Dam Removal: Federal Appellate Court Addresses Whether Opponent Had Standing to Bring Taking Claim

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The Sixth Circuit Court of Appeals ("Court") addressed in an April 11th opinion an issue arising out of the proposed removal of a dam. See *Barber v. Charter Township of Springfield, Mich*., 31 F.4th 382 (2022).

The question involved whether an opponent of the dam removal had standing to bring a taking action.

Blanche Barber ("Plaintiff") owns property near a dam and pond ("Dam") that was built in 1836. Charles Township of Springfield, Michigan, and Oakland County, along with their Parks and Recreation Departments, (collectively "Defendants") are jointly responsible for maintaining the Dam.

The Defendants conducted a feasibility study which provided various options for upgrading, repairing or removing the Dam. Members of the Springfield Board subsequently recommended removing the Dam. The Defendants budgeted for the dam removal and stated on its website that the project:

. . . has moved to the next phase which includes preliminary engineering and conceptual parks design.

A newspaper article referencing the future removal was also published.

Plaintiff filed suit against Defendants to halt the demolition. She argued that the Dam's removal would:

1. interfere with her property rights;
2. possibly flood her land and cause other property damage;
3. pollute and impair the flora and fauna of the wetlands; and
4. have other negative environmental impacts.

After the case was moved to federal court the Plaintiff argued that Defendants' decision to remove the Dam was a Fifth Amendment taking. The federal district court held the claims were not yet ripe. Therefore, Plaintiff did not have standing to bring her claims and dismissed Plaintiff's claims.

The Court on appeal disagreed. It found that Plaintiff's claims were both ripe and that Plaintiff had standing . The Court did not address the merits of Plaintiff's claims. However, it noted that the Fifth Amendment states :

Nor shall private property be taken for public use, without just compensation.

A taking can include a "physical taking" such as a government condemning land through the power of eminent domain, physically occupying it, or taking title to the land. Also included is "regulatory takings."

Further, a regulation's terms and provisions can amount in appropriate circumstances to a physical taking. Plaintiff argued Cedar Point Nursery v. Hassid, holds that Defendants' planned actions would be an unconstitutional regulatory form of taking. See 141 S.Ct. 2063, 210 L.Ed.2d 369 (2021).

The Court held that Plaintiff's claims are ripe because Defendants publicly stated they would remove the Dam. Defendants were deemed to have made a definite decision that could possibly cause Plaintiff's property interests serious harm. Because there is an actual conflict between Defendants and Plaintiff's interests, the claims were considered ripe and a court should not delay hearing them.

The Court also found that Plaintiff had standing. It found that Plaintiff plausibly:

. . . faces a risk of 'concrete' and 'particularized' injuries."

If Defendants decide to remove the Dam, Plaintiff's property faces the real threat of flooding and other damage . These injuries are personal to Plaintiff's pondside property.

Therefore, the Court found that Plaintiff's claims were ripe and she had standing to bring them.

A copy of the Opinion can be downloaded here.