IN THE SUPREME COURT OF OHIO

STATE OF OHIO, EX RELATORS RUTH BROWN,
ET. AL.,

RELATORS,

VS. CASE #2011-2133

SENECA COUNTY BOARD OF COMMISSIONERS,
DAVID G. SAUBER, SR., BENJAMIN E. NUTTER, AND
JEFFERY (SIC) D. WAGNER IN THEIR OFFICIAL CAPACITIES,

RESPONDENTS.

RESPONDENTS RESPONSE AND MEMORANDUM *CONTRA* RELATOR'S MOTION FOR TEMPORARY RESTRAINING ORDER, PRELIMINARY INJUNCTION, AND EMERGENCY WRIT OF MANDAMUS WITH SUPPORTING AFFIDAVITS

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Relators seek various forms of injunctive relief in their filing of December 19, 2011. By Order of this Court, Respondents hereby file this timely pleading in opposition. Relator's motion should be denied as it fails to establish that Relators are entitled under Ohio law to a Temporary Restraining Order, Preliminary Injunction, or other injunctive relief.

Operative Facts

Relators allege in their motion that they are entitled to injunctive relief because "the current temporary court facilities are inadequate", the "most cost-efficient means of correcting the deficiencies requires restoration and rehabilitation of the 1884 Courthouse", and the Seneca County Commissioners have "made a number of binding commitments" to rehabilitate the 1884 Courthouse. (Complaint, paragraphs 9 a., 17).

Relator's Complaint presents two theories for relief. First, Relators assert a taxpayer suit pursuant to RC 309.13. The second claim is for mandamus to compel Respondent to provide for the courthouse renovation Relators themselves have chosen for Seneca County.

I: Revised Code Section 309.13

Relators assert that they are entitled to relief pursuant to RC **307.13** (paragraph #2, page 2 of Complaint). The undersigned reasonably believes that Relators are requesting to proceed pursuant to RC 309.13 and will respond to that code section.

RC 309.13 allows for a taxpayer to institute a civil action if the prosecuting attorney fails to do so after demand. Relators are correct that they did demand that the undersigned institute an action pursuant to RC 309.13. The undersigned's entire

response is attached hereto as Exhibit 1. Of significance in the response, the undersigned wrote:

> RC 309.12 allows for this county official to seek judicial protection of the county from illegal, fraudulent, or corrupt actions. You have not raised such issues in your letters. Instead you raise issues of prudence, wisdom, and insight. Those issues are very important; so important in fact that they are reserved for the citizens of Seneca County to vote on at elections.

Exhibit 1. Relators' core assertion is not that Seneca County has failed to provide adequate courtroom space; their true complaint is that Seneca County has not implemented Relators' plan for renovating the 1884 courthouse.

A plain reading of RC 309.12 requires that county funds are being misapplied or that a "contract, in contravention of law, has been executed or about to be entered into, or that such a contract was procured by fraud or corruption" to file an action. RC 309.12. The allegations of the Complaint do not allege with any specificity illegality or fraud. The allegations are simply "second-guessing" or "Monday morning quarterbacking" the decisions by the Seneca County Board of Commissioners.

On its face, Relator's claim for protection of public funds via a Taxpayer's Suit is frivolous and does not even allege a prima facie claim. As such, Relators clearly fail to meet the burden necessary for any type of injunctive relief.

II: Mandamus

Relators' second theory of relief is based in Mandamus. To be entitled to a writ of Mandamus, Relators must have a clear legal right to the relief demanded; that the Seneca County Commissioners are under a clear legal duty to renovate the 1884 Courthouse; and that Relators have no adequate remedy at law. *See, State ex rel. McGrath v. Ohio Adult Parole Authority*, 2003 Ohio 1969 (2003).

(A) Right to Relief Sought/Right to have the 1884 Courthouse Renovated to the specifications of the Relators

Relators assert that Seneca County has a legal duty pursuant to RC 307.01 to provide for a courthouse. RC 307.01 states in part: "A courthouse, jail, public comfort station, offices for county officers, and a county home shall be provided by the board of county commissioners when, in its judgment, any of them are needed."

RC 307.01 (and the case law) generally state that decisions related to providing for a courthouse are reserved to the legislative branch of government subject to review by judicial authorities regarding sufficiency. Respondents have decided to remove the dilapidated 1884 courthouse structure. Relators' frivolous suit attempts to trump the decision-making of the board of commissioners.

Relators rely heavily on *Zangerle vs. Court of Common Pleas of Cuyahoga County*, 141 Ohio St. 70 (1943) as additional authority that Respondent has a duty to provide a courthouse. The precise issue as stated by the Ohio Supreme Court in *Zangerle* was:

> The question presented by these conflicting contentions is substantially as follows: When, by reason of the constantly increasing volume of litigation and other resulting essential activities, the court is unable properly and adequately to function without additional space which is appropriate for the purpose of conducting the business of the court, and the county commissioners neglect or refuse to make such changes as are necessary to provide the additional space in the courthouse required for such purpose, has the court any authority in the matter, or is it altogether powerless?

Id. at 81. As revealed and indicated by the Complaint of Relators, the issue presented is not *if* Respondent has or will provide a courthouse, but rather that Relators desire this

Court to impose on the Respondent (and by continuation, Seneca County) that the courthouse be the renovated 1884 structure as ordained by Relators.

As indicated in the pleadings of Relators, Respondent has seriously studied the issues related to a courthouse. Relators aver "various studies" performed for Respondent. In 2009 Respondent passed a resolution supporting renovation of the 1884 courthouse. Relators rely heavily on this resolution and January 6, 2011 resolution in their filings with this Court referring to a "binding commitment" (Complaint, paragraph 17).

Numerous changes occurred beyond the control of Respondents since those earlier Resolutions. First, the August 25, 2009 Resolution references the pledge by former Governor Strickland for funds for the renovation. As evidenced by the attached affidavit of Commissioner Nutter (Exhibit 2) and Commissioner Wagner (Exhibit 3), the Governor's office has not indicated in over a year that the promised funds from the Governor's office would be forthcoming.

Rhetorically, if Relators can proceed in this manner, can Respondents bring a 3rd party complaint against the Governor for failing to keep the "binding commitments" of his predecessor to Seneca County?

Second, again as evidenced by Exhibit 2 and Exhibit 3, Seneca County has suffered a significant decrease in its general fund due to decreases in funding from the State of Ohio. Both Commissioner Nutter and Commissioner Wagner believe that based on the current situation that Respondent has insufficient funding to proceed with the renovation plans for the 1884 courthouse. See, Exhibit 2 and Exhibit 3. The

undersigned has not requested an affidavit from Commissioner David G. Sauber, Sr. as he is undergoing a hip replacement surgery on December 20, 2011.

Third, one Commissioner has introduced his plan in a public meeting for a new courthouse. See, Exhibit 2. This again supports the premise herein that Relators are not contesting the need for a courthouse, but are instead insisting on their plan for a renovated 1884 courthouse.

Fourth, Relators in paragraph 20(b) aver that Respondent has failed to take up private citizens' offer to mothball the 1884 courthouse until Seneca County could undertake the financing of the renovation. If Relators assert that an action in Mandamus is necessary to provide for a courthouse, how can they simultaneously assert that Respondent has not been fiscally responsible by failing to agree to mothball the structure? This again evidences that Relators' intent is not to seek Mandamus to insure that a sufficient courthouse is in place, but is instead essentially a request for an injunction to save this historic building.

Fifth, Relators continued reference to a "binding commitment" implies that a contract was entered into between Respondent and some person or entity to renovate the 1884 courthouse. The undersigned is unaware of any contract or any "binding commitment". If such a commitment exists, a breach of contract would be the proper remedy in lieu of a taxpayer suit or Mandamus.

Sixth, Relators omit from their presentation to this Court Respondent's Resolution of November 22, 2011 which rescinds the Board of Commissioners prior intent to renovate the 1884 Courthouse. See the attachment to Exhibit 2, which incorporates this Resolution.

Seventh, Seneca County has a courthouse for the General and Domestic Relations Divisions of the Common Pleas Court which was constructed in 2004 and an older structure housing the Probate and Juvenile Division of Common Pleas Court. Exhibit 2, paragraph 2-5; Exhibit 3, paragraphs 3-6.

Finally, there has already been a judicial determination that Seneca County has the statutory right and privilege to remove and replace a courthouse. In *State ex rel. Cook vs. Seneca County Commissioners*, the Third District Court of Appeals stated:

> Here, appellants argue that the board was prohibited from passing a resolution to demolish the courthouse because the General Assembly did not expressly provide the terms "demolish" or "destroy" among the powers enumerated in R.C. 307.02 and that the trial court inappropriately interpreted the unambiguous term "rebuild" to include demolition. However, it is undisputed that the General Assembly affirmatively granted the board the authority under R.C. 307.01 to regulate the courthouse and other specified facilities. Clearly, the board has discretion to determine not only that a courthouse is needed but also that one is not needed. Nothing in the plain language of R.C. 307.01(A) limits the judgment of the board solely to determining whether a courthouse is needed where none originally exists. Likewise, R.C. 307.01(A) does not prohibit the board from deciding that an existing courthouse is no longer necessary. This is particularly so in light of the additional powers granted to the board under R.C. 307.02 for providing a courthouse, including the power to rebuild.
>
> Appellants argue that the trial court inappropriately interpreted the term "rebuild" to encompass demolition and that the board could not rebuild a new courthouse on the same location as the current one unless the current courthouse was destroyed by fire, storm, or other natural disaster. However, a review of the record indicates that the trial court did not find that the term "rebuild" was ambiguous and, consequently, did not interpret it. Instead, the trial court merely applied the plain meaning of "rebuild" in finding that the board was authorized to demolish the courthouse. The ordinary, dictionary definition of "rebuild" is "to make extensive repairs to, including the replacement of missing or defective parts; to restore to a previous state or condition; to make extensive changes in; to build again or anew." Webster's Third New International Dictionary (2002) 1893. Clearly, the board could decide not only to restore or repair the courthouse, but also to make extensive changes to it or to completely build it again or anew. The ability to demolish the courthouse is inherent in the ability to build it again or anew at the same location. Contrary to appellants' assertion, neither the definition of "rebuild" or R.C. 307.02 restricts the board's ability to

> completely rebuild the courthouse only after it has been destroyed by fire or a natural disaster.
>
> Additionally, were we to accept appellants' reading of R.C. 307.01, 307.02, and "rebuild," the board would not only be prevented from demolishing a courthouse, but it could also never demolish any of the other numerous public facilities that it is authorized to provide under R.C. 307.02. The board could only repair or renovate an existing structure-no matter its condition-or construct a new one without tearing the old one down-regardless of the economic costs required to do so. Instead, the General Assembly would have to determine when a public facility listed under R.C. 307.02 should be demolished-for each and every county in Ohio.[4] Such a reading would work an absurdity and defies the legislative intent that the board of each county make these decisions. See, e.g., *State ex rel. Dispatch Printing Co. v. Wells* (1985), 18 Ohio St.3d 382, 384, 18 OBR 437, 481 N.E.2d 632 ("It is an axiom of judicial interpretation that statutes be construed to avoid unreasonable or absurd consequences"). Thus, we find that the board had the authority to pass a resolution to demolish the courthouse. Consequently, we find that the trial court properly denied appellants' motion for declaratory judgment, judgment on the pleadings, and/or summary judgment on their unauthorized conduct claim.

State ex rel. Cook vs. Seneca County Commissioners, 175 Ohio App. 3d 721, 729-730 (2008). Of note, several relators from the 2008 action are also part of this action including Nancy Cook, Rayella Engle, Jackie Fletcher, Lenora Livingston, Adams Engle, and Doug Collar.

(B) Adequate Remedy at Law

Relators are challenging the policy decisions of the Seneca County Commissioners in court, when the appropriate forum to implement their policy preferences is the ballot box. The right to vote is our most fundamental liberty. Each voter in Seneca County may cast his or her ballot for the position of Seneca County Commissioner when each term of office concludes. As evidenced by the Affidavit of Commissioner Wagner, Exhibit 3, he campaigned for office indicating a policy preference of removing the 1884 Courthouse structure.

While not directly on point, when others have attempted to utilize Mandamus to compel the Governor (the executive branch of the state as compared to the county commissioners who serve as the legislative branch of a county), Ohio Courts have recognized limitations for interfering with the executive or legislative decisions of government.

> Similarly, it is a general rule that when granting a writ of mandamus, no court has jurisdiction to compel the performance of an executive act of the Governor that is dependent upon the judgment or discretion of the Governor. *State ex rel. Watkins v. Donahey* (1924), 110 Ohio St. 494, 500, 144 N.E. 125. Such an act of discretion by the Governor will be subject to judicial control only when there has been a clear abuse of discretion. *State ex rel. Armstrong v. Davey* (1935), 130 Ohio St. 160, 163, 4 O.O. 38, 198 N.E. 180. An abuse of discretion is established where the Governor has neglected or refused to act to exercise discretion when duty requires it. *State ex rel. Gilligan v. Hoddinott* (1973), 36 Ohio St.2d 127, 65 O.O.2d 310, 304 N.E.2d 382. Only the ministerial duties of the Governor may be subject to control by mandamus proceedings in appropriate circumstances. *Watkins,* 110 Ohio St. at 500, 144 N.E. 125.

State ex. Rel. AFSCME, et. al. vs. Taft, et. al., 156 Ohio App.3d 37 (2004). *See also, Board of Ed.vs.Gilligan*, 36 Ohio App. 2d 15 (1973). Relators are alleging that Respondent has abused its discretion by not providing a renovated courthouse for Seneca County. If Relators seek to manage the affairs of Seneca County, our system of government mandates that one or more of them should first be elected to the office of county commissioner.

Respondents' efforts at utilizing the authority of this Court to impose their will on Respondents should also be considered with due caution. Prior opinions by this Court have suggested that a high standard should be utilized before ordering another branch of government to undertake or refrain from performing a function.

> Great caution should be exercised when a court of law enjoins the functions of other branches of government. *Garono v. State (*1988), 37 Ohio St.3d 171, 173, 524 N.E.2d 496, 499. Thus, only those rights which are unequivocally

> guaranteed should be enforced through an injunction against governmental entities.

Dandino v. Hoover, (1994) 70 Ohio St. 3d 506, 510.

III: Lack of Jurisdiction

(A) RC 309.13

It is respectfully suggested that this honorable Court does not have jurisdiction over Relators' claims for violations of RC 309.13. As this Court is well aware, original jurisdiction is limited to those specific items set forth in Article 2 of the Ohio Constitution. Clearly, claims pursuant to RC 309.13 are not within the original jurisdiction of the Ohio Supreme Court.

The undersigned in very time-limited research, was unable to find any case where this Court accepted original jurisdiction of a taxpayer suit pursuant to RC 309.13.

(B) Injunction

It is further suggested that Relators' complaint is not in Mandamus as stated, but is instead a complaint for an injunction. RC 2727.02 states in part:

> A temporary order may be granted restraining an act when it appears by the petition that the plaintiff is entitled to the relief demanded, and such relief, or any part of it, consists in restraining the commission or continuance of such act.

Relators are clearly trying to restrain the demolition of the 1884 Courthouse, not attempting to compel Respondent to provide an adequate courthouse. Ohio Constitution Article IV, Section 2 (B)(1) sets forth those actions which the Ohio Supreme Court may exercise original jurisdiction. Injunction is not within the original jurisdiction of this Court.

As held earlier this year in the Sixth District Court of Appeals, "in this case, relators are attempting to simultaneously bring an injunction and a mandamus action in

this court. Ohio courts have held that "neither the (Ohio) Supreme Court not the Court of Appeals has original jurisdiction in injunction . . ". *State ex rel. Wasserman vs. City of Fremont*, 2011-Ohio-1269 (March 14, 2011, 6th App. Court of Appeals), copy attached hereto quoting *State ex rel. Pressley v. Indus. Comm. of Ohio* (1967), 11 Ohio St. 2d 141 (Syllabus paragraph #4).

IV: Injunction legal standards

Relators assert that pursuant to Ohio law they are entitled to a temporary restraining order, preliminary injunction or an emergency alternate writ. Respondents will not dispute the legal standard for granting injunctive relief cited by Relators as set forth in *DK Prods., Inc. vs. Miller* (page 3-4 of *Relators' Motion*).

(A) Relators will not succeed on the merits

As set forth herein, Relators' claims are entirely without merit, and as such, Relators have no likelihood of success on the merits. Relators themselves acknowledge this when they state, "Even if the Court ultimate (sic) does not issue the writ, Seneca County loses nothing but a small amount of time during which it had no plans for the site". *Relators' Motion*, p. 11.

(B) Irreparable Harm

Of course, demolition of the 1884 structure would cause irreparable harm if the purpose of this litigation is to force renovation of the structure, not to provide for a courthouse.

(C) Harm to Third parties

As indicated by Relators, the demolition contractor would have to shut down operations during the pendency of any stay.

(D) Issuance would not serve the public interest

Relators have not set forth any valid legal claims for relief but instead of have relied on emotional arguments regarding the "Beaux Arts style", "National Register of Historic Places", "Elijah Myers--famous architect" building. (*Complaint*, paragraphs 5, 6). While a quote from General Gibson is of historic interest (see footnote 1, page 4 of *Relators' Motion*), it does not provide a legal basis for this lawsuit.

It is respectfully suggested that continuation of this litigation harms the public interest. Continuing the litigation costs Seneca County much-needed funds. Hundreds of hours will needlessly and necessarily be expended by Respondents, the undersigned, and various other Seneca County employees and officials.

V: Conclusion

Respondents respectfully request that this Honorable Court deny Relators' motion for a temporary restraining order, preliminary injunction or emergency alternate writ of mandamus.

DEREK W. DeVINE
SENECA COUNTY PROSECUTING ATTORNEY

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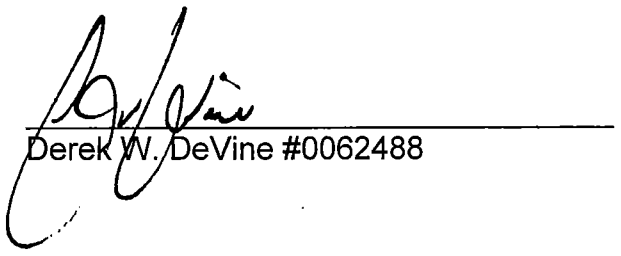
COUNSEL FOR RESPONDENTS

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing was served upon David W. T. Carroll, counsel for Relators on this the 20th day of December 2011 via regular US mail, 7100 N. High St. Suite 301, Worthington, Ohio 43085 and a courtesy copy via email.



Derek W. DeVine #0062488

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SUPPORT STAFF

Sharon M. Skeel
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Matthew C. Noftz
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November 18, 2011

David W.T. Carroll
Carroll, Ucker & Hemmer, LLC

Via email only

Re: 1884 Courthouse

Greetings:

I have reviewed your letters of November 17, 2011. I find your arguments and assertions for undertaking a legal action pursuant to RC 309.12 inappropriate and disingenuous. Your strategy of more litigation is unfortunately predictable.

RC 309.12 allows for this county official to seek judicial protection of the county from illegal, fraudulent, or corrupt actions. You have not raised such issues in your letters. Instead you raise issues of prudence, wisdom, and insight. Those issues are very important; so important in fact that they are reserved for the citizens of Seneca County to vote on at elections.

I will vigorously defend Seneca County against your lawsuit.

Sincerely,

Derek W. DeVine

Cc: Seneca County Commissioners

Exhibit 1

IN THE SUPREME COURT OF OHIO

STATE OF OHIO, EX RELATORS RUTH BROWN,
ET. AL.,

RELATORS,

VS. CASE #2011-2133

SENECA COUNTY BOARD OF COMMISSIONERS,
DAVID G. SAUBER, SR., BENJAMIN E. NUTTER, AND
JEFFERY (SIC) D. WAGNER IN THEIR OFFICIAL CAPACITIES,

RESPONDENTS.

AFFIDAVIT OF RESPONDENT BENJAMIN E. NUTTER

EXHIBIT #2

After being lawfully sworn, Benjamin E. Nutter, hereby testifies as follows:

1. I am a duly elected Seneca County Commissioner;
2. Seneca County presently has a courthouse for the General and Domestic Relations Divisions of Common Pleas Court and a separate courthouse for the Probate and Juvenile Division of the Common Pleas Court;
3. The General and Domestic Relations Division Courthouse was constructed in 2004 and provides safe, clean, attractive, and sufficient Courthouse;
4. The General and Domestic Relations Division Courthouse may not fully comply with Standard 14 of the Jury Use and Management Standard or with the Court Facility Standards B, C, and F;
5. The Juvenile and Probate Courthouse is located in a former Carnegie library. Said Courthouse is not ideal, but is safe, clean, and sufficient until such time as a new courthouse can be constructed. Additional and a better space is needed for Juvenile and Probate Court;
6. I have served Seneca County as Commissioner continuously since January, 2005;
7. During the duration of my service as Seneca County Commissioner I have participated in numerous discussions, studies, reviews, and considerations of providing for the space needs of the Seneca County Common Pleas Court;
8. In August 2009 along with my fellow Commissioners passed a resolution supporting the renovation of the 1884 Courthouse;
9. Said August 2009 Resolution included references to $2,000,000 in financial support as had previously been committed by Governor Ted Strickland;
10. With the decrease in revenue throughout the State of Ohio, the promise from the State of Ohio for $2,000,000 in financial support has disappeared;
11. In 2011, the State of Ohio has radically reduced funding to Seneca County by reducing local government funds to be received by the county over the next two (2) fiscal years;
12. Seneca County has experienced a decrease in its general revenue funding since 2008;

13. It is my expectation that Seneca County will not see any return of the local government funds from the State of Ohio in the near future if ever;

14. It is further my expectation that general revenue funds for Seneca County will not rebound significantly for a lengthy period of time;

15. It is further my opinion and judgment that Seneca County can not afford to renovate the 1884 Courthouse;

16. The Board of Commissioners decided in 2011 not to renovate the 1884 structure;

17. On or about December 8, 2011 I presented to the full Board of Seneca County Commissioners my proposed plan for a replacement structure for the Seneca County Common Pleas Court at a much more fiscally responsible price;

18. Prior to implementing any plan to provide for a replacement structure, Seneca County necessarily needs to remove the existing structure to make room for the new structure;

19. Furthermore, my plan necessitates the County saving our general fund carry-over for several years to pay for this new structure;

20. Commissioner Sauber has suggested in past meetings of the Seneca County Commissioners that Seneca County consider relocating Juvenile and Probate Court to the county owned CSB facility. Significant space in that facility becomes available on January 1, 2012 as 5th 3rd Bank's lease ends. While not an ideal solution (in my current opinion), I would consider use of the space for this purpose;

21. Seneca County has not entered into any illegal or fraudulent contract;

22. Attached hereto as Exhibit 2-A (3 pages) is a true and accurate copy of the Seneca County Board of Commissioner's Resolution of November 22, 2011 Rescinding prior Board orders;

FURTHER AFFIANT SAYETH NAUGHT.

Benjamin E. Nutter

NOTARY CLAUSE

On this the 20th day of December, 2011 appeared Benjamin E. Nutter, a person known to me, who did after being duly sworn, execute this *Affidavit of Respondent Benjamin E. Nutter* before me a Notary Public of the State of Ohio.

DEREK W. DeVINE, Attorney at Law
Notary Public - State of Ohio
My Commission has no expiration date
Section 147.03 R.C.

****

COMMISSIONERS' OFFICE

November 22, 2011

IN THE MATTER OF: RESCINDING THE BOARDS ORDERS OF AUGUST 25, 2009 (VOLUME 84, PAGE 371-372) - RESOLUTION OF THE SENECA COUNTY COMMISSIONERS, SUPPORTING THE RESTORATION OF THE 1884 SENECA COUNTY COURTHOUSE

Mr. Wagner offered the following resolution and moved the adoption of the same, which was duly seconded by Mr. Nutter.

WHEREAS, The Seneca County Commissioners, David G. Sauber, Benjamin E. Nutter, and Jeffrey D. Wagner met this 22nd day of November, 2011 in open and regular session, and

WHEREAS, It is the desire of this Board to rescind the orders of August 25, 2009 (Journal Number 84, Page 371-372) - A Resolution of the Seneca County Commissioners Supporting the Restoration of the 1884 Seneca County Courthouse, and

WHEREAS, This change is due to the acceptance of the bid from B&B Wrecking for the Demolition of the 1884 Courthouse and authorization to enter into a contract for these services, now therefore be it

RESOLVED, That this Board of Commissioners, Seneca County, Ohio, be and it does hereby rescind the Boards orders of August 25, 2009 Journal Number 84, Page 371-372 - A Resolution of the Seneca County Commissioners Supporting the Restoration of the 1884 Seneca County Courthouse, and be it further

RESOLVED, That the Clerk to the Board, be and she is hereby authorized and instructed to certify a copy of this resolution to the any related departments in line with this action.

Mr. Wagner– yea Mr. Nutter – yea Mr. Sauber– yea

Attest: Nicole Smith
Clerk to the Board

I, the undersigned, Clerk to the Board of County Commissioners, Seneca County, Ohio, do hereby certify that the foregoing is a true and correct copy from the official record of said Board of County Commissioners as recorded in Journal 87, Page 471

Nicole Smith
Clerk to the Board

COMMISSIONERS' OFFICE

A RESOLUTION OF THE SENECA COUNTY COMMISISONERS, SUPPORTING THE RESTORATION OF THE 1884 SENECA COUNTY COURTHOUSE

Mr. Sauber offered the following resolution and moved the adoption of the same, which was duly seconded by Mr. Bridinger

WHEREAS, The Seneca County Commissioners, Benjamin E. Nutter, David G. Sauber and Michael A. Bridinger met this 25th day of August, 2009 in open and regular session, and

WHEREAS, The Seneca County Commissioners recognize the urgent need to provide adequate and appropriate space to the court system of Seneca County; and

WHEREAS, The Juvenile and Probate Divisions of Seneca County Common Pleas Court are currently in a building of inadequate size and is not compliant with the Americans with Disabilities Act; and

WHEREAS, The building known as the 1884 Seneca County Courthouse has fallen into disrepair and is not fit for the conduct of Seneca County business and currently is vacant of public offices due to its poor condition; and

WHEREAS, The Seneca County Courthouse and Downtown Development Group has presented the commissioners with a proposal that would bring the former 1884 Courthouse back to its original usefulness and grandeur for less than eight million dollars; and

WHEREAS, Of the estimated eight million dollar renovation project, approximately one million four hundred thousand will be needed to restore the magnificent dome and clock tower, which the SCCDDG has committed to raising private funds to cover this portion of the project; and

WHEREAS, The Governor of the Great State of Ohio, Ted Strickland has committed to supporting this restoration project with two million dollars in state funding and Governor Strickland has many times stated the importance and statewide significance of this renovation project; and

WHEREAS, Based on the cost estimate of the renovation project by the SCCDDG and coupled with the financial support of the State of Ohio and private citizens this restoration project will save the local taxpayer a significant amount of money over removing and replacing the 1884 Courthouse with a new structure; and

NOW, THEREFORE, BE IT RESOLVED, that The Seneca County Board of Commissioners do hereby support the renovation of the former 1884 Courthouse and calls upon Governor Strickland and the SCCDDG to secure the promised funding pledged heretofore.

Section 1. Seneca County hereby commits to moving forward with developing final plans to renovate and restore the 1884 Seneca County Courthouse for renewed courthouse use, contingent only upon obtaining the necessary financing to undertake the project.

Section 2. The Redevelopment Group, in cooperation with Seneca County and other supporting non-profit organizations, is authorized to assist in confirming the availability of all additional funds necessary to undertake this project beyond those funds to be committed by Seneca County, by October 30, 2010. The amount of funds to be committed by Seneca County ("county share") and the minimum amount to be raised from other sources in cooperation with the Redevelopment Group ("non-county share") is itemized in Section V of the Project Portfolio submitted to the Board of County Commissioners dated August 11, 2009, and included herein as attachment A.

Section 3. The obligation of the Redevelopment Group and other supporting non-profit

Section 4. Upon execution of the contract, Seneca County will begin confirming the availability of the county share of the proposed project cost. The Redevelopment Group will assist if requested by Seneca County.

RESOLVED, That the Acting Clerk be and she is hereby authorized and instructed to certify a copy of this resolution to the Seneca County Auditor, Prosecutor and the Seneca County Courthouse and Downtown Development Group in line with this action, and be it further

RESOLVED, That it is found and determined that all formal actions of this Board concerning and related to the adoption of this resolution were so adopted in an open meeting of this Board and that all deliberations of this Board and of any of it communities that resulted in such formal actions, were in meeting open to the public and in compliance with all legal requirements, including Section 121.22 of the Ohio Revised Code.

Mr. Bridinger – YES Mr. Sauber – yes Mr. Nutter – yes

Attest: Kayla Heschel
Acting Clerk

I, the undersigned, Acting Clerk of the Board of County Commissioners, Seneca County, Ohio, do hereby certify that the foregoing is a true and correct copy from the official record of said Board of County Commissioners as recorded in Journal 84, Page 371 - 372

Kayla Heschel
Acting Clerk

IN THE SUPREME COURT OF OHIO

STATE OF OHIO, EX RELATORS RUTH BROWN,
ET. AL.,

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VS. CASE #2011-2133

SENECA COUNTY BOARD OF COMMISSIONERS,
DAVID G. SAUBER, SR., BENJAMIN E. NUTTER, AND
JEFFERY (SIC) D. WAGNER IN THEIR OFFICIAL CAPACITIES,

RESPONDENTS.

AFFIDAVIT OF RESPONDENT JEFFREY D. WAGNER

EXHIBIT #3

After being lawfully sworn, Jeffrey D. Wagner, hereby testifies as follows:

1. I am a duly elected Seneca County Commissioner;
2. I have served Seneca County as Commissioner continuously since January, 2011;
3. During my campaign for election as Seneca County Commissioner I openly and publically endorsed the removal of the 1884 Courthouse;
4. Seneca County presently has a courthouse for the General and Domestic Relations Divisions of Common Pleas Court and a separate courthouse for the Probate and Juvenile Division of the Common Pleas Court;
5. The General and Domestic Relations Division Courthouse was constructed in 2004 and provides safe, clean, attractive, and sufficient Courthouse;
6. The General and Domestic Relations Division Courthouse may not fully comply with Standard 14 of the Jury Use and Management Standard or with the Court Facility Standards B, C, and F;
7. The Juvenile and Probate Courthouse is located in a former Carnegie library. Said Courthouse is not ideal, but is safe, clean, and sufficient until such time as a new courthouse can be constructed. Additional and a better space is needed for Juvenile and Probate Court;
8. During the duration of my service as Seneca County Commissioner I have participated in numerous discussions and considerations of providing for the space needs of the Seneca County Common Pleas Court;
9. Governor Strickland's promise of State of Ohio providing financial support in the amount of $2,000,000 has disappeared;
10. In 2011, the State of Ohio has radically reduced funding to Seneca County by reducing local government funds to be received by the county over the next two (2) fiscal years;
11. Seneca County has experienced a decrease in its general revenue funding since 2008;
12. It is my expectation that Seneca County will not see any return of the local government funds from the State of Ohio in the near future if ever;

13. It is further my expectation that general revenue funds for Seneca County will not rebound significantly for a lengthy period of time;

14. It is further my opinion and judgment that Seneca County can not afford to renovate the 1884 Courthouse;

15. The Board of Commissioners decided in 2011 not to renovate the 1884 structure;

16. On or about December 8, 2011 Commissioner Benjamin E. Nutter presented to the Board of Seneca County Commissioners a proposed plan for a replacement structure for the Seneca County Common Pleas Court at a much more fiscally responsible price;

17. Prior to implementing any plan to provide for a replacement structure, Seneca County necessarily needs to remove the existing structure to make room for the new structure;

18. Furthermore, Mr. Nutter's plan necessitates the County saving our general fund carry-over for several years to pay for this new structure;

19. Commissioner Sauber has suggested in past meetings of the Seneca County Commissioners that Seneca County consider relocating Juvenile and Probate Court to the county owned CSB facility. Significant space in that facility becomes available on January 1, 2012 as 5th 3rd Bank's lease ends. While not an ideal solution (in my current opinion), I would consider use of the space for this purpose;

20. Seneca County has not entered into any illegal or fraudulent contract;

FURTHER AFFIANT SAYETH NAUGHT.

Jeffrey D. Wagner

NOTARY CLAUSE

On this the 20th day of December, 2011 appeared Jeffrey D. Wagner, a person known to me, who did after being duly sworn, execute this *Affidavit of Respondent Jeffery D. Wagner* before me a Notary Public of the State of Ohio.

DEREK W. DeVINE, Attorney at Law
Notary Public - State of Ohio
My Commission has no expiration date
Section 147.03 R.C.

State ex rel.Wasserman v. City of Fremont, 2011-Ohio-1269, S-10-031 (OHCA6)

2011-Ohio-1269

State of Ohio, ex rel. Stanley J. Wasserman

and

State of Ohio, ex rel. Kathryn A. Wasserman Relators

v.

City of Fremont and Terry Overmyer Respondents

No. S-10-031

Court of Appeals of Ohio, Sixth District, Sandusky

March 14, 2011

Corey J. Speweik and J. Douglas Ruck, for relators.

Robert G. Hart, Director of Law, for respondents.

DECISION AND JUDGMENT

OSOWIK, P.J.

{¶ 1} On June 25, 2010, relators, Stanley and Kathryn Wasserman, filed a petition for a writ of mandamus against respondents, the city of Fremont, Ohio, and Fremont's Mayor, Terry Overmyer.[1] In the petition, relators asked this court to order respondents to commence an eminent domain action to compensate relators for the partial taking of an easement that provided drainage of excess water from relators' property, across property owned by the city of Fremont, and into nearby Minnow Creek. In support, relators alleged in the petition that drainage tiles running from their property across respondents' property were damaged when respondents began creating a reservoir on the city-owned land.

{¶ 2} On July 20, 2010, this court issued an alternative writ, in which we ordered respondents to either commence eminent domain proceedings or show cause as to why they have not done so. On August 6, 2010, respondents filed a motion to dismiss, a motion to strike and for attorney fees, and a motion to add additional "indispensable" parties.[2] On January 18, 2011, this court issued a decision in which we found that: (1) respondents' motion to dismiss was not well-taken because relators have no adequate remedy at law other than a mandamus action, and respondents' actions, if found to be an unlawful taking of relators' easement, are the proper subject of a mandamus action; (2) respondents did not put forth sufficient evidence of misconduct by relators and their attorneys to support a

motion to strike or an award of attorney fees; and (3) respondents' motion to add a party was not well-taken because respondents did not show that the Kipps' absence would prevent either party in this action from obtaining complete relief, and the mere possibility that respondents may be exposed to multiple litigation is insufficient to render the Kipps, or any other party, "indispensable" pursuant to Civ. R. 19(A).

{¶ 3} Based on the foregoing findings, respondents' motions to strike, dismiss and to add a party were denied on January 18, 2011. Pursuant to 6th Dist.Loc.App.R. 6, both parties were ordered to submit their cases to this court in written form within 20 days of our decision. On February 7, 2011, relators and respondents complied by timely submitting merit briefs to this court.

{¶ 4} In their merit brief, relators reassert their earlier arguments in favor of a remedy by way of a mandamus action. Specifically, relators state that respondents' encroachment on their drainage easement constitutes a taking of their property without just compensation; the amount of reduced earning capacity of their farmland due to such encroachment is an issue to be determined by a jury; and respondents' argument that the drainage issue has been resolved is not relevant to the issue of whether or not a compensable taking ever occurred.

{¶ 5} In addition to the foregoing, relators now ask this court to grant them an injunction that prohibits respondents from "further encroaching upon Relators' property rights during the pendency of the eminent domain proceedings." Relators cite *State ex rel Bilmour Realty, Inc. v Mayfield Hts.,* 119 Ohio St.3d 11, 2008-Ohio-3181, ¶ 10-12, 14, as authority for their position that a property owner may seek both mandamus and an injunction in cases where an injunction alone does not afford complete relief from a taking of private property.

{¶ 6} In their merit brief, respondents attempt to reassert the issue of whether or not a writ of mandamus is the proper remedy in this case. In support, respondents once again argue that no taking has occurred. Alternatively, respondents argue that, if relators have suffered damage because of respondents' actions, relators have an alternative remedy at law through a lawsuit for damages due to breach of contract.

{¶ 7} As to the parties' arguments for and against the issuance of a writ of mandamus, in our decision issued on January 18, 2011, we held that "an action for mandamus 'is the appropriate means for a property owner to compel public authorities to institute proceedings to appropriate property where the property owner is alleging that an involuntary taking of private property has occurred.'" *State ex rel. Wasserman v. City of Fremont* (Jan. 18, 2011), 6th Dist. No. L-10-031, quoting *State ex rel. Cleveland Cold Storage v. Beasley,* 10th Dist. No. 07AP-736, 2008-Ohio-1516, ¶ 12. We further found that, in this case, "relators' petition alleges a taking that, if proved, is compensable through an eminent domain action." *Id.* Finally, we held that the written agreement through which relators' easement was originally formed, "although contractual in nature, created an easement over respondent's property." Accordingly, the contractual nature of the agreement does not in any way prevent relators from pursuing a remedy by way of a mandamus action. *Id.*

{¶ 8} As to relators' request for a preliminary injunction pending the outcome of eminent domain proceedings, we disagree with relators' assertion that *State ex rel. Bilmour Realty, Inc.,* is applicable to this case. *In Bilmour Realty,* an action for a declaratory judgment and an injunction were sought by the relator in the trial court. The ultimate decision of the Ohio Supreme Court in that case was that a mandamus action brought in the court of appeals was not precluded by prior filings in the trial court, since those actions were inadequate to afford complete relief *Id.* In contrast, in this case, relators are attempting to simultaneously bring an injunction and a mandamus action in this court. Ohio courts have held that "neither the [Ohio] Supreme Court nor the Court of Appeals has original jurisdiction in injunction * * *." *State ex rel. Pressley v. Indus. Comm. of Ohio* (1967), 11 Ohio St.2d 141, paragraph four of the syllabus. Accordingly, a petition that purports to be in mandamus must be dismissed by the court of appeals for want of jurisdiction, if its real objective is to

obtain an injunction. *Id.* Relators' request for a preliminary injunction in this court pending the outcome of eminent domain proceedings is, therefore, not well-taken and is denied.

{¶ 9} Upon consideration of the entire record in this case, we find that no evidence has been presented to change our prior finding that relators are entitled to a writ of mandamus to determine whether or not a taking actually occurred in this case and how much compensation, if any, is due from respondents. Pursuant to R.C. 2731.07, we hereby issue a writ of mandamus and order respondents to commence eminent domain proceedings to determine if a taking has occurred and what, if any, compensation is due to relators.

{¶ 10} Writ granted. Costs assessed to respondents.

{¶ 11} To the clerk: Manner of Service.

{¶ 12} The sheriff of Sandusky County shall immediately serve, upon the respondents by personal service, a copy of this writ in a manner pursuant to R.C. 2731.08. The clerk is directed to immediately serve upon all other parties a copy of this writ in a manner prescribed by Civ.R. 5(B).

{¶ 13} It is so ordered.

Mark L. Pietrykowski, J. Arlene Singer, J.Thomas J. Osowik, P.J. JUDGE CONCUR.

Notes:

[1]The facts in this mandamus action are more fully set forth in our decision issued on January 18, 2011, which is attached hereto as Appendix A.

[2]Respondents sought to add adjacent landowners, Sharon and Thomas Kipps, as parties in this mandamus action. In support, respondents argued that the Kipps are "indispensable parties" pursuant to Civ.R. 19(A), because a possibility exists that the Kipps may bring a similar action for damages against respondents.
