23.

54 Id., at Paragraphs 24-26.

55 See Plaintiff's "Exhibit A&B," attached to Plaintiff's August 10, 2015 Complaint.

IV. CONCLUSION

Because private property rights are fundamental rights, all inferences must be drawn in favor or the Defendant homeowners, and the City of Perrysburg's effort to take what it refuses to negotiate for must be carefully scrutinized. This effort fails to withstand serious scrutiny. The City cannot state a claim upon which relief can be granted for immediate possession (1) for the purpose of sidewalks, paths, or other ambiguous purposes; (2) for any purpose within Middleton Township, and particularly for sidewalks, paths, or other ambiguous purposes. And neither the City's Resolutions nor the City's pleadings permit this Court to disentangle permissible from impermissible purposes. Accordingly, Plaintiffs' Complaint must be dismissed.

Further, because (1) every plot of land is unique, Defendants' property being no exception; and (2) the City's plan will irreparably harm Defendants and their land by permanently altering its character, Defendants respectfully request that this Court expedite its consideration of the homeowners' constitutional rights, and in the interim, preserve the *status quo* by enjoining the City of Perrysburg from damaging the land in dispute.

Respectfully submitted,

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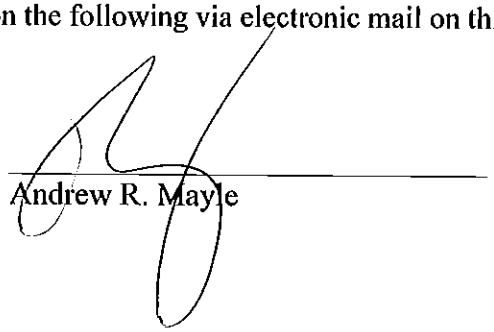
CERTIFICATE OF SERVICE

Pursuant to Ohio Rules of Civil Procedure 5(B)(2)(c) and 5(B)(2)(f), the undersigned does hereby certify that a true and accurate copy of the foregoing was served upon the following via electronic mail on this 15 day of October, 2015.



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