IN THE SUPREME COURT OF OHIO

STATE OF OHIO, ex rel., R.T.G., INC., et al.,	:	Case No. 01-748
Appellees-Cross Appellants,	:	On Appeal from the Franklin County Court
v.	:	of Appeals, Tenth Appellate District
STATE OF OHIO, et al.,	:	
Appellants-Cross Appellees.	:	Court of Appeals Case No. 98AP-1015

AMICUS CURIAE BRIEF OF VILLAGE OF PLEASANT CITY AND COMMUNITY RIGHTS COUNSEL IN SUPPORT OF APPELLANTS-CROSS APPELLEES STATE OF OHIO, et al.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

STATEMENT OF INTEREST

The Village of Pleasant City is a small, rural community in Guernsey County, Ohio, in the Wills Creek Valley, just east of the confluence of Buffalo Fork and Buffalo Creek. The unsuitable-for-mining designation that gave rise to the instant case came in response to a September 21, 1988, petition filed by Pleasant City with the Division of Reclamation, Ohio Department of Natural Resources. The petition requested the designation to protect the sole-source aquifer that has served as Pleasant City's drinking-water supply since 1914. The two shallow city wells that tap the Pleasant City aquifer supply potable water for approximately 1000 people. As their sole source of drinking water, the Pleasant City aquifer is vitally important to residents of the Pleasant City area. A ruling that the State's unsuitable-for-mining designation constitutes a compensable taking might well chill the future actions of government officials charged with protecting Ohio's communities and precious natural resources like the Pleasant City Aquifer.

Community Rights Counsel (CRC) is a non-profit, public interest law firm in Washington, D.C., established in 1997 to assist state and local governments in defending against challenges to land-use measures, environmental safeguards, and other community protections. CRC began as a project of the International City/County Management Association, a national association representing more than 8,000 city and county managers. CRC has represented municipalities and local government groups in many regulatory takings cases in federal and state courts, including *Palazzolo v. Rhode Island*, No. 99-2047, pending before the U.S. Supreme Court, and *Machipongo Land & Coal Co. v. Commonwealth of Pennsylvania*, No. 112 MAP 2000, a takings challenge to an unsuitable-for-mining designation pending before the Pennsylvania Supreme Court.

STATEMENT OF THE CASE

Amici hereby adopt the factual statement set forth in the State of Ohio's opening Merits Brief. We wish to emphasize the following points of particular relevance to this amicus brief.

The importance of the Pleasant City aquifer to the Villages of Pleasant City and Fairview and the surrounding area cannot be overstated. As this Court previously recognized, the aquifer is the only groundwater system in Guernsey County or neighboring Noble County capable of producing significant amounts of water. *Village of Pleasant City v. Ohio Dept. of Natural Resources* (1993), 67 Ohio St. 3d 312, 312, 617 N.E.2d 1103, 1104 (Syllabus by the Court). The aquifer has provided water to the Pleasant City area since 1914, many decades before R.T.G., Inc. and the other Plaintiffs-Relators (collectively referred to as "RTG") expressed an interest in mining the land at issue. *See id*. at 313, 617 N.E.2d at 1105. The Magistrate found that "[t]he wells supply water to approximately one thousand residents of the Village and to the Village's fire department, three churches, the post-office, three farms, a beauty shop, and ice-cream shop, a bar, and the Valley Township garage." *State ex rel. R.T.G., Inc v. State of Ohio* (Oct. 30, 2000), Franklin App. No. 98AP-1015, Magistrate's Decision at 13, unreported (hereinafter "Magistrate's Decision"). As stated by the Magistrate, "[t]he wells provide a reliable and inexpensive source of water which meets EPA drinking water standards." *Id.*

In 1987, the U.S. Environmental Protection Agency ("U.S. EPA") designated the Pleasant City Aquifer and the known boundaries of its recharge area as a "sole-source" aquifer under the federal Safe Drinking Water Act. 52 Fed. Reg. 32342 *et seq.* The U.S. EPA concluded that the aquifer serves as the sole source of drinking water for the Pleasant City area and there is no cost-effective, future source of drinking water. *See id*. at 32343. Because the screened interval of Pleasant City's wells are within 25-36 feet of the ground surface, contamination at the surface

could migrate down, pollute the drinking water, and significantly threaten public health. *See id*. As a result of this federal designation, all projects assisted by federal funds within the aquifer are subject to EPA review to ensure against any significant hazard to public health. *See id*. at 32342.

In reliance on the continued availability of the aquifer, Pleasant City has made considerable capital investments, including the construction of a water treatment plant completed in 1997 at a cost of $720,000, and a multi-million dollar sewage treatment plant. Pleasant City's water wells are immediately adjacent to the area proposed to be mined and directly across the street from one of the parcels. Affidavit of Dave Williams, Superintendent of the Pleasant City Water Department, State of Ohio Supplement at 00422.

In its 1993 ruling on the unsuitable-for-mining designation, this Court observed that mining can harm the productivity of the aquifer and the recharge area in at least two ways. First, excavated mine pits are dewatered, which may reduce groundwater levels. *Village of Pleasant City,* 67 Ohio St. 3d at 313-14, 617 N.E.2d at 1105. Second, mining companies replace the original stratified deposits with less permeable "mine spoil," which affects the water storage capacity and transmission ability of the aquifer and recharge area. *See id*.; *accord*, Magistrate's Decision at 15-16 (Findings 43-44, discussing the effects of dewatering and mine spoil). This Court also emphasized that the Ohio Reclamation Board of Review had made several findings indicating that mining and reclamation could cause substantial harm to the long-range productivity of the Pleasant City aquifer, and "that the mining that has already occurred within the petition area has already affected the aquifer, although the precise cause and duration are unknown" 67 Ohio St. 3d at 318-19, 617 N.E.2d at 1108-09.

At the hearing before the Magistrate in this case, the State of Ohio introduced the affidavit of Truman Bennett, a hydrologist with forty years of experience, who confirmed that

strip mining by RTG in the area "has already damaged this aquifer and the capacity of the Villages of Pleasant City and Fairview ("Village") to withdraw water from this aquifer." Bennett Affidavit, Paragraph 1, State of Ohio Supplement at 00226. He concluded that "any additional strip mining in the floodplain * * * will further damage this aquifer and the Village's capacity to withdraw water from this aquifer. The impacts on the Village's water supply from any additional mining will range from loss of water reserves to the total loss of water (or dewatering) of the Village's wells * * *." *Id*. Mr. Bennett stressed that "[t]he end result of the mining's destruction of the sand and gravel layers * * * is that the ability of the groundwater to move through the floodplain of Sections 7 and 8 to the Village's wells will be diminished seriously. Once the Village's capacity to draw ground water from the sand and gravel layers is lost, this loss is permanent in nature." *Id*. at Paragraph 8, State of Ohio Supplement at 00229..

The Magistrate found that the area already mined and proposed to be mined by RTG are hydraulically connected to Pleasant City's wells and "that pumping at the mining pit did cause a [five-foot] draw down of water at MW-4," Monitoring Well 4, which is located about mid-way between the City's wells and the mine site. Magistrate's Decision at 28; *see also id.* at 14 (Finding 36). The Magistrate emphasized that this five-foot decline was "very near the Village's wells' known cone of depression during normal pumping conditions." *Id*. at 28. Having designated the eight parcels at issue as Parcels A through H, the Magistrate concluded that with respect to Parcels C, D, and E, "the state has demonstrated by clear and convincing evidence that mining within this portion of the aquifer would, indeed, constitute a nuisance." *Id*. at 31. The Magistrate stressed that "[t]he bottom line is that * * * everyone agrees [that mining in this area] has significantly greater probability of damaging the aquifer." *Id*. at 31. The Magistrate limited the nuisance determination to Parcels C, D, and E because she found that available, economically

viable uses of the other five parcels precluded any argument that a taking had occurred, and thus it was unnecessary to determine whether mining in these parcels would constitute a nuisance. *See id*. at 28.

The court of appeals rejected the Magistrate's nuisance determination and concluded that the unsuitable-for-mining designation worked a compensable taking of Parcels C, D, and E. It is important to emphasize that these three parcels are those that are closest to the City's wells, and as found by the Magistrate, strip mining on this land would pose the greatest risk to the City's current water supply and a significant probability of damaging the aquifer. *See id*. at 31.

ARGUMENT

"When the well's dry, we know the worth of water."[1]

I. Introduction

This case presents the issue of whether the Takings Clause of the Fifth Amendment requires Ohio taxpayers to pay a mining company to refrain from conduct that would seriously degrade and perhaps destroy public drinking-water supplies.

It would have boggled the minds of the framers of our Constitution and other members of the founding generation to suggest that the Takings Clause requires compensation in these circumstances. Indeed, it is well accepted by jurists and scholars alike that the Takings Clause was originally understood to apply only to direct expropriations or government-compelled permanent occupations of property.[2]

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[1] Benjamin Franklin (1746), POOR RICHARD'S ALMANAC.

[2] *See, e.g.*, *Lucas v. South Carolina Coastal Council* (1992), 505 U.S. 1003, 1014 ("Prior to Justice Holmes's exposition in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), it was generally thought that the Takings Clause reached only a 'direct appropriation' of property . . . or the functional equivalent of a 'practical ouster of [the owner's] possession.'"); *id*. at 1028 n. 15

To be sure, modern takings precedent holds that in "extreme circumstances," land-use regulation also may constitute a compensable taking,[3] but the U.S. Supreme Court still uses direct expropriation as an important benchmark in determining whether a regulatory taking has occurred. The Court has made clear that in regulatory taking cases, its task is "to distinguish the point at which regulation becomes so onerous that it has the same effect as an appropriation of the property through eminent domain or physical possession." *Williamson County Reg'l Planning Comm'n v. Hamilton Bank* (1985), 473 U.S. 172, 199.

For the reasons set forth by the State of Ohio and other amici, Pleasant City and CRC agree that the unsuitable-for-mining designation does not constitute the functional equivalent of an expropriation and thus does not effect a compensable taking of property. Foremost among these arguments is the demonstration by the State and other amici that the designation does not deprive any claimant of all economically viable use of its entire parcel of property, or what the U.S. Supreme Court refers to as the parcel as a whole. *See, e.g.*, *Penn Central Transp. Co. v. New York City* (1978), 438 U.S. 104, 130-31 (in a regulatory takings case, the court must focus "on the nature and extent of the interference with rights in the parcel as a whole * * *."); *accord, Concrete Pipe & Prods., Inc. v. Construction Laborers Pension Trust* (1993), 508 U.S. 602, 644 (same); *Keystone Bituminous Coal Assn. v. DeBenedictis* (1987), 480 U.S. 470, 498-501 (same).

("[E]arly constitutional theorists did not believe the Takings Clause embraced regulations of property at all . . . ."); John F. Hart, *Land Use Law in the Early Republic and the Original Meaning of the Takings Clause* (2000), 94 Nw. U. L. Rev. 1099 (same); William Michael Treanor (1995), *The Original Understanding of the Takings Clause and the Political Process*, 95 Colum. L. Rev. 782 (same).

[3] *United States v. Riverside Bayview Homes, Inc.* (1985), 474 U.S. 121, 126 ("[L]and-use regulation may under extreme circumstances amount to a 'taking' of the affected property.").

This brief focuses on a separate issue of particular importance to Pleasant City and other local governments: namely, whether public officials may act to protect their communities from injury without incurring takings liability. The U.S. Supreme Court and this Court have long recognized that "all property in this country is held under the implied obligation that the owner's use of it shall not be injurious to the community." *Mugler v. Kansas* (1887), 123 U.S. 623, 665; *Miller v. Anthony* (1995), 72 Ohio St. 3d. 132, 136, 647 N.E.2d 1368, 1371 (same). Under *Mugler*, the right to swing your fist ends at the tip of your neighbor's nose, and the right to engage in commercial activity ends where that conduct endangers the welfare of the community. In *Lucas v. South Carolina Coastal Council* (1992), 505 U.S. 1003, the Court reaffirmed the core truth expressed in *Mugler* by ruling that no taking occurs where the challenged government action is designed to prevent a private or public nuisance that would harm neighboring property owners or the welfare of the community. *Id*. at 1027-32.

Pleasant City and CRC respectfully request this Court to affirm the Magistrate's nuisance determination with respect to Parcels C, D, and E, and to conclude as a matter of law based on the record evidence that surface mining on any of the land in question would constitute a nuisance that precludes takings liability.

II. The Proposed Strip Mining Would Constitute a Nuisance, and Thus the Unsuitable-for-Mining Designation is Not a Compensable Taking.

In *Lucas*, the U.S. Supreme Court reaffirmed that no one has a property right to engage in a nuisance, and thus government action designed to prevent a nuisance does not give rise to a compensable taking. 505 U.S. at 1027-32. *Lucas* refers to the inquiry into nuisance law and other background principles of law as the "logically antecedent inquiry" (*id*. at 1027) because it is used to determine whether the claimant even possesses the property right alleged to have been taken.

The record evidence in this case shows just how harmful any further strip mining in the aquifer would be to the surrounding community. Hydrologist Truman Bennett averred unequivocally that RTG's strip mining "has already damaged this aquifer and the capacity of the Villages of Pleasant City and Fairview ("Village") to withdraw water from this aquifer." Bennett Affidavit, Paragraph 1, State of Ohio Supplement at 00226. He further stated that "any additional strip mining in the floodplain * * * will further damage this aquifer and the Village's capacity to withdraw water from this aquifer. The impacts on the Village's water supply from any additional mining will range from loss of water reserves to the total loss of water (or dewatering) of the Village's wells * * *." *Id*. If the proposed mining were allowed, "the ability of the groundwater to move through the floodplain of Sections 7 and 8 to the Village's wells will be diminished seriously. Once the Village's capacity to draw ground water from the sand and gravel layers is lost, this loss is permanent in nature." *Id*. at Paragraph 8, State of Ohio Supplement at 00229..

Relying on this and other record evidence, the Magistrate determined that "the state has demonstrated by clear and convincing evidence that mining within this portion of the aquifer would, indeed, constitute a nuisance." Magistrate Decision at 31. The Magistrate stressed that "[t]he bottom line is that * * * everyone agrees [that mining in this area] has significantly greater probability of damaging the aquifer." *Id*.

There are many definitions of the term "nuisance," and "[a]ll vary according to the facts existing in the particular case." *State ex rel. Chalfin v. Glick* (1960), 113 Ohio App. 23, 26, 177 N.E.2d 293, 296. Whatever the definition, however, the concept of a nuisance reaches far beyond conduct that threatens public safety and human health. Any conduct "producing material annoyance, inconvenience, discomfort, or hurt" constitutes a nuisance, as does conduct "that

injuriously affects the safety, health, or morals of the public, or works some substantial annoyance, inconvenience, or injury to the public * ** *." *Id*. at 26-27, 177 N.E.2d at 296. A qualified nuisance consists of "anything lawfully but so negligently or carelessly done or permitted as to create a potential and unreasonable risk of harm, which, in due course, results in injury to another." *Taylor v. Cincinnati* (1944), 143 Ohio St. 426, 55 N.E.2d 724, at paragraph three of the syllabus. "[A] person confronted with a nuisance and threatened with the destruction of his property does not have to await the actual infliction of damage on his property, but has the right, when the potential danger arises, to appeal to a court of equity for relief * * *." *State ex rel. Chalfin v. Glick* (1960), 113 Ohio App. 23, 27 177 N.E.2d 293, 297.

Very often a nuisance is "merely a right thing in the wrong place, like a pig in the parlor instead of the barnyard." *Village of Euclid v. Ambler Realty Co.* (1926), 272 U.S. 365, 388. No one disputes that mining can be a lucrative economic activity, but it is hard to imagine a more "wrong place" for mining than in an area where it threatens a community's drinking-water supply. The record evidence demonstrates that mining on the land at issue would harm and threaten the destruction of the Pleasant City aquifer. The Magistrate's nuisance determination regarding mining on Parcels C, D, and E is supported by credible, competent evidence and should be affirmed. The record evidence, particularly the testimony provided by Mr. Bennett, also easily supports a determination by this Court that mining on the balance of the land at issue also would constitute a nuisance.

II. The Nuisance Inquiry Under *Lucas* Is an Inherently Flexible Inquiry that Easily Encompasses the Harm That Would be Caused by RTG's Proposed Mining Activity.

RTG contends that its proposed mining cannot constitute a nuisance because the state issued previously issues permits for mining in the general vicinity. This permit issuance, RTG

contends, shows that a ban on mining could not have inhered in its title under *Lucas* in a manner that now precludes takings liability.

The nuisance inquiry under *Lucas*, however, is not rigid and static, but flexible and dynamic. It is broad enough to accommodate changing values and new information. Just as in a nuisance tort case, a court conducting a nuisance inquiry under *Lucas* must weigh a variety of factors, including the degree of harm to public resources posed by the proposed activity and its "suitability to the locality in question." *Lucas*, 505 U.S. 1030-31 (citing the Restatement (Second) of Torts). Significantly, the *Lucas* Court emphasized that "changed circumstances or new knowledge may make what was previously permissible no longer so." *Id*. at 1031. In other words, conduct is not insulated from the nuisance inquiry simply because someone engaged in that conduct in the past, particularly where, as here, new information shows that the conduct would harm the community. Ohio courts, too, have recognized that in nuisance cases, "the contemporary view of public policy shifts from generation to generation." *Antonik v. Chamberlain* (1947), 81 Ohio App. 465, 475, 78 N.E.2d 752, 759.

Indeed, this Court's view of nuisance liability as it relates to the effect of mining on drinking-water supplies shifted dramatically in 1984 with its ruling in *Cline v. American Aggregates Corp.* (1984), 15 Ohio St. 3d 384, 474 N.E.2d 324. In *Cline*, this Court overruled a 123-year-old precedent and adopted the Restatement of Tort's view that de-watering of a mine is a nuisance where it "unreasonably causes harm to a proprietor of neighboring land through lowering the water table or reducing artesian pressure." *Id*. at 386-87, 474 N.E.2d at 326-27. The Court adopted this new liability standard in recognition of scientific advances in the understanding of subsurface waters. *Id*.

Several other courts have rejected takings challenges to government land-use controls designed to protect drinking-water supplies where the conduct was far less deleterious than RTG's proposed mining would be. For example, in *Commonwealth v. Blair* (2000), 2000 WL 875903, No. CIV.A 98-2758-G, (Mass. Super. Ct.) (attached as Attachment B), the court rejected a takings challenge to restrictions imposed under the state's Watershed Protection Act. The Act prevented the claimants from replacing a camp house with a much larger house on their property on Demond Pond, water from which flows into a reservoir that serves as a public drinking-water supply. In rejecting the takings claim, the court concluded that "[c]onduct affecting a public resource, such as public drinking supplies, that could be actionable at common law under a public nuisance theory, may be aptly regulated, or at a minimum, be regulated with a decreased risk of having the regulation adjudicated an unconstitutional taking." *Id*. at *7 (citing *Keystone Bituminous Coal Ass'n*, 480 U.S. at 492 n.22). The court emphasized that that "[i]t could hardly be argued that an unreasonable interference with the use and enjoyment of a public resource would not be actionable as a public nuisance at common law." *Id*.

Similarly, in *Palazzolo v. Rhode Island* (1997), 1997 WL 1526546, No. C.A. 88-0297 (R.I. Super. Ct), *aff'd on other grounds,* 746 A.2d 707 (R.I. 2000), *cert. granted on other grounds*, 121 S. Ct. 296 (Oct. 10, 2000) (attached as Attachment C), the court rejected a takings challenge to the denial of a permit to build a housing subdivision on wetland property adjacent to Winnapaug Pond in Westerly, Rhode Island. The court concluded that filling the wetlands to build the subdivision would result in a twelve- percent loss of the total salt marsh on the pond, thereby reducing the wetland's filtering capacity. *See id*. at *5. Consequently, it "could be expected to result in increased harmful nitrate levels within the Pond," which could result in higher nitrate levels in the groundwater, the sole source of drinking water for the surrounding

community. *Id*. at *5. This threat to the community's drinking water was sufficient to support a nuisance determination that precluded takings liability. *See id*.[4]

In *Village of Wilsonville v. SCA Services, Inc*. (Ill. Ct. App. 1979), 396 N.E.2d 552, the appeals court affirmed issuance of an order enjoining as a nuisance the continued operation of a landfill for disposal of hazardous substances that had been licensed by the state. The landfill posed several potential threats, but the primary danger was the possibility of contaminant migration to other properties. *See id.* at 558. Although the evidence that toxic substances would migrate "was, at best, uncertain, contingent upon the existence of conditions in the subsurface which were not known," the appeals court affirmed the issuance of the injunction because the trier of fact "could have determined that there was a reasonable likelihood that escape would take place sometime in the future." *Id*. at 563. Quoting the Restatement (Second) of Torts (1977), section 933, comment on subsection (1), the court emphasized that where the potential harm is serious, "the less justification there is for taking the chances that are involved in pronouncing the harm too remote" to warrant relief. *Id*. at 635, 396 N.E.2d at 563-64. The appeals court sustained the injunction notwithstanding the landfill's significant social value in view of "undeniable need for facilities to dispose of hazardous waste." *Id*. at 564.

At the heart of the nuisance inquiry with respect to Parcels A, B, F, G, and H is the question of whether this Court will apply Ohio nuisance law in a manner to protect not only the existing uses of the Pleasant City Aquifer, but future uses as well. The State added these Parcels to the unsuitable-for-mining designation in response to this Court's 1993 ruling that the State must consider future uses of the aquifer. We submit that this Court likewise should apply nuisance law in a manner that safeguards future uses of this and other precious natural resources

[4] *Palazzolo* is currently pending before the U.S. Supreme Court, but the issues before the Court do not implicate the trial court's nuisance determination.

in Ohio from the threat of ruinous compensation awards that would chill public officials from protecting them.

Suppose a family were to store large quantities of bottled water in the basement of its home to ensure an adequate supply of potable water in the event of a tornado or other natural disaster. If someone were to steal the bottled water from the basement, it would not disrupt the family's current drinking-water supplies, but there is no question that it would cause harm by depriving the family of a needed resource for the future. In the same way, the proposed mining in Parcels A, B, F, G, and H would leave the residents of the Pleasant City area without recourse if their current water wells were to become unusable (for example, as the result of a toxic waste spill near the existing wells). Moreover, by depleting alternative water supplies in the Pleasant City aquifer, the proposed mining would render Pleasant City incapable of accommodating future growth.

Courts regularly act to protect public resources to ensure their availability for future enjoyment, regardless of whether those resources are currently being used. Public beaches, historic properties, cultural treasures, and other public resources retain value for future generations regardless of whether anyone is currently using them. This Court has sustained the ability of a municipality to use its zoning authority to protect groundwater resources and recharge areas to be used by future residents. *Ketchel v. Bainbridge Township* (1990), 52 Ohio St. 3d 239, 242-43, 557 N.E.2d 779, 782 (sustaining zoning ordinance designed "to protect the aquifer recharge areas"). In the same way, it should apply Ohio nuisance law in a way that protects public resources for future generations.

RTG emphasizes that no Ohio court has deemed its mining to be a nuisance. Under *Lucas*, however, it makes no difference whether a court has previously found a

nuisance on facts identical to those in this case. The nuisance inquiry under *Lucas* is not a bureaucratic search for a reported case on all fours with the case at hand, but rather an "objectively reasonable" application of nuisance precedent to the facts set forth in the record, the essence of reasoned judicial decision-making. *Lucas*, 505 U.S. at 1032 n.18. In other words, the nuisance inquiry is flexible enough to accommodate new information and changing values regarding the relative importance of public resources. Nuisance law, like common law generally, rarely reduces to the simple application of squarely controlling precedent. As stated by Justice Holmes, the common law must evolve through experience and "cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics." Oliver Wendell Holmes, Jr., THE COMMON LAW 1 (1881). Instead, the nuisance inquiry under *Lucas*, like nuisance litigation generally, frequently requires courts to extend prior rulings to new situations.

Lucas itself shows just how dynamic the nuisance inquiry is. By way of example, *Lucas* asserts that the owner of a lakebed would not be entitled to compensation if denied permission to fill land that would cause the flooding of nearby land owned by others. *See Lucas*, 505 U.S. at 1029. The *Lucas* Court likewise explains that that no taking would occur if the government were to direct the owner of a nuclear power plant to remove all improvements from its land upon discovery that the plant sits on an earthquake fault. *See id.* These examples demonstrate that the nuisance inquiry is not contingent on the existence of a pre-existing state law or state court decision declaring the conduct to be a nuisance because the *Lucas* court cited none. Indeed, because nuclear power plants are regulated primarily by federal law, there are few state cases that address the siting of a nuclear power plant as a nuisance. Yet *Lucas* proceeds on the assumption that the

proposed conduct is unlawful regardless of whether the relevant state courts previously have so ruled. *See id.*

The power plant example in *Lucas* also illustrates the *Lucas* Court's assertion that "changed circumstances or new knowledge may make what was previously permissible no longer so." *Id.* at 1031. New knowledge about earthquake risks at the plant allows the government to order a complete removal of the plant without incurring takings liability, regardless of the order's economic impact. In the same way, the Magistrate correctly determined that new record evidence regarding the effect of RTG's proposed mining on the Pleasant City aquifer justifies land-use restrictions to protect the resource, and that the unsuitable-for-mining designation does not effect a taking because a weighing of harms and benefits under state nuisance law justifies the restriction.

Finally, the power plant example in *Lucas* is not premised on actual or imminent harm to the community. The serious threat of harm disclosed by the discovery of an earthquake fault is sufficient to justify dismantling the plant without giving rise to takings liability.

RTG has spent considerable energy in this case arguing that the unsuitable-for-mining designation is not equivalent to a nuisance determination. RTG exaggerates the difference in standards applicable to these two determinations, but more to the point, the argument is a strawman. The State of Ohio does not argue that the unsuitable-for-mining designation automatically entitles it to an effective nuisance defense. Rather, it argues that based on the evidence before the Magistrate in this proceeding, the Court should deem the proposed mining to be a nuisance that precludes takings liability. Of course, many of the considerations that led to the unsuitable-for-mining designation support a

nuisance determination as well. But throughout this proceeding, the State has emphasized the record evidence it presented in the instant case, not the mere fact of the designation, or the administrative record before the Board in the designation proceeding. In fact, it is RTG that continues to emphasize that the Board found that additional mining "could" impair the aquifer's long-range productivity. In contrast, the State has cited exclusively to the record evidence, such as the Bennett Affidavit, which shows unequivocally that the proposed mining would in fact harm the aquifer.

RTG also relies heavily on a so-called "early warning system," the use of monitoring wells to determine when RTG's de-watering poses an immediate threat to Pleasant City's existing water needs. The State has effectively showed the inadequacy of this monitoring proposal, but even if it were completely effective, it goes only to the threat to current water needs posed by de-watering. It does nothing to reduce the long-term threat that would be posed by the mining's destruction of the aquifer through the replacement of water-bearing deposits with mine spoil.

The appeal court ruled that the State should prevail only if it showed that it could obtain equitable relief under Ohio law by putting forth "clear and convincing evidence" of a nuisance sufficient to justify a common law injunction. *State ex rel. R.T.G. v. State of Ohio* (March 8, 2001), No. 98AP-1015, 2001 WL 238424, at *12. Although we believe the Magistrate correctly found that the State has presented such evidence, it is important to note that the appeals court improperly imported the "clear and convincing" standard for equitable relief into its nuisance analysis. Under *Lucas*, a takings defendant need only show that the challenged government action prevents nuisance activity. The reason is simple: no one has a property right to engage in a nuisance. *Lucas* does not impose the additional burden of showing by clear and convincing

evidence that an injunction would issue under equitable principles. In many nuisance actions, the harmed party does not seek an equitable injunction, but monetary damages for the harm caused by the nuisance. Here, if the State had not banned the proposed mining, Pleasant City residents could have sued RTG for damages by showing a nuisance through a mere preponderance of the evidence. No more is required to avoid takings liability under *Lucas*.

CONCLUSION

The word 'rival' comes from the Latin word 'rivalis,' which refers to one who uses a stream in common with another. WEBSTER'S ENCYCLOPEDIC UNABRIDGED DICTIONARY OF THE ENGLISH LANGUAGE, p. 1661 (1996). Conflicts over the use of water are ancient and deep.

There can be no question that RTG and the 1000 residents of the Pleasant City area are rivals for a unique and vital water resource. Pleasant City wants to continue to use the Pleasant City aquifer as it has for nearly a century, to nourish and sustain the people who live in the community and future generations. RTG would threaten the resource by dewatering its excavation pits and replacing the aquifer's water-bearing deposits with mine spoil. Following the mandate of this Court, the State has protected this public resource and the community from harm through its unsuitable-for-mining designation. Nothing in the Takings Clause requires the taxpayers of Ohio to pay RTG for not inflicting harm on the Pleasant City area.

Respectfully submitted,