IN THE COURT OF COMMON PLEAS
WOOD COUNTY, OHIO

KINDER MORGAN UTOPIA, LLC,	:	**Case No. 2016-CV-225**
	:	
Plaintiffs,	:	**Judge MAYBERRY**
	:	
v.	:	
	:	
DONALD KEPPLER, *et al.*,	:	
	:	
Defendants.	:	

DEFENDANTS' MOTION FOR PARTIAL JUDGMENT ON THE PLEADINGS AND PARTIAL SUMMARY JUDGMENT AND MEMORANDUM IN SUPPORT

Maurice A. Thompson (0078548)
122 E. Main Street
Columbus, Ohio 43215
Tel: (614) 340-9817
MThompson@OhioConstitution.org

Andrew R. Mayle (0075622)
210 South Front Street
Fremont, Ohio 43420
Tel.: (419) 334-8377
Fax: (419) 355-9698
AMayle@mayleraymayle.com

Attorneys for Defendants

Gregory D. Bruton (0061722)
Daniel J. Hyzak (0092198)
Bruce A. Moore (0093334)
200 Civic Center Drive, Ste 800
Columbus, Ohio 43215
Tel: (614) 228-3111
Fax: (614) 232-2410
GBrunton@Reminger.com
DHyzak@Reminger.com
BMoore@Reminger.com

Attorneys for Plaintiff

TABLE OF CONTENTS

INTRODUCTION

Imagine that a private sector lawyer desired to get to the Wood County Court of Common Pleas faster. Could he forcibly appropriate others' private land along the route, from his front door step to the Court's parking lot to build a personal road, with no on-ramps or exits, and twenty foot walls on either side, just to represent one very wealthy client who anticipated routinely using his services? If the answer is "no," then it must be here as well. And it *is* "no," because no such road would be a public use, even if the lawyer appealed to the public interest in "justice" and "market demand for lawyers."

With this example in mind, Defendants Don and Ken Keppler respectfully move this Honorable Court, pursuant to Civ. R. 12(C) and Civ. R. 56(c), for judgment on the pleadings as to Plaintiff's takings claim(s).[1] The granting of this Motion is warranted for the following reasons: (1) unlike other pipelines crossing Wood County, the Kinder Morgan Utopia Pipeline is a purely private pipeline; (2) the Utopia Pipeline is not a public utility pipeline running heat to Ohioans' homes, nor an oil pipeline serving to fuel cars or factories or advance energy independence; (3) the Utopia Pipeline runs underground throughout the entire State of Ohio, and then to a factory in *Canada*, serving no Ohioans in the process; (4) the Utopia Pipeline is being built for the benefit of one Canadian plastics factory of one private company; and (5) the pipeline route has been set and declared "necessary" by no public authority, other than the paid employees of Kinder Morgan itself. Meanwhile, Defendants cannot demonstrate that they meet the statutory requirements of R.C. 1723.01 and R.C. 1723.08, much less the constitution requirements of "public use" and "public necessity."

I. BACKGROUND

Defendant Don Keppler resides on land in eastern Wood County, outside of Pemberville, that his family has owned and farmed for generations. The same holds true for each of his neighbors that are now threatened by the Utopia Pipeline. Kinder Morgan insists that the highly combustible pipeline slash

[1] 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).

through the middle of his farm, cutting it in half, forever prohibiting a fifty-foot wide tract of land from agricultural use and drainage, much less any prospect of development. Rather than simply building its pipeline over land that owners are willing to sell, Kinder Morgan takes these bullying positions against Mr. Keppler and his neighbors because it believes there is just enough ambiguity in Ohio's eminent domain statutes to allow it to make a semi-credible claim of eminent domain authority.

Neither the facts nor the law support this claim: unlike other pipelines that may have recently come before this Court in the past, no governmental agency has held a hearing on the Utopia Pipeline, much less reviewed it and found it to be necessary to the public. And the Utopia is merely shipping "plastics feedstock" to the private Canadian factory of the only shipper who will be using the pipeline.

A. The Statutory Delegation of Eminent Domain Power to Pipeline Projects

Kinder Morgan Utopia's highly unusual claim of eminent domain authority originates with a long-dormant 1953 statute that the energy boom in eastern Ohio has recently resuscitated. That statute, R.C. 1723.01, indicates as follows: "If a company is organized for the purpose of erecting or building * * * for transporting natural or artificial gas, petroleum, coal or its derivatives, water, or electricity, through tubing, pipes, or conduits, * * * ; for storing, transporting, or transmitting water, natural or artificial gas, petroleum, or coal or its derivatives, or for generating and transmitting electricity; then such company may enter upon any private land to examine or survey lines * * * and may appropriate so much of such land, or any right or interest therein, *as is deemed necessary* for the laying down or building of such tubing, conduits, pipes, * * *."

Further, through R.C. 1723.08, the statutory framework at issue may appear to label many types of pipelines as common carriers *per se*, irrespective of their actual activities: "With respect to the transporting by it of natural gas, petroleum, coal or its derivatives, water, and electricity, a company described in section 1723.01 of the Revised Code is a common carrier and is subject to the duties and liabilities of a common carrier under the laws of this state. A company described in section 1723.01 of the Revised Code includes any firm, partnership, voluntary association, joint-stock association, company, or corporation,

wherever organized or incorporated, when engaged in the business of transporting petroleum through tubing, pipes, or conduits as a common carrier." However, closer review demonstrates that a private pipeline must actually be *acting as a common carrier* to maintain eminent domain authority.

The Ohio Supreme Court has not addressed the constitutionality of this statutory framework since its 2006 holding that "economic development" takings violate the "public use" limitation in Ohio's Constitution. *Norwood v. Horney*, 110 Ohio St.3d 353 (2006).

B. The Kinder Morgan Utopia Pipeline

Importantly, the Utopia Pipeline is not a public utility pipeline that carries water or heat to Ohioans' homes. Nor is it an oil or natural gas pipeline contributing to the energy independence of Ohio or even the United States. Instead, the Utopia Pipeline runs underground, through the entire State of Ohio, and serves no Ohioans along the way. Unlike a ditch or a road, no Wood County resident (and in fact, no Ohio resident west of Appalachia) can put anything in it, or take anything out of it, get on or off of it, or otherwise use it.

Instead, according to Kinder Morgan itself, the Utopia is a private pipeline "to move ethane and ethane-propane mixtures eastward *to Windsor, Ontario*. These ethane and ethane-propane mixtures are initially planned to be used primarily as a *feedstock for producing plastics*."[2] Again, the Utopia Pipeline is going straight to Canada to provide one factory of one private corporation - - the only one using the pipeline - - with ethane that can be used to make things like milk jugs and then sold to Canadians.

But Plaintiff Kinder Morgan has built a billion-dollar business doing such things, apparently counting on padding its bottom line on the backs of those like the Defendants here. Houston, Texas corporation Kinder Morgan Energy Partners, L.P. describes itself as follows:

> [A] leading pipeline transportation and energy storage company and one of the largest publicly traded pipeline limited partnerships in America. It owns an interest in or operates approximately 54,000 miles of pipelines and 180 terminals. The general partner of KMP is owned by Kinder Morgan, Inc. Kinder Morgan is the largest midstream and the third largest energy company in North America with a combined enterprise value of approximately $125

[2] Id.

billion. It owns an interest in or operates approximately 80,000 miles of pipelines and 180 terminals.[3]

With an eye toward adding to these billions, Kinder Morgan touts the Utopia Pipeline as follows: "NOVA Chemical Corporation (NOVA) has executed a long-term transportation agreement with Kinder Morgan to support the approximately $500 million Utopia East system, which will include a new approximately 240-mile, 12-inch diameter pipeline constructed entirely within the State of Ohio from Harrison County to Fulton County. The new pipeline facilities will then connect with and utilize existing Kinder Morgan pipeline and facilities to move *ethane and ethane-propane mixtures eastward to Windsor, Ontario*. These ethane and ethane-propane mixtures are initially planned to be used primarily as a *feedstock for producing plastics*."[4]

Kinder Morgan describes this as "*exciting news for the growing Ontario market*," adding that *"[t]his pipeline project supports NOVA Chemicals' growth strategy* - - providing our Corunna, Ontario, facility with diversity of supply by accessing feedstock from new and existing producers in the growing Utica shale basin, in addition to our current feedstock supply."[5] The Utopia East pipeline system will have an initial capacity of 50,000 barrels per day, carrying only ethane and/or propane to Canada for another private company - - Nova Chemicals.[6]

In its Complaint(s), Kinder Morgan Utopia describes the pipeline as "an approximately 300 mile long common carrier interstate petroleum pipeline system consisting of a 12-inch diameter pipeline, with an initial capacity of approximately 50,000 barrels per day in Ohio and approximately 75 miles of repurposed pipeline in Michigan," serving "at least one shipper."[7]

---

[3] See Exhibit B to Defendants' Verified Answer, September 29, 2014 Press Release of Kinder Morgan, entitled *Kinder Morgan Announces NOVA Chemicals as Anchor Shipper for UTOPIA Project.*

[4] Id.

[5] Id.

[6] Id.

[7] See Kinder Morgan Utopia's April 18, 2016 Complaint against Donald Keppler, *et al.* in the Wood County Court of Common Pleas, case number 2016CV225, at Paragraphs 10-12.

Rather than voluntarily purchasing property so as to complete its pipeline, Kinder Morgan seeks to take Defendants' land through eminent domain for a pipeline "right-of-way" and a pipeline "easement."[8] This arrangement would effectively create a forced "co-tenancy," whereby (1) Kinder Morgan would own, though not pay property taxes on, a fifty foot strip of land the full length of Defendants' farm; (2) Kinder Morgan would control the route the pipeline takes across Defendants' land, despite their objections; and (3) Kinder Morgan would enter Defendants' farm at its pleasure for any reason at any time.

C. Distinctions from other private facilities with eminent domain authority

The Utopia Pipeline occupies an extremely uncommon place, operating within the confines of a newly-created regulatory gap. While the routes, necessity, and public value of other pipelines with putative eminent domain authority must be approved by neutral public authorities after public hearings and debate and the application of numerous criteria, Kinder Morgan Utopia claims that it maintains the unfettered public power, without such approval or oversight, to build its pipeline wherever it wants, so as to maximize its own self-interest at the expense of Ohioans.

However, nominally private projects derive their eminent domain authority only after enduring and withstanding public oversight - - interstate natural gas pipelines must pass FERC review, most other pipelines (and electrical transmission lines) must pass Ohio Power Siting Board review, railroads must pass Interstate Commerce Commission review, and other takings, such as roads and parks, are directly commenced by government (even Ohio Turnpike projects are subject to the review of the publicly-appointed and accountable Ohio Turnpike Commission). Here, "Kinder Morgan is unaware of any public

[8] Kinder Morgan describes those interests in land as follows: "A right-of-way, or ROW, is the actual strip of land granted to a company as result of the easement agreement allowing the company to cross your property to install, inspect, operate, and maintain the pipeline and equipment. The company's right-of-way extends along, across, below and above the easement;" and "an easement provides the Utopia East project with a limited use of property for defined, specific purposes. The acquisition of an easement does not transfer ownership of the land to the Utopia East project; it does, however, give us the right of access for construction and maintenance and the safe operations of the pipeline . . . The permanent easement for this project will be 50 feet in width." See *Kinder Morgan Utopia Frequently Asked Questions,* available online at pp. 6-7.

hearings by a government agency that were held pertaining to the establishment of the Utopia Pipeline route."[9]

This distinction is no small matter: the lack of public review prior to this Motion means that no government agency has put its stamp of approval on the Utopia Pipeline's route across Defendants' land, purpose, or necessity. Thus there are no agency findings for this Court to defer to, the Court owes no deference to Kinder Morgan, and as *the only line of defense* for Defendants' property rights, this Court must strictly scrutinize whether the Utopia Pipeline is entitled to take land by force.

Further, the distinction means that unlike pipelines or utilities with routes that have already been fixed by a public agency, Kinder Morgan has the unique flexibility to simply alter the route of the Utopia Pipeline *over land not belonging to objecting landowners such as Defendants,* once this Court recognizes that the project lacks appropriation authority.

As a purely private underground pipeline simply running through Ohioans' land on its way to a private factory making consumer plastics in Canada for Canadians for the profit of Kinder Morgan and Nova Chemicals alone, it's highly unlikely that Utopia Pipeline could ever have been approved as "necessary to the public" by FERC or OPSB.[10]

i. The Utopia Pipeline has not been approved or sited by the Ohio Power Siting Board.

The OPSB must "Approve, disapprove, or modify and approve applications for certificates;" for "major utility facilities." R.C. 4906.03(D).

However, with the explosion of fracking in Eastern Ohio, oil and gas industry lobbying intensified at the statehouse. In 2012, the Ohio General Assembly enacted SB 315, reducing the oversight authority of the OPSB to create, scrutinize, and establish the route of pipelines such as the Kinder Morgan Utopia by narrowing the definition of "major utility facility." Prior to the enactment of SB 315, R.C. 4906.01 defined a "major utility facility" in a manner that would have included the Utopia Pipeline. R.C. 4906.01(B)(1)(c).

[9] See Exhibit A to Defendants' Answer, Kinder Morgan Utopia's June 16, 2016 responses to Interrogatories of Defendants Donald Keppler and Kenneth Keppler in the Wood County Court of Common Pleas, case number 2016CV225, Response to Interrogatory No. 9. This evidence qualifies as Civ. R. 56(c) summary judgment evidence, but is also attached to Defendants' Answer and therefore properly before the Court on Defendants' Motion for Judgment on the Pleadings.

[10] See siting/routing criteria below.

And the General Assembly added language expressly exempting from the definition of "major utility facility" any "Natural gas liquids finished product pipelines" and "any Pipelines from a gas processing plant as defined in section 4905.90 of the Revised Code to a natural gas liquids fractionation plant, including a raw natural gas liquids pipeline, or to an interstate or intrastate gas pipeline." R.C. 4906.01(B)(2)(g); R.C. 4906.01(B)(2)(h). These are pipelines that ship "ethane" and "propane," such as the Kinder Morgan Utopia Pipeline. See R.C. 4906.01(H), (I), and (J).[11]

A pipeline approved by the OPSB has been found to "support sound energy policies that provide for the installation of energy capacity and transmission infrastructure for the benefit of the Ohio citizens," and "promot[e] the state's economic interests" while "protecting land use."[12] Further, "no person shall commence to construct a major utility facility in this state without first having obtained a certificate for the facility." R.C. 4906.04.[13] And to determine whether to issue such a certificate, the OPSB demands that the party seeking to build the pipeline submit, *inter alia,* a "description of the location and of the major utility facility," *"a statement explaining the need for the facility," and a "statement of the reasons why the proposed location is best suited for the facility."* R.C. 4906.06(A)(1)-(4). Finally, after one or more hearing, the Board apply eight criteria, many of which are calculated to protect Ohio landowners and farmers in particular, to determine whether to vest a private pipeline with eminent domain authority. Specifically, "The board shall not grant a certificate for the construction, operation, and maintenance of a major utility facility, either as proposed or as modified by the board, unless it finds and determines *"that the facility will serve the public interest, convenience, and necessity"* R.C. 4906.10(A)(1), (6).

---

[11] **R.C. 4906.01(H) "Raw natural gas"** means hydrocarbons that are produced in a gaseous state from gas wells and that generally include methane, ethane, propane, butanes, pentanes, hexanes, heptanes, octanes, nonanes, and decanes, plus other naturally occurring impurities like water, carbon dioxide, hydrogen sulfide, nitrogen, oxygen, and helium. **(I) "Raw natural gas liquids"** means naturally occurring hydrocarbons contained in raw natural gas that are extracted in a gas processing plant and liquefied and generally include mixtures of ethane, propane, butanes, and natural gasoline. **(J) "Finished product natural gas liquids**" means an individual finished product produced by a natural gas liquids fractionation plant as a liquid that meets the specifications for commercial products as defined by the gas processors association. Those products include ethane, propane, iso-butane, normal butane, and natural gasoline.

[12] See Ohio Power Siting Board homepage: *http://www.opsb.ohio.gov/opsb/*.

[13] R.C. 4906.01(D) "Certificate" means a certificate of environmental compatibility and public need issued by the power siting board under section 4906.10 of the Revised Code or a construction certificate issued by the board under rules adopted under division (E) or (F) of section 4906.03 of the Revised Code.

Because ethane pipeline are no longer subject to OPSB review, no state agency has found that the Utopia Pipeline meets any of these criteria.[14] Nor has the state or any other governmental authority fixed the route of the pipeline in a manner that would prohibit it from going around Defendants' land.

ii. The route of the Utopia Pipeline has not been approved by FERC.

Like R.C. 1723, the Natural Gas Act "delegates the federal power of eminent domain" to *some* private parties, including *some pipelines*.[15] However, to exercise eminent domain under the NGA, the private party must be "a holder of a certificate of public convenience and necessity."[16] And getting the FERC certificate is far from perfunctory. The FERC application requires **"**[t]he facts relied upon by applicant to show that the proposed service, sale, operation, construction, extension, or acquisition is or will be required by the present or future public convenience and necessity," and "a general description of what the applicant will need from the landowner if the project is approved."[17]

"Pipeline Siting, Construction, and Operation Authorization for 'siting' of a pipeline facility *generally involves approval of the route and location of the pipeline and related facilities* (e.g., compressor stations that push natural gas through pipelines). Notably, *siting of interstate natural gas transmission pipelines involves a centralized federal approval process overseen by FERC*."[18] And FERC's decision whether to grant or deny a pipeline certificate is based not just "upon a determination whether the pipeline project would be *in the public interest*," but further, "*avoiding the unnecessary use of eminent domain*, and other considerations."[19]

---

[14] Before the power of eminent domain can vest in a private party, a public hearing where any property owner threatened with eminent domain can testify and advocate must be held on the pipeline's route. R.C. 4906.07, R.C. 4906.08.

[15] 15 U.S.C. §717f(h).

[16] Id.

[17] 18 CFR 157.6(b)(2), (d)(1), (d)(2), and (d)(3).

[18] Congressional Research Service, *Pipeline Transportation of Natural Gas and Crude Oil: Federal and State Regulatory Authority*, March 28, 2016. Available online at *https://www.fas.org/sgp/crs/misc/R44432.pdf*

[19] Id. Congressional Research Service, *Interstate Natural Gas Pipelines: Permit and Timing of FERC Application Review*, January 16, 2015. Available online at *https://www.fas.org/sgp/crs/misc/R43138.pdf*. See also Federal Energy Regulatory Commission, Certification of New Interstate Natural Gas Pipeline Facilities (Policy Statement), 88 FERC ¶ 61,227, 1999 and orders clarifying policy, 90 FERC ¶ 61,128 and 92 FERC ¶ 61,094, 2000. See also See also 18 C.F.R. § 157.6.

If FERC grants a pipeline certificate, the commission's order will state the terms and conditions of the approval, including the pipeline route that has been authorized.[20] And the holder may exercise the power of eminent domain, only if *consistent with the terms of the certificate*.[21] In other words, once FERC has approved the route, that route is set in stone.

For example, the Rover Pipeline, an interstate natural gas pipeline, is currently traversing Wood County. That pipeline's route has been set by FERC, its public necessity has been affirmed by FERC, it serves Ohioans ("Rover is a critical link to make new low-cost natural gas supplies available to Ohio and Michigan consumers over the long-term"), and it clearly maintains eminent domain authority under the Natural Gas Act.[22] The same holds true for the Nexus Gas Transmission pipeline.[23]

Here, although Kinder Morgan has dealt with FERC as to certain rates, FERC has not considered or approved the route. Thus, it is not set in stone, and Kinder Morgan can navigate around objecting landowners, such as Defendants. Moreover, FERC did not approve the public nature or necessity of Utopia Pipeline, so this Court owes no deference to any prior governmental finding.[24]

iii. Kinder Morgan is the only entity that has deemed appropriation of Defendants' land necessary and for public use.

The discovery responses before this Court painstakingly demonstrate that the Utopia Pipeline is purely private and that Kinder Morgan alone has made the decision to attempt to run its route over objecting landowners such as Defendants.[25]

---

[20] Id.

[21] Importantly, to exercise eminent domain, the holder of a FERC certificate must still file a Complaint in federal district court – the FERC Certificate is *a prerequisite to,* and not a substitute for, a court proceeding.

[22] See Rover Pipeline Facts, available online at *http://www.roverpipelinefacts.com*/.

[23] See Nexus Gas Transmission facts, available online at *http://www.nexusgastransmission.com/content/project-overview-map.* Also the Court of Appeals for the Sixth District recently decided *Nexus Gas Transm. LLC v. Sprague, Case No. E-15-69 (July 7, 2016), avail online at http://lcapps.co.lucas.oh.us/Courts/Appeals/DecisionsPDF/7059.pdf.* That decision stays the taking, but finds that the Nexus, unlike the Utopia, will have a FERC certificate, and therefore, eminent domain authority.

[24] Finally, this detailed FERC process is for a necessary public use: natural gas pipelines that deliver heat to American homes. In the Natural Gas Act, "it is declared that the business of transporting and selling natural gas for ultimate distribution to the public is affected with a public interest." The same has not been said, nor could be said, for Kinder Morgan's "business of transporting and selling ethane for the making of plastic items in Canada."

[25] See Exhibit A to Defendants' Answer, Kinder Morgan Utopia's June 16, 2016 responses to Interrogatories of Defendants Donald Keppler and Kenneth Keppler in the Wood County Court of Common Pleas, case number 2016CV225.

Simply put by Kinder Morgan itself, "*[T]he Company* has determined, through the exercise of reasonable and prudent *business judgment*, that the acquisition of the said right-of-way and easements is in the public interest and is a public necessity. . ."[26]

Evidence regarding Kinder Morgan Utopia's route is a matter of public record as a result of Kinder Morgan's discovery responses to numerous Defendants in its Wood County Court of Common Pleas lawsuits.[27] There, Kinder Morgan, when asked to identify every reason why the use of eminent domain to take private property along the pipeline route is necessary, responds that "Kinder Morgan passed a resolution declaring the use of appropriation to construct the Utopia Pipeline is a necessity. Accordingly, the use of appropriation to construct the Utopia Pipeline is a necessity," and "the Utopia Pipeline is both useful and convenient to the public."[28]

As to the use of eminent domain along the route it alone has chosen, "[Kinder Morgan] has declared the appropriation to be necessary by its Corporate Resolution attached as Exhibit B, thereby satisfying its prima facie burden pursuant to R.C. 163.09(B)," and elsewhere, it claims to have, entirely on its own, "surveyed and selected the location and route for the Utopia Pipeline and the required pipeline easement."[29] Attached to each Complaint attempting to take land for the Utopia Pipeline through eminent domain, Kinder Morgan has attached its own "Declaration of Necessity" indicating that "there is a public need," and "it is necessary and proper and in the best interest of the citizens of the State of Ohio that the company should acquire by purchase or, if the necessary easement rights cannot be obtained by acceptable

---

This evidence qualifies as Civ. R. 56(c) summary judgment evidence, but is also attached to Defendants' Answer and therefore properly before the Court on Defendants' Motion for Judgment on the Pleadings.

[26] Id., at Paragraph 5.

[27] See Exhibit A to Defendants' Answer, Kinder Morgan Utopia's June 16, 2016 responses to Interrogatories of Defendants Donald Keppler and Kenneth Keppler in the Wood County Court of Common Pleas, case number 2016CV225.

[28] Id., Response to Interrogatory No. 2.

[29] See Exhibit A, Kinder Morgan Utopia's April 18, 2016 Complaint against Donald Keppler, *et al.* in the Wood County Court of Common Pleas, case number 2016CV225, at Paragraphs 44, 45. Mr. Keppler is a neighbor of the Plaintiffs here, and is identically situated. Each of Kinder Morgan Utopia's approximately 40 Complaints in Wood County make identical claims.

terms by voluntary conveyance, by exercise of the power of eminent domain, a permanent easement . . across certain land. . .”[30]

Further, each member of a “Right of Way Acquisition Committee,” identified in the Exhibits to Plaintiff’s Complaint, “in his or her sole discretion, is authorized, empowered, and directed to make or cause to be made determinations with respect to the best selected route for the Pipeline . . . and [d]etermine or cause to be determined which properties should be subject to eminent domain proceedings and to authorize the appropriate persons or entities to commence and conduct eminent domain proceedings.”[31] “The Committee’s determination that a particular property should be subject to an eminent domain action shall constitute a finding of the Company. . . that acquisition of said property is a public necessity and for the public use, and that there is a public need for the real property. . .”[32] All members of the decision-making committee, Kinder Morgan’s “Right-of-Way Acquisition Committee,” “are paid employees of Kinder Morgan’s parent company.”[33] When asked how these members are “accountable to the public,” Kinder Morgan’s response is that this is consideration is “irrelevant.”[34]

In Kinder Morgan’s view, how paid employees of Kinder Morgan determined that Defendants’ private property, should be subjected to eminent domain is “irrelevant,” “confidential and proprietary,” protected by “work product privilege,” and anyways, “the best principles and practices in the pipeline industry were relied to determine which properties along the pipeline route should be subject to eminent domain.”[35] And while Kinder Morgan maintains that the Utopia is “reasonably routed,” its only evidence in support of this proposition is that it, Kinder Morgan, used “the best principles and practices relied upon in the pipeline industry – combined with sound engineering principles – top determine the most reasonable route necessary to cross Defendants’ property.”[36]

---

30 Id., “Consent Authorizing and Declaring Public Necessity,” attached as “Exhibit B” to the Complaint against Donald Keppler.
31 Id., at Paragraph 6.
32 Id., at Paragraph 7.
33 Id., Response to Interrogatory No. 47.
34 Id., Response to Interrogatory No. 49.
35 Id., Response to Interrogatory No. 48.
36 Id., Response to Interrogatory No. 46, 50.

Thus, the evidence before the court demonstrates that Kinder Morgan has unilaterally and arbitrarily established the route of the Utopia Pipeline. This being the case, Kinder Morgan is unrestricted from again unilaterally established a route that does not require the taking of Defendants' land.

II. JUDGMENT ON THE PLEADINGS AND SUMMARY JUDGMENT

"[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."[37] 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).[38] 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.[39]

However, under Civil Rule 12(C), the Court should consider both the complaint and the answer.[40] 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."[41] Consequently, the exhibits attached to the Kinder Morgan'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.[42] 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*, whether the Utopia Pipeline meets the statutory requirements necessary to exercise eminent domain - - whether it is acting as a common carrier and its takings are necessary. *Second*, whether the Utopia Pipeline is a public use. And third, whether the Utopia Pipeline is

---

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

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

39 *Id.* at 570.

40 *Id.* at 569.

41 *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.").

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

"necessary."[43] This Court currently maintains the law and evidence, and therefore the duty to Ohio landowners, to answer each foregoing question in the negative.

In the alternative, summary judgment is appropriate where the pleadings and affidavits disclose no genuine issues of material fact, and the movant is entitled to judgment as a matter of law. Ohio R. Civ. P. 56(C); *Ohio State Bar Ass'n v. Heath*, 123 Ohio St.3d 483, 484 (2009). Where there is no genuine issue of material fact, summary judgment is to be favored. *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986). The existence of some factual dispute will not defeat summary judgment; rather, there must be no *genuine* issue of *material* fact. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). When a movant's affidavits and other evidence demonstrate lack of a genuine issue, the burden shifts to the opposing party to demonstrate the existence of a genuine issue for trial. *Celotex Corp.*, 477 U.S. at 327; *Vogias v. Ohio Farmers Ins. Co.*, 177 Ohio App.3d 391, 397-398 (11th Dist. 2008). If the nonmoving party fails to demonstrate the existence of a genuine issue for trial, summary judgment "shall be entered." *Id.*, citing *Mitseff v. Wheeler*, 38 Ohio St.3d 112 (Ohio 1988).

Judgment on the Pleadings and Summary judgment evidence before the court includes the Defendants' denials in their Answers, the evidence attached to Plaintiffs' Complaint, and the evidence attached to Defendants' Answers (which include Plaintiff's discover responses to Defendants).

III. LAW AND ANALYSIS

"Pipeline development is indisputably important given our State's fast-growing energy needs, but economic dynamism—and more fundamentally, freedom itself—also demand strong protections for individual property rights.

-*Texas Rice Land Partners, Ltd. v. Denbury Green Pipeline-Texas*, LLC, 363 S.W.3d 192, 194-204 (Tex. 2012)

The pleadings demonstrate that the Utopia Pipeline is not a public use ("public use" is a legal issue for the Court to decide). In the dispositive evidence already before the Court now suggests that Defendants are also entitled to summary judgment because there is no genuine issue as to any material fact, and, as a matter of law, the Utopia Pipeline is neither a "public use," nor "necessary."

[43] Subsumed within each of these issues is whether the Utopia Pipeline is acting as a common carrier, both with respect to the legislative label and the actual meaning of the term.

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.[44] 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.[45]

Section 19, Article I states "Private property shall ever be held inviolate, but subservient to the public welfare."[46] 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."[47] 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 * * *."
>
> * * *
>
> In light of these Lockean notions of property rights, 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.
>
> * * *

---

44 *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.

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

46 Section 19, Art. I, Ohio Constitution.

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

> 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.
>
> ***
>
> 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.[48]

A. This Court must strictly scrutinize any private corporation's eminent domain claim.

Due to the fundamental nature of private property rights, as articulated above and elsewhere, the Ohio Supreme Court has repeatedly clarified that the power of eminent domain is to be strictly construed against the entity attempting to take property.[49] 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.[50] This matter features a classic 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 Kinder Morgan. With careful judicial scrutiny, however, it is clear that Kinder Morgan seeks to unconstitutionally overreach.

When the use of eminent domain is attempted "for transfer to another individual or to a private entity rather than for use by the state itself, the judicial review of the taking is paramount. A primordial purpose of the public-use clause is to prevent the legislature from permitting the state to take private

---

[48] *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; *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; *Bank of Toledo*, 1 Ohio St. at 632; *Cleveland v. Hurwitz* (P.C.1969), 19 Ohio Misc. 184, 192, *Buchanan*, 245 U.S. 60, 38 S.Ct. 16, 62 L.Ed. 149; *Reckner v. Warner* (1872), 22 Ohio St. 275, 287–288.

[49] The Supreme Court expressed that a considerable "distinction exists however, in the case of statutes which grant to others, such as public utilities, a right to exercise the power of eminent domain on behalf of themselves. These are by their very nature, grants of limited powers." *U.S. v. Carmack*, 329 U.S. 230 (1946). Likewise, the Iowa Supreme Court last year expressed concern over the constitutionality of "allowing private entities to exercise the public power of eminent domain jointly with public entities," and rejected any statutory construction that would "effectively enable private entities to exercise eminent domain powers." *Clarke Cnty. Reservoir Comm'n v. Robins,* 862 N.W.2d 166, 171-178 (Iowa 2015), citing *Dept. of Transp. v. Ass'n of Am. Railroads,* supra., at 1234.

[50] *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.

property from one individual simply to give it to another. Such a law would be a flagrant abuse of legislative power, see *Calder v. Bull* (1798), 3 U.S. (3 Dall.) 386, 388, 1 L.Ed. 648, and to give deference to it would be a wholesale abdication of judicial review." *Norwood*, supra, at ¶ 72, citing *Kelo*,545 U.S. at ___, 125 S.Ct. at 2676-2677 (O'Connor, J., dissenting). The Ohio Supreme Court has deemed Ohio courts' "proper role as arbiters of the scope of eminent domain," explaining "Given the individual's fundamental property rights in Ohio, the courts' role in reviewing eminent-domain appropriations, though limited, is important in all cases. Judicial review is even more imperative in cases in which the taking involves an ensuing transfer of the property to a private entity, where a novel theory of public use is asserted, and in cases in which there is a showing of . . . impermissible financial gain, or other improper purpose." *Id*., at ¶74.

"A court's independence is critical, particularly when the authority for the taking is delegated to another or the contemplated public use is dependent on a private entity. In such cases, the courts 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." *Norwood*, supra, at ¶ 72, citing *Pontiac Improvement Co.,* 104 Ohio St. at 453-454, 135 N.E. 635,citing *Giesy,* 4 Ohio St. at 326. "[t]he power of eminent domain . . . 'deserves no favor; to construe it liberally would be sinning against the rights of property.'" *Pontiac Improvement Co., supra.,* 104 Ohio St. 447 (1922).

Thus, the Supreme Court has acknowledged the need for strict scrutiny where government purports to delegate eminent domain power to purely private entities. The delegation Kinder Morgan claims here entirely fails to withstand such scrutiny.

B. The Utopia Pipeline is not a public use.

"We would do nothing to hinder the development of the state, nor to cripple railroad companies in assisting such development, but at the same time we must protect the property rights of the citizens. All that to which the corporations are entitled under a proper construction of the law they will receive; but they must not, for their own gain and profit, be permitted to take private property for private use"

-*Norwood v. Horney***,** (2006), 110 Ohio St.3d 353, citing *Pittsburg, Wheeling & Kentucky RR. Co. v. Benwood Iron-Works (1888), 31 W.Va. 710, 73.*

"Even under * * * a deferential standard * * * public use is not established as a matter of law whenever the legislative body acts." *Norwood,* supra., at ¶ 66, citing *99 Cents Only Stores v. Lancaster Redevelopment Agency* (C.D.Cal.2001), 237 F.Supp.2d 1123, 1129. This is true because "the public-use requirement cannot be reduced to mere '"hortatory fluff.'" *Id.,* citing *Kelo,* 125 S.Ct. at 2673 (O'Connor, J., dissenting). To the contrary, it remains an essential and critical aspect in the analysis of any proposed taking. Thus, "defining the parameters of the power of eminent domain is a judicial function, and we remain free to define the proper limits of the doctrine." Id., citing *Worthington v. Columbus,* 100 Ohio St.3d 103, 2003-Ohio-5099, ¶ 21: *Pub. Serv. Co. of Oklahoma v. B. Willis C.P.A., Inc.* (1997), 1997 OK 78, ¶ 19 ("Under our constitutional provisions and cases interpreting them, the issue of whether a proposed taking is for a `public use' is a judicial question"); *Merrill v. Manchester* (1985), 127 N.H. 234, 236 ("Whether a particular use is a public use is a question of law to be resolved by the courts").

Accordingly, the Ohio Supreme Court explains that "our precedent does not demand rote deference to legislative findings in eminent-domain proceedings, but rather, it preserves the courts' traditional role as guardian of constitutional rights and limits. Accordingly, 'questions of public *purpose* aside, whether * * * proposed condemnations [are] consistent with the Constitution's `public use' requirement [is] a constitutional question squarely within the Court's authority.' *Norwood,* supra., at ¶ 69, citing *Hathcock,* 471 Mich. at 480;*Kelo,* 545 U.S. 469, (Thomas, J., dissenting)(advocating that no deference should be given to "a legislature's judgment concerning the quintessentially legal question of whether the government owns, or the public has the right to use, the taken property"). Therefore, Ohio courts "are independent of [legislative pronouncements]" and must "always ma[ke] an independent determination of what constitutes a public use for which the power of eminent domain may be utilized." *Id.*

i. Ohio narrowly defines "public use."

Ohio defines the scope of what constitutes a "public use" warranting the exercise of eminent domain more narrowly than how federal courts have defined the "public use" limitation in the federal constitution. Nearly a Century ago, the Ohio Supreme Court explained this: "[t]he phrase, 'where private

property shall be taken for public use,' contained in section 19, article 1, of the Constitution of Ohio, implies possession, occupation and enjoyment of the property by the public, or by public agencies, to be used for public purposes," and therefore, "[w]here private property is taken against the will of the owner under the power of eminent domain, it is a prerequisite that possession, occupation, and enjoyment of the property by the public, or by public agencies, is sought and is necessary." *Pontiac Improvement Co., supra.,* 104 Ohio St. 447 (1922). Thus it is only public projects such as "public buildings, public squares, parks, boulevards, streets, or highways, ditches, drains, or water courses" for which land may be taken. *Id.* And "[t]he natural import of the words 'taken for public use,' used in our Constitution, is that the thing is to be used by the public or by some agency for the public," or put otherwise, "[p]ublic use means the same as use by the public, and this, it seems to us, is the construction the words should receive in the constitutional provision in question. The reasons which incline us to this view are: First, that it accords with the primary and more commonly understood meaning of the words; second, it accords with the general practice in regard to taking private property for public use in vogue when the phrase was first brought into use in the earlier constitutions; third, it is the only view which gives the words any force as a limitation or renders them capable of any definite and practical application.'" *Id.* Consequently, under the Ohio Constitution,"[p]ublic use implies possession, occupation and enjoyment of the land by the public at large, or by public agencies.'" *Id.*

Over the past century, federal courts, and occasionally even Ohio courts, strayed from this strict definition.[51] In response to the inappropriate broadening of this power, the Ohio Supreme Court reaffirmed its narrow and strict construction in the 2006 case of *Norwood v. Horney.*

There, the Court expressly acknowledged that federal courts have employed "broad constructions of 'public use'" and a "more liberal framing of public use," that result in "abuse of eminent domain power,"

[51] See, for instance, *Ohio River Pipeline LLC v. Gutheil, 144 Ohio App.3d 694 (2001)* and *Ohio River Pipeline v. Henley,* 144 Ohio App.3d 703 (2001). Of note, the landowners there did appeal, and the Ohio Supreme Court accepting the appeal, presumably to overturn the appellate court. Before it could do so, however, the pipeline companies apparently made significant monetary offers to the landowners, causing the case to settle out of court.

citing to the paradigmatic example of the Supreme Court's 2005 decision in *Kelo v. City of New London,* 545 U.S. 469 (2005). *Norwood,* supra., at ¶ 50, 51.

The Court then expressly rejected the notion that "economic development alone is sufficient to satisfy the public use clause," concluding that "[i]n addressing the meaning of the public-use clause in Ohio's Constitution, we are not bound to follow the United States Supreme Court's determinations of the scope of the Public Use Clause in the federal Constitution, *Hathcock,* 471 Mich. at 479-480, and we decline to hold that the Takings Clause in Ohio's Constitution has the sweeping breadth that the Supreme Court attributed to the United States Constitution's Takings Clause." *Id.,* at ¶ 65. The Court instead chose to identify Ohio's constitutional limits with those expressed by the dissenting Justices in *Kelo,* including the proposition of Justice Thomas that, consistent with the Ohio Supreme Court's 1922 precedent in *Pontiac Improvement Co.,* the correct inquiry as to "public use" is "whether the government owns, or the public has a right to use, the taken property." *Id., at* ¶ 69, citing *Kelo,* supra (Thomas J., dissenting). This is consistent with the Ohio Supreme Court's 1965 ruling that public use means "necessary 'for the use of the public.'" *O'Neil v. Bd. of Cty. Comm'rs of Summit Cty.*,3 Ohio St. 2d 53, 53 (1965).

Consequently, the Ohio Constitution requires government ownership or a public right to use. As a private pipeline running ethane underground through Ohio to Canada, the Utopia Pipeline cannot meet this test.

ii. <u>Private</u> uses are not public uses.

"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, 1 L.Ed. 391, 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)." *Norwood,* supra., at ¶ 43.

"A primordial purpose of the public-use clause is to prevent the legislature from permitting the state to take private property from one individual simply to give it to another. Such a law would be a flagrant abuse of legislative power." *Norwood,* supra., citing *Calder v. Bull* (1798), 3 U.S. (3 Dall.) 386, 388. Therefore, "it is axiomatic that the use for which the power [of eminent domain] is exercised must be public and not private." *O'Neil v. Bd. of Cty. Comm'rs of Summit Cty.*, 3 Ohio St. 2d 53, 57 (1965).

Accordingly, the Ohio Supreme Court is clear that promotion of private business, particularly when done at the expense of another business or industry (such as agriculture, here) is not a public use.[52] Further, a project associated with a private interest must be expressly dedicated to the public: "[w]here the petitioner for a road through the lands of another . . . merely offers to develop his land and construct therein streets for public use, without guaranteeing or securing that offer to the public or to the board of county commissioners, no present public necessity is demonstrated so as to permit the board to exercise the power of eminent domain under those statutes." *O'Neil v. Bd. of Cty. Comm'rs of Summit Cty.*, 3 Ohio St. 2d 53, 53 (1965).

Finally, the Ohio Supreme Court's decision in *Norwood* frequently cites to and is patterned after the Michigan Supreme Court's 2004 decision in *Cnty. of Wayne v. Hathcock,* which concluded that

---

[52] *Norwood,* supra., citing *Merrill v. Manchester,* 127 N.H. at 237-239 (holding that in light of declared legislative policy of preserving open lands, plaintiffs' open lands could not be taken for construction of an industrial park, because an industrial park did not provide a direct public benefit); *In re Petition of Seattle* (1981), 96 Wash.2d 616, 627-629 (without giving deference to legislature's determination, court concluded that primary purpose of planned redevelopment was to promote retail and therefore the contemplated use was "a predominantly private, rather than public, use," and court noted that "[a] beneficial use is not necessarily a public use"); *Owensboro v. McCormick* (Ky.1979), 581 S.W.2d 3, 7-8 (invalidating a statute to the extent that it granted the city or other governmental unit "unconditional right to condemn private property which [was] to be conveyed by the local industrial development authority for private development for industrial or commercial purposes"); *Karesh v. Charleston City Council* (1978), 271 S.C. 339, 343 (holding that a city could not condemn land and lease it to a developer for a parking garage and convention center, because there was no assurance that the new use would provide more than a "negligible advantage to the general public"); *Baycol, Inc. v. Fort Lauderdale Downtown Dev. Auth.* (Fla.1975), 315 So.2d 451, 456-458 (holding that the economic benefit that would come from an appropriation of land for a parking garage and a shopping mall did not satisfy the public-use requirement despite potential economic benefits and holding that any public benefit from construction of the garage was incidental and insufficient to justify the use of eminent domain); *Little Rock v. Raines* (1967), 241 Ark. 1071, 1083-1084(holding that a proposed taking for an industrial park did not satisfy the public-use clause); *Opinion of the Justices* (1957), 152 Me. 440, 447 (advisory opinion concluding that a proposed statute that would authorize the city to use eminent domain for the development of an industrial park was unconstitutional).

condemning property to transfer it to a private entity is only acceptable for one of three traditional "public uses," where the economic benefit is not merely incidental: (1) "where public necessity of the extreme sort requires collective action;" (2) "where the property remains subject to public oversight after transfer to a private entity"; and (3) where the property is selected for condemnation because of "facts of independent public significance," rather than the interests of the eventual private owner, such as where condemnation and razing of a blighted area is itself a public use, not the subsequent rebuilding by a private entity (internal quotation marks omitted)). 471 Mich. 445 (2004). Applying these rules, that court has held, in scenarios highly analogous to that of Kinder Morgan's Utopia Pipeline, "that condemnation of land for a rail spur serving a single private company was an unconstitutional exercise of condemnation power because the private company could control its use and exclude the public;" and "this Court disapproved condemnation that would have facilitated the generation of water power by a private corporation because the power company 'will own, lease, use, and control' the water power. In addition, [we] warned, 'Land cannot be taken, under the exercise of the power of eminent domain, unless, after it is taken, it will be devoted to the *use* of the public, *independent of the will of the corporation taking it.*'" *Id.*

In *Pittsburg, Wheeling & Kentucky RR. Co. v. Benwood Iron-Works,* which the Ohio Supreme Court repeatedly cited in *Norwood,* the court held that a proposed condemnation to build a rail spur failed the public use test because it connected only to a single steel works owned by a private firm. (1888), 31 W.Va. 710, 73. The court concluded that the fact that "the public will have a right to use" the rail spur itself "amounts to nothing in the face of the fact that the only incentive to ask for the condemnation was private gain." There, "access to the terminal, not to the rail spur, was the determining factor." *Illinois Central R. Co. v. Mayeux*, 301 F.3d 359 (5th Cir. 2002)(Smith, Dissenting on other grounds). Similarly, in *Atlanta, Stone Mountain & Lithonia R.R. v. Bradley,* 141 Ga. 740 (1914) the court invalidated a condemnation undertaken "for the purpose of constructing a spur track from its main line merely to afford transportation facilities for the owners of an individual enterprise." 141 Ga. 740 (1914). The Arkansas Supreme Court has come to the same conclusion: "A railway cannot exercise the right of eminent domain

to establish a private shipping station *for an individual shipper*. If the station is for the exclusive use of a single individual, *or a collection of individuals less than the public, that stamps it as a private use, and private property cannot be taken for private use.* The fact that the railway's business would be increased by the additional private facilities is not enough to make the use public." *St. Louis, Iron Mountain & S. Ry. v. Petty,* 57 Ark. 359, 21 S.W. 884 (1893).

"Here too, the railroad was a common carrier, and the general public had a right of access to all its rail lines, including the spur in question. Once again, the determining factor is the status of the enterprise to which the spur line connected, not the status of the spur line itself." *Illinois Central R. Co.,* supra.

The takeaway from these cases is that "the 'right' to use a rail spur that connects to only one terminal is utterly worthless to the general public if it does not also have a right to use the terminal itself." *Illinois Central R. Co.,* supra. Such is the case with the Utopia Pipeline: not only does the public not have a right to use a pipeline running underground all of the way to a private plastics factory in Canada, but even if the public did have such a right, why *would* that use it? Such a right to use the Utopia would be "utterly worthless to the general public."

iii. Economic growth, benefit, or gain is not a public use.

In *Norwood,* the Ohio Supreme Court expressly and unambiguously rejected the notion that economic benefits could provide the basis for the taking of private property: "We hold that an economic or financial benefit alone is insufficient to satisfy the public-use requirement of Section 19, Article I. In light of that holding, any taking based solely on financial gain is void as a matter of law, and the courts owe no deference to a legislative finding that the proposed taking will provide financial benefit." *Norwood,* supra., at ¶ 80. Rather than side with broad federal court interpretations affirming economic benefits as public uses, the Court observed that "the analysis by the Supreme Court of Michigan in *Hathcock,* 471 Mich. 445, and those presented by the dissenting judges of the Supreme Court of Connecticut and the dissenting justices of the United States Supreme Court in *Kelo* are better models for interpreting Section 19, Article I of Ohio's Constitution." *Id.,* at ¶ 76.

iv. Private ethane pipelines not serving the state's people are not public uses.

Kentucky courts' recent rejection of the eminent domain authority of the Bluegrass Pipeline is illuminating. The Bluegrass Pipeline, like the Utopia Pipeline here, proposed to ship ethane, as well as mixtures of ethane and propane ("natural gas liquids"), from the Marcellus and Utica shale formations. In denying the Bluegrass appropriation authority, the Circuit Court explained as follows: (1) the pipeline provided "no reliable service for the public;" (2) there must be "regulatory oversight for gas pipeline companies that benefit from the statute's grant of eminent domain power;" (3) "eminent domain power is limited to pipelines used 'in the public service;'" and (4) "Bluegrass is a private, for-profit, unregulated entity engaging in the interstate transportation of NGLs. It is not acting in the public service. . . . the proposed pipeline transports NGLs *through* Kentucky, but does not have any impact on the energy needs of Kentuckians. Bluegrass argues that the pipeline will be available for Kentucky manufacturers and producers. However, the only stated purpose of the pipeline is to transport NGLs to the Gulf Coast to be processed and sold in Louisiana; not to provide natural gas to Kentuckians, but to have NGLs, a mixture of highly dangerous chemicals, running through Kentucky farmland and forests, and near rural communities," and "[t]he transportation of hazardous liquids interstate through Kentucky to the Gulf Coast does not justify granting a private company the right to condemn private property." *Kentuckians United to Restrain Eminent Domain v. Bluegrass Pipeline Co., Case No. 13-CI-1402 (Franklin Circuit Court of KY, March 25, 2015).* *Bluegrass Pipeline* argued that it was a "common carrier" and "public use." However, the Court explained that any claim to common carrier status was irrelevant, because irrespective of such status, the pipeline company remained subject to the state's overriding limitations on eminent domain.

The Appellate Court affirmed, observing "the NGLs in Bluegrass's pipeline are being transported to a facility in the Gulf of Mexico. If these NGLs are not reaching Kentucky consumers, then Bluegrass and its pipeline cannot be said to be in the public service of Kentucky." *Bluegrass Pipeline Co., LLC v. Kentuckians United to Restrain Eminent Domain, Inc.*, 478 S.W.3d 386, 392 (Ky. Ct. App. 2015), review denied (Feb. 10, 2016).

v. None of Kinder Morgan's avowed uses are public uses.

Defendants' Interrogatory No. 1 requests "each and every reason why [Kinder Morgan's] proposed condemnation of the Defendants' property is for a public use." In response, Kinder Morgan cites the following reasons: (1) "Kinder Morgan is a company organized for the purpose of constructing and operating an interstate common carrier petroleum pipeline. . . accordingly, the appropriation of an easement over Defendants' property is statutorily defined in the Ohio Revised Code to be for a public use," and "as a common carrier . . . Utopia Pipeline is designed to transport goods indiscriminately for any member of the public that wishes to use the Pipeline;" (2) "the Utopia Pipeline is designed to provide the safest, most efficient, and most economical method of petroleum transportation available to the members of the public who have a desire to use the Utopia Pipeline;" (3) "[i]t will play an important part in the ongoing development of America's energy infrastructure system by (a) responding to market demand for additional takeaway capacity from the Marcellus and Utica shale supply areas; (b) supporting overall development of domestic energy supplies; and (c) enhancing the reliability of the interstate pipeline grid in a geographic region that serves as a critical junction between sources of hydrocarbon production from the Marcellus and Utica shale supply area and end-use markets outside of Ohio;" and (4) "the Utopia Pipeline will provide a significant public use and benefit to the State of Ohio by generating hundreds of temporary union jobs as well as several full-time and permanent positions in the State of Ohio."[53]

However, none of these are public uses.

a. Providing "the safest, most efficient, and most economical method of petroleum transportation available," as presented here, is not a public use.

On this front, Kinder Morgan elaborates that Ohio residents will *benefit* because the Utopia Pipeline will be "increasing safety," "providing a significant influx of capital," and "allowing manufacturers utilizing the petroleum to prove quality affordable raw materials for finished goods to Ohio residents." Resp. to Int. 15.

[53] See June 16, 2016 Responses to Discovery Requests of Keppler, attached to Defendants' Answer, Resp. No. 1.

First, when asked to name any Ohio resident who would benefit, or category of residents who would benefit, and how, Kinder Morgan could not do so, demurring that such a concern is simply "irrelevant." Resp. to Int. 14.

Second, in any event, public *benefit* is not a sufficient basis to take private property. *Safety* is a "benefit," and not a "use." And a safer way to conduct a purely private business may provide a positive externality to the public, but it is not a public use. For instance, could Home Depot appropriate land next to one of its buildings to obviate the need to stack inventory to great heights within that building under the guise of "safety"?

Third, the claim of safety is untrue in its own right. In reality, there is no reason to believe that pipelines under Ohioans properties full of ethane is safer than barges shipping ethane up the Ohio River and through the middle of Lake Erie. Indeed, the last ethane pipeline upon which the undersigned counsel represented Ohioans was the ATEX Pipeline. On or about January 25, 2015 that pipeline exploded, sending fireballs into the sky, evacuating families, and scorching five acres and a residential home 2,100 feet from the site of the pipeline.[54] These explosions may well be rare, but they are precipitated by the creation of the pipeline - - as the *BlueGrass Pipeline* court noted, ethane is a "hazardous chemical." And the fact that forcing the Defendants to accept the pipeline across their land may ultimately result in their deaths is sufficient reason to reject the prospect of safety as a "public use."

Fourth, efficiency and economy are private *benefits* that *increase private profits*: Kinder Morgan benefits from efficient transportation of chemicals through increased profits; Nova Chemicals benefits because this efficiency means that it pays lower prices to Kinder Morgan. However, generating increased profits for large Texas corporations is not a public use.

Fifth, Kinder Morgan's predictions of "efficiency and economy" are exactly what *Norwood* rejected as public uses in rejecting takings based on "economic or financial benefit." The Court's rationale has clear import here:

---

[54] See *http://marcellusdrilling.com/2015/01/atex-ethane-pipeline-explodes-burns-in-brooke-county-wv/.*

> Every business, every productive unit in society, * * * contribute[s] in some way to the commonwealth. To justify the exercise of eminent domain solely on the basis of the fact that the use of that property by a private entity seeking its own profit might contribute to the economy's health is to render impotent our constitutional limitations on the government's power of eminent domain. [An] `economic benefit' rationale would validate practically *any* exercise of the power of eminent domain on behalf of a private entity. After all, if one's ownership of private property is forever subject to the government's determination that another private party would put one's land to better use, then the ownership of real property is perpetually threatened by the expansion plans of any large discount retailer, `megastore,' or the like.

Norwood, supra., at¶ 77, citing *Hathcock*, 471 Mich. at 482.

Finally, providing efficient, economic, and safe transportation of ethane for *one shipper* on a pipeline that is routed *directly to that one shipper's Canadian factory* means that the pipeline is utterly worthless to the general public," and has nothing to do with "public travel." *Illinois Central R. Co.,* supra, *Hathcock,* supra. In conclusion, a taking that simply permits a private business to conduct *its own affairs* more safely, economically, and efficiently is not a public use.

b. "The ongoing development of America's energy infrastructure system," as presented here, is not a public use.

First, this is simply non-cognitive bumper-sticker language, not a tangible basis for taking the private rights of another. It has no clearer meaning than "the Utopia Pipeline is Making America Great Again," or "Utopia Pipeline: Yes We Can." Without specificity, this rationale fails to withstand scrutiny, since a public use cannot be founded upon "vague grounds of public benefit," *Hathcock*, supra., 496-99, and "[T]he mere recitation of a benign * * * purpose is not an automatic shield which protects against any inquiry into the actual purposes underlying a statutory scheme." *Norwood,* supra., at ¶ 73, citing *Weinberger v. Wiesenfeld* (1975), 420 U.S. 636, 648. Moreover, "To constitutionally exercise the power of eminent domain, the use must "be public in fact; in other words, that it should contain provisions entitling the public to accommodations," and "The public use implies a possession, occupation, and enjoyment of the land by the public at large, or by public agencies." *Hathcock*, supra. Consequently, the imaginative phraseology of a twenty-something law clerk should not impress the Court.

Second, when Defendants' insisted that Kinder Morgan clarify this basis with specificity, Kinder Morgan was unable to do so, instead simply repeating the same thing with different words, testifying "Utopia Pipeline will provide significant petroleum transportation infrastructure to the interstate pipeline grid. The additional market outlets that will be created by the Utopia Pipeline will enhance the reliability of the overall infrastructure," and this is a public use by "increasing the access and reliability of transportation methods to additional market outlets." Resp. 28, 29.

Third, this rationale is a public *benefit,* rather than a public *use,* and it is an impermissible *economic* benefit at that.

Fourth, this rationale is internally inconsistent. The Utopia Pipeline will not "develop energy infrastructure" because ethane is not "energy." And even if it were, it will not be *used* as energy here. Indeed, when pressed to "identify each and every use to which the substance transported through the Utopia Pipeline will be put after it is shipped to the Nova Chemical facility in Canada," KM responds "Kinder Morgan has no control over the manner in which any shipper uses the petroleum it ships on the Utopia Pipeline." Resp. to Int. 13. But the reality is that this ethane is going to Canada to make plastics for the benefit of one private company. Further, shipping to Canada fails to bolster "*America's* energy infrastructure." Canada may be part of "North America," but benefiting Canadians is not a public use, and to the extent "America" means "The United States," shipping ethane to Canada does little for *this nation's* public, much less Ohioans.

Fifth, this rationale could be use to support any taking for any business. For example, taking Defendants' land to build gas stations would also "develop America's energy infrastructure."

This list of businesses includes *the current business to which Defendants' land is being put:* agriculture. Growing food plays an important part in America's "agricultural infrastructure." It respond to the market demand for food, which exceeds the market demand for an ethane pipeline to Canada, at least amongst Ohioans (and Americans - - despite holding several "open seasons" offering up space on its pipeline, there were absolutely no shippers desiring to ship on the Utopia). It supports the overall

development of food supplies, which is necessary to the overall development of *human beings.* And it enhances the reliability of the food supply, which is more important than an ethane pipeline to Canada to make milk jugs for Canadian shoppers.

If these were public uses, every hotel, gas station, supermarket, restaurant, and farm could also appropriate for public use. Indeed, the land appropriated by Kinder Morgan could be instantly appropriated *from* Kinder Morgan for another pipeline or any other sort of business. Here again, "Every business, every productive unit in society, * * * contribute[s] in some way to the commonwealth. To justify the exercise of eminent domain solely on the basis of the fact that the use of that property by a private entity seeking its own profit might contribute to the economy's health is to render impotent our constitutional limitations on the government's power of eminent domain." *Id.*

Sixth, there is no limiting principle to this "energy infrastructure" rationale. If "developing America's energy infrastructure" is a public use, and *this* pipeline contributes to that use, then every ounce of farmland can be seized from Ohio farmers for an unlimited number of pipelines and other private energy industry uses. And while many state constitutions expressly provide for such "natural resource development takings," Ohio's does not.

c. The creation of temporary union jobs is not a public use.

Even if this claim were true, this would be a *benefit* of the taking rather than a *use* of the property. And redistributing private property for "job creation" is precisely the type of economic benefit taking rejected by the Ohio Supreme Court in *Norwood*: "We hold that an economic or financial benefit alone is insufficient to satisfy the public-use requirement of Section 19, Article I. In light of that holding, any taking based solely on financial gain is void as a matter of law, and the courts owe no deference to a legislative finding that the proposed taking will provide financial benefit." *Norwood,* supra., at ¶ 80. Such a job-creation benefit has no limiting principle - - any business creates jobs, and were it valid, Defendants' property could be seized so that union workers could repeatedly dig holes and fill them back in. Indeed, the

city government in *Norwood* argued that the mall project the private developer there was set to build would create more jobs than simple home ownership.

Moreover, "To constitutionally exercise the power of eminent domain, the use must "be public in fact; in other words, that it should contain provisions entitling the public to accommodations," and a condemnation that would simply generally serve the public interest is insufficient to justify the exercise of eminent domain authority because, every lawful business does this. It is thus well-established that the 'public use' requirement precludes the condemnation of property for private use even if the private use will generally benefit the public. *Cty. of Wayne v. Hathcock*, 471 Mich. 445, 496-99, (2004)(Emphasis added).

d. The Utopia Pipeline is a private carrier, not a public use.

Kinder Morgan claims that the Utopia is a common carrier because (1) "Kinder Morgan is statutorily defined to be a common carrier;" and (2) "The Utopia Pipeline is designed to transport goods indiscriminately – for any member of public that wishes to use the pipeline." Resp. to Int. 11.

1. The legislature cannot convert a private project into a public use simply by labeling that project a common carrier, and then declaring all common carriers to be public uses.

As an initial matter, the inquiry into whether the Utopia Pipeline is a "common carrier" is an endeavor in misdirection: the only relevant constitutional inquiry concerns whether the Utopia is a *public* or *private* use. "Even under * * * a deferential standard * * * public use is not established as a matter of law whenever the legislative body acts." *Norwood*, supra., at ¶ 66, citing *99 Cents Only Stores v. Lancaster Redevelopment Agency* (C.D.Cal.2001), 237 F.Supp.2d 1123, 1129. "[D]efining the parameters of the power of eminent domain is a judicial function, and we remain free to define the proper limits of the doctrine." *Id*., citing *Worthington v. Columbus*, 100 Ohio St.3d 103, 2003-Ohio-5099, ¶ 21. Thus, the Ohio Supreme Court explains that "our precedent does not demand rote deference to legislative findings in eminent-domain proceedings, but rather, it preserves the courts' traditional role as guardian of constitutional rights and limits. Accordingly, 'questions of public *purpose* aside, whether * * * proposed condemnations [are] consistent with the Constitution's `public use' requirement [is] a constitutional question squarely within the Court's authority." *Norwood*, supra., at ¶ 69. Therefore, Ohio courts "are independent of

[legislative pronouncements]" and must "always ma[ke] an independent determination of what constitutes a public use for which the power of eminent domain may be utilized." *Id.* This means that Ohio courts must look beyond a simply label and instead simply determine, irrespective of that label, whether a proposed land use is public or private.

The Texas Supreme Court, with analogous constitutional protections and more experience in these matters than Ohio courts, has recently and authoritatively addressed this exact issue:

> The Texas Constitution safeguards private property by declaring that eminent domain can only be exercised for "public use." Even when the Legislature grants certain private entities "the right and power of eminent domain," the overarching constitutional rule controls: no taking of property for private use.
>
> ***
>
> Unadorned assertions of public use are constitutionally insufficient. Merely registering as a common carrier does not conclusively convey the extraordinary power of eminent domain or bar landowners from contesting in court whether a planned pipeline meets statutory common-carrier requirements. Nothing in Texas law leaves landowners so vulnerable to unconstitutional private takings.
>
> ***
>
> Nothing in the statutory scheme indicates that the Commission's decision to grant a common-carrier permit carries conclusive effect and thus bars landowners from disputing in court a pipeline company's naked assertion of public use. As stated above, the right to condemn property is constitutionally limited and turns in part on whether the use of the property is public or private. We have long held that "the ultimate question of whether a particular use is a public use is a judicial question to be decided by the courts."
>
> ***
>
> [T]he Commission's process for granting a T–4 permit undertakes no effort to confirm that the applicant's pipeline will be public rather than private. . .There was no investigation, and certainly no adversarial testing, of whether Denbury Green was indeed entitled to common-carrier status and the extraordinary power to condemn private property.
>
> ***
>
> Denbury Green contends that merely making the pipeline available for public use is sufficient to confer common-carrier status. We disagree . . . Denbury Green's construction leads to a result that we cannot believe the Legislature intended, namely a gaming of the permitting process to allow a private carrier to wield the power of eminent domain.
>
> ***
>
> The oil company should not be able to seize power over the farmer's property simply by applying for a crude oil pipeline permit with the Commission, agreeing to subject itself to the jurisdiction of the Commission and all requirements of Chapter 111, and offering the use of the pipeline to non-existent takers. "A sine qua non of lawful taking ... for or on account of public use ... is that the professed use be a public one in truth. Mere fiat, whether pronounced by the Legislature or by a subordinate agency, does not make that a public use which is not such in fact...."

Texas Rice Land Partners, Ltd. v. Denbury Green Pipeline-Texas, LLC, 363 S.W.3d 192, 194-204 (Tex. 2012)

Here, R.C. 1723.01 and R.C. 1723.08 suggest that the Utopia Pipeline, as a pipeline, *could* be a common carrier. Meanwhile, R.C. 163.01(H)(1)(a) provides that "'Public use' does not include any taking that is for conveyance to a private commercial enterprise, economic development, or solely for the purpose of increasing public revenue, unless the property is conveyed or leased to one of the following: A public utility, municipal power agency, or common carrier."

However, even if the Utopia were a common carrier (it is *not* - - see below), the legislature does not have the authority to exempt "common carriers," from the public use requirement enshrined in the Ohio Constitution. Further complicating matters, Kinder Morgan appears to believe that the statutory framework attempts to confer eminent domain power based upon the *identity* of the would-be appropriator (here, a pipeline company), rather than the *use* to which the land will be put, once appropriated (here, a private pipeline). No deference could be owed to this identity-based theory: instead Ohio courts are required to strictly scrutinize the use to which the land taken will, with certainty, be put. Were it otherwise, a road-builder could exercise eminent domain powers to take land for the precise type of private shopping mall prohibited in *Norwood.* And as demonstrated above, irrespective of whether it is "statutorily defined to be a common carrier," the Utopia Pipeline is a private pipeline for private use. To hold otherwise would be to invite "a gaming of the permitting process to allow a private carrier to wield the power of eminent domain." *Texas Rice Land Partners, Ltd.,* supra.

2. The Utopia Pipeline is not a common carrier.

Even if these Court were to inquire into the common carrier status of the Utopia Pipeline, it could come to no conclusion but that the Utopia is a *private* carrier.

First, eminent domain statutes fail to define "common carrier." But other Ohio statutes do so in a manner that would clearly exclude the Utopia Pipeline. R.C. 4921.02, dealing with the general powers of the Public Utilities Commission to regulate certain common and private carriers, includes in its definition of common carrier 'every corporation, company * * * engag[ed] in the business of transporting persons or property, or the business of providing or furnishing such transportation service, for hire, whether directly or

by lease or other arrangement, for the public in general." (Emphasis added). In contrast, R.C. 4923.02, which defines a private carrier, does not use the language "for the public in general."

This definition is consistent with Ohio Supreme Court precedent defining "common carrier." The Supreme Court of Ohio has maintained, since the seminal case of *Columbus-Cincinnati Trucking Co. v. Public Utilities Commission,* as follows: "one performing transportation service for specific customers at prices fixed in each case by definite contract, for a particular group or class of persons under a special contractual arrangement, or for a particular person only is not a common carrier."[55] There, "the applicant" was found not to be a common carrier because his "service is of a highly specialized type and limited to a relatively small class of shippers."[56]

In contrast, a *private* carrier is one that undertakes by special agreement or contract to transport a definite number of persons for a special undertaking. *Spath v. Dillon Enterprises* (D.Mon.1999), 97 F.Supp.2d 1215, 1218(defendant was a private carrier where it contracted to transport individuals on white water rafting trips; this was by nature a special agreement). The issue of whether a particular person or instrumentality is a common carrier is generally a question of law for the court. 13 Ohio Jurisprudence 3d (1995) 567, Carriers, Section 1; *Harper*, supra.

Here, the Utopia is not furnishing transportation *for the public in general*. Instead, it is transporting ethane for just one company: Nova Chemicals. And there is no doubt that the Utopia is being built for the *sole* benefit and use of Nova Chemicals. When forced to identify "each and every shipper who will use the Utopia Pipeline to ship substances," Kinder Morgan can identify only one: "Nova Chemical and any other member of the public that wishes to transport petroleum on the Utopia Pipeline." Resp. to Int. 12. Further, the Utopia's capacity is 50,000 gallons, and Nova Chemicals is utilizing *all* 50,000 gallons. And while Kinder Morgan claims to have held an "open season" between September and October of 2014, no other

---

[55] 141 Ohio St. 228 (1943)(Emphasis added), citing 9 American Jurisprudence, 430, Section 4; *Goodman v. New York, N. H. & H. Rd. Co*., 295 Mass. 330. American Jurisprudence, 432, Section 5; 9 American Jurisprudence, 431, Section 4; *State, ex rel. Stimson Lumber Co., v. Kuykendall, Dir*., 137 Wash. 602, 243 P. 834. *Hissem v. Guran*, 112 Ohio St. 59, at page 63, 146 N.E. 808; *Faucher v. Wilson*, 68 N.H. 338, See annotations 18 A.L.R. 1317 and 42 A.L.R. 855.

[56] *Id.*

shippers showed any interest in using the Utopia whatsoever;[57] nor could any be expected to, given that the pipeline runs directly to Nova Chemical's facility in Canada. There can be no doubt that this is a "special undertaking," made by "special agreement or contract."

Thus, Utopia's "service" is utterly nothing like a taxi cab, which picks up any person that flags it down alongside the road. Rather, the Utopia is more like a private limousine driver who works full time for one very wealthy individual, driving only one very specific route that only that one individual would ever care to take. Sure, the driver, instead of the customer, may own the limo. But the limo does not pull over to pick up others. In fact, it never transports others. And while there may be room for others in the back seat, nobody is using it. Private property could not be taken to build a road for the travel of such a limo.

Second, construing the Utopia Pipeline, carrying for one private shipper straight to that shipper's Canadian facility, to be a common carrier would transgress legislative intent. In determining that intent, courts must consider the common law or former statutory provisions, including laws upon the same or similar subjects, and the consequences of a particular construction. R.C. 1.49. As explained above, Ohio's common law takes a much narrower view of "common carrier," than does Kinder Morgan. And if the legislature intended *all* pipelines to be deemed common carriers or to maintain eminent domain power, it could have just said so.

Finally, any argument by Kinder Morgan that the Utopia may *someday* be a common carrier is irrelevant. In *Norwood*, the Ohio Supreme Court unmistakably explained (1) "Public use cannot be determined as of the time of completion of a proposed development, but must be defined in terms of present commitments which in the ordinary course of affairs will be fulfilled;" and (2) "`* * * If the public use is contingent and prospective and the private use or benefit is actual and present, the public use would be incidental to the private use, and in such a case the power of eminent domain clearly could not lawfully be exercised." *Norwood*, supra., at ¶ 101, 102, citing *Kessler v. City of Indianapolis* (1927), 199 Ind. 420,

[57] See Kinder Morgan press release announcing NOVA Chemicals as "anchor shipper," attached to Defendants' Answer as Exhibit B.

430; *O'Neil,* 3 Ohio St.2d at 58 ("A municipal corporation has no power or authority to appropriate lands for some contemplated but undetermined future use.").

Kinder Morgan maintains no concrete *allegations,* much less evidence, that it will serve anyone other than Nova Chemicals or ever undertake any function other than shipping ethane or some variation thereof to Nova's private facility in Canada. Consequently, the Utopia is a *private* carrier for Nova, and not a *common carrier* for "the public at large."

3. <u>Construing the Utopia Pipeline to be a "common carrier" would renter that takings criteria unconstitutionally vague.</u>

If the Utopia Pipeline were to be considered a common carrier, then that term, as used in R.C. 1723.01, R.C. 1723.08, and R.C. 163.01 is far too unconstitutionally vague to serve as an independent basis for the taking of private property.

In *Norwood,* the Ohio Supreme Court explained that "the Due Process Clause of the Fourteenth Amendment demands that fair notice be given to a property owner in an appropriation action. Given that eminent domain necessarily entails the state's intrusion onto the individual's right to garner, possess, and preserve property and that sufficient notice is the critical core of the void-for-vagueness doctrine, the doctrine has utility in eminent-domain cases." *Norwood,* supra., ¶ 81-105.

The Court then held that the terms, labels, and criteria that grant eminent domain authority are subject to the strictest scrutiny possible: "We hold that when a court reviews an eminent-domain statute or regulation under the void-for-vagueness doctrine, *the court shall use the heightened standard of review* employed for a statute or regulation that implicates a First Amendment or other fundamental constitutional right." *Id.* Under this standard, the Court held that the term "deteriorating" was, as an independent basis for taking property, unconstitutionally vague: "the Due Process Clause of the Fourteenth Amendment demands that fair notice be given to a property owner in an appropriation action . . . But what notice does the term "deteriorating area" give to an individual property owner? . . . Because the Norwood Code's definition of a deteriorating area describes almost any city, it is suspect . . . In essence, 'deteriorating area' is a standardless standard . . .We therefore hold that the use of "deteriorating area" as a standard for

determining whether private property is subject to appropriation is void for vagueness and offends due-process rights because it fails to afford a property owner fair notice and invites subjective interpretation." *Id.* Likewise here, if the Utopia were a *common* carrier, then that term would have no meaning. In essence that term would describe *any private pipeline* and would be a "standardless standard."

However, this Court must presume "compliance with the constitutions of the state and of the United States is intended," R.C. 1.47(A), and the canon of constitutional avoidance, which demands a narrow construction, "allows courts to *avoid* the decision of constitutional questions. It is a tool for choosing between competing plausible interpretations of a statutory text, resting on the reasonable presumption that Congress did not intend the alternative which raises serious constitutional doubts." *Clark v. Martinez*, 543 U.S. 371, 381-82 (2005).

C. The taking of Defendants' property is not "necessary."

A *sine qua non* of eminent domain in Ohio is the understanding that the sovereign may use its appropriation powers only upon necessity." *Norwood,* at ¶ 43. And any exercise of eminent domain must be "necessary 'for the use of the public.'" *O'Neil v. Bd. of Cty. Comm'rs of Summit Cty.*,3 Ohio St. 2d 53, 53 (1965). Accordingly, even if this Court were to determine the use to be public (which it cannot), in addition to requiring public use, the Ohio Constitution requires that any taking be necessary, and the statute cited by Kinder Morgan requires the same.[58]

Here, (1) the pleadings fail to *adequately allege* that the Utopia Pipeline's route across Defendants' property is necessary; (2) Kinder Morgan's *evidence* fails to demonstrate that the Utopia's route across Defendants' property is necessary; (3) Kinder Morgan fails to allege or demonstrate that the specific route taking across Defendants' property - - through the middle rather than along the side - - is necessary; and (4) Kinder Morgan fails to demonstrate that eminent domain is at all necessary.

---

[58] *R.C. 1723.01 provides not just a grant of eminent domain, but also a statutory limitation on that grant: a private pipeline entity* may only appropriate so much of such land, or any right or interest therein, *as is deemed necessary* for the laying down or building of such tubing, conduits, pipes, * * *." If the taking is not "necessary for such pipes," then no taking can occur.

i. "Necessary" means "necessary."

Here, Kinder Morgan demands an easement by necessity from Defendants. Fortunately, the Ohio Supreme Court has clearly defined the scope of the necessity requirement in a context where "necessity must be established: when determining whether to grant such an easement by necessity. First, like easements acquired by eminent domain on grounds of necessity, "easements implied of necessity are not favored." *Tiller v. Hinton* (1985), 19 Ohio St.3d 66, 69, quoting *Ciski v. Wentworth* (1930), 122 Ohio St. 487, paragraph one of the syllabus. Accordingly, [t]he party asserting an easement by necessity has the burden of proving that one exists by clear and convincing evidence." *Trattar v. Rausch* (1950) 154 Ohio St. 286, 293, 295.

In *Tiller*, the Ohio Supreme Court explained that "to justify the implication of an easement by necessity, strict necessity is required. An easement will not be implied where there is an alternative outlet to a public way, even though it is less convenient or more expensive." *Tiller* at 69; see also *Trattar*, supra.; *Meredith v. Frank*, 56 Ohio St. 479, 47 N.E. 656 ("it must be one of strict necessity . . . It is not merely a matter of convenience"). "Other outlets" are sufficient to disprove necessity, "even though such other outlets are less convenient and would necessitate the expenditure of a considerable sum of money to render them serviceable." *Trattar*, at 295; see also 15 Ohio Jurisprudence 62, Section 44. This definition of "necessity" is consistent with the plain language of the term. The most relevant dictionary definition of necessary is a thing "that cannot be done without" or is "absolutely required." Webster's Third New International Dictionary 1151 (1986).

Certainly, there can be no "absolute requirement" for expropriation if noncoercive alternatives are readily available, such as the acquisition of the properties of neighbors who would or could consent. Even if the expropriator need not prove that the condemnation of any specific site is required, it still must prove that the expropriation of *some* location is necessary to achieve its public use. If the public use can be achieved by voluntary means, it cannot possibly be "*necessary*" to achieve it by means of coercive expropriation. *Coleman v. Chevron Pipe Line Co.*, 673 So.2d 291, 296 (La.App. 4th Cir. 1996); *Claiborne*

Elec. Coop. v. Garrett, 357 So.2d 1251, 1255 (La.App. 2d Cir.1978); *Illinois Central R. Co. v. Mayeux,* 301 F.3d 359 (5th Cir. 2002).

In its continued absence of humility, Kinder Morgan appears to believe that it is entitled to the same level of deference when it steals Ohioans' land as is afforded the United States Congress when it promulgates legislation. Kinder Morgan continuously stresses that the taking of Defendants' land is "convenient" for it (see below). Kinder Morgan, whether knowingly or not, derives the formulation of "necessary" from Chief Justice John Marshall's construction of the Necessary and Proper Clause in the United States Constitution in *McCulloch v. Maryland,* 4 Wheat. 316, 413, 4 L.Ed. 579 (1819). There, the Chief Justice, stressing the need for the judiciary to accord a high level of deference to *Congress,* read the word "necessary" to mean "convenient, or useful," rejecting a stricter reading of the term which would have limited congressional power under the Constitution to the "most direct and simple" means available. *Id*. As aptly demonstrated above, the Ohio Constitution requires Ohio courts to strictly and narrowly construe the takings power of private corporations, and construe all doubts in favor of the property owner. As such, any construction of "necessity" as "convenient for the private corporation" is fundamentally inconsistent with the scrutiny required of private takings. Moreover, those who ratified Section 19, Article I of the Ohio Constitution in 1851 would have been aware Justice Marshall's interpretation in 1819, but deliberately rejected the term "convenient" in favor of the stricter term "necessary." Finally, proof that these two standards are not the same is demonstrated by the OPSB and FERC standards cited above: each require that a pipeline seeking to take land prove "necessity" *and* "convenience" before obtaining the power to take land for the route. Thus the two standards are entirely different.

Finally, it must be noted that it is highly unusual that an Ohio Court is called upon to determine "necessity" without a roadmap. Prior to 2012, any pipeline built in Ohio would have come before the Court with a certificate of necessity from FERC or an OPSB approval as prima facie evidence of necessity. Likewise, when municipalities and other governmental authorities come before the court with eminent domain claims, those accountable public authorities have already adjudicated and declared necessity within

the applicable ordinance. Only in this new age where Texas pipeline corporations claim unfettered eminent domain power in Ohio are courts called upon to analyze the necessity of their routes without prior guidance.

ii. Kinder Morgan has not alleged, has not proven, and cannot prove that its route over Defendants' land is "necessary."

Unlike other pipelines to have recently exercised eminent domain authority in Wood County, neither OPSB nor FERC has determined the Utopia Pipeline or its route across Defendants' property to be necessary.

The discovery responses before this Court painstakingly demonstrate that Kinder Morgan alone believes the pipeline and its proposed route are necessary, but even then, it presents no reasons in support of this necessity.[59]

There, Kinder Morgan, when pressed to identify <u>every reason</u> *why the use of eminent domain to take private property along the pipeline route is necessary*, responds that (1) "Kinder Morgan passed a resolution declaring the use of appropriation to construct the Utopia Pipeline is a necessity. Accordingly, the use of appropriation to construct the Utopia Pipeline is a necessity;" and (2) "the Utopia Pipeline is both useful and convenient to the public."[60]

Kinder Morgan's second justification can be immediately ruled out, because "convenience" is not "necessity." Further, strict necessity is required. A self-serving declaration of necessity by the paid employees of a private company with an extreme self-interest and no accountability to the public does not prove necessity. Meanwhile, the evidence is clear that Kinder Morgan is not in public demand: it has only one pre-arranged shipper, and when it held "open seasons," there were no additional takers. And as a matter of law, a private ethane pipeline to Canada to make plastics for Canadians is inherently unnecessary (except perhaps to Kinder Morgan's gross profits). Simply put by Kinder Morgan itself, "*[T]he Company*

---

[59] See Exhibit A to Defendants' Answer, Kinder Morgan Utopia's June 16, 2016 responses to Interrogatories of Defendants Donald Keppler and Kenneth Keppler in the Wood County Court of Common Pleas, case number 2016CV225. This evidence qualifies as Civ. R. 56(c) summary judgment evidence, but is also attached to Defendants' Answer and therefore properly before the Court on Defendants' Motion for Judgment on the Pleadings.

[60] Id., Response to Interrogatory No. 2.

has determined, through the exercise of reasonable and prudent *business judgment*, that the acquisition of the said right-of-way and easements is in the public interest and is a public necessity. . ."[61] If the "business judgment" of private corporations, which is necessarily directed toward profit maximization, could furnish a basis for finding public necessity, then the necessity requirement would utterly fail to protect property owners from *any* business - - such a view has been expressly rejected by the Ohio Supreme Court. And the only real "necessity" for Kinder Morgan appears to be its "business reputation." Resp. 44.

In reality, Kinder Morgan has not bothered to determine whether the route across Defendants' property is necessary, or even simply "reasonably routed": Kinder Morgan indicates that the necessity requirement is "irrelevant," and any thought it put into the route is "confidential and proprietary," protected by "work product privilege," and all that matters is that, "the best principles and practices in the pipeline industry were relied to determine which properties along the pipeline route should be subject to eminent domain."[62]

Meanwhile, Kinder Morgan fails to even allege, much less prove, that the route over Defendants' property is the only route available. When pressed as to whether it considered voluntarily acquiring the property it desired from Plaintiffs' neighbors, Kinder Morgan simply insists that attempts at voluntary acquisition are "irrelevant," and "confidential and proprietary."[63] In Kinder Morgan's short-sighted view, taking Defendants' land is "necessary" simply because Defendants "have refused to sell Kinder Morgan the requested pipeline easement across the property.

In summary, Kinder Morgan's only arguments and evidence as to necessity are that this route maximizes Kinder Morgan's profits, there is no need to examine other routes where property could have been voluntarily acquired, and Defendants here have not sold to Kinder Morgan. If this were to satisfy the "necessity" requirement, that requirement would have no meaning. Moreover, Kinder Morgan has failed to allege or prove the absence of an "alternative way" or "other outlets." Indeed here, there are numerous

---

61 Id., at Paragraph 5.
62 Id., Response to Interrogatory No. 4, 46, 48, 50.
63 Id., Response to Interrogatory No. 51.

other pipeline corridors, such as those of the Nexus and Rover, not to mention older pipeline corridors, that Kinder Morgan could have taken advantage of.

Thus, Kinder Morgan fails to even allege, much less prove, that the Utopia itself is "necessary," that the route over Defendants' property is the only route available, or that the use of eminent domain against Defendants is necessary. However, the Court can take judicial notice that other recent ethane pipelines, such as the ATEX, were assembled across Ohio without *any* use of eminent domain. By contrast, the fact that Kinder Morgan has sued 40 Wood County residents alone suggests that it has failed to do its homework. At the same time, it remains far from clear that an ethane *pipeline* is at all necessary: Kinder Morgan concedes that ethane can be shipped by railroad, tanker truck, and barge - - means for transportation for which eminent domain authority has already been exercised. Resp. 45.

Finally, Kinder Morgan makes no allegation and provides no evidence as to why it is necessary for the Utopia to cut directly through the middle of Defendants' property.[64] This move self-evidently requires the taking from Defendants of more land than is necessary to build a pipeline on their property, and therefore violates not just the Ohio Constitution's requirement of necessity, but also the mandate in R.C. 1723.01 that a pipeline company take no more land than is necessary.

iii. Kinder Morgan is entitled to no presumption in its favor.

The statute provides no clarification as to when private property may be "deemed necessary," or as to *who* may deem particular private property here, "necessary for the laying down . . . of pipes." To this end, R.C. 1723.02 provides "The appropriation referred to in section 1732.01 of the Revised Code shall be made in accordance with sections 163.01 to 163.22 of the Revised Code." However, R.C. 163.09(B) states in, in pertinent part, as follows:

> (1) When an answer is filed pursuant to section 163.08 of the Revised Code and any of the matters relating to the right to make the appropriation, the inability of the parties to agree, *or the necessity for the appropriation* are specifically denied in the manner provided in that section, the court shall set a day, not less than five or more than fifteen days from the date the

[64] See Exhibit 2 to Plaintiff's April 18, 2016 Complaint, two diagrams displaying how the pipeline crosses Defendants' land.

> answer was filed, to hear those matters. *Upon those matters, the burden of proof is upon the agency by a preponderance of the evidence except as follows*:
>
> (a) *A resolution or ordinance of the governing or controlling body, council, or board of the agency declaring the necessity for the appropriation creates a rebuttable presumption of the necessity for the appropriation* if the agency is not appropriating the property because it is a blighted parcel or part of a blighted area or slum.[65]

Kinder Morgan Utopia interprets its power under R.C. 163.09 as extraordinarily self-aggrandizing: "[Kinder Morgan] has declared the appropriation to be necessary by its Corporate Resolution attached as Exhibit B, thereby satisfying its prima facie burden pursuant to R.C. 163.09(B)," and elsewhere claims "a rebuttable presumption in favor of . . . the necessity of the appropriation."[66] Kinder Morgan's failure to examine all of its options or pay any regard to Defendants here, as chronicled above, demonstrates how this presumption of necessity results in considerable abuse and "gaming of the system" - - Defendants' position is that the requirement of "necessity" is satisfied upon the showing of something entirely different from "necessity," i.e. that a pipeline "provides convenience and is useful to the public," and that "Kinder Morgan's business reputation will be severely damaged if it fails to meet its targeted in-service date."[67]

However, the Ohio Supreme Court has expressly determined that all inferences must be drawn in favor of *the Ohio landowner.* And in *Norwood v. Horney,* the Court left no doubt that drawing a presumption in favor of the necessity of the appropriation is unconstitutional:

> Recognizing that the General Assembly is currently reviewing legislation in this area of law, we have limited our decision to those points of law that we feel must be decided at this

---

[65] Kinder Morgan Utopia claims to be a common carrier. R.C. 1723.08 states as follows: "With respect to the transporting by it of natural gas, petroleum, coal or its derivatives, water, and electricity, a company described in section 1723.01 of the Revised Code is a common carrier and is subject to the duties and liabilities of a common carrier under the laws of this state. A company described in section 1723.01 of the Revised Code includes any firm, partnership, voluntary association, joint-stock association, company, or corporation, wherever organized or incorporated, when engaged in the business of transporting petroleum through tubing, pipes, or conduits as a common carrier." Note that R.C. 163.09(B)(2) states "Subject to the irrebuttable presumption in division (B)(1)(c) of this section, only the judge may determine the necessity of the appropriation." However, no guidelines are articulated to guide the judge, and the statues appear to stack the deck in favor of politically powerful private pipelines.

[66] See Exhibit A, Kinder Morgan Utopia's April 18, 2016 Complaint against Donald Keppler, *et al.* in the Wood County Court of Common Pleas, case number 2016CV225, at Paragraph 44. Mr. Keppler is a neighbor of the Plaintiffs here, and is identically situated. Each of Kinder Morgan Utopia's approximately 40 Complaints in Wood County make identical claims. However, the Ohio Supreme Court has suggested that this presumption violates Due Process; while the *American Railroads, infra.,* Court has warned against provisions that "stack the deck" in favor a private party to whom public power is delegated.

[67] See Exhibit B, Kinder Morgan Utopia's June 16, 2016 responses to Interrogatories of Defendants Donald Keppler and Kenneth Keppler in the Wood County Court of Common Pleas, case number 2016CV225, Response to Interrogatories No. 22, 24, 27, 30, 34, 36, 39, 41, 44,

> juncture. We note, however, that given our reaffirmation that the Ohio Constitution confers on the individual fundamental rights to property that may be violated only when a greater public need requires it, there are significant questions about the validity of the presumption in favor of the state that is set forth in R.C. 163.09(B), which provides that a resolution or ordinance of an agency declaring the necessity of an appropriation shall be prima facie evidence of necessity in the absence of a showing by the property owner of an abuse of discretion. See *Grace v. Koch* (1998), 81 Ohio St.3d 577, syllabus (holding that elements of adverse possession must be proved by clear and convincing evidence); *Addington v. Texas* (1979), 441 U.S. 418, 424 (noting that the "clear and convincing evidence" standard of proof is often used in cases in which the "interests at stake * * * are deemed to be more substantial than mere loss of money" and "to protect particularly important individual interests in various civil cases").

Of note, the Court above addresses a presumption in favor of *the state*, much less a *purely private party*. *However*, "[a] court's independence is critical, particularly when the authority for the taking is delegated to another or the contemplated public use is dependent on a private entity. In such cases, the courts 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." *Norwood*, supra, at ¶ 72, citing *Pontiac Improvement Co.*, 104 Ohio St. at 453-454, citing *Giesy*, 4 Ohio St. at 326. Likewise, "when the authority is delegated to another, the courts 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." Id. "[D]efining the parameters of the power of eminent domain is a judicial function, and [courts] remain free to define the proper limits of the doctrine." *Id.*, citing *Worthington v. Columbus*, 100 Ohio St.3d 103, 2003-Ohio-5099, ¶ 21. Given the instructions of the Ohio Supreme Court on this matter, this Court must put aside any "presumption" in favor of this purely private pipeline. After having done so, the Court can reach no conclusion but that (1) there is no public necessity for the Utopia Pipeline; (2) it is not necessary for the Utopia Pipeline to cross Defendants' property; and (3) it is not necessary for the Utopia Pipeline to cross Defendants' property in the manner that Kinder Morgan seeks.

IV. CONCLUSION

For the foregoing reasons, there remain no genuine issues as to any material fact, and Defendants, Wood County farmers Don and Ken Keppler, are entitled to judgment on the pleadings and/or summary judgment as a matter of law.

Respectfully submitted,

/s/ *Maurice A. Thompson*
Maurice A. Thompson (0078548)
208 E. State Street
Columbus, Ohio 43215
Tel: (614) 340-9817
Fax: (614) 365-9564
MThompson@OhioConstitution.org

Andrew R. Mayle (0075622)
210 South Front Street
Fremont, Ohio 43420
Tel.: (419) 334-8377
Fax: (419) 355-9698
AMayle@mayleraymayle.com

Attorneys for Defendants

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 12th day of July, 2016.

/s/ Maurice A. Thompson
Maurice A. Thompson