



the trial court.<sup>1</sup>

{¶2} In 2003, MJB showed interest in purchasing property in Ross Township in order to build Layhigh Crossing, a proposed subdivision. MJB submitted a preliminary plat to the Butler County Planning Commission (the Commission) detailing its proposed plans for the subdivision. On August 15, 2003, the Commission conditionally approved the plat, but required that MJB procure the off-site easements necessary to install gravity-based sewers for the subdivision's use.

{¶3} Between October 2003 and January 2004, MJB approached the homeowners whose property was adjacent to the proposed subdivision and asked for the necessary easements. The homeowners, however, did not agree to MJB's terms and refused to provide the required easements. Nonetheless, in November 2003, MJB purchased the property and moved forward with its plan to create Layhigh Crossing.

{¶4} MJB informed the commissioners that it had been unable to obtain the easements, and instead, requested that the Commission permit the subdivision to obtain sanitary sewer service via a lift station. MJB submitted proposed plans and construction drawings to the Commission detailing the proposed lift station for use at Layhigh Crossing.

{¶5} In a letter dated September 12, 2005, Butler County informed MJB that it would not approve the request for a lift station to serve the needs of the subdivision. MJB later asked that the Commission explain its reasoning for the denial, and for the next eight months, contested the Commission's decision. On May 22, 2006, the Commission passed a resolution that required future development in Ross Township to use gravity sewer service and otherwise prohibited lift station service.

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1. Pursuant to Loc.R. 6(A), we sua sponte remove this case from the accelerated calendar and place it on the regular calendar for purposes of issuing this opinion.

{¶6} MJB filed a petition for a writ of mandamus, claiming that Butler County should be compelled to initiate appropriation proceedings because the resolution prohibiting lift station services constituted a regulatory taking of the proposed sight of the Layhigh subdivision. Butler County filed a motion for summary judgment, which was denied on September 29, 2009.

{¶7} On April 8, 2010, the Ohio Supreme Court released *State ex rel Gilbert v. City of Cincinnati*, 125 Ohio St.3d 385, 2010-Ohio-1473, ¶20, and held that "access to government-provided sewer service is not a constitutionally protected interest subject to the Takings Clause." Butler County moved the trial court to reconsider its motion for summary judgment based on *Gilbert*. After reconsideration, the trial court granted Butler County's motion for summary judgment. MJB now appeals the decision of the trial court, raising the following assignment of error.

{¶8} "THE TRIAL COURT ERRED IN GRANTING THE APPELLEE'S MOTION FOR RECONSIDERATION OF SUMMARY JUDGMENT."

{¶9} In MJB's assignment of error, it claims that the trial court improperly granted Butler County's motion for summary judgment. This argument lacks merit.

{¶10} This court's review of a trial court's ruling on a summary judgment motion is de novo. *Broadnax v. Greene Credit Serv.* (1997), 118 Ohio App.3d 881, 887. Civ.R. 56 sets forth the summary judgment standard and requires that there be no genuine issues of material fact to be litigated, the moving party is entitled to judgment as a matter of law, and reasonable minds can come to only one conclusion being adverse to the nonmoving party. *Slowey v. Midland Acres, Inc.*, Fayette App. No. CA2007-08-030, 2008-Ohio-3077, ¶8. The moving party has the burden of demonstrating that there is no genuine issue of material fact. *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St.2d 64.

{¶11} Both the Ohio and United States Constitutions guarantee that private property will not be taken for public use without providing just compensation. Should a property owner allege an involuntary taking, "mandamus is the appropriate action to compel public authorities to institute appropriation proceedings." *State ex rel. Shemo v. City of Mayfield Hts.*, 95 Ohio St.3d 59, 63, 2002-Ohio-1627. Mandamus is proper where the owner is able to establish (1) a clear legal right to compel the government to commence appropriation; (2) a corresponding legal duty on the part of the government to institute the action; and (3) the lack of an adequate remedy in the ordinary course of law. *Gilbert* at ¶15.

{¶12} "In order to make a successful claim under the Takings Clause, appellants must establish first that they possess a constitutionally protected property interest." *Id.* at ¶19. While takings encompass more than the physical land or object owned, "courts have nevertheless recognized that access to government-provided sewer service is not a constitutionally protected interest subject to the Takings Clause." *Id.* at ¶20. Furthermore, "a municipality is not obligated to construct sewers." *Id.* at ¶21.

{¶13} The trial court granted Butler County's motion for summary judgment because based on *Gilbert*, MJB failed to demonstrate that it possessed a constitutionally-protected interest. MJB's failure to demonstrate a protected right was therefore fatal to its partial regulatory taking claim. MJB now asserts that *Gilbert* is distinguishable because Butler County established a property interest for Fifth Amendment purposes by creating a reasonable expectation that the Commission would approve a lift station to provide sewage service to the subdivision.

{¶14} MJB claims that the property interest was created when Butler County passed an ordinance in 1999 permitting developers to utilize a lift station and because other lift stations were approved in Butler County in the few years preceding its request

in 2004. MJB also claims that it was confronted by contradictory behavior from Butler County's counsel, and that genuine issues of material fact remain regarding whether the behavior created a property right for Fifth Amendment purposes.

{¶15} However, *Gilbert* is clear that MJB had no constitutionally protected property interest because access to government-provided sewer service does not receive constitutional protection. Neither Butler County nor Ross Township was under an obligation to construct sewage systems for the proposed subdivision. While MJB claims that the Commission's actions somehow created a property interest where none existed, we disagree.

{¶16} The record is clear that the Commission conditionally approved the preliminary plat with the express provision that MJB successfully procure the necessary easements to construct a gravity-based sewer system to service the subdivision. MJB was well-aware of the Commission's preliminary approval before it purchased the property and cannot now claim that it relied on contradictory behavior from counsel for Butler County.

{¶17} Furthermore, the court's holding in *Gilbert* does not direct a court to consider a factual inquiry regarding the merits of a possible taking when a landowner is challenging a government action denying sewer service. While the court specifically noted that according to *Penn Cent. Transp. Co. v. New York City* (1978), 438 U.S. 104, 98 S.Ct. 2646, regulatory takings can occur in instances where there is "no physical invasion and the regulation deprives the property of less than 100 percent of its economically viable use," the court declined to analyze the Gilbert's mandamus request under the test enumerated in *Penn Central*. *Gilbert* at ¶17. Instead, the court held that access to government-provided sewer service is not a constitutionally protected interest subject to traditional takings clause jurisprudence.

{¶18} While MJB invites this court to perform a factual inquiry into whether any of the Commission's actions created a reasonable expectation that it would provide sewage service, this inquiry is immaterial given the holding in *Gilbert* and the very explicit rule of law that there is no protected interest in access to government-provided sewer service.

{¶19} MJB's mandamus claim fails because it did not have a legitimate right to compel the government to commence appropriation. As there are no genuine issues of material fact to be litigated, Butler County is entitled to judgment as a matter of law. Having found that the trial court did not err in granting summary judgment, MJB's assignment of error is overruled.

{¶20} Judgment affirmed.

YOUNG, P.J., and POWELL, J., concur.