4-2-2017

Litz v. Maryland Department of the Environment: Maryland's Decision That Inaction Can Support an Inverse Condemnation Claim

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Case Notes

LITZ v. MARYLAND DEPARTMENT OF THE ENVIRONMENT: MARYLAND'S DECISION THAT INACTION CAN SUPPORT AN INVERSE CONDEMNATION CLAIM

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In *Litz v. Maryland Department of the Environment*,[1] the Court of Appeals of Maryland recognized a new basis for inverse condemnation claims.[2] The case arose following the contamination of the petitioner's lake, allegedly due to the failure of local septic systems.[3] The Court of Appeals held that a governmental entity's inaction, when that governmental entity had an affirmative duty to act, can serve as a basis for an inverse condemnation claim.[4] This holding is somewhat controversial because only a few states have recognized that inaction can form the basis of an inverse condemnation claim.[5] In contrast, some states have expressly held that an inverse condemnation claim requires government action.[6] The holding of the Court of Appeals of Maryland, however, is justified as it: (1) conforms with the reasoning used by some courts in other jurisdictions; (2) supports the policy objectives underlying takings jurisprudence; and (3) can be limited in the future to avoid potentially harmful consequences, such as increasing litigation against government entities or increasing government liability for failures to act.[7]

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1. 446 Md. 254, 131 A.3d 923 (2016) [hereinafter "*Litz II*"].
2. *Id.* at 267, 131 A.3d at 931.
3. *Id.* at 257, 131 A.3d at 925.
4. *Id.* at 267, 131 A.3d at 931.
5. *See infra* Part II.B (discussing cases holding that inaction can serve as the basis for inverse condemnation claims).
6. *See infra* Part II.B (discussing cases holding inaction cannot serve as the sole basis for inverse condemnation claims).
7. *See infra* Part IV (analyzing the how the court's decision conforms with decisions made in other jurisdictions and with takings jurisprudence broadly and discussing how the court may limit the holding in the future).

I. THE CASE

The *Litz* case arose out of the contamination of a privately owned lake due to the lack of an adequate sewage system in a Maryland town.[8] The petitioner alleged that because of the contamination, she could no longer operate her property as a campground.[9] Following the foreclosure of her property, she sued the town of Goldsboro, the state of Maryland, and several state agencies alleging, among other claims, an inverse condemnation of the property.[10] The court analyzed whether government inaction can serve as the basis of an inverse condemnation claim.[11]

A. The Contamination of Lake Bonnie

The property at issue in *Litz* was a 140-acre property that was purchased by the parents of petitioner Gail Litz in 1948 and located in Goldsboro, a small town in Caroline County, Maryland.[12] The Litzes transformed a portion of the property into a lake, Lake Bonnie, in the 1950s for irrigation purposes and started running a recreational business on the property, including activities such as boating, camping, fishing, and swimming.[13] In 2001, petitioner Gail Litz inherited this property and became the owner of the recreational business.[14]

The contamination of Lake Bonnie was caused by two streams that fed into the lake.[15] Those streams received water from groundwater sources, from surface water sources, and from three drainage collection systems.[16] The residents of Goldsboro relied on wells and septic systems because the town did not have public water or sewer systems.[17] From as early as the 1970s, however, those septic systems began to fail and contaminated the drainage collection system.[18] Contamination of the drainage collection system in turn contaminated the streams that the drainage system discharged into and, ultimately, contaminated Lake Bonnie.[19] In 1985, the Caroline County Health Department studied the issue and concluded that between

8. *Litz II*, 446 Md. at 257, 131 A.3d at 925.
9. *Id.* at 257–58, 131 A.3d at 925.
10. *Id.*
11. *Id.* at 257, 267, 131 A.3d at 925, 931.
12. *Id.* at 258, 131 A.3d at 925.
13. *Id.*
14. *Id.*
15. *Id.* at 259, 131 A.3d at 925.
16. *Id.*, 131 A.3d at 926.
17. *Id.*, 131 A.3d at 925–26.
18. *Id.*
19. *Id.*, 131 A.3d at 926.

seventy and eighty percent of the town had sewage pits, raw sewage, waste water, or wells less than one hundred feet from a source of contamination.[20]

The failure of the drainage system and the resulting contamination of Lake Bonnie continued unabated, despite the County's findings.[21] In 1995, the Caroline County Health Department stated that "use of the stormwater management system in the Town as a sewage system has gotten to crisis proportions," and the Maryland Department of the Environment ("MDE") concluded that the situation impacted Lake Bonnie's water quality.[22] On August 8, 1996, MDE and Goldsboro's mayor at the time, William Bartin, signed an administrative consent order.[23] The order required Goldsboro to identify sources of contamination, complete a study on the construction of a sewage system, and submit plans for construction of a sewage system to MDE.[24] Goldsboro did not fulfill the requirements of the consent order, but MDE also failed to penalize the town as the order required.[25] Shortly before the consent order was executed, in June 1996, Litz received a letter from the Caroline County Health Department stating that Lake Bonnie posed a threat to health because the lake continued to receive water contaminated with raw sewage.[26] Litz claimed that as a result of her inability to operate her recreational business because of the lake's polluted state, she could not afford to make her mortgage payments on the property.[27] The property was foreclosed and sold to Provident State Bank for $364,000 on May 14, 2010.[28]

B. The Procedural History of Litz v. Maryland Department of the Environment

Litz came before the Court of Appeals of Maryland once before, and not surprisingly, the case had a somewhat lengthy procedural history.[29] On March 8, 2010, Litz filed a complaint in the Circuit Court for Caroline County, alleging negligence and inverse condemnation against Goldsboro, the Caroline County Health Department,[30] and MDE.[31] She also claimed

20. *Id.* at 259–60, 131 A.3d at 926.

21. *See generally id.* at 259–61, 131 A.3d at 926–27 (describing the history of the Goldsboro stormwater drainage and sewage problem and the resulting contamination of Lake Bonnie).

22. *Id.* at 260, 131 A.3d at 926.

23. *Id.*

24. *Id.*

25. *Id.* at 260–61, 131 A.3d at 927.

26. *Id.* at 270, 131 A.3d at 932.

27. *Id.* at 261, 131 A.3d at 927.

28. *Id.*

29. *Id.* at 257, 131 A.3d at 925.

30. The Caroline County Health Department was treated as a state agency for purposes of the litigation. *Id.* at 261 n.6, 263 n.9; 131 A.3d at 927 n.6, 928 n.9.

trespass and private and public nuisance against Goldsboro and Caroline County, and sought a permanent injunction.[32] Later, Litz amended the complaint to add a count for mandamus or equitable relief under the Environmental Standing Act.[33] She also added the Maryland Department of Health and Mental Hygiene ("DHMH") and the state of Maryland as defendants, claiming negligence, trespass, private and public nuisance, and inverse condemnation against them, as well as seeking a permanent injunction against them.[34] Litz alleged that because of the contamination, she could no longer operate her recreational business and the property was "substantially devalued," resulting in a loss of income that led to her failure to make mortgage payments on the property,[35] which ultimately led the bank to foreclose on the property.[36]

Litz's claims were unsuccessful at the Circuit Court and at the Maryland Court of Special Appeals.[37] Maryland, MDE, DHMH, Caroline County, and Goldsboro filed motions to dismiss, and after a hearing the Circuit Court granted those motions.[38] Litz subsequently filed a Motion for Reconsideration and a Third Amended Complaint, which only added factual allegations.[39] The Circuit Court denied the Motion for Reconsideration and dismissed all the claims with prejudice and without leave to amend.[40] Litz appealed the decision and the Court of Special Appeals of Maryland affirmed, concluding Litz's claims were untimely under the relevant statutes of limitations.[41] Litz appealed to the Court of Appeals of Maryland, which affirmed the Circuit Court's decision dismissing the nuisance claims, but reversed the lower court's dismissal of the trespass and negligence claims.[42]

31. *Id.* at 257, 261, 131 A.3d at 925, 927.
32. *Id.* at 261, 131 A.3d at 927.
33. *Id.*
34. *Id.*
35. *Id.*
36. *Id.* at 257, 131 A.3d at 925.
37. *Id.* at 261–62, 131 A.3d at 927–28.
38. *Id.*, 131 A.3d at 927.
39. *Id.* at 262, 131 A.3d at 927.
40. *Id.*
41. Litz v. Md. Dep't of the Env't, 434 Md. 623, 637, 76 A.3d 1076, 1084 (2013) (hereinafter "*Litz I*"). The decision by the Court of Special Appeals was unreported. *Id.*
42. *Id.* at 642, 76 A.3d at 1087. The Court of Appeals concluded that the lower court erred in dismissing those claims because a fact finder had not yet concluded whether the acts of trespass and negligence occurred on a continuing basis during the time period allowed by the statute of limitations, and therefore the Circuit Court could not conclude whether those claims were barred. *Id.* at 647–50, 76 A.3d at 1090–92. Further, the court stated that the inverse condemnation claims may not be barred because a taking does not occur and the statute of limitations does not begin to run "until the taking becomes permanent or stabilized." *Id.* at 654–57, 76 A.3d at 1094–95. The taking may not have become permanent until the property was foreclosed, which occurred within the time period permitted by the statute, and so a fact finder could conclude the inverse condemnation claims were not barred by the statute of limitations. *Id.* at 656–57, 76 A.3d at 1095.

The Court of Appeals remanded the case to the Court of Special Appeals, which reviewed the remaining claims in an unreported decision.[43] The Court of Special Appeals concluded that the Circuit Court did not err in dismissing the remaining claims against Maryland and the state agencies, but did err in dismissing the remaining claims against Goldsboro.[44] The Court of Special Appeals found that the inverse condemnation claims against Maryland and the state agencies were properly dismissed because Litz's claims against them merely constituted "discretionary inaction," which could not support an inverse condemnation claim.[45] The Court of Special Appeals reached this conclusion because the court classified the actions of the state and the state agencies as a "failure to regulate."[46] It relied on federal case law to conclude that a failure of the government to "avert mitigate, or cure" interference with property rights by third parties was not sufficient to constitute a taking.[47] Following this ruling, Litz filed a second Petition for a Writ of Certiorari with the Court of Appeals that the court granted.[48] The court reviewed whether the Court of Special Appeals erred in holding that Litz failed to state a cause of action for inverse condemnation against Maryland, MDE, and DHMH.[49]

II. LEGAL BACKGROUND

Takings claims can arise against state and local governments under either the United States Constitution[50] or under a state's own constitution and

43. *Litz II*, 446 Md. at 262–63, 131 A.3d at 928.

44. *Id.* at 263, 131 A.3d at 928.

45. *Id.*

46. *Id.* at 270–71, 131 A.3d at 933.

47. *Id.* (first citing Ga. Power Co. v. United States, 633 F.2d 554, 555 (Ct. Cl. 1980); and then citing Alves v. United States, 133 F.3d 1454, 1455–56 (Fed. Cir. 1998)).

48. *Id.* at 263, 131 A.3d at 928.

49. *Id.* The full list of questions presented to the court were:

> 1) Whether the Court of Special Appeals erred when it held that Petitioner failed to state a cause of action for inverse condemnation against the State government Respondents?
>
> 2) Whether an inverse condemnation claim comes within the notice requirements of the Maryland Tort Claims Act and the Local Government Tort Claims Act?
>
> 3) Whether the Court of Special Appeals exceeded the scope of this Court's remand order when it considered an issue disavowed expressly by Respondents, to wit, Petitioner's claim for inverse condemnation against the State government Respondents was subject to the Maryland Tort Claims Act?
>
> 4) Whether a trespass claim is covered by the notice requirement of the Local Government Tort Claims Act?

Id. at 263–64, 131 A.3d at 928–9.

50. *See* Chi., Burlington & Quincy R.R. Co. v. Chicago, 166 U.S. 226, 241 (1897) (holding that the Fourteenth Amendment Due Process Clause prohibits a state government from taking private property for public use without just compensation).

laws.[51] This Part will first summarize the background of the Takings Clause in the U.S. Constitution and how federal courts have interpreted that clause.[52] Next, this Part will look at how Maryland courts have interpreted Maryland's own constitutional clause guaranteeing citizens the right to just compensation for property taken by the state government.[53] Finally, this Part will examine how courts in jurisdictions other than Maryland have decided on the issue presented in *Litz*.[54] Notably, courts have split on the issue of whether inaction can form the sole basis of an inverse condemnation claim.[55] This Part will compare their holdings and reasoning.[56]

A. Takings Claims Federally and in Maryland

This Section will examine both the federal law and Maryland state law on takings. The U.S. Constitution provides the basis for federal takings claims through the Fifth Amendment[57] and for state takings claims through the Due Process Clause of the Fourteenth Amendment.[58] Maryland also has its own constitutional provision guaranteeing just compensation for the taking of property by the government.[59] Maryland views U.S. Supreme Court decisions on Fourteenth Amendment takings claims as authoritative on Maryland's own constitutional provision prohibiting takings without just compensation.[60]

1. Federal Application of the Takings Clause in the U.S. Constitution

The Fifth Amendment to the U.S. Constitution, which provides that "private property [shall not] be taken for public use without just compensation," serves as the constitutional basis for takings claims.[61] This clause of the Fifth Amendment is known as the Takings Clause. Traditionally, tak-

51. *See, e.g.*, MD. CONST. art. III, § 40 ("The General Assembly shall enact no Law authorizing private property, to be taken for public use, without just compensation, as agreed upon between the parties, or awarded by a Jury, being first paid or tendered to the party entitled to such compensation.").

52. *See infra* Part II.A.1.

53. *See infra* Part II.A.2.

54. *See infra* Part II.B.

55. *See infra* Part II.B.

56. *See infra* Part II.B.

57. U.S. CONST. amend. V.

58. Allied American Mut. Fire Ins. Co. v. Comm'n of Motor Vehicles, 219 Md. 607, 615–16, 150 A.2d 421, 426–27 (1959) (citing Home Utils. Co. v. Revere Copper & Brass, Inc., 209 Md. 610, 122 A.2d 109 (1956); Leonard v. Earle, 55 Md. 252, 260, 141 A. 714 (1928)).

59. MD. CONST. art. III, § 40.

60. *Allied American Mut. Fire Ins. Co.*, 219 Md. at 615–16, 150 A.2d at 426–27 (citing *Home Utils. Co.*, 209 Md. 610, 122 A.2d 109; *Leonard*, 55 Md. at 260, 141 A. 714).

61. U.S. CONST. amend. V.

ings were thought only to require compensation when the government physically appropriated the property of a private owner.[62] In *Pennsylvania Coal Co. v. Mahon*,[63] however, the U.S. Supreme Court recognized that regulatory actions could serve as the basis for takings claims that require compensation by the government.[64]

A person with a real property interest may bring an inverse condemnation claim when a government entity has allegedly committed a taking of that property interest but did not provide just compensation.[65] A taking may be either partial or complete.[66] A partial taking is defined as "one in which 'there would be an intrusion so immediate and direct as to subtract from the owner's full enjoyment of the property and to limit his exploitation of it.'"[67] A partial taking does not need to be permanent or stabilized, while a complete taking must be permanent or stabilized.[68]

To determine whether a particular action constitutes a taking, the courts conduct a fact-based inquiry into whether the action "forc[es] some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."[69] In *Penn Central Transportation Co. v. New York City*,[70] the U.S. Supreme Court refused to adopt a "set formula" for this determination, but did identify three factors for courts to consider in order to determine whether a regulation requires compensating a private property owner: (1) the economic impact on the property owner, (2) the diminished expectations of the property owner, and (3) the character of the government action.[71] Further, the Court has held that certain government actions constitute per se takings: (1) when the property owner suffers a total and complete loss of property value, or (2) when the property owner suffers a permanent physical invasion of the property.[72] However, the Court only finds such per se takings occur in rare circumstances.[73] Addi-

62. *See, e.g.*, Transp. Co. v. Chicago, 99 U.S. 635, 642 (1878) (requiring "a physical invasion of the real estate of the private owner, and a practical ouster of his possession" in order for a taking to require just compensation).

63. 260 U.S. 393 (1922).

64. *Id.* at 415.

65. United States v. Clarke, 445 U.S. 253, 257 (1980); *see also* Litz v. Md. Dep't of the Env't, 434 Md. 623, 653, 76 A.3d 1076, 1093 (2013) (citing Coll. Bowl, Inc. v. Mayor & City Council of Balt., 394 Md. 482, 489, 907 A.2d 153, 157 (2006)) ("Inverse condemnation is a taking without just compensation.").

66. *Litz I*, 434 Md. at 654, 76 A.3d at 1094.

67. *Id.* (quoting United States v. Causby, 328 U.S. 256, 265 (1946)).

68. *Id.*

69. Armstrong v. United States, 364 U.S. 40, 49 (1960).

70. 438 U.S. 104 (1978).

71. *Id.* at 123–24.

72. Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1015 (1992).

73. *See* Lingle v. Chevron U.S.A., LLC, 544 U.S. 528, 538 (2005) (describing the per se takings categories as "relatively narrow"); Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning

tionally, the United States Court of Claims and the United States Court of Appeals for the Federal Circuit have held that takings claims only exist when the government itself causes the damage, and not when the damage is caused by the "acts of independent third parties."[74]

Although federal courts have not decided on the issue of whether inaction can serve as the basis for inverse condemnation claims, at least one case suggested at the possibility.[75] In *Columbia Basin Orchard v. United States*,[76] the Court of Claims stated that:

> To constitute a taking, the overflow of or seepage into the spring must have been the direct, natural or probable result of an authorized activity and not the incidental or consequential injury inflicted by the action. . . . There must have been an intent on the part of the defendant to take plaintiff's property or an intention to do an act the natural consequence of which was to take its property.[77]

The court went on to describe a situation in which a government entity had the requisite intent: when the natural result of discharging a dredging channel would obviously cause damage to private property.[78] This suggested that even though intent is required for an inverse condemnation claim, a government inaction could potentially constitute an intentional act if the government's failure to act would have naturally resulted in the taking of property.[79]

2. Takings Claims in Maryland

The state basis for takings claims in Maryland is found in Article III, Section 40 of the Maryland Constitution, which states that "[t]he General Assembly shall enact no Law authorizing private property, to be taken for public use, without just compensation, as agreed upon between the parties, or awarded by a Jury, being first paid or tendered to the party entitled to such compensation."[80] Additionally, the Fifth Amendment protection against takings without just compensation in the U.S. Constitution applies to the states through the Due Process Clause of the Fourteenth Amend-

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Agency, 535 U.S. 302, 324 & n.19 (2002) (discussing the per se situations as "relatively rare" and "narrow").

74. Ga. Power Co. v. United States, 633 F.2d 554, 556 (Ct. Cl. 1980); *see also* Alves v. United States, 133 F.3d 1454, 1458 (Fed. Cir. 1998) ("The government is not an insurer that private citizens will act lawfully with respect to property subject to governmental regulation merely because the government has chosen to regulate . . . .").

75. Columbia Basin Orchard v. United States, 132 F. Supp. 707, 709, 711 (Ct. Cl. 1955).

76. 132 F. Supp. 707 (Ct. Cl. 1955).

77. *Id.* at 709.

78. *Id.* at 711.

79. *Id.* at 709, 711.

80. MD. CONST. art. III, § 40.

ment.[81] The Court of Appeals of Maryland has held that the U.S. Supreme Court's decisions on the Fourteenth Amendment in regard to takings claims are "practically direct authorities" on the Maryland takings provision because the clauses "have the same meaning and effect in reference to an exaction of property."[82]

In *College Bowl, Inc. v. Mayor & City Council of Baltimore*,[83] the Court of Appeals stated that inverse condemnation claims might arise from a variety of factual circumstances, including:

> the denial by a governmental agency of access to one's property, regulatory actions that effectively deny an owner the physical or economically viable use of the property, conduct that causes a physical invasion of the property, hanging a credible and prolonged threat of condemnation over the property in a way that significantly diminishes its value, or . . . conduct that effectively forces an owner to sell.[84]

In Maryland inverse condemnation proceedings, the claimant must prove (1) that the property was taken and (2) what constitutes "just compensation" under the circumstances.[85] In particular, in cases in which the inverse condemnation claim is not based on a physical invasion, the damage cannot be "consequential"; rather, "[t]he impact on the plaintiff's property ha[s] to be special to it and of a high degree."[86]

At least one inverse condemnation case in Maryland discussed inaction as part of the basis for a takings claim.[87] In *College Bowl, Inc.*, the petitioner alleged that the petitioner's lease was terminated due to the City's threats to the building owner, forcing the owner to terminate leases and redevelop or face condemnation proceedings.[88] In its *College Bowl, Inc.* opinion, the Court of Appeals discussed *Amen v. City of Dearborn*,[89] a case adjudicated by the United States Court of Appeals for the Sixth Circuit.[90]

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81. Bureau of Mines v. George's Creek Cool & Land Co., 272 Md. 143, 157–58, 321 A.2d 748, 756 (1974) (citing Chi., Burlington & Quincy R.R. Co. v. Chicago, 166 U.S. 226, 241 (1897)).

82. Allied Am. Mut. Fire Ins. Co. v. Comm'n of Motor Vehicles, 219 Md. 607, 615–16, 150 A.2d 421, 426–27 (1959) (citing Home Utils. Co. v. Revere Copper & Brass, Inc., 209 Md. 610, 122 A.2d 109 (1956); Leonard v. Earle, 55 Md. 252, 260, 141 A. 714 (1928)).

83. 394 Md. 482, 907 A.2d 153 (2006).

84. *Id.* at 489, 907 A.2d at 157.

85. Millison v. Wilzack, 77 Md. App. 676, 683, 551 A.2d 899, 902 (1989).

86. Md. Port Admin. v. QC Corp., 310 Md. 379, 391, 529 A.2d 829, 834 (1987).

87. *See Coll. Bowl, Inc.*, 394 Md. at 489–99, 907 A.2d at 157 (citing Amen v. City of Dearborn, 718 F.2d 789 (6th Cir. 1983)).

88. *Id.* at 394 Md. at 487–88, 907 A.2d at 156.

89. 718 F.2d 789 (6th Cir. 1983).

90. *Coll. Bowl, Inc.*, 394 Md. at 490, A.2d at 157 (citing *Amen*, 718 F.2d 789).

The Sixth Circuit found in *Amen* that government inaction,[91] together with certain government actions, constituted a taking based on an "aggregate of that conduct," even though none of the actions or inactions individually would have formed a sufficient basis for the claim.[92] The Court of Appeals relied on *Amen*'s explanation of aggregate conduct to clarify the level of intrusion necessary to establish a taking.[93] The court found, for example, that in *College Bowl, Inc.* the City did not reach the adequate level of intrusion.[94] Nevertheless, the court has at least acknowledged prior to *Litz* that inaction could potentially serve as part a pattern of conduct constituting a taking.[95]

B. Inaction as the Basis for Inverse Condemnation Claims Beyond Maryland

Several states have decided whether government inaction can serve as the basis for a takings claim.[96] Jurisdictions are split on whether inaction can give rise to a taking.[97] Even in those jurisdictions that have held inaction can give rise to a taking, the courts are split on the circumstances under which it can do so.[98] Courts in some jurisdictions have relied on the state's definition of takings when faced with the issue,[99] while courts in other ju-

91. The government inaction included delaying permits and allowing properties "to remain vacant and unprotected." *Amen*, 718 F.2d at 795 (quoting Amen v. City of Dearborn, 363 F. Supp. 1267, 1272–73 (E.D. Mich. 1973)).

92. *Id.* at 795–98.

93. *Coll. Bowl, Inc.*, 394 Md. at 490, A.2d at 157–58 (citing *Amen*, 718 F.2d 789).

94. *Id.* (citing *Amen*, 718 F.2d 789).

95. *See id.* (citing *Amen*, 718 F.2d 789) (stating that the "degree of interference" exhibited in *Amen*, which based on its claim on both actions and inactions, was sufficient for an inverse condemnation claim).

96. Arreola v. Cty. of Monterey, 122 Cal. Rptr. 2d 38, 55 (Cal. Ct. App. 2002); Jordan v. St. Johns Cty., 63 So. 3d 835, 839 (Fla. Dist. Ct. App. 2011); Evenson v. City of Saint Paul Bd. of Appeals, 467 N.W.2d 363, 365 (Minn. Ct. App. 1991); State *ex rel.* Blue Springs v. Nixon, 250 S.W.3d 365, 367 (Mo. 2008); Electro-Jet Tool & Mfg. Co. v. City of Albuquerque, 845 P.2d 770, 771, 773, 777 (N.M. 1992); Hawkins v. City of Greenville, 594 S.E.2d 557, 562 (S.C. Ct. App. 2004); Harris Cty. Flood Control Dist. v. Kerr, 499 S.W.3d 793, 799 (Tex. 2016).

97. *Compare Evenson*, 467 N.W.2d at 365 (holding inaction can serve as the basis for an inverse condemnation claim), *with Hawkins*, 594 S.E.2d at 562 (holding an affirmative act is required for inverse condemnation claims).

98. *Compare Evenson*, 467 N.W.2d at 365 (imposing no limits on when inaction can serve as the basis of an inverse condemnation claim), *with Arreola*, 122 Cal. Rptr. 2d at 55 (limiting the circumstances for inaction as the basis of an inverse condemnation claim to those in which the defendant failed to act despite a known risk).

99. *See, e.g.*, *Hawkins*, 594 S.E.2d at 562–63 (holding that because South Carolina courts have consistently defined inverse condemnation as requiring an affirmative act, inaction alone cannot support an inverse condemnation claim).

risdictions relied on the elements required for a taking,[100] or on whether the government had a duty to act.[101]

1. Decisions Based on a State-Specific Definition of Inverse Condemnation

Courts in a couple of jurisdictions have decided whether inaction can serve as the basis for inverse condemnation claims based on the state's definition of inverse condemnation.[102] For example, South Carolina defines inverse condemnation as requiring "(1) an affirmative, positive, aggressive act on the part of the governmental agency; (2) a taking; (3) the taking is for a public use; and (4) the taking has some degree of permanence."[103] Based on this definition, which requires an "affirmative, positive, aggressive" act, South Carolina held that a failure to act could not serve as the basis for an inverse condemnation claim.[104] Similarly, Minnesota relied on its definition of takings to decide on the issue.[105] In Minnesota, however, the standard for a taking is broad: "governmental action or inaction that deprives a landowner of all reasonable uses of its land."[106] Therefore, in Minnesota, government inaction is expressly a sufficient basis for a takings claim.

2. Decisions Based on the Public Use and Intentional Act Requirements of an Inverse Condemnation Claim

Several states have placed emphasis on two elements common to most inverse condemnation laws: (1) that the taking must confer a public benefit and (2) that government acted intentionally in taking the property.[107] Courts in both Texas and New Mexico determined that inaction could not serve as the basis for inverse condemnation claims because it could not

100. *See, e.g.*, *Kerr*, 499 S.W.3d at 799 (holding inaction cannot serve as the basis of inverse condemnation claims because it cannot meet the necessary elements).

101. *See, e.g.*, *Jordan*, 63 So. 3d at 839 (holding inaction can serve as the basis of inverse condemnation claims where the defendant had a duty to act).

102. *Evenson*, 467 N.W.2d at 365; *Hawkins*, 594 S.E.2d at 562–63.

103. *Hawkins*, 594 S.E.2d at 562 (citing Marietta Garage, Inc. v. South Carolina Dep't of Pub. Safety, 572 S.E.2d 306, 308 (S.C. Ct. App. 2002); Gray v. South Carolina Dep't of Highways & Pub. Transp., 427 S.E.2d 899, 902 (S.C. Ct. App. 1992)).

104. *Id.* at 562–63 (citing Berry's on Main, Inc. v. City of Columbia, 281 S.E.2d 796, 797 (S.C. 1981)).

105. *Evenson*, 467 N.W.2d at 365 (citing Czech v. City of Blaine, 253 N.W.2d 272, 274 (Minn. 1977)).

106. *Id.*

107. *See, e.g.*, Harris Cty. Flood Control Dist. v. Kerr, 499 S.W.3d 793, 799–800, 805 (Tex. 2016) (holding inaction cannot serve as the basis for an inverse condemnation claim because a failure to act cannot be intentional).

meet these public use and intent elements.[108] In contrast, California determined that under certain circumstances, an inverse condemnation claim could meet these elements.[109]

In Texas, the issue first came up in a case in which a landfill's retention ponds overflowed and caused trash and other contamination to flood onto the plaintiffs' property, resulting in damage.[110] The Court of Appeals of Texas stated that the plaintiffs' claims for inverse condemnation were not sufficient because, at most, government inaction could result in negligence.[111] The court reasoned that a failure to regulate does not confer a benefit on the public and therefore does not meet the public use element of a taking.[112] In a later Texas Supreme Court case, the court affirmed that inaction could not serve as the basis for an inverse condemnation claim and clearly stated that an affirmative, intentional act is required for a takings claim in Texas.[113] The Supreme Court of New Mexico reached a similar conclusion in *Electro-Jet Tool and Manufacturing Co. v. City of Albuquerque*,[114] finding that damage caused by the failure of a drainage ditch was mere negligence.[115] For an inverse condemnation claim to succeed, the court held that the defendant must have intended or knew that damage would likely occur.[116]

In contrast to the decisions in Texas and New Mexico, the California Court of Appeals held in *Arreola v. County of Monterey*[117] that inaction can serve as the basis for inverse condemnation claims.[118] Despite reaching a different outcome, the court used reasoning similar to that used by the Texas and New Mexico courts to limit the circumstances under which such a claim may succeed.[119] The court held that inadequate maintenance of public improvement projects can form the basis of an inverse condemnation claim because acts of maintenance can be considered extensions of public improvement works.[120] By limiting the holding to situations involving a

108. Electro-Jet Tool & Mfg. Co. v. City of Albuquerque, 845 P.2d 770, 771, 773, 777 (N.M. 1992); *Kerr*, 499 S.W.3d at 799.

109. Arreola v. Cty. of Monterey, 122 Cal. Rptr. 2d 38, 53, 55 (Cal. Ct. App. 2002).

110. City of El Paso v. Ramirez, 349 S.W.3d 181, 183–85 (Tex. Ct. App. 2011).

111. *Id.* at 187.

112. *Id.* at 186–87.

113. *Kerr*, 499 S.W.3d at 799–800, 805.

114. 845 P.2d 770 (N.M. 1992).

115. *Id.* at 771, 773, 777.

116. *Id.*

117. 122 Cal. Rptr. 2d 38 (Cal. Ct. App. 2002).

118. *Id.* at 53.

119. *See id.* (holding that inaction can serve as the basis for an inverse condemnation claim when the government failed to act in regard to a public improvement project despite a known risk).

120. *Id.*

public improvement project, the court ensured that the public use element would be met.[121]

Similar to the Texas courts,[122] the California court found that "simple negligence cannot support" an inverse condemnation claim.[123] The court held that an inverse condemnation claim had to be supported by a "show[ing] that the entity was aware of the risk posed by its public improvement and deliberately chose a course of action—or inaction—in the face of that known risk."[124] Therefore, California requires intent by the government entity. The court clarified in a later case that a mere failure to maintain, or "garden variety inadequate maintenance," of a public works project is therefore only negligence.[125] In order to constitute a taking, the government entity must have been aware that the failure to maintain a public improvement project would pose a risk to property and, despite this risk, chose not to maintain the project.[126]

3. Decisions Based on a Determination of Whether the Defendant Had a Duty to Act

Several courts based their decisions about inaction in inverse condemnation claims on whether the defendant had a duty to act under the circumstances.[127] In *Ressel v. Scott County*,[128] the Missouri Court of Appeals found that the government defendant could not be held liable under an inverse condemnation claim for the government's failure to repair a road washed out by a flood.[129] The court determined that the cause of the claimant's injury was a "force of nature" and found persuasive that other jurisdictions have denied inverse condemnation claims where the damage resulted from a force of nature rather than a government act.[130] Many of the cases

121. *Id.*

122. City of El Paso v. Ramirez, 349 S.W.3d 181, 187 (Tex. App. 2011) (holding that inaction by a government defendant cannot support a claim for inverse condemnation).

123. *Arreola*, 122 Cal. Rptr. 2d at 53.

124. *Id.* at 55.

125. Tilton v. Reclamation Dist. No. 800, 48 Cal. Rptr. 3d 366, 372–73 (Cal. Ct. App. 2006).

126. *Id.*

127. *See, e.g.*, Jordan v. St. Johns Cty., 63 So. 3d 835, 839 (Fla. Dist. Ct. App. 2011) (limiting inaction as a basis for inverse condemnation claims to circumstances where the defendant had an affirmative duty to act).

128. 927 S.W.2d 518 (Mo. Ct. App. 1996).

129. *Id.* at 519–21.

130. *Id.* at 521 (citing Wildensten v. E. Bay Reg'l Park Dist., 283 Cal. Rptr. 13, 16 (Cal. Ct. App. 1991); Electro-Jet Tool & Mfg. Co. v. City of Albuquerque, 845 P.2d 770, 773 (N.M. 1992); Brown v. Sch. Dist. of Greenville Cty., 161 S.E.2d 815, 817 (S.C. 1969); Starks v. Albemarle Cty., 716 F. Supp. 934, 938 (W.D. Va. 1989)). Though a California case cited by the court, *Wildensten v. East Bay Regional Park District*, found no inverse condemnation claim existed when the government defendant merely failed to stabilize land, resulting in a landslide, later decisions in California have allowed inverse condemnation claims based on inaction in a limited num-

cited by the court were decided on the grounds that the inverse condemnation claims failed to allege a specific government act that caused the damage; rather, a natural event caused the damage.[131] In a subsequent case decided in 2008, the Supreme Court of Missouri discussed *Ressel*'s implication that government inaction cannot serve as the basis for an inverse condemnation claim.[132] The court held that no inverse condemnation claim existed where a city failed to realize that an approved plat could not adequately drain storm water, resulting in flood damage to the claimant's property.[133] It found that the claimants could not cite any precedent for government liability resulting from a failure to act, nor could they point to a legal duty breached by the respondent.[134] The court refused to adopt "such an extreme extension of the law governing inverse condemnation."[135]

In Florida, the Court of Appeals for the Fifth District addressed the issue in a case in which the complainants alleged that the respondent county failed to reasonably maintain and repair a public road, effectively depriving the complainants of the ability to access their property.[136] The court concluded that government inaction in the face of an affirmative duty to act can support a claim for inverse condemnation.[137] The court stated that governments have a duty to maintain their public roads, and a fact finder would need to determine whether the county fulfilled that duty.[138]

The Vermont Supreme Court has also held that an inverse condemnation claim can exist where a government entity failed to act when that entity had a duty to act.[139] In *Alger v. Dep't of Labor and Industry*,[140] the plaintiffs claimed the Vermont Department of Labor and Industry caused an unconstitutional taking of the plaintiffs' apartment buildings without just compensation due to the Department's failure to enforce the housing code in the buildings.[141] The court found that under Vermont law, the Department had "a legal duty to enforce the housing code."[142] Even though the

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ber of circumstances, as described in Section II.B.2 of this Note. *See Wildensten*, 283 Cal. Rptr. at 15; *Ressel*, 927 S.W.2d at 521; *see also* Section II.B.2.

131. *Ressel*, 927 S.W.2d at 521 (citing *Wildensten*, 283 Cal. Rptr. at 16; *Electro-Jet Tool & Mfg. Co.*, 845 P.2d at 773; *Brown*, 161 S.E.2d at 817; *Starks*, 716 F. Supp. at 938).

132. State *ex rel.* Blue Springs v. Nixon, 250 S.W.3d 365, 372 (Mo. 2008) (citing *Ressel*, 927 S.W.2d at 521).

133. *Id.* at 367.

134. *Id.* at 372.

135. *Id.* at 372–73.

136. Jordan v. St. Johns Cty., 63 So. 3d 835, 837 (Fla. Dist. Ct. App. 2011).

137. *Id.* at 839.

138. *Id.*

139. Alger v. Dep't of Labor & Indus., 917 A.2d 508, 521–22 (Vt. 2006).

140. 917 A.2d 508 (Vt. 2006).

141. *Id.* at 511.

142. *Id.* at 517.

Department was given broad discretion to enforce the code, "a wholesale failure to enforce the code would violate that duty."[143] The Court further found that if the plaintiffs' allegations were true:

> the Department knew of the relevant code violations, and . . . it chose to allow the violations to continue until they became serious enough to require removal of the tenants or termination of utility service. But for the Department's failure to act, there would have been no nuisance to abate, and plaintiffs' property would not have been taken.[144]

The court concluded therefore that the plaintiffs were entitled to just compensation.[145] Notably, the court recognized that though the "plaintiffs' takings claims are unusual . . . [w]e need only ascertain that plaintiffs' complaint corresponds to general takings principals, and we conclude that it does."[146] Additionally, the court did not make any sweeping statements about whether and under what circumstances other inactions by a government entity could serve as the basis for future takings claims.[147]

III. THE COURT'S REASONING

The Court of Appeals of Maryland held in *Litz* that a plaintiff can adequately plead an inverse condemnation claim where the plaintiff alleges a government entity's failure to act in the face of an affirmative duty to act resulted in a taking.[148] The court further held that Litz had therefore sufficiently stated a claim for inverse condemnation against the Respondents at the current stage of the litigation.[149] The court found that no Maryland law existed that contemplated whether government inaction can result in a taking.[150] The court thus surveyed other jurisdictions to determine how other courts have decided cases with similar issues.[151] Holding that the Court of Special Appeals of Maryland improperly dismissed the inverse condemnation claims against the state and its agencies, the Court of Appeals remand-

143. *Id.*

144. *Id.* at 521–22.

145. *Id.* at 517, 521–22.

146. *Id.* at 521.

147. *Id.* at 521–22.

148. Litz v. Md. Dep't of the Env't, 446 Md. 254, 267, 131 A.3d 923, 931 (2016). The Court also held that trespass is covered by the notice requirement of the Local Governmental Tort Claims Act ("LGTCA") and that inverse condemnation claims are not covered by the notice requirements of the Maryland Tort Claims Act or the LGTCA. *Id.* at 264, 131 A.3d at 928–29. These holdings are not discussed substantially in this Note.

149. *Id.* at 264, 267, 131 A.3d at 929, 931.

150. *Id.*

151. *Id.* at 268, 131 A.3d at 931.

ed the case to the Court of Special Appeals "with instructions to remand the case to the Circuit Court for Caroline County for further proceedings."[152]

The jurisdictions discussed by the court in its opinion—California, Florida, Minnesota, and South Carolina—were split on whether government inaction is sufficient to constitute a taking.[153] In particular, Minnesota, Florida, and California all held that government inaction could be the basis for an inverse condemnation claim.[154] In contrast, the South Carolina Court of Appeals held that inaction could not form the basis of an inverse condemnation claim.[155] The court noted the precise reasons for the particular holdings in each jurisdiction, and found only the reasoning of the Florida and California courts persuasive.[156] The court found that South Carolina's case law prescribed a much narrower requirement for an inverse condemnation claim than found in Maryland case law: "*an affirmative, positive, aggressive act*."[157] Thus, the court did not find South Carolina's holding persuasive because Maryland law establishes no such specific requirement.[158]

The court also declined to follow Minnesota's broad standard for inverse condemnation claims.[159] Minnesota defines a taking as "government action *or inaction* that deprives a landowner of all reasonable uses of its land."[160] Rather, the court found persuasive decisions made by courts in Florida and California, which held that government inaction is sufficient as a basis for an inverse condemnation claim only when the government has an affirmative duty to act or when the government failed to act despite a known risk.[161] The court found these decisions relevant because the Respondents were warned of the contamination risk through a 1985 study conducted by the Caroline County Health Department and subsequent warnings over the next two decades.[162] Additionally, the court concluded,

152. *Id.* at 280–81, 131 A.3d at 939.

153. *Id.* at 268–69, 131 A.3d at 931–32 (citing Jordan v. Saint Johns Cty., 63 So. 3d 835, 839 (Fla. Dist. Ct. App. 2011); Arreola v. Cty. of Monterey, 122 Cal. Rptr. 2d 38, 55 (Cal. Ct. App. 2002); Hawkins v. City of Greenville, 594 S.E.2d 557, 562 (S.C. Ct. App. 2004); Evenson v. City of Saint Paul Bd. of Appeals, 467 N.W.2d 363, 365 (Minn. Ct. App. 1991)).

154. *Id.* (citing *Jordan*, 63 So. 3d at 839; *Arreola*, 122 Cal. Rptr. 2d at 55; *Evenson*, 467 N.W.2d at 365).

155. *Id.* (citing *Hawkins*, 594 S.E.2d at 562).

156. *Id.* at 268–70, 131 A.3d at 931–32 (citing *Jordan*, 63 So. 3d at 839; *Arreola*, 122 Cal. Rptr. 2d at 55, 69–72; *Hawkins*, 594 S.E.2d at 262; *Evenson*, 467 N.W.2d at 365).

157. *Id.* at 268, 131 A.3d at 931 (quoting *Hawkins*, 594 S.E.2d at 262).

158. *Id.*

159. *Id.*, 131 A.3d at 931–32 ("We find more persuasive cases which sanction a plaintiff advancing an inverse condemnation claim in the face of government inaction where the government agency had an affirmative duty to act . . . .").

160. *Id.*, 131 A.3d at 931 (quoting *Evenson*, 467 N.W.2d at 365) (emphasis added).

161. *Id.* at 269, 131 A.3d at 932 (citing *Jordan*, 63 So. 3d at 839; *Arreola*, 122 Cal. Rptr. 2d at 55).

162. *Id.* at 269–73, 131 A.3d at 932.

the Respondents may have had an affirmative duty to correct the contamination problem or penalize Goldsboro for failing to correct the problem.[163]

The court disagreed with the Court of Special Appeals, which characterized the actions of the Respondents as a "failure to regulate."[164] It did not find the cases cited by the Court of Special Appeals to support its "failure to regulate" characterization persuasive because those cases involved government failures to "avert, mitigate, or cure" interference with property rights by third parties.[165] The court argued that in those cases, the claims did not constitute a taking "because the regulations [at issue] imposed by the Federal Government were not meant to act as an 'insurer that private citizens will act lawfully with respect to property subject to governmental regulation.'"[166] It reasoned that Litz's case was "not merely a case of a property right being affected adversely by private and third parties solely and exclusively," but, rather, one in which the Respondents failed to act when they had "an affirmative duty to abate a known and longstanding public health hazard."[167] The Respondents had knowledge of the failing sewage and drainage systems, as well as knowledge of the serious contamination resulting from its failure to repair the systems, including the contamination of Lake Bonnie.[168] The court concluded the Respondents may have had a duty to resolve such a problem in the interest of protecting public health.[169]

The court further concluded that in addition to a duty to protect public health, the State of Maryland, its agencies, and Goldsboro may have had a "general or specific statutory" duty to act in the situation under state environmental statutes. Specifically, the Environment Article gives MDE the power to enforce the Federal Water Pollution Control Act[170] and the Health-Environmental Article gives DHMH the power to compel sewage operations as necessary for "public health and comfort."[171] Additionally, the court also pointed out that even if no "general or specific statutory" duty to act existed, Maryland and Goldsboro may have created an affirmative duty to act by entering into the consent order.[172] The court therefore held be-

163. *Id.*, 131 A.3d at 932–33.

164. *Id.* at 270, 131 A.3d at 933.

165. *Id.* at 270–71, 131 A.3d at 933 (citing Alves v. United States, 133 F.3d 1454, 1455–56 (Fed. Cir. 1998); Ga. Power Co. v. United States, 633 F.2d 554, 555 (Ct. Cl. 1980)).

166. *Id.* (quoting *Alves*, 133 F.3d at 1458).

167. *Id.* at 272, 131 A.3d at 933–34.

168. *Id.*

169. *Id.*

170. 33 U.S.C. §§ 1251–1387 (2012).

171. *Litz II*, 446 Md. at 272–73, 131 A.3d at 934 (quoting State Dep't of Env't v. Showell, 316 Md. 259, 270, 558 A.2d 391, 396 (1989)).

172. *Id.* at 273, 131 A.3d at 934.

cause the state, its agencies, and Goldsboro may have had an affirmative duty to act, Litz sufficiently pleaded her claims for inverse condemnation.[173] Noting that although Litz may not ultimately succeed in proving her claims, the court could not conclude as a matter of law at the motion to dismiss stage of the litigation that she would not be able to prove her claims.[174]

In a dissenting opinion, joined by Judges Battaglia and McDonald, Judge Watts dissented from the majority's holding that government inaction can form the basis of an inverse condemnation claim.[175] Judge Watts argued that "[t]he definition of 'inverse condemnation,' examples of claims for inverse condemnation, and judicial restraint" lead to the result that an affirmative act is required to make a claim that a taking occurred.[176] The dissenters would have held that an affirmative act is required.[177] Judge Watts noted that when the case was first considered by the court in 2013 on appeal under different grounds, the court stated that an inverse condemnation claim requires that the property was "taken in fact," which Judge Watts interpreted as requiring an affirmative action.[178] In all of the examples of inverse condemnation claims decided or even contemplated under Maryland case law, all such claims involved an affirmative act, and not inaction.[179]

Judge Watts further argued that the majority's decision effectively "creat[es] a private right of action anytime a plaintiff's property decreases in value as a result of a governmental entity's noncompliance with a statute."[180] Examining the language of the relevant portion of the Environment Article and noting that the majority did not examine the legislative history of the article to determine the intent of the legislature, Judge Watts found no indication that the General Assembly intended for the statute to create such a private right of action.[181] Judge Watts concluded that the majority

173. *Id.*

174. *Id.*

175. *Id.* at 281–82, 131 A.3d at 939–40 (Watts, J., dissenting).

176. *Id.* at 282–83, 131 A.3d at 940.

177. *Id.*

178. *Id.* at 283, 131 A.3d at 940 (quoting Litz v. Md. Dep't of the Env't, 434 Md. 623, 653, 76 A.3d 1076, 1093 (2013)).

179. *Id.* at 283–85, 131 A.3d at 940–41 (citing Muskin v. State Dep't of Assessments & Taxation, 442 Md. 544, 566, 30 A.3d 962, 974 (2011); Coll. Bowl, Inc. v. Mayor & City Council of Balt., 394 Md. 482, 489, 907 A.2d 153, 157 (2006); Reichs Ford Rd. Joint Venture v. State Rds. Comm'n of the State Highway Admin., 388 Md. 500, 504–06, 880 A.2d 307, 309–10 (2005); City of Annapolis v. Waterman, 357 Md. 484, 507, 745 A.2d 1000, 1012 (2000); MacLeod v. City of Takoma Park, 257 Md. 477, 481, 478, 263 A.2d 581, 582, 584 (1970)).

180. *Id.* at 285, 131 A.3d at 941.

181. *Id.* at 285–86, 131 A.3d at 941–42 (citing MD. CODE ANN., ENVIR. § 9-253 (LexisNexis 2013); Walton v. Mariner Health of Md., Inc., 391 Md. 643, 669, 894 A.2d 584, 599 (2006)).

"greatly expand[ed] the definition of inverse condemnation, the consequences of which are yet to be seen."[182]

IV. ANALYSIS

The Court of Appeals of Maryland held for the first time in *Litz* that inaction can serve as the basis for an inverse condemnation claim when the government fails to act despite a duty to do so.[183] Other jurisdictions have held similarly, and the Court of Appeals justifiably found persuasive the reasoning of those courts.[184] The decision in *Litz* is also consistent with the policy objectives behind takings clauses on both the federal and state level.[185] Additionally, the majority's reasoning in *Litz* will avoid the negative consequences the dissent argues will occur as a result of the holding,[186] because the holding only applies in circumstances where the government had an affirmative duty to act, which the courts can limit in the future.[187]

A. The Court of Appeals Properly Found Convincing the Reasoning of the California and Florida Courts

The cases on which the Court of Appeals of Maryland relied were those in which the courts found inaction could serve as the basis for an inverse condemnation claim when the government entity had an affirmative duty to act or failed to act despite a known risk.[188] The Maryland court was justified in finding these cases persuasive not only because of the factual similarities between *Litz* and those cases, but also because of the reasoning used to reach the holdings in those cases.[189]

In contrast, the majority in *Litz* found the reasoning in *Evenson v. City of Saint Paul Board of Appeals*[190] and *Hawkins v. City of Greenville*,[191] the cases from Minnesota and South Carolina, unconvincing.[192] The majority

182. *Id.* at 286, 131 A.3d at 942.

183. *Id.* at 267, 131 A.3d at 931 (majority opinion).

184. *Id.*, 131 A.3d at 932 (citing Jordan v. Saint Johns Cty., 63 So. 3d 835, 839 (Fla. Dist. Ct. App. 2011); Arreola v. Cty. of Monterey, 122 Cal. Rptr. 2d 38, 55, 6972 (Cal. Ct. App. 2002)).

185. *See infra* Part IV.B (discussing how the holding in *Litz* relates to prior takings cases federally and in Maryland).

186. *See generally Litz II*, 446 Md. at 282–86, 131 A.3d at 940–42 (Watts, J., dissenting) (arguing that the majority's holding unreasonably expands the definition of inverse condemnation).

187. *See infra* Part IV.C (discussing how the majority's holding avoids the negative consequences asserted by the dissent).

188. *Litz II*, 446 Md. at 269, 131 A.3d at 932 (citing Jordan v. Saint Johns Cty., 63 So. 3d 835, 839 (Fla. Dist. Ct. App. 2011); Arreola v. Cty. of Monterey, 122 Cal. Rptr. 2d 38, 50 (Cal. Ct. App. 2002)).

189. *See supra* Part II.B.1–2 (summarizing the decisions of the California and Florida courts).

190. 467 N.W.2d 363, 365 (Minn. Ct. App. 1991).

191. 594 S.E.2d 557, 562 (S.C. Ct. App. 2004).

192. *Litz II*, 446 Md. at 268, 131 A.3d at 931.

found the doctrine put forth by Minnesota was overly broad—it stated that any inaction which deprived an owner of "all reasonable uses" was a taking.[193] In contrast, the majority found the South Carolina definition of takings was more specific than the Maryland definition.[194] Therefore, the court was justified in choosing not to rely on the reasoning of these courts, which based their decisions on state-specific definitions.

The Court of Appeals of Maryland found most persuasive two cases from Florida and California[195]: *Arreola v County of Monterey* and *Jordan v. Saint Johns County*.[196] Both of these cases involved the government's failure to adequately maintain public improvement projects—a road in *Jordan*[197] and a levee in *Arreola*.[198] Similarly, *Litz* involved Goldsboro's failure to develop a public sewage system and the State of Maryland's failure to enforce the installation of such a system.[199] The *Litz* court thus relied on cases with similar facts. Additionally, although not discussed in *Litz*, the Vermont case *Alger* is also factually similar to *Litz* because in *Alger*, as in *Litz*, the claimant alleged a taking resulting from the government's failure to enforce a state law.[200]

The Court of Appeals of Maryland did not consider the decisions of several other states which have touched on the issue of whether inaction can support an inverse condemnation claim, such as decisions in New Mexico and Texas.[201] Even though the New Mexico and Texas courts found that under the specific circumstances of those cases the inverse condemnation claims could not succeed,[202] the decisions can be reconciled with courts that ruled inaction could serve as the basis for inverse condemnation claims.

193. *Id.*

194. *Id.*

195. *Id.* at 269, 131 A.3d at 932 (citing Arreola v. Cty. of Monterey, 122 Cal. Rptr. 2d 38, 55 (Cal. Ct. App. 2002); Jordan v. Saint Johns Cty., 63 So. 3d 835, 839 (Fla. Dist. Ct. App. 2011)).

196. 63 So. 3d 835 (Fla. Dist. Ct. App. 2011).

197. *Id.* at 836.

198. *Arreola*, 122 Cal. Rptr. 2d at 44.

199. *See generally Litz II*, 446 Md. at 265, 131 A.3d at 925–27 (outlining the factual history of the case and the allegations put forth in the complaint).

200. *Compare id.* at 272–73; 131 A.3d at 934 ("Ms. Litz contends that she alleged sufficiently a cause of action for inverse condemnation by alleging that the failure of Respondents to address the pollution and sewage problems led directly to the substantial devaluing of her property and its ultimate loss."), *with* Alger v. Dep't of Labor & Industry, 917 A.2d 508, 513 (Vt. 2006) ("Plaintiffs alleged that the Department's actions were consistent with its general failure to enforce the housing code . . . . The amended complaint also contained the previous complaints' claims that the Department took plaintiffs' property without due process or just compensation . . . .").

201. *See generally Litz II* at 268–69, 131 A.3d 931–32 (examining only the decisions made by the California, Florida, Minnesota, and South Carolina courts); *supra* Part II.B.2 (describing the decisions of the New Mexico and Texas courts).

202. *See supra* Part II.B.2 (summarizing the holdings and reasoning of the New Mexico and Texas courts).

The Supreme Court of Texas held that inaction could never rise above the level of negligence.[203] The court, however, also stated "the requisite intent is present when a governmental entity knows that a specific *act* is causing identifiable harm or knows that the harm is substantially certain to result."[204] And, in *City of Dallas v. Jennings*,[205] the same court stated: "There may well be times when a governmental entity is aware that its action will necessarily cause physical damage to certain private property, and yet determines that the benefit to the public outweighs the harm caused to that property."[206]

Therefore, Texas appears to have left open the possibility that the affirmative act of *deciding not act* could potentially serve as the basis for an inverse condemnation claim. The New Mexico decision similarly suggests that the defective maintenance of a public use project with the defendant's "knowledge of a substantial probability of damage" or a deliberately calculated risk could support an inverse condemnation claim.[207] The Court of Claims also suggested that a failure to act might still be intentional if the known result of that failure would be damage to private property.[208] These implications in the Texas, New Mexico, and Court of Claims decisions are remarkably similar to the holding of the California Court of Appeals in *Arreola*—that inaction can serve as the basis for an inverse condemnation claim only when the government entity "deliberately chose a course of action—or inaction."[209] This holding could be interpreted as still requiring an affirmative act—the affirmative act of deciding not to act.

In scope and in language, Maryland's holding is most similar to Florida's holding—both require an affirmative duty to act in order for a government's failure to act to constitute a taking.[210] Given the factual circumstances in *Litz*, however, the decision is also consistent with the reasoning of the California Court of Appeals in *Arreola*. Specifically, the government defendants in *Litz* had knowledge that the failure to act would result in the continued pollution of Lake Bonnie and yet chose not to enforce the con-

203. Harris Cty. Flood Control Dist. v. Kerr, 499 S.W.3d 793, 799 (Tex. 2016).

204. Tarrant Reg'l Water Dist. v. Gragg, 151 S.W.3d 546, 555 (Tex. 2004).

205. 142 S.W.3d 310 (Tex. 2004)).

206. *Id.* at 314.

207. Electro-Jet Tool & Mfg. Co. v. City of Albuquerque, 845 P.2d 770, 773, 777–79 (N.M. 1992).

208. Columbia Basin Orchard v. United States, 132 F. Supp. 707, 709, 711 (Ct. Cl. 1955).

209. Arreola v. Cty. of Monterey, 122 Cal. Rptr. 2d 38, 55 (Cal. Ct. App. 2002).

210. *Compare* Litz v. Md. Dep't of Env't, 446 Md. 254, 267, 131 A.3d 931 (2016) ("[A]n inverse condemnation claim is pleaded adequately where a plaintiff alleges a taking caused by a governmental entity's or entities' failure to act, in the face of an affirmative duty to act."), *with* Jordan v. St. Johns Cty., 63 So. 3d 835, 839 (Fla. Dist. Ct. App. 2011) ("[G]overnmental inaction—in the face of an affirmative duty to act—can support a claim for inverse condemnation.").

struction of a sewage system.[211] In both *Litz* and *Arreola*, the government defendants knew that their failure to act would result in damage to private property and nevertheless chose not to act.[212] Therefore, the Court of Appeals was justified in relying on the Florida and California cases, based both on the similarity of the factual circumstances, and on the reasoning used by the courts.

B. The Holding of Litz *Supports the Goals of Takings Jurisprudence*

The court's decision to expand the doctrine of inverse condemnation to include government inaction comports with the purposes of the takings clause as interpreted by the U.S. Supreme Court and Maryland courts. The U.S. Supreme Court stated that the goal of the federal takings clause is to prevent the government "from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."[213] The Court of Appeals cites this language frequently in its own takings cases,[214] including in *Litz*.[215] This view of the takings clause, as well as the factual and legal circumstances of *Litz*, may have influenced the court's decision.[216] While Litz's claims might better be expressed as tort claims, such as nuisance and trespass—Litz in fact alleged claims of nuisance, negligence, and trespass—her tort claims against the state and the state agencies were all barred either by statutes of limitation, the notice requirements of the Maryland Tort Claims Act, or sovereign immunity.[217]

As a local newspaper pointed out in regard to the court's decision: "The decision is significant not just because the state has resources that small towns like Goldsboro do not, but also because the state has issued hundreds of similar orders to fix pollution, but doesn't enforce them all."[218]

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211. *Litz II*, 446 Md. 272, 131 A.3d 934 (2016).

212. *Id.*; *Arreola*, 122 Cal. Rptr. at 55, 57.

213. Armstrong v. United States, 364 U.S. 40, 49 (1960).

214. *See, e.g.*, Coll. Bowl, Inc. v. Mayor & City Council of Balt., 394 Md. 482, 489, 907 A.2d 153, 157 (2006) (quoting PruneYard Shopping Ctr. v. Robins, 447 U.S. 74, 83 (1980)); Reichs Ford Rd. Joint Venture v. State Rds. Comm'n of the State Highway Admin., 388 Md. 500, 511, 880 A.2d 307, 313 (2005) (using similar language to explain that "the economic impact of a public project" should not be borne by "a group of individual property owners" (citing *Armstrong*, 364 U.S. at 49)).

215. 446 Md. at 266, 131 A.3d at 930 (quoting *Coll. Bowl, Inc.*, 394 Md. at 289, 907 A.2d at 157).

216. *Id.* at 267, 131 A.3d at 931.

217. *See generally id.* at 261–64, 131 A.3d at 927–29 (citing Litz v. Md. Dep't of Env't, 434 Md. 623, 642, 76 A.3d 1076, 1087 (2013) (describing the procedural history of the case).

218. Rona Kobell, *Maryland Court Revives Water Pollution Lawsuit Against State*, BAY J. (Feb. 1, 2016), http://www.bayjournal.com/article/maryland_court_revives_water_pollution_lawsuit_against_state.

Indeed, the population of Goldsboro was 264 people as of 2010[219] and, as the article noted, the town's residents could not afford even ten percent of the total cost of the very public sewer system at issue in the case.[220] Therefore, without the opportunity to recover from the state through her inverse condemnation claims, Litz would be left only with her claims against the town, lessening the possibility that she would recover any actual monetary compensation if her claims are eventually successful. Allowing Litz to recover on inverse condemnation theory fits into the policy justifications underlying the takings theory to compensate individuals whose property is inequitably taken by the government.

The court took the view that the government respondents in *Litz* may have been responsible for the property damage at issue, and if so, would owe the petitioner just compensation.[221] In particular, the court pointed out that Litz did not allege that her property was "affected adversely by private third parties solely and exclusively."[222] Indeed, federal courts have expressly denied that the government is responsible for compensating takings of regulated property committed by third parties.[223] Rather, the petitioner's property was "'condemned' by the failure of the State and Town . . . to abate a known and longstanding public health hazard."[224] The court reasoned that the town and the state may have had affirmative duties to act to prevent or limit such a hazard generally, or specifically under the Consent Order entered into by the town and MDE.[225] The court indicated that such a duty does not exist when the government merely fails to enforce the conduct of third parties with respect to property rights regulated by the government.[226] Specifically, the court pointed to the statutory powers of the state agencies to make and enforce rules and Consent Orders in the interest of protecting public health and preventing pollution.[227] The court held the

219. *Goldsboro*, MD. STATE ARCHIVES, http://msa.maryland.gov/msa/mdmanual/37mun/goldsboro/html/g.html (last updated Jan. 10, 2017). Caroline County had a population of 33,066 as of 2010. *Caroline County, Maryland*, MD. STATE ARCHIVES, http://msa.maryland.gov/msa/mdmanual/36loc/caro/html/caro.html (last updated Aug. 26, 2016).

220. Kobell, *supra* note 218.

221. 446 Md. at 273; 131 A.3d at 934.

222. *Id.* at 272, 131 A.3d at 934.

223. Alves v. United States, 133 F.3d 1454, 1458 (1998); Georgia Power Co. v. United States, 633 F.2d 554, 556 (Ct. Cl. 1980) (citing Minot v. United States, 546 F.2d 378 (Ct. Cl. 1976)). *See also Litz II*, 446 Md. at 271, 131 A.3d at 933 ("Neither [*Alves* nor *Georgia Power Co.*] resulted in a 'taking' because the regulations imposed by the Federal Government were not meant to act as an 'insurer that private citizens will act lawfully with respect to property subject to governmental regulation.'" (quoting *Alves*, 133 F.3d at 1458)).

224. *Litz II*, 446 Md. at 272, 131 A.3d at 934.

225. *Id.*

226. *Id.* at 271–72, 131 A.3d at 933.

227. *Id.* at 272–73, 131 A.3d at 934 (quoting State Dep't of Env't v. Showell, 316 Md. 259, 264, 270, 558 A.2d 391, 393, 396 (1989)).

lower court must determine whether such an affirmative duty existed.[228] According to the court, a taking can only occur when the government entity had an affirmative duty to act and failed to do so.[229] The decision therefore leaves open the possibility that Litz may recover on her claims and that future complainants may obtain recovery from damages resulting from a government entity's failure to fulfill an affirmative duty.

In his article *Passive Takings*, Professor Christopher Serkin argues that inaction should be a sufficient basis for takings claims because such takings claims could ensure government actions are benefiting the public.[230] He argues that such claims are justified because property owners can inequitably suffer costs from government inaction just as they suffer costs from government actions.[231] Claims like the one at issue in *Litz* seem to fit within these policy objectives of takings claims. In *Litz*, the failure to develop a public sewer system disproportionately impacted Litz because the lake on her property was contaminated to the point where she could no longer operate her business.[232] The cost of building a sewer system, however, should have been borne by the public through taxpayer funds collected and used by the government.[233] The court embraced the view that the government may have effectively condemned Litz's property by forcing her to bear the costs of the government's failure to build a public sewer system.[234] Allowing her claim to continue past the motion to dismiss stage of the litigation therefore comports with the fairness-based theory of takings,[235] because it requires the government to bear the cost of failing to build the sewage system if the government had an affirmative duty to do so.[236]

C. The Majority Opinion Avoids the Negative Consequences Suggested by the Dissenting Opinion

The dissenting opinion authored by Judge Watts argued that the decision by the majority in *Litz* contradicts Maryland's takings jurisprudence.[237] Judge Watts offered several reasons why Maryland should only recognize inverse condemnation claims that plead a taking due to a government ac-

228. *Id.* at 273; 131 A.3d at 934.

229. *Id.*

230. Christopher Serkin, *Passive Takings: The State's Affirmative Duty to Protect Property*, 113 MICH. L. REV. 345, 362 (2014).

231. *Id.*

232. 446 Md. at 264, 131 A.3d at 929.

233. *Id.*

234. *Id.* at 272, 131 A.3d at 934.

235. Serkin, *supra* note 230, at 364.

236. *Litz II*, 446 Md. at 273, 131 A.3d at 934.

237. *Id.* at 283–85, 131 A.3d at 940 (Watts, J., dissenting).

tion, and not due to government action.[238] However, the majority's reasoning was actually consistent with takings jurisprudence, and Maryland can avoid the negative consequences asserted by the dissenting opinion. Further, the holding in *Litz* can be limited in the future, and therefore will not vastly increase takings litigation as the Maryland courts can clarify the exact scope of the holding through application.[239]

1. Nothing in Maryland Takings Jurisprudence Prevented the Majority from Holding Inaction Can Constitute a Taking

Judge Watts argued that the very term "take" requires the government to take "some kind of affirmative action, as opposed to an omission."[240] Further, Judge Watts argued that Maryland's description of what actions constitute the basis for inverse condemnation claims in prior cases did not contemplate inaction, only affirmative acts.[241] The majority's holding, however, has a sufficient basis in federal and state takings jurisprudence. While the U.S. Supreme Court has never recognized an inaction as the basis for an inverse condemnation claim, the Court also has never rejected the theory. Further, several states other than Maryland have held that a government's failure to act, at least in certain circumstances, can constitute a basis for inverse condemnation.[242] Although several other courts agreed with the dissent's view of the definition of a taking, the holdings in some of those jurisdictions are not inconsistent with *Litz*.[243]

While the Maryland Court of Appeals has not previously recognized that government inaction can serve as the basis for inverse condemnation, the court has also never addressed the issue before.[244] The court previously outlined examples of inverse condemnation, but it did not state that inverse condemnation claims were limited to such examples.[245] Therefore, nothing in Maryland's takings jurisprudence prevented the court from deciding that inaction could serve as the basis for inverse condemnation claims. In particular, the majority may have been concerned that Litz's case and any simi-

238. *Id.* at 940–41.

239. *See infra* Part IV.C.2.

240. *Litz II*, 446 Md. at 283, 131 A.3d at 940 (Watts, J., dissenting).

241. *Id.* at 284, 131 A.3d at 941.

242. *See supra* Part II.B (discussing the holdings of Minnesota, Florida, California, and Vermont that inaction can serve as the basis for an inverse condemnation claim in some circumstances).

243. *See supra* Part IV.A (comparing the reasoning of courts that have previously ruled on the issue with the Court of Appeals' reasoning).

244. *See Litz II*, 446 Md. at 267, 131 A.3d at 931 (finding no Maryland law is controlling on the issue of whether government inaction can serve as the basis for an inverse condemnation claim).

245. Coll. Bowl, Inc. v. Mayor & City Council of Balt., 394 Md. 482, 489, 907 A.2d 153, 157 (2006).

lar cases that may arise could only be resolved "in all fairness and justice"[246] by allowing inaction to serve as a basis for inverse condemnation. While the court did not directly articulate such an intention, instead stating merely that it found the California and Florida cases persuasive,[247] the intention seems implied from Litz's sympathetic situation,[248] the quote used to open the opinion,[249] and the court's emphasis that the town and the state failed "to abate a known and longstanding public health hazard."[250]

2. The Decision Can Be Limited in the Future

In *Litz*, the Court of Appeals of Maryland was clear that the holding that government inaction can serve as a basis for inverse condemnation claims was limited to circumstances where the government had an affirmative duty to act.[251] The court also made clear that no affirmative duty to act might actually exist in *Litz*, noting that at the time the decision was handed down, the parties had neither briefed nor argued the issue.[252] Beyond these limitations, the court did not provide much direction as to the potential scope of its holding. Such a vague holding, at first glance, may not appear beneficial to litigants desiring predictability, especially government entities that may now face new claims based on their inaction.[253] Although the dissent argued that the holding "greatly expands the definition of inverse condemnation,"[254] the court will have an opportunity to narrow the application of the holding to specific factual or legal circumstances as cases arise. Further, the holding is already limited in that claimant must demonstrate that the government entity had a legal duty to act, not just the power to act.[255]

246. *Litz II*, 446 Md. at 266, 131 A.3d at 930 (quoting *Coll. Bowl, Inc.*, 394 Md. at 489, 907 A.3d at 157).

247. *Id.* at 269–70, 131 A.3d at 932.

248. *See generally id.* at 257–61, 131 A.3d at 925–27 (describing the factual background of the case). Additional details regarding Litz's history with the property can be found in a local newspaper article about the case. Kobell, *supra* note 218. Notably, Litz planned to use the campground business to fund her retirement and planned to pass the property on to her children, but now she has lost the property to foreclosure and currently lives with her son and his family. *Id.*

249. "The nine most terrifying words in the English language are, 'I'm from the government and I'm here to help.'" *Litz II*, 446 Md. at 257, 131 A.3d at 924 (quoting President Ronald Reagan, Statement at a Chicago Press Conference (August 12, 1986)).

250. *Id.* at 272, 131 A.3d at 934.

251. *Id.* at 267, 131 A.3d at 931.

252. *Id.* at 273, 131 A.3d at 934.

253. For example, a representative of the environmental group Chesapeake Legal Alliance stated the decision will allow environmental groups to ensure the state enforces consent orders requiring the prevention, reduction, or clean-up of pollution. Kobell, *supra* note 218.

254. *Litz II*, 446 Md. at 286, 131 A.3d at 942 (Watts, J., dissenting).

255. *Id.* at 267, 131 A.3d at 931 (majority opinion).

Takings cases are already decided on a fact-specific, case-by-case basis.[256] The court's holding in *Litz* merely imposes another inquiry in cases based on inaction: whether the defendant had an affirmative duty to do act.[257] The U.S. Supreme Court recognizes only two limited instances where government action constitutes a per se taking: (1) when the government entity physically invades or compels the physical invasion of the property, and (2) when the action results in a total loss of the property's value.[258] Further, the Court has so narrowly interpreted per se takings that such takings are rarely found, especially under the total loss of value standard.[259] In all other circumstances, takings claims are analyzed by the court using the factors outlined by the U.S. Supreme Court in *Penn Central Transportation Company v. New York City*.[260] The Court has outright stated that it:

> has been unable to determine any "set formula" for determining when "justice and fairness" require that economic injuries caused by public action be compensated by the government . . . whether a particular restriction will be rendered invalid by the government's failure to pay for any losses proximately caused by it depends largely "upon the particular circumstances [in that] case."[261]

As the Court of Appeals pointed out, it is entirely possible that Litz may not succeed in her claim for inverse condemnation, because the state and the town may not have had affirmative duties to act and Litz may not be able to prove that damage to her property rises to the level of a taking for which compensation is required.[262] The dissent argued that the statute the majority relied on to find the respondents might have had an affirmative duty to act[263] did not create a private right of action.[264] Therefore, the dissent argued, the majority's opinion improperly created such a private right.[265]

256. *Id.*, 131 A.3d at 930.

257. *Id.*, 131 A.3d at 931.

258. Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1015 (1992).

259. John D. Echeverria, *Making Sense of Penn Central*, 23 UCLA J. ENVTL. L. & POL'Y 171, 173 (2005).

260. 438 U.S. 104, 124 (1978); *see also* Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 330 (2002); Echeverria, *supra* note 259, at 173.

261. *Penn Cent. Transp. Co.*, 438 U.S. at 124 (citation omitted) (first citing Goldblatt v. Hempstead, 369 U.S. 590, 594 (1962); and then quoting United States v. Cent. Eureka Mining Co., 357 U.S. 155, 168 (1958)).

262. *Litz II*, 446 Md. at 273, 131 A.3d at 934 (majority opinion); *see also* Millison v. Wilzack, 77 Md. App. 676, 683, 551 A.2d 899, 902 (1989) (stating that inverse condemnation complainants must demonstrate that their property was taken and how much compensation is owed).

263. MD. CODE ANN., ENVIR. § 9-253 (LexisNexis 2014).

264. *Litz II*, 446 Md. at 285, 131 A.3d at 941–42 (Watts, J., dissenting).

265. *Id.*

However, the majority opinion merely stated that the statute, or the Consent Order, *may* have created an affirmative duty.[266] The court was careful to specify that the parties neither briefed nor argued the question of whether such affirmative duties existed, and therefore the court could properly resolve the issue on remand.[267] Indeed, Litz did not bring a claim under the Environmental Code, but rather her claim arose under the takings provision of the Maryland Constitution.[268]

We can use the facts in *Litz* to analyze the extent to which the court's holding may be limited in the future based on what could occur on remand in the case. On remand, Litz will need to prove that the Respondents had an affirmative duty to act.[269] Comparing the circumstances in *Litz* to cases in which courts held the government entity did have an affirmative duty to act, the circumstances are relatively similar, and on remand the court could find those cases persuasive.[270] Similar to the government actors in *Arreola*, *Jordan*, and *Alger*, the Respondents in *Litz* were aware that their failure to act would and did result in extensive damage to private property.[271] Even if Litz can establish that an affirmative duty to act existed, she may not be able to recover under her inverse condemnation claim. Her property does not fit within the per se takings category of total loss of property value.[272] The fact that her property was sold for $364,000 in the foreclosure action rules out the possibility of total loss of value.[273]

Litz may argue that her claim fits within another category of per se takings: that the government compelled a physical invasion of her property.[274] However, to take advantage of the per se takings rule, Litz would

266. *Id.* at 272, 131 A.3d 934 (majority opinion) (stating that although the issue of whether an affirmative duty existed remained to be decided, "it is not frivolous to hypothesize that state, county, and municipal agencies may have duties to step in to protect the public health").

267. *Id.*

268. *Id.* at 265–66, 131 A.3d at 930.

269. *Id.* at 273, 131 A.3d at 934.

270. *See supra* Part IV.A.1 (comparing the circumstances in *Litz* with the circumstances in other cases where courts have held that the government defendant had an affirmative duty to act).

271. *Compare* Arreola v. Cty. of Monterey, 122 Cal. Rptr. 2d 38, 53, 55, 57 (Cal. Ct. App. 2002) (holding that a failure to maintain a public improvement project despite a known risk to private property can support a claim of inverse condemnation, and therefore the plaintiffs adequately pleaded their inverse condemnation claim), *and* Jordan v. St. Johns Cty., 63 So. 3d 835, 839 (Fla. Dist. Ct. App. 2011) (holding that the failure to act in the face of an affirmative duty to act can support a claim for inverse condemnation where the County failed to maintain a public road, depriving the claimants of access to their property), *and* Alger v. Dep't of Labor & Industry, 917 A.2d 508, 517 (Vt. 2006) (holding that the government defendant had a duty to enforce the housing code), *with Litz II*, 466 Md. at 258–61, 131 A.3d at 925–27 (discussing the factual circumstances under which the Respondents failed to enforce the installation of a sewage system despite known damage to Litz's property).

272. Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1015 (1992).

273. *Litz II*, 466 Md. at 261, 131 A.3d at 927.

274. *Lucas*, 505 U.S. at 1015.

need to demonstrate that the physical invasion was permanent and not temporary, as temporary physical invasions are analyzed under the *Penn Central Transportation* factors and do not constitute per se takings.[275] Additionally, Maryland has not yet addressed the issue of whether sewage contamination constitutes a physical invasion of the land in the context of inverse condemnation claims.[276] To demonstrate a permanent taking may require a factual finding that the contamination is permanent in nature, and potentially that the government will permanently fail to install a public sewer system. Litz likely will not be able to prove the latter because the county has begun construction on a public sewer system.[277] Additionally, per se takings generally are rarely found and the standards are applied narrowly.[278]

If Litz cannot prove her claims fall under a per se takings rule, the *Penn Central* factors apply.[279] Application of the *Penn Central* factors is somewhat unpredictable, as the courts consider the totality of the circumstances and the Supreme Court has failed to provide much detailed guidance.[280] Notably, the economic impact under the *Penn Central* analysis must generally still be severe, and even a severe economic loss alone will not constitute a taking.[281] Therefore to recover, Litz will likely need to demonstrate a large percentage of her property value was lost as a result of the contamination. She must additionally demonstrate that the character of the government's inaction would support a takings claim or that she had investment backed expectations that were destroyed by the government's inaction. Even if Litz argues that she lost not only the value of her property, but the ability to profitably run her business, she may not succeed because "profitability has traditionally not been recognized as a protected property interest under the takings clause."[282] One circumstance in Litz's favor, however, is the fact that damage to her property affects her property unique-

275. Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 331 (2002).

276. In *Maryland Port Administration v. QC Corporation*, the Court of Appeals noted that while installations such as telephone lines and pipes, as well as the dumping of waste, constituted a physical invasion, microscopic particles in the ambient air above the claimant's property were not a physical invasion. 310 Md. 379, 389–90, 529 A.2d 829, 834 (1987). Therefore, if the contamination is considered the dumping of waste, the court could find a physical invasion; however, the court could instead determine that the contamination was more similar to the microscopic particles in *Maryland Port Administration*. At least one other jurisdiction has held that sewage contamination, including odor, is a physical invasion under an inverse condemnation claim. Sundell v. Town of New London, 409 A.2d 1315, 1319 (N.H. 1979).

277. Kobell, *supra* note 218.

278. Echeverria, *supra* note 259, at 173 (2005).

279. *Tahoe-Sierra Pres. Council, Inc.*, 535 U.S. 302, 330 (2002).

280. Echeverria, *supra* note 259, at 171–72.

281. *Id.* at 178.

282. *Id.* at 182.

ly and to "a high degree," as required in inverse condemnation cases where no physical invasion is involved.[283]

The other two *Penn Central* factors, Litz's investment-backed expectations and the character of the government's action, could also ultimately fall within Litz's favor.[284] Typically, the investment-backed expectations factor is analyzed in the context of whether the relevant regulation was enacted before the claimant purchased the property, the extent of the claimant's knowledge of the regulatory action restricting the property if it existed prior to purchase, and the foreseeability of the regulation if the regulation was not in place prior to purchase.[285] Additionally, the courts consider the reason the property was purchased.[286] Litz's case in particular is complicated by the fact that she inherited the property at issue, and the Court has struggled with the weight that inheritance should hold on the investment-backed expectations factor because the inheritor did not actually invest in the property.[287] Based on the facts disclosed by the Court of Appeals, Litz's parents originally used the property as a farm and the lake was created for irrigation purposes.[288] Litz apparently planned to depend on the campground business her parents had developed for income[289]; however, even if the property was used as originally intended, the sewage contamination of Lake Bonnie likely would have prevented adequate irrigation.

Finally, the character of the government action in *Litz* is unusual because the claimant alleges her property was taken due to the Respondents' inaction rather than a specific act.[290] One component of this factor is whether there was an actual physical invasion of the property.[291] Litz could argue that her property was physically invaded by contaminated water[292] and even a temporary physical invasion tends to favor a finding that a taking occurred.[293] Additionally, the courts look at whether the act harms the claimants as individuals disproportionately, or places a burden properly on the public as a whole.[294] In Litz's case, the failure to develop an apparently necessary sewage system appears to have caused some harm to the

283. Md. Port Admin v. QC Corp., 310 Md. 379, 391, 529 A.2d 829, 834 (1987).
284. Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978).
285. Echeverria, *supra* note 259, at 183–84.
286. *Id.* at 185.
287. *Id.* at 185–86.
288. Litz v. Md. Dep't of the Env't, 446 Md. 254, 258, 131 A.3d 923, 925 (2016).
289. *Id.* at 258–59, 131 A.3d at 925.
290. *Id.* at 265, 131 A.3d at 929.
291. Echeverria, *supra* note 259, at 186–87, 203.
292. *See Litz II*, 446 Md. at 259–60, 131 A.3d at 925–26 (describing the sewage contamination of Lake Bonnie).
293. Echeverria, *supra* note 259, at 203.
294. *Id.* at 204.

Goldsboro population as a whole.[295] Litz has a strong argument though that the failure disproportionately affected her property alone because the town's drainage systems fed into the streams, which terminated at Lake Bonnie, dumping the contaminated water in the lake.[296] Additionally, the courts look at the advantage of the regulation both to the public as a whole and to the claimants.[297] Here, the failure to develop a sewage system was beneficial to neither the residents of Goldsboro nor to Litz—to the contrary, this failure continued a longstanding harm to public health.[298] Therefore, in the event that the court holds the Respondents had an affirmative duty to enforce the development of a sewage system, Litz has a reasonable chance of obtaining at least some compensation based on the *Penn Central* analysis. The standards for takings claims are typically high,[299] however, and as the Court of Appeals pointed out, there is also a reasonable probability that Litz will not meet these standards.[300]

The Maryland courts can refine the scope of the holding in *Litz* through application. California, for example, also broadly held that inaction can form the basis of an inverse condemnation claim.[301] Following that decision, the court further refined the scope of that holding through application in subsequent cases.[302] For example, in *Tilton v. Reclamation Dist. No. 800*,[303] a California court began defining the scope, stating that, "garden variety inadequate maintenance, as distinguished from a faulty plan involving the design, construction and maintenance of a levee, is not an adequate basis for an inverse condemnation claim."[304] California also held that inaction can form the basis of an inverse condemnation claim only in the context of public improvement projects: "to state a cause of action for inverse condemnation, the plaintiff must allege the defendant substantially participated in the planning, approval, construction, or operation of a public project or

295. *See Litz II*, 446 Md. at 259–61, 131 A.3d at 925–27 (describing the history and extent of Goldsboro's stormwater drainage and sewage contamination problems).

296. *Id.*

297. Echeverria, *supra* note 259, at 204.

298. *See Litz II*, 446 Md. at 259–61, 131 A.3d at 925–27 (describing the history and extent of Goldsboro's stormwater drainage and sewage contamination problems).

299. Echeverria, *supra* note 259, at 178.

300. *See Litz II*, 446 Md. at 273, 131 A.3d at 934.

301. Arreola v. Cty. of Monterey, 122 Cal. Rptr. 2d 38, 55 (Cal. Ct. App. 2002)

302. *See, e.g.*, Tilton v. Reclamation Dist. No. 800, 48 Cal. Rptr. 3d 366, 373–74 (Cal. Ct. App. 2006) (refusing to extend the inverse condemnation doctrine to situations where the government entity merely failed to adequately maintain a public improvement project).

303. 48 Cal. Rptr. 3d 366 (Cal. Ct. App. 2006).

304. *Id*. at 373–74.

improvement which proximately caused injury to plaintiff's property."[305] Maryland can similarly refine the scope of the holding in *Litz* in the future.

The dissent in *Litz* is not the first to criticize government inaction as the basis for inverse condemnation claims. For example, some scholars have criticized Florida's holding in *Jordan*:

> The court . . . concluded, without citing authority, "that governmental *inaction*—in the face of an affirmative duty to act—can support a claim for inverse condemnation." . . . Should this extremely troublesome notion gain judicial traction, the implications would be disastrous for government officials whose budgets would be stretched to the limits (and beyond) by a judicial mandate to absorb the repair costs for damages caused by storms, floods, drought, unprecedented snowfalls, and other manifestations of climate change.[306]

These critics were concerned with the increased financial liability that governments could face for failures to act due to the decision in *Jordan*.[307] Because of the holding, private citizens could potentially recover under an inverse condemnation claim for a government's failure to make repairs following damages caused by natural disasters or storms.[308] Another article noted that if courts found that governments have a duty to maintain public improvement projects such that no damage would result to private property, local governments would be forced to make the choice between spending potentially unreasonable amounts of money or facing legal liability.[309] The article noted that the impact of Florida's cases which held that inaction can serve as the basis for inverse condemnation will depend on how the courts decide in future cases on whether the government had an affirmative duty to act.[310] Similarly, the Court of Appeals of Maryland left open the question of whether the Respondents in *Litz* actually had an affirmative duty to act.[311] How the courts decide on the issue of whether the Respondents had

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305. Wildensten v. E. Bay Reg'l Park Dist, 283 Cal. Rptr. 13, 15 (Cal. Ct. App. 1991) (citing Ullery v. Cty. of Contra Costa, 248 Cal. Rptr. 727 (Cal. Ct. App. 1988); Souza v. Silver Dev. Co., 210 Cal. Rptr 146 (Cal. Ct. App. 1985); Holtz v. Superior Court, 475 P.2d 441 (Cal. 1970) (en banc); Albers v. Cty. of Los Angeles, 398 P.2d 129 (Cal. 1965) (en banc)).

306. DANIEL R. MANDELKER & MICHAEL ALLAN WOLF, LAND USE LAW § 12.15 (6th ed. 2015).

307. *Id.*

308. *Id.*

309. Thomas Ruppert & Carly Grimm, *Drowning in Place: Local Government Costs and Liabilities for Flooding Due to Sea-Level Rise*, 87 FLA. BAR J., at 29, 31–32 (2013).

310. *Id.* No subsequent Florida cases have cited to *Jordan* or another Florida case in which certain government actions and inactions resulted in a finding that the claimant was entitled to just compensation. Charlotte County v. Rotonda Project, 91 So. 3d 249, 249–50 (Fla. Dist. Ct. App. 2012).

311. Litz v. Md. Dep't of the Env't, 446 Md. 254, 273, 131 A.3d 923, 934 (2016).

an affirmative duty to act will determine whether Litz's claim individually can succeed, and can further define whether such affirmative duties exist in other situations.

The dissenting opinion in *Litz*, as well as critics of decisions by courts in other jurisdictions which made similar holdings, argue that holding inaction can serve as the basis for inverse condemnation unreasonably expands the scope of the claim.[312] The holding in *Litz*, however, is limited to situations in which the government had an affirmative duty to act.[313] Courts in other jurisdictions have similarly limited their holdings, and through subsequent application, further refined the scope of their holdings.[314] Therefore, through application over time, the Maryland courts can also limit the holding in *Litz*. The facts of the *Litz* case in fact demonstrate that even given the decision by the Court of Appeals, Litz still faces a substantial burden on remand.[315] Litz must prove not only that the defendants had an affirmative duty to act,[316] but that her damages fulfill the elements of an inverse condemnation claim. Therefore, the holding in *Litz* can avoid potential negative consequences, such as vastly increasing the liability of state and local governments.

V. CONCLUSION

The holding in *Litz v. Maryland Dep't of the Environment* is only one of several state court decisions on the issue of whether inaction by a government entity can serve as the basis for an inverse condemnation claim.[317] While various jurisdictions have held differently, the Maryland Court of Appeals found most persuasive the reasoning that government entities should be held liable in inverse condemnation for inaction if the government entity had an affirmative duty to act.[318] As applied to Litz's case and generally, this holding does not contradict any federal or state takings jurisprudence and comports with the policy objectives behind inverse condemnation claims.[319] Further, by limiting the cause of action to circumstances in which an affirmative duty exists, the Court of Appeals provided a mech-

312. *See generally id.* at 281–86, 131 A.3d at 939–42 (Watts, J., dissenting); MANDELKER & WOLF, *supra* note 306, at § 12.51; Ruppert & Grimm, *supra* note 309.

313. *Litz II*, 446 Md. at 267, 131 A.3d at 931.

314. *See, e.g.*, Tilton v. Reclamation Dist. No. 800, 48 Cal. Rptr. 3d 366, 373–74 (Cal. Ct. App. 2006) (clarifying the scope of when inaction can support an inverse condemnation claim).

315. *Litz II*, 446 Md. at 273; 131 A.3d at 934.

316. *Id.*

317. *Id.* at 267, 131 A.3d at 931; *see also supra* Part II.B (summarizing state court decisions on whether inaction can serve as the basis for inverse condemnation claims).

318. *Litz II*, 446 Md at 269, 131 A.3d at 932.

319. *See supra* Part IV.B (discussing the policy objectives of takings clauses and federal and state takings jurisprudence).

anism by which inverse condemnation claims can be further limited by what duties are determined to be affirmative.[320]

320. *See supra* Part IV.C (discussing how courts in other jurisdictions have limited their holdings that inaction can serve as the basis of an inverse condemnation claim and how Maryland may limit its holding in the future).