Ohio Northern University Law Review

Volume 47 | Issue 2 Article 8

State ex rel. AWMS Walter Solutions, L.L.C. v. Mertz2020-Ohio-5482

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I. INTRODUCTION

"Nor shall private property be taken for public use, without just compensation."[1] These simple words encompass what is perhaps the most fundamental constitutional provision in modern American property law, The Fifth Amendment's Takings Clause.[2] The Takings Clause takes center stage in the Ohio Supreme Court case of *State ex rel. AWMS Walter Solutions, L.L.C. v. Mertz.*[3] Specifically, the question arises whether an indefinite suspension of an economically beneficial activity, imposed by a governmental body, may consist of a regulatory taking of the property upon which the activity is slated to take place.[4] In a comprehensive decision immersed in nuanced investigation of a number of critically relevant factors, the Court answers with a qualified "yes," and offers a ray of hope, or at the very least an alternate pathway to recovering investment, for businesses operating in highly regulated fields.[5] By grounding their decision in a common sense application of well settled case law to the distinctive facts and circumstances of the case, the Court admonishes regulatory overreach in respect to the burden state regulators can place on businesses to meet targets that are shifting so fluidly, as to be rendered invisible.[6]

II. STATEMENT OF FACTUAL AND PROCEDURAL HISTORY

The catalyst for this case was a lease entered into by the appellants, AWMS Water Solutions, L.L.C. (hereafter "AWMS") for the purpose of operating two saltwater injection wells on just over five acres of property in Trumbull County, Ohio.[7] AWMS is a company which disposes of waste produced by oil and gas drilling, primarily saltwater.[8] The function of the injection wells here was to guide waste saltwater into underground geologic crevices, as a way to ensure that it remain separate from fresh groundwater, and mitigate the risk of contamination.[9] Four days after securing the lease,

1. U.S. CONST. amend. V.
2. Edward J. Sullivan, *A Brief History of the Takings Clause*, WASH. U. ST. LOUIS, https://landuselaw.wustl.edu/articles/brief_hx_taking.htm (last visited Feb. 25, 2021).
3. Slip Opinion 2020-Ohio-5482, 2020 WL 7213816.
4. *Id.* at 1.
5. *Id.*
6. *Id.* at 7.
7. *Id.* at 1.
8. *Mertz,* 2020-Ohio-5482 at *1.
9. *Id.*

AWMS applied to the Ohio Department of Natural Resources Division of Oil and Gas Resources Management (hereafter "the Division") for the permits needed to construct and operate two saltwater injection wells on the site.[10] However, AWMS's permits were put in jeopardy when nearby earthquakes occurred in close succession in the days directly following their permit application.[11] While these earthquakes were not connected to wells operated by AWMS, they were allegedly triggered by a nearby injection well operated by a separate company.[12] Because the Division found a "compelling argument" of a causal connection between the other company's injection well and the earthquakes, concern arose regarding the safety and long term viability of the injection wells proposed by AWMS.[13] This concern was cemented by Governor John Kasich's moratorium on the construction of new injection wells following the earthquakes, and the subsequent investigation put the AWMS wells in a state of suspension.[14] However, eighteen months later and after an extensive investigation, the AWMS permits were granted, and construction began on two salt water injection wells on the site.[15] After the wells were constructed, but before the process of injection began, AWMS offered interested parties the opportunity to invest in the operation of the two wells, at a price of $50,000 per share of membership.[16] In its memo to prospective investors, AWMS disclosed some risks associated with the well.[17] In particular, they outlined the risks associated with investing in such a highly regulated industry, and the possibility that earthquakes like the ones that had already occurred nearby might halt the operation of the injection wells.[18] This memo turned out to be prescient, when the following year, two earthquakes approximately a month apart occurred nearby to one of the injection wells operated by AWMS (hereafter "Well #2").[19] After initially suspending the operations of both AWMS injection wells on the site, the Division ultimately only instituted an indefinite suspension of injection into Well #2.[20] In order to consider reopening Well #2, the Division mandated that AWMS submit a report outlining its plan surrounding seismic activity connected to the well.[21] Although the Division provided no guidelines as to the content they were seeking, AWMS submitted an extensive report

10. *Id*.
11. *Id*.
12. *Id*.
13. *Mertz*, 2020-Ohio-5482 at *1.
14. *Id*.
15. *Id*.
16. *Id*.
17. *Id*.
18. *Mertz,* 2020-Ohio-5482 at *2.
19. *Id*.
20. *Id*.
21. *Id*.

proposing several alternatives for how to manage Well #2 and the surrounding site, so to mitigate the risk of further seismic events.[22] However, the Division summarily rejected the report, labeling it "generic and inadequate."[23] Naturally, AWMS appealed.[24] The appeals process was extensive and nebulous, with the Division first telling AWMS that the Division was planning to release a comprehensive statewide policy regarding seismic events connected to injection wells, within the subsequent four to six months.[25] Moreover, the Division communicated that it was not willing to consider lifting the suspension on Well #2, until the statewide policy was in place.[26] Then, during a second meeting between the Division and AWMS, the Division extended its timeline for implementing the statewide policy by at least six additional months, and further required AWMS to address a list of fourteen criteria the Division was considering making part of its policy.[27] Finally, the Division emphasized that it would only recommend a statewide policy that carried with it "zero risk" of future seismic events.[28] At this point, substantive communication between the Division and AWMS regarding the criteria ceased, and upon a request by AWMS for further clarification, the Division asked for a report from AWMS addressing the fourteen criteria in "whatever way they thought was appropriate."[29] A month after this second meeting took place, AWMS did just that, but received no immediate response from the Division.[30] Several months later (now almost a year after the initial suspension of Well #2) the Division again communicated with AWMS, this time affirming the decision to halt operations of Well #2, and putting off any further decision until the implementation of a statewide policy, which at this point had no proposed time parameters in place.[31] In affirming its decision, the Division cited the possibility of imminent danger related to the operation of Well #2, and it defended its lengthy process of determining the framework of a statewide policy.[32]

When AWMS again appealed, this time they received a receptive ear in the Franklin County Court of Common Pleas (hereafter "Franklin County").[33] Franklin County stated that it was unreasonable for the Division to require plans and reports from AWMS which addressed a statewide policy that was

22. *Id*. at 3.
23. *Mertz,* 2020-Ohio-5482 at *3.
24. *Id*.
25. *Id*.
26. *Id*.
27. *Id*.
28. *Mertz,* 2020-Ohio-5482 at *3.
29. *Id*.
30. *Id*.
31. *Id*.
32. *Id*.
33. *Mertz,* 2020-Ohio-5482 at *4.

nebulous, and not yet in place.[34] Franklin County placed conditions on the reopening of Well #2 after proposals were made by both AWMS and the Division, with the primary condition being that the operation of Well #2 could be restarted if representatives from both the Division and AWMS were satisfied that there was no imminent danger to public safety, or an imminent threat to the surrounding environment.[35] This time it was the Division's turn to appeal, and while the Tenth District Court of Appeals did not fully reverse Franklin County's decision, it did reinstate the indefinite suspension of Well #2.[36]

After AWMS's subsequent appeal was denied, AWMS petitioned for a writ of mandamus with the Eleventh District, in essence asking the state to classify the Division's actions as a taking, thus requiring the government to bestow AWMS with just compensation.[37] By indefinitely halting the operation of Well #2, AWMS argued, the Division deprived AWMS of the beneficial use of the land it was leasing.[38] The State of Ohio moved for summary judgment, and its motion was granted.[39] The Eleventh District rejected the argument that AWMS had been deprived of "all" economically beneficial use of its land, primarily because it was allowed to continue the operation of Well #1. In addition, the Eleventh District found persuasive the state's arguments that AWMS was able to procure additional revenue from other activities on the property (including processing and recycling) and that there had been inquiries from third parties regarding subleasing the property from AWMS.[40] Therefore, the Eleventh District reasoned, the state had not enacted a total regulatory taking of the property.[41] Moreover, the Court refused to give credence to the claim of a partial regulatory taking.[42] The Court was moved by the state's contention that the suspension of Well #2 was to "protect the public's health and safety . . ." and the fact that the prospectus AWMS sent to potential investors strongly warned of just the type of risk which came to fruition.[43] With summary judgment having been granted against them, AWMS appealed to the Ohio Supreme Court.[44]

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34. *Id*.
35. *Id*.
36. *Id*.
37. *Id*.
38. *Mertz,* 2020-Ohio-5482 at *4.
39. *Id*.
40. *Id*.
41. *Id*.
42. *Id*.
43. *Mertz,* 2020-Ohio-5482 at *4.
44. *Id*. at 5.

III. THE OHIO SUPREME COURT'S DECISION AND RATIONALE

A. The Majority Decision—Justice Patrick F. Fischer

The Ohio Supreme Court (hereafter "the Court") first clarified the criteria AWMS must meet to overturn the lower court's ruling.[45] First, AWMS had to demonstrate "a clear legal right to compel the state to commence property-appropriation proceedings."[46] Second, they had to demonstrate "a clear legal duty on the part of the state to institute that action."[47] And finally, AWMS had to demonstrate "the lack of an adequate remedy in the ordinary course of the law."[48] Next, the court defined the Takings Clause under the Fifth Amendment,[49] and acknowledged that the leasehold interest held by AWMS qualified for consideration under the Takings Clause.[50] Then, the court parsed the difference between a traditional ouster, where a property holder is physically expelled from her land,[51] and a regulatory taking, where a property holder technically retains her property, but excessive regulations prevent her from extracting its benefits.[52] The alleged regulatory taking at issue in this case required the court to examine the facts in light of two separate analyses: total regulatory takings, and partial regulatory takings.[53]

First, the Court examined a total takings analysis.[54] Whether a total taking has occurred is evaluated by determining if a property holder has been *fully* deprived of the property's economic benefits.[55] While the State argued that the continued operation of Well #1 (and related activities such as the recycling and treatment of wastewater) constituted an economic benefit derived from the property, an AWMS expert countered that without the simultaneous operation of Well #2, the continued operation of Well #1 was not profitable, nor economically viable.[56] The State quibbled with the AWMS expert's calculations, but the Court found the two opposing viewpoints adequately robust to support a "genuine issue of material fact," defeating summary judgment on a total taking.[57] Moreover, the Court found the State's contention that AWMS could have derived a benefit from

45. *Id*.
46. *Id*.
47. *Id*.
48. *Mertz,* 2020-Ohio-5482 at *5.
49. *Id*.
50. *Id*.
51. Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1014 (1992).
52. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 414 (1922).
53. *State ex rel. AWMS Water Sols.*, L.L.C. v. Mertz, 2020-Ohio-5482 at 6.
54. *Id*. at 8.
55. *Id*.
56. *Id*.
57. *Id*. at 9.

subleasing the property unpersuasive.[58] First, the Court cited *Lost Tree Village Corp. v. U.S.* in finding that the sale of a property (or sublease in this case) does not "rise to the level of an economically beneficial use."[59] Second, the Court doubted that subletting the property was even a reasonable option for AWMS, as any sublessor would encounter the same restrictions which befell AWMS, and no inquiries had reached past the exploratory stage.[60]

Next, the Court briefly explored whether AWMS's use of the property constituted a nuisance, which in the context of a total regulatory taking, is constituted by the disallowance of an activity that would *never* be permissible on the property given the circumstances, thus eliminating the requirement for just compensation.[61] Here, the Court found that even if AWMS's use of the property might have constituted a nuisance, the State waived its nuisance defense because its argument was not grounded in relevant nuisance case law, as is required for consideration.[62]

Finally, the Court examined a partial takings analysis.[63] Partial takings are evaluated under the standard set forth by the Supreme Court in *Penn Central v. City of New York*,[64] a three factor test which covers 1) the economic impact on the claimant; 2) the impact of the regulatory action on investment-backed expectations; and 3) the character of regulatory action.[65] The Court here first looked at the economic impact on AWMS of the Division suspending the operations of Well #2.[66] The Court listened to experts from both AWMS and the State, who offered well-reasoned but disparate calculations in estimating the economic impact.[67] Here, the Court found a clear dispute of fact in regards to economic impact of the suspension of operations of Well #2, based primarily on the AWMS expert's estimate that the suspension resulted in over a 100% loss for investors in the company, and the State's expert's competing estimate of loss, which was significantly lower.[68]

Second, the court examined the impact of the suspension on the reasonable expectations of investors.[69] Here, the Court acknowledged that investors were aware that their funds were to be utilized in the service of a highly regulated field, and moreover that detrimental regulation could thwart

58. *Mertz,* 2020-Ohio-5482 at *9.
59. *Id*.
60. *Id*.
61. *Id*. at 10.
62. *Id*.
63. *Mertz,* 2020-Ohio-5482 at *11.
64. 438 U.S. 104 (1978).
65. *Id.* at 124.
66. *Mertz,* 2020-Ohio-5482 at *11.
67. *Id*. at 12.
68. *Id*.
69. *Id*.

their investment in the event of seismic activity caused by injection wells operated by AWMS.[70] However, the Court dismissed the State's argument that the earthquakes caused by a nearby injection well factored into the reasonable expectations of investors, because those earthquakes happened *after* the AWMS investors had made their decision.[71] The Court also focused here on the indecisive nature of the State's actions, vacillating between evaluating seismic activity on a "case by case basis," and implementing a sweeping statewide policy.[72] According to the Court, investors could not have reasonably anticipated such lack of clarity from regulators, nor the extensive delay which accompanied it.[73] These considerations weighed heavily on the Court, which found a genuine issue of material fact on this second factor of reasonable investment-backed expectations.[74]

Third, the Court evaluated the character of the regulatory action.[75] Here, the Court found that AWMS was not singled out for regulatory action when compared with similar operations, that the regulatory action of suspending Well #2 was made for the purpose of reducing the risk of significant harm to the surrounding community, and that AWMS failed to demonstrate "extraordinary delay" in the Division's decision-making process to the extent necessary for the Court to find bad faith.[76] On this factor, the Court firmly sided with the State.[77] However, when evaluating the three major *Penn Central* factors together in this case, the Court found that the major questions of fact arising in both the economic impact of the regulatory action, and the frustration of reasonable investment-backed expectations, were sufficiently consequential to defeat summary judgment on a partial takings claim.[78]

Therefore, because the Court found genuine issues of material fact in both its total takings and partial takings analysis, it reversed summary judgment on these issues, and remanded the case to the Eleventh District Court of Appeals.[79]

B. The Concurrence—Justice Sharon L. Kennedy

In her concurrence on the Court's total takings analysis, Justice Kennedy agreed that there was a cogent argument to be made for AWMS suffering the complete loss of economic value of their property, triggered by the Division's

70. *Id*.
71. *Mertz,* 2020-Ohio-5482 at *12.
72. *Id*. at 13.
73. *Id*.
74. *Id*.
75. *Id*.
76. *Mertz,* 2020-Ohio-5482 at *14-16.
77. *Id*. at 16.
78. *Id*.
79. *Id*. at 17.

regulatory action.[80] However, she found the Court's focus on alternate uses for the property (outside of operating saltwater injection wells) and the possibility of subleasing to other investors extraneous and unnecessary.[81] According to Justice Kennedy, the property interest held by AWMS was "narrow": a leasehold for the express purpose of operating saltwater injection wells.[82] When the Division suspended the operation of saltwater injection Well #2, which AWMS's expert contended made continued use of the site economically impracticable, it raised a genuine issue of material fact regarding a total taking connected to the narrow property interest of AWMS, regardless of other potential economically beneficial uses of the property.[83]

Examining the partial takings analysis, Justice Kennedy agreed with the majority on the question of fact raised by the disparate expert estimates on economic impact.[84] She also agreed with the majority in its analysis on the objective reasonableness of investment-backed expectations, but instead of focusing on the prospectus and the restrictive extent of the regulatory environment, Justice Kennedy zeroed in on the simple expectation that if AWMS were to closely follow the guidelines laid out in its permit, continued operation of the wells would be granted.[85] As AWMS did indeed follow the permit guidelines, and relevant Ohio statutes, its investors had a reasonable expectation that both wells would continue operation on the property.[86] Moreover, Justice Kennedy found it important that there was no express language in the permit stating that the Division could suspend AWMS operations based on related seismic activity.[87] Therefore, in Justice Kennedy's estimation, the majority was correct in finding that reasonable investment-backed expectations were conceivably defeated.[88] In looking at the third *Penn Central* factor concerning the character of the regulatory action, Justice Kennedy gave significant consideration to the evidence presented which called into question the Division's contention that the suspension of Well #2 was related to science and public safety, rather than "press and politics."[89] She also lent considerable weight to the inconsistency, delay, and lack of clarity provided by the Division throughout the process.[90] Finally, Justice Kennedy found a legitimate question as to whether AWMS

80. *Id*. at 18.
81. *Mertz,* 2020-Ohio-5482 at *18.
82. *Id*. at 17.
83. *Id*. at 18.
84. *Id*. at 19.
85. *Id*.
86. *Mertz,* 2020-Ohio-5482 at *19.
87. *Id*.
88. *Id*. at 20.
89. *Id*.
90. *Id*.

was singled out for such extensive regulatory action, rather than treated equally to its peers.[91] With these considerations in mind, Justice Kennedy went further than the majority by finding a genuine issue of material fact regarding the character of the regulatory action,[92] and ultimately concurred with the majority's decision to reverse summary judgement on AWMS's claims of total and partial takings.[93]

C. The Dissent—Justice Michael P. Donnelly

The dissent here supported retaining the lower court's ruling granting summary judgment against both total and partial takings.[94] In his total taking analysis, Justice Donnelly focused squarely on the divergence between this case, and the ruling in *Lucas v. S.C. Coastal Council*.[95] According to Donnelly, the critical difference was that in the present case, AWMS had ample opportunity to derive some modicum of revenue from the property—regardless of whether such revenue resulted in profit—while in *Lucas*, the property was rendered dormant, or as Justice Donnelly put it, "valueless."[96] Here, because AWMS could engage in income producing activities, including the continued operation of Well #1, it could not use *Lucas* to support its contention of a total taking.[97] Moreover, Justice Donnelly saw a key distinction as being whether AWMS had the right to use the property's resources, not whether these resources necessarily conferred an economic benefit.[98] Because the Division's suspension of Well #2 did not equate to a "complete deprivation of use" of the property, there was no basis for finding a total taking.[99]

In his analysis of partial takings in the dissent, Justice Donnelly again narrows the focus of his opinion.[100] Here, his discourse centers on a singular factor promulgated under *Penn Central:* the existence and extent of reasonable investment-backed expectations.[101] Citing *Good v. U.S.*, Justice Donnelly argues that a lack of reasonable investment-backed expectations eliminates the necessity to examine the economic impact of the regulatory action or the character of such action, the two remaining *Penn Central*

91. *Mertz,* 2020-Ohio-5482 at *20.
92. *Id*.
93. *Id*. at 21.
94. *Id*.
95. *Id*.
96. *Mertz,* 2020-Ohio-5482 at *21.
97. *Id*.
98. *Id*. at 22.
99. *Id*.
100. *Id*. at 23.
101. *Mertz,* 2020-Ohio-5482 at *23.

factors.[102] And here Justice Donnelly finds that if investors could not anticipate a suspension of one of AWMS's injection wells connected to seismic activity, then their expectations were unreasonable indeed.[103] According to the dissent, a "heightened sensitivity" to the environment has been well established, and more stringent regulations arising from that sensitivity should not be a surprise.[104] The triggering of seismic activity by saltwater injection wells falls squarely into this concern, and in fact was highlighted in AWMS's own prospectus to potential investors.[105] Therefore according to Justice Donnelly, the lower court's summary judgement ruling regarding both total and partial takings should have been upheld.[106]

IV. ANALYSIS

A. Introduction

The Court here was correct to overturn summary judgment for both total and partial takings. However, because the Division's decision to suspend Well #2 was indefinite but not final, the lower court should ultimately find in favor of a partial taking, based on a balancing of the *Penn Central* factors, and the simultaneously heavy-handed and indecisive nature of the regulatory action, yawning arduously over an extended chasm of time.[107]

B. Discussion

First, we need to examine the case for a total taking. The modern test for a total taking is established in *Lucas v. S.C. Coastal Council*, in which a total taking was found when the State of South Carolina enacted a regulatory action preventing a builder from erecting single family homes on a piece of land purchased on the Isle of Palms.[108] The Supreme Court in that case found that the government could no longer simply point to the legitimate prevention of public harm by way of its regulatory action, in order to avoid paying just compensation to the landowner.[109] Instead, the State must show that any regulation which deprives the landowner of all economically beneficial use of the property, is grounded in the state's traditional nuisance law—a much higher standard to meet.[110] In *AWMS*, the State of Ohio unquestionably failed

102. *Id*.
103. *Id*.
104. *Id*.
105. *Id*. at 24.
106. *Mertz,* 2020-Ohio-5482 at *24.
107. *Id*. at 11, 13.
108. *Lucas*, 505 U.S. at 1003.
109. *Id*. at 1004.
110. *Id*.

to meet this standard, and indeed neglected to approach it any meaningful way.[111] At first glance, this points to the possibility of a just compensation award pursuant to a total taking.[112] However, there is a critical difference between *AWMS* and *Lucas*, and that difference lies in the permanence of the regulatory action. In *AWMS*, the Division's suspension of Well #2 may be characterized as unsupported by science, inconsistent, amorphous, and certainly economically crushing.[113] In addition, the majority makes a compelling argument that it may be optimistic to call the suspension temporary, due to its extended and indefinite nature.[114] However, as *Lucas* makes clear, in order for a total taking to be found, the regulatory action must be clearly "unconditional and permanent."[115] Here, while the conditions are, in the words of the *AWMS* majority, "hardly ministerial,"[116] the Division did lay out a number of criteria affecting whether the suspension would ultimately be lifted, and showed a repeated willingness to work with AWMS in pursuit of that outcome.[117] Therefore unlike in *Lucas*, the court here should not find a total taking on remand.

Next, we need to examine the case for a partial taking.[118] Here, the argument in favor of AWMS is much more compelling. To find a partial taking, a court must find in favor of the property owner after balancing three critical factors laid out in *Penn Central*.[119] First, the court must evaluate the economic impact of the regulation on the claimant.[120] Second, the court must examine the extent to which the regulation has interfered with specific, *and reasonable,* investment-backed expectations.[121] Finally, the court must scrutinize the character of the governmental action in relation to this particular property owner.[122]

With regard to the economic impact of the Division's regulation, we can use the "with and without" method established in *Keystone Bituminous Coal Ass'n v. DeBenedictis*.[123] This method simply compares the value that has been subtracted from the property, with the value that remains after the regulation has been enacted.[124] But what exactly does "value" mean in this

111. *Mertz,* 2020-Ohio-5482 at *10.
112. *Id*. at 11.
113. *Id*. at 20, 13, 8.
114. *Id*. at 8.
115. *Lucas*, 505 U.S. at 1012.
116. *Mertz,* 2020-Ohio-5482 at *8.
117. *Id*. at 13.
118. *Id*. at 11.
119. *Id*.
120. *Id*.
121. *Mertz,* 2020-Ohio-5482 at *11.
122. *Id*.
123. 480 U.S. 470, 497 (1987).
124. *Id*. at 497.

context? According to *Cienega Gardens v. United States*,[125] it can primarily mean one of two things.[126] First, value can refer to the change in market value of the property itself before and after the regulatory action.[127] In other words, the change in the value at which a willing buyer would pay a willing seller for property neither party is under a compulsion to buy or sell, and where both parties have access to all relevant information. The calculation of market value is muddied in this case, because AWMS is simply a lessor of the property, and thus would need to engage a limited list of potential sublessors, who could only use the property for the limited purposes spelled out in the original lease.[128] However, it is fair to say that the market value for such a sublease would be $0, considering no legitimate interest or offers developed despite evidence of AWMS engaging multiple parties.[129] Putting the decline in dollar amount aside, the market value of AWMS's lease could was essentially worthless with the regulation in place.[130] The second test for value in the "with or without" approach is the decline in net income brought upon by the regulatory action, calculated over the total life of the property interest.[131] Competing experts for the State and AWMS made wildly disparate estimates concerning the economic impact, but both acknowledged a significant economic effect.[132] Considering the inability of AWMS to realistically sublease the property for any compensation, and the parallel significant loss of profits rendering the income producing quality of the property somewhere between crippled and worthless, the economic impact factor of *Penn Central* skews strongly in the direction of AWMS.[133]

Next, we need to look at the extent of the regulatory action's interference with reasonable investment-backed expectations, and the character of the government action.[134] We are going to lump these two factors together here, because my contention is that the majority and the concurrence each used these factors differently to drive home a cohesive salient point: that the actions of the Division unjustly frustrated the sincere collaborative efforts of AWMS, and ultimately violated the public trust.[135] The most glaring evidence of the Division's malfeasance lies in the extent of delay.[136] The

125. 503 F.3d 1266 (Fed. Cir. 2007).
126. *Id. at* 1282.
127. *Id*.
128. *Mertz,* 2020-Ohio-5482 at *9.
129. *Id*.
130. *Id*.
131. *Cienega Gardens v. United States*, 503 F.3d at 1282.
132. *Mertz,* 2020-Ohio-5482 at *11-12.
133. *Id*. at 9, 12.
134. *Id*. at 11.
135. *Id*. at 13, 20.
136. *Id*. at 14.

Division first suspended the operations of Well #2 on September 3, 2014.[137] It then repeatedly communicated timelines to AWMS which turned out to be at best optimistic, and at worst deceptive.[138] By the time the Division indefinitely upheld the suspension order in August of 2015, AWMS had lost almost a year of income potential, and the Division was still content to kick the can down the road, stating that the regulation of seismic activity connected to injection wells couldn't be expected to happen "overnight."[139] This affirmation of the Well #2 suspension, along with a loose expression by the Division of their desire to make some unknowable regulation *at some future time*, was the last straw for AWMS, and compelled them to file suit.[140] Because the delay can be measured in a succession of broken promises as to when a regulatory structure would be in place (first four to six months, then an additional 8 months, then indefinitely), it provides the clearest window into the unjust nature of the governmental action, and the frustration of reasonable investor expectations that the Division would keep its word.[141] However, the time delay itself is just the tip of the iceberg in this case.

The more unsettling problem arises as a result of the Divisions lack of consistency in its dealings, and more pertinently, the crushing amount of fruitless labor it imposed on AWMS.[142] First, the Division required AWMS to submit a comprehensive written plan addressing the seismic risk posed by continued operation of Well #2.[143] However, the Division provided no substantive guidelines on what type of information to include, and despite AWMS's report and associated proposals detailing its plans to continue operation under bolstered managerial and operational control, the Division rejected the written plan outright.[144] Once AWMS appealed, the Division acquiesced to taking meetings with AWMS representatives in order to outline a potential path forward.[145] However, those meetings turned out to be unproductive, and ultimately exasperating.[146] In the first meeting, the Division refused to discuss any steps at all that AWMS could take to move towards resuming operations, including anything AWMS proposed in the written plan that the Division required.[147] In this meeting, the Division simply informed AWMS that there would be a statewide policy on the issue

137. *Mertz,* 2020-Ohio-5482 at *2.
138. *Id*. at 3.
139. *Id*.
140. *Id*. at 3-4.
141. *Id*. at 3, 13, 20.
142. *Mertz,* 2020-Ohio-5482 at *20.
143. *Id*. at 2.
144. *Id*. at 3.
145. *Id*.
146. *Id*.
147. *Mertz,* 2020-Ohio-5482 at *3.

enacted within the next four to six months, and left AWMS management no choice but to sit on its hands while the Division formulated such a policy.[148] The second meeting, occurring over four months after the first, was equally fruitless, but this time had the added insult of imposing an increased workload on AWMS representatives, borne out of a sense of false hope.[149] During this second meeting, the Division outlined fourteen criteria that it was apparently considering as part of its statewide policy.[150] While at the time this appeared to be a promising development, the Division's presentation to AWMS came with three caveats. First, the criteria were not fleshed out in the least, fitting comfortably on one sheet of paper.[151] Second, the Division again drastically extended the timeline necessary to put the policy in place, this time by "at least" an additional 8 months.[152] Third, the Division dropped a bombshell: that it would not recommend *any* policy to the Ohio Department of Natural Resources, unless the policy "guaranteed zero risk."[153] The Division then solicited a proposal from AWMS based on the 14 criteria with the aforementioned qualifications in place, and when AWMS subsequently asked for clarification on the bare bones criteria in order to satisfy the Division's request, the Division declined to provide it.[154] Nevertheless, AWMS did submit a substantive plan in good faith, to which the Division failed to respond or even acknowledge.[155]

In essence, it appears that the meetings hosted by the Division were designed only to placate AWMS, with a lack of sincere collaboration, or a demonstrable willingness to substantively consider a way to balance business viability with public safety. By imposing repeated delays which were devastatingly costly to AWMS, and further saddling AWMS with a series of arduous tasks which 1) delayed their ability to adjust to the suspension; 2) cost countless man hours and 3) delivered false hope that AWMS could do anything to help their cause, the Division both defied reasonable investment backed expectations, and embodied a subversive character of action.[156] Therefore, the Court was correct in reversing summary judgment on a partial taking,[157] and the lower court should ultimately decide in favor of AWMS in their partial takings analysis.

148. *Id*.
149. *Id*.
150. *Id.*
151. *Id*.
152. *Mertz,* 2020-Ohio-5482 at *3.
153. *Id*.
154. *Id*.
155. *Id*.
156. *Id.* at 13, 20.
157. *Mertz,* 2020-Ohio-5482 at *17.

V. CONCLUSION

I believe the Ohio Supreme Court correctly reversed summary judgment on both total and partial takings in this case.[158] A total taking occurs when a governmental regulation strips the property owner of all economically beneficial use of a given property, and there is a significant question of material fact as to whether the regulation here meets that criteria.[159] Competing experts for AWMS and the State fervently disagreed about whether the suspension of Well #2 constituted a full loss of economic benefit by means of eliminating the company's profit on the site, or simply eliminated one of several ways AWMS could use the site to generate revenue, profit notwithstanding.[160] The Court used *Lucas* to reject the State's argument that profit was unimportant,[161] and instead focused on the more pertinent point of contention as to whether *all* profit was indeed destroyed.[162] Based on the disparity of expert opinions in this area, the Court was compelled to reverse summary judgment on total takings.[163] However, based on the standard set in *Lucas*, AWMS is unlikely to win this point on appeal.[164] Under *Lucas*, a total taking may only be found when the government regulation rendering a deprivation of all economic benefits is "unconditional and permanent."[165] Here, while AWMS convincingly argues that the Division's suspension of Well #2 was so lengthy and indefinite as to constitute permanence,[166] the State can point to myriad instances in which it laid out conditions (or at the very least proposed future conditions) for the reopening of the well, and treated the suspension as reversible throughout its communications with AWMS.[167] For these reasons, I believe the Court may have been hasty in characterizing the taking as permanent for purposes of evaluating the summary judgment standard in this case.[168] Also for these reasons, and absent a clear showing of bad faith,[169] a total takings argument should ultimately fail.

While a total taking should not be found in this case, it does appear a partial taking has befallen AWMS. Using the established *Penn Central* factor test evaluating economic impact on the claimant, impact of the regulatory

158. *Id*.
159. *Id.* at 8.
160. *Id*. at 9.
161. *Id*.
162. *Mertz,* 2020-Ohio-5482 at *8.
163. *Id*. at 11.
164. *Lucas*, 505 U.S. at 1012.
165. *Id*.
166. *Mertz,* 2020-Ohio-5482 at *4.
167. *Id*. at 8.
168. *Id.*
169. *Id*. at 15.

action on investment-backed expectations, and character of regulatory action,[170] it becomes clear that the evidence weighs heavily against the state. First, the economic impact on AWMS can only be described as severe. Using the "with and without" method established in *Keystone Coal*,[171] AWMS both forfeited any meaningful profits under the Division's suspension, and had no substantive ability to sublease the property in order to recover what was lost.[172] Second, the Court perfectly laid out the argument displaying an interference with reasonable investment-backed expectations. In essence, despite awareness of infusing funds into a project falling under a complex regulatory structure,[173] investors could never have anticipated that the regulators in charge would act with such indecision and callous disregard, leading to an indefinite delay stretching several years.[174] Third, the character of the Division's actions aligns closely with this malfeasance.[175] Through extraordinary delay, shifting objectives, and a lack of clear communication regarding conditions and standards, the character of the Division's actions may be said to range from inadequate to insincere.[176] Therefore, a partial taking should be found in this case, and AWMS should receive just compensation for their losses.

In conclusion, I believe the Court sought to punish the Division for not only the economic impact of its regulation, but its handling of communication and collaboration with AWMS.[177] In doing so, the Court conveyed a strong warning to Ohio governmental agencies tasked with regulatory power, and that warning should be emphasized upon compensation awarded for a partial taking.

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170. Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978).
171. *DeBenedictis*, 480 U.S. at 497.
172. *Mertz,* 2020-Ohio-5482 at *9, 11-12.
173. *Id*. at 12.
174. *Id*. at 13.
175. *Id*. at 20.
176. *Id*.
177. *Mertz,* 2020-Ohio-5482 at *7.