IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

JERRY R. KENNEDY, *et al.*,

Plaintiffs

v.

CITY OF ZANESVILLE, OHIO, *et al.*,

Defendants

Case No. 2:03-cv-1047
District Court Judge: Algenon L. Marbley
Magistrate Judge: Mark R. Abel

PLAINTIFFS' COMBINED OPPOSITION TO DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT

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INTRODUCTION

This case is the story of Coal Run, an African-American neighborhood in central Ohio that suffered under a decades-long discriminatory government policy of refusing to provide clean, safe water to the community. The Coal Run neighborhood, which is in Muskingum County and adjacent to the City of Zanesville, sits atop abandoned mines that contaminated the ground water. Wells in Coal Run produce water that one cannot drink, cannot use to bathe, and that corrodes, clogs, or destroys everything it touches. In Coal Run, the residents had to catch water off their roofs, melt snow, and truck it in using barrels, pool liners, and every other manner of container. The water that was gathered went into cisterns and then was pumped into the homes. The cisterns, though, would fill with bugs and worms and rodents and animals would crawl in them and die. Drinking water came from the store or was boiled on the stove. Even as late as 2002, outhouses could be seen in Coal Run and so could sinks and toilets that sat in the corners of homes unable to be used because of the contaminated water.

Coal Run is not particularly rural, sharing a border with the City of Zanesville, the 25,000-person seat of Muskingum County, and Interstate 70 is a stone's throw away. Public water is also nearby. The water treatment plant that pumps water to all reaches of the County is a mile from Coal Run. And, while the Coal Run residents suffered everyday trying to cope without water, they were literally surrounded by waterlines going to predominantly white areas, but they all stopped when they reached Coal Run, the only predominantly African-American area in the whole County. Some of the Coal Run residents lived, for decades, no more than fifty yards from Defendants' waterlines, but they were never allowed to connect. Their white neighbors would have their sprinklers

on while at the same moment, literally across the street, African-American residents of Coal Run might be saving used dishwater for washing the plates after their next meal. The water going to these white homes and to far-flung areas throughout the County came from the water treatment plant that Coal Run residents could see from their porches.

Three governments, who are the Defendants here, are responsible for the waterlines that run throughout the County: the City of Zanesville; Muskingum County and its predecessor, the East Muskingum Water Authority; and Washington Township. Since this case was filed, each of these Defendants has tried to excuse its failure to provide water to Coal Run over the years, but these Defendants, and these Defendants alone, were responsible for the web of waterlines that were laid down in white areas throughout the County over the last five decades. And they are responsible for the fact that those lines went near and far, but never to Coal Run.

Each of the Defendants had the power and ability to bring water to Coal Run. Beginning as early as the 1930s the City brought water to various communities that were, like Coal Run, adjacent to the City. The City also controlled the Old Adamsville Road line that ran right past many Coal Run households, but the City would not let them connect to it. It did, however, allow white households up and down the line to tap-in at the very same time that it was denying the Coal Run residents' requests. In 1967, the County through its predecessor water authority — the East Muskingum Water Authority — for which it has assumed all liabilities, began constructing waterlines. Over the next thirty-five years, it constructed water projects all over County, stretching miles from the water treatment plant. Those lines went in every direction, but never to Coal Run. In 1995, Washington Township, the township in which the Coal Run neighborhood sits,

became an important force in bringing water to its residents. The Township's efforts led to the construction of major water projects in the Township, but neither its efforts nor the lines ever pointed to Coal Run.

In their brief, Defendants now try to paint a picture of fanciful ignorance, claiming that they just did not know of the need for water in Coal Run and that only one or two requests for water ever came from the neighborhood's residents. That is a blatant misrepresentation of the record. And Defendants themselves admit it. The City's own Water Superintendent, Robert Pletcher, admitted in a 2000 written report that residents of the Coal Run neighborhood have been consistently seeking water for *thirty-five* years. The record, which was created through extensive discovery in this matter and included nearly one hundred depositions, confirms Pletcher's statement. The Coal Run residents have been continuously requesting water since the early 1950s.

The requests came in every form, through meetings, personal inquiries, letters, petitions, calls, and so forth, but Defendants always said "no" and simply disregarded this predominantly African-American community's water needs. The County Commissioners' response to Jerry and Richard Kennedy, Sr.'s request for water at a December 2001 Muskingum County public hearing on funding water projects is symptomatic of Defendants' treatment of the Coal Run neighborhood. The Kennedys were told by Commissioner Montgomery that they would not see water unless President Bush dropped a spiral bomb in their neighborhood and it hit good water. She went on to say that the Kennedys' great grandchildren would be lucky to see water.

The denials, excuses, rejections, and finger-pointing went on for fifty years with one result: no water in Coal Run. Defendants resisted every chance to bring water to the

neighborhood. Only once Plaintiffs filed discrimination complaints in this matter did Defendants respond. Finally, after five decades of suffering, water came to Coal Run. There is only one explanation for the fifty years of conduct: racial discrimination. That discrimination deprived Plaintiffs of a basic human need — access to uncontaminated water. This is precisely the type of discriminatory conduct that the broad reach of the Fair Housing Act was designed to prevent. This case is about ensuring that the injuries caused by the illegal conduct are redressed and that Defendants are not permitted to harm the community again.

The record in this case compels the conclusion that the Coal Run neighborhood was denied water because of the race of its residents. Defendants try to articulate two general responses to the evidence, but they are overwhelmed by the weight and clarity of the relevant facts and controlling law, which demand a finding of liability.

Defendants first raise procedural arguments, asserting that Plaintiffs' claims are barred by the statute of limitations and that Plaintiffs do not have standing. These arguments cannot withstand scrutiny.

The Fair Housing Act explicitly incorporates the continuing violations doctrine, which allows plaintiffs to pursue claims based on ongoing, continuous practices of discrimination that start outside the limitations period and continue into it. As specifically interpreted by the Supreme Court in *Havens Realty v. Coleman*, 455 U.S. 363 (1982), the doctrine is designed for precisely this type of factual scenario, and Plaintiffs' allegations and the evidence presented in this case fit squarely within the controlling precedent on continuing violations under the Fair Housing Act.

The Supreme Court has also spoken clearly about the broad standing under the Fair Housing Act and has found that residents, whether African American or white, of neighborhoods targeted by a defendant's discrimination have standing to seek redress of their injuries. The touchstone is injury, and decades of being denied a basic service, like water, simply because residents live in an African-American neighborhood unquestionably constitutes sufficient injury under the fair housing laws. That is all that is required to assert a claim under the Fair Housing Act. Defendants' assertion that standing can only be conferred here upon those residents who made specific requests for water is contrary to this controlling precedent because every denial of water service, whether in response to an aggrieved person's request, in response to the neighborhood, or as a result of a Defendant's passing over the Coal Run neighborhood in favor of a white neighborhood, is a discriminatory act that causes injury cognizable under the fair housing laws to all residents of the minority community. Defendants' argument also ignores the fact that each member of a household cannot possibly be required to make a request when his or her mother, father, spouse, or other family member has already been refused.

Second, Defendants broadly assert with little support that there is insufficient evidence of disparate treatment here. Nothing could be further from the truth. One wonders if Defendants attended the same one hundred depositions that Plaintiffs did. One need look no further than the maps presented in this brief. A single glance tells the story: the waterlines end where the African-American homes begin. Waterlines are laced throughout the County, but there is a gap in their coverage that is precisely aligned with the African-American homes in Coal Run.

The picture told by the maps is confirmed by the record of Defendants' actions over the last fifty years. Defendants engaged in three broad forms of discrimination as part of their practice of denying the Coal Run neighborhood water. First, Defendants regularly passed over this African-American neighborhood in favor of funding and constructing waterlines to distant white areas. Second, Defendants rejected or disregarded the numerous requests for waterlines to be extended into the neighborhood while at the same time pursuing projects in response to requests from white areas. Third, Defendants denied individual requests from Coal Run residents to connect to the existing Old Adamsville Road line while at the same time letting white homes connect.

Defendants have no explanation for the differences in treatment. It cannot be explained by chance — the statistical picture makes that clear. The overwhelming number of people denied water in Coal Run are African American while the surrounding areas served with water are almost exclusively white. It is also not explained by Defendants' after-the-fact justifications. Defendants' excuses are directly contradicted by the evidence of their extensive efforts to ensure that the predominantly white areas of the County had water. Plaintiffs have developed through discovery a clear picture of three governmental Defendants who did absolutely everything to ensure that they could complete water projects in predominantly white areas, but gave no consideration to a project in Coal Run, the only predominantly African-American neighborhood in Muskingum County. The water projects Defendants constructed in white areas were often more difficult and more expensive than the Coal Run project. Defendants brought water to white areas where the residents had little interest in receiving water. Defendants had to overcome legal objections and public opposition to water projects in some of the

white areas, but they did it anyway. No such obstacles presented themselves in Coal Run, and a project for Coal Run even qualified for federal funding — funding for which many of the projects in white areas did not qualify. Still no waterlines ran in Coal Run.

Defendants' discrimination is clear from the comprehensive factual record that has been systematically developed by Plaintiffs in this case. Plaintiffs begin this brief with a full discussion of the record evidence. Given the extent and length of Defendants' discrimination, the presentation of the facts is necessarily extensive. Sixty-seven residents of Coal Run brought this action. Each has a moving story to tell about how they made it from one day to the next without one of the most basic of human necessities—water. Not every story can be told in this brief, but as Plaintiffs walk through the chronology of the persistent and consistent refusal to provide water to Coal Run, Plaintiffs describe some of the Coal Run families' experiences.

After setting the factual stage, Plaintiffs present the law and specific facts that contradict Defendants' arguments for summary judgment. First, Plaintiffs address Defendants' procedural arguments related to statute of limitations and standing. Plaintiffs demonstrate that those arguments are based on a misapprehension of the controlling law and a misunderstanding of the factual basis for Plaintiffs' claims. *See* Discussion *infra* pp. 58-97. Second, Plaintiffs address Defendants' assertion that Plaintiffs have adduced insufficient evidence for a finding of discrimination. Using the *McDonnell Douglas* framework, Plaintiffs demonstrate that the evidence easily permits an inference of discrimination and that Defendants' attempts to justify their refusals to run water to Coal Run are contradicted by Defendants' own testimony, by Defendants' past actions, and other evidence showing that they are mere pretexts. *See* Discussion

infra pp. 97-134. Finally, Plaintiffs address a series of miscellaneous meritless arguments Defendants raise in their briefs. *See* Discussion *infra* pp. 134-141.

At the end, there is only one conclusion to be drawn from this story. For nearly fifty years, Plaintiffs suffered profound emotional, financial, and physical harm at the hands of Defendants. The harm was caused by an ongoing discriminatory practice purposefully directed at the Coal Run neighborhood because of the race of the residents. The practice constitutes a continuing violation that Plaintiffs, as residents of the neighborhood, have standing to challenge. The extensive record shows a clear pattern of discrimination that is inexplicable on any other grounds. It kept water from Coal Run for five decades until Plaintiffs had no alternative but to bring this action. Water flows to Coal Run today because Plaintiffs filed this discrimination action, but the harm of the discrimination is not gone.

The story of Coal Run is the story of relentless and enduring hardship and needless suffering from the denial of water. This was not merely the denial of the convenience of public water. The only water available to Coal Run residents was contaminated and unusable. When Defendants denied Coal Run water service, they denied the residents their only access to usable water.

Plaintiffs' day in court has finally come. Justice requires that Defendants' motions for summary judgment be denied and that this matter be heard and decided by a jury of the Plaintiffs' peers.

FACTUAL BACKGROUND

I. The Coal Run Neighborhood

Sixty miles east of Columbus, Ohio, just off Interstate 70, on the outskirts of the City of Zanesville is the small community of Coal Run. (Ex. 61, Pls. Expert Disclosure at Ex. A, Map 1; *see also* Figure 1.) The neighborhood, which is on the eastern border of the City, is located within Muskingum County and Washington Township. *See* Figure 1. The neighborhood includes approximately twenty-five homes along the length of the U-shaped Coal Run Road and continuing up Langan Lane to its intersection with Circle Lane. (*See* Ex. 61, Pls. Expert Disclosure at Ex. A, Map 4; *see also* Figure 3, *infra* p. 38.)

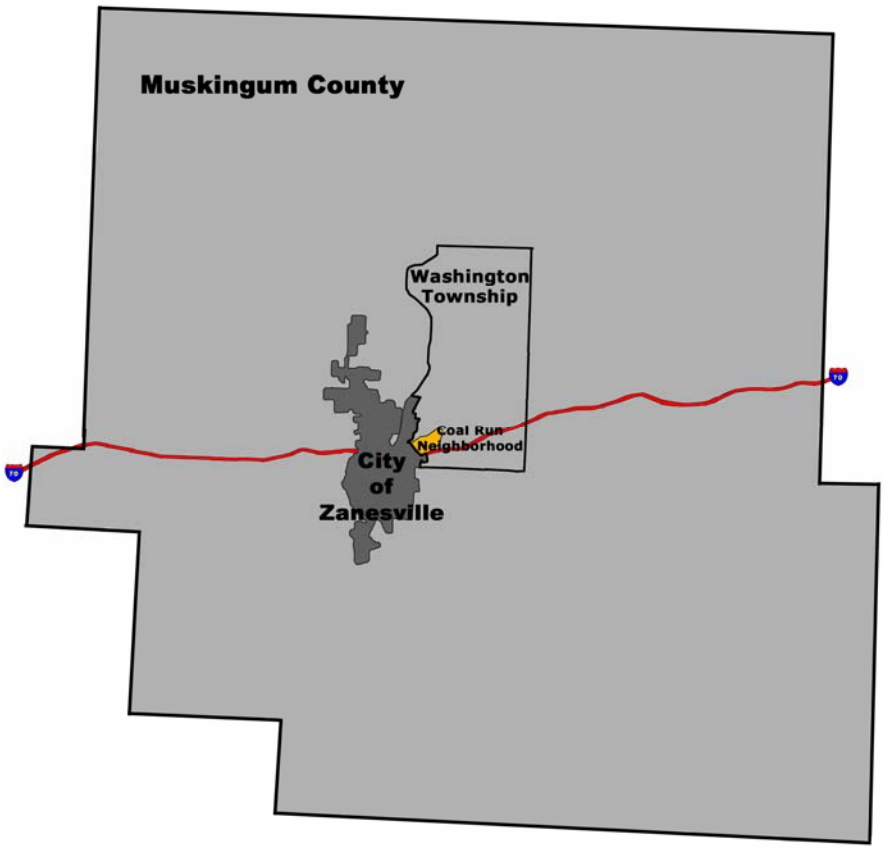

Figure 1. (Ex. 62, Ehler Decl.)

The Coal Run neighborhood is a close-knit community with over half of the residents related to each other by blood or marriage. (*See* Ex. 30, Kennedy, Jerry Dep. at 123.) Throughout its history, the vast majority of Coal Run residents have been African American.[1] Currently, approximately 85% of Coal Run neighborhood residents are African American. (Ex. 61, Pls. Expert Disclosure at Ex. A, p.5.) The areas surrounding the Coal Run neighborhood, on the other hand, are virtually all white. (Ex. 61, Dr Pls. Expert Disclosure at Ex. B.) Muskingum County and Washington Township are both over 95% white. (Ex. 61, Pls. Expert Disclosure at Ex. B.)

Contaminated by years of mining in the area, the ground water in the Coal Run neighborhood could not safely meet the Coal Run residents' most basic needs. (*See, e.g.*, Ex. 53, Montgomery Dep. at 284-86; Ex. 64, 2000 City Report on Extension of Water to Coal Run Area at 3.) In fact, in the last decade, the Ohio Department of Mines condemned existing wells in the area because of the mine contamination. (*See* Ex. 15, Hale, Mark Dep. at 33-34.)

As a result, the Coal Run residents struggled for decades to have safe, useable water for drinking, cooking, and bathing. For example, Plaintiff Kathleen Hill and her husband moved to 910 Langan Lane in the late 1960s and had to use several methods to bring water to their cistern — first paying a water hauler and later purchasing a series of trucks that they equipped with water tanks to haul water several times a week. (Ex. 22, Hill, Kathleen Dep. at 7; Ex. 19, Hill, James Dep. at 19-25.) Despite their efforts, the water was insufficient. The family had an outhouse and an indoor toilet that, without water, did not flush. (Ex. 65, Plaintiff Julie Hill Mayle's Response to Defendant City of

[1] (Ex. 53, Montgomery Dep. at 25; Ex. 24, Howard Dep. at 62; Ex. 45, Madden Dep. at 17; Ex. 58, Pletcher Dep. at 480-81; Ex. 3, Bunting Dep. at 40; Ex. 7, Culbertson Dep. at 33-34.)

Zanesville's Interrogatory No. 20.) The Hill family had to reuse dishwater, boiling it before each time it was used. The family also bathed in an inch of bathwater that several family members had to share. (Ex. 65, Plaintiff Julie Hill Mayle's Response to Defendant City of Zanesville's Interrogatory No. 20.) The lack of water led Plaintiff Julie Hill Mayle to move out of the neighborhood before even finishing high school. (Ex. 65, Plaintiff Julie Hill Mayle's Response to Defendant City of Zanesville's Interrogatory No. 20.)

In addition to using failed wells, paying water haulers, and hauling water themselves, Coal Run residents also caught rain water off their roofs and melted snow for water. For example, Plaintiff Jeffrey Hill, whose family moved to 1715 Coal Run Road in 1953 and who still lives on Coal Run Road, remembered collecting rainwater in the family's cistern, and Plaintiff Jerry Kennedy testified about melting snow to make coffee for guests at his home. (Ex. 20, Hill, Jeffrey Dep. at 17; Ex. 30, Kennedy, Jerry Dep. at 98-99.)[2]

Despite the Plaintiffs' continuous efforts, bacteria, insects, and rodents infested their water. Bernard Kennedy testified that his family's cistern — like many cisterns in Coal Run — would be polluted with insects and mice and he would often "turn on the faucet . . . and a bug would fly out." (Ex. 27, Kennedy, Bernard Dep. at 30.)[3] Rebecca Kennedy remembers the stench of the water: "[I]f you can imagine when you turn the water on . . . it smells so bad . . . like the Zanesville city sewer plant when you are driving

[2] *See also* (Ex. 46, Martin, Tommy Dep. at 19 (explaining that the family caught rain and snow off the house to the cistern); Ex. 28, Kennedy, Dennis Dep. at 18 (explaining that the family caught rainwater off the house); Ex. 18, Harvey, Ellen Dep. at 17 (testifying that her family used barrels to collect rainwater).)
[3] *See also* (Ex. 12, Hairston, Cynthia Dep. at 116 (recalling bugs and animals in the McCuen's cistern); Ex. 23, Hill, Robert Dep. at 57 (recalling bugs in his family's cistern); Ex. 32, Kennedy, Marsha Dep. at 20 (recalling dead animals in her family's cistern).)

by. It stunk. It had awful stenches. We couldn't drink it." (Ex. 36, Kennedy, Rebecca Dep. at 13.)

The contaminated water also ruined appliances, plumbing, and clothes. The Hale family's experience was typical: due to the corrosion caused by their well water, the Hale family was forced to replace the electric pump, kitchen and bathroom sinks, toilet, wringer and electric washers, the hot water heater, faucets, faucet filters, toilet fixtures, sink valves, shower heads, and the entire plumbing system. (Ex. 66, Rodney Hale's Response to City of Zanesville's Interrogatory No. 15.) As Plaintiff Audrey Ford described it: "That was kind of devastating to me. You know, you move into a brand-new home and you got orange toilets because of the water being so bad from the well." (Ex. 10, Ford, Audrey Dep. at 34-35.) Despite the expense, Plaintiffs were forced to purchase bottled water, when it was financially feasible, to ensure that they drank safe water. (*See, e.g.*, Ex. 32, Kennedy, Marsha Dep. at 18-19; Ex. 50, McCuen, Saundra Dep. at 47.)

Meanwhile, the white households surrounding the neighborhood enjoyed clean and pure water pumped straight to their homes from the City of Zanesville's water treatment plant, which is about a mile from the Coal Run neighborhood. *See* Figure 3, *infra* p. 38; (Ex. 30, Kennedy, Jerry Dep. at 88; Ex. 61, Dr Pls. Expert Disclosure at Ex. B, Map S1.) As discussed in greater detail below, the clean City water came to the white households as a result of the efforts of three governmental entities that are responsible for the waterlines that run throughout the County: (1) the City of Zanesville; (2) Muskingum County; and (3) Washington Township.

II. The City of Zanesville, Muskingum County and Washington Township Were Responsible for Providing Water in the Area

A. The City of Zanesville

The City of Zanesville is the seat of Muskingum County. *See* City of Zanesville, Ohio, www.coz.org. Located in the center of the County and approximately fifty miles east of Columbus, the City has a population of 25,000. *See* City of Zanesville, Ohio, www.coz.org. The City has its own government, which is responsible for all activities within the City's boundaries. *See* City of Zanesville, Ohio, www.coz.org. In 1999, the City was the site of a Ku Klux Klan rally at the Courthouse. (Ex. 59, Quarles Dep. at 142.)

The City of Zanesville participated in supplying water in two relevant ways. First, since the 1930s, the City regularly constructed water projects in various areas adjoining the City. (Ex. 58, Pletcher Dep. at 80-82, 87, 89.) Over ten percent of the City's customers lived outside of the City limits, but were connected to City lines. (Ex. 58, Pletcher Dep. at 90-92; *see also* Figure 4, *infra* p. 43.) Second, from 1956 until 2004, the City operated and controlled the "Old Adamsville Road line." (Ex. 67, Zanesville City Council Ordinance No. 5435; Ex. 2, Brock Dep. at 29-30.) The waterline served white residences on Old Adamsville Road and down Langan Lane — roads that border the Coal Run neighborhood. (*See* Figure 3, *infra* p. 38; Ex. 58, Pletcher Dep. at 150; Ex. 2, Brock Dep. at 43 (explaining that the city decided who could tap into the line).) For the first forty-two years of the line's existence the City partnered with the Washington Rural Water Authority in the operation of the line. (Ex. 2, Brock Dep. at 29-30.) In 1998, the Washington Rural Water Authority dissolved and the City obtained exclusive control of the Old Adamsville Road line. (Ex. 67, Zanesville City Council Ordinance No.

5435; Ex. 68, Judgment Entry, Apr. 16, 1998 (dissolving the Washington Rural Water Authority).)

B. Muskingum County

Muskingum County, one of Ohio's eighty-eight counties, encompasses approximately 650 square miles and sits forty miles east of Columbus. The County is governed by a Board of three Commissioners that serves both legislative and executive functions. (Ex. 45, Madden Dep. at 42-43.) In 2000, Muskingum County had a population of 84,585. (Ex. 61, Pls. Expert Disclosure at Ex. A, p.3.)

In 1967, the County created the East Muskingum Water Authority as an independent water authority. (Ex. 69, Order Establishing the East Muskingum Water Authority, Apr. 28, 1967; Ex. 11, Gormley Dep. at 23.) Over the next thirty-six years, the East Muskingum Water Authority constructed water projects throughout its jurisdiction, including most developed areas of the County where water services were not already available. (Ex. 70, Feasibility Report Regarding the East Muskingum Water Authority; Ex. 71, Cooperative Water Agreement, Dec. 7, 2000.)

Since at least 1978, the County has studied and advocated for water services for various parts of the County. (Ex. 72, County Journal Entry.) In 1990, the County began funding and constructing water projects throughout the County. (Ex. 73, County Journal Entry.) In 2000, the County acquired a portion of the East Muskingum County Water Authority and began increasing its efforts to bring water to its residents. (Ex. 71, Cooperative Water Agreement, Dec. 7, 2000; Ex. 74, Acquisition and Dissolution Agreement, Oct. 23, 2002; Ex. 24, Howard Dep. at 102; Ex. 53, Montgomery Dep. at 110-11.) In 2003, the County acquired the East Muskingum Water Authority in its

entirety. (Ex. 74, Acquisition and Dissolution Agreement, Oct. 23, 2002; Ex. 75, Order Dissolving the East Muskingum Water Authority, Feb. 28, 2003.) The County expressly assumed the East Muskingum County Water Authority's liabilities as part of the acquisition. (Ex. 74, Acquisition and Dissolution Agreement, Oct. 23, 2002; Ex. 75, Order Dissolving the East Muskingum Water Authority, Feb. 28, 2003.)

C. Washington Township

The County is composed of twenty-five townships which govern certain issues not governed by the County. (Ex. 3, Bunting Dep. at 21; Ex. 45, Madden Dep. at 61.) Washington Township, which is directly east of the City of Zanesville, counts the Coal Run area as one of its neighborhoods. (Ex. 4, Cameron Dep. at 94.)

Washington Township is governed by a board of three trustees. Beginning in approximately 1995, the Township began making substantial efforts, including legislation and advocacy, to obtain water for some of the predominantly white areas of the Township.

III. History of the Provision of Water in Muskingum County

A. 1954-1967

1. The City and Washington Rural Water Authority's Installation and Operation of the Old Adamsville Road Waterline

The story of water and the Coal Run neighborhood begins in 1954 when the City of Zanesville and the Washington Rural Water Authority began plans for a waterline running east from the City along Old Adamsville Road, halfway down Langan Lane, and west along Circle Lane. *See* Figure 2; (Ex. 67, Zanesville City Council Ordinance No. 5435.) The City supervised the construction and approved the line, which stopped at the

last house before the Coal Run neighborhood. (Ex. 67, Zanesville City Council Ordinance No. 5435; Ex. 58, Pletcher Dep. at 149, 210-11.) *See* Figure 2.

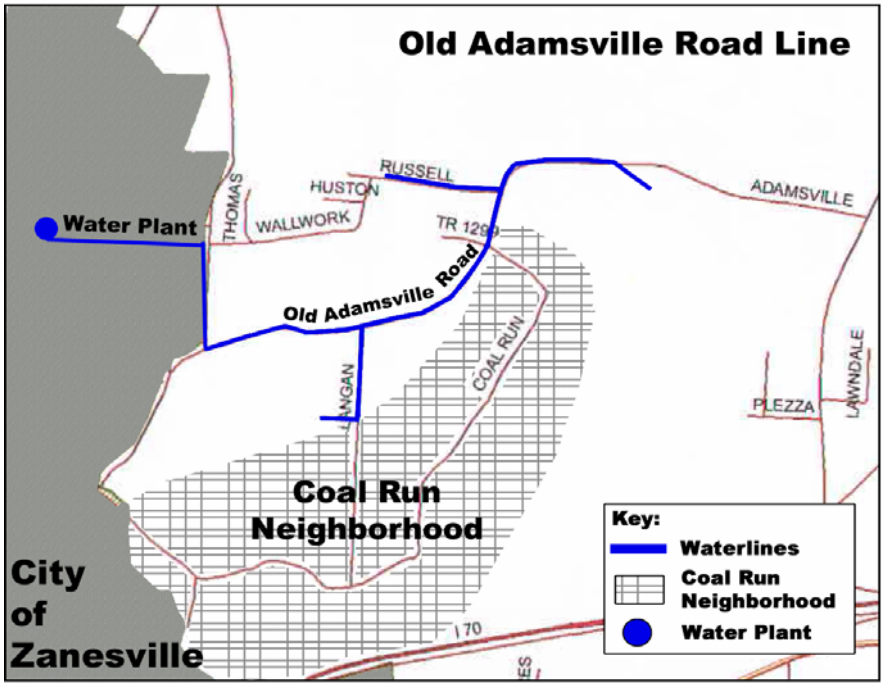

Figure 2. (Ex. 62, Ehler Decl.)

The Coal Run residents were *never* permitted to connect to the Old Adamsville Road line. (*See, e.g.*, Ex. 30, Kennedy, Jerry Dep. at 91-92.) Meanwhile, their white neighbors received all the water they needed from the line. (*See* Ex. 61, Pls. Expert Disclosure at Ex. A, p.2; Figure 3, *infra* p. 38.)

2. Coal Run Residents Immediately Request Extension of the Old Adamsville Road Line

Even before the Old Adamsville Road waterline was installed, Coal Run residents began asking to have the line extended to their neighborhood. Plaintiff Marvin Kennedy testified that he attended multiple meetings in 1954, 1955, and 1958 where he and other Coal Run residents sought water. (Ex. 33, Kennedy, Marvin Dep. at 21, 23-24, 30-35.)

Throughout the 1950s and 1960s another African-American resident of Coal Run, Plaintiff Rodney Hale, continuously communicated with a representative of the Washington Rural Water Authority about when water would be run into the Coal Run neighborhood. On some occasions, Mr. Hale received no response and on other occasions he was told that the lines were too small. (Ex. 16, Hale, Rodney Dep. at 17, 30-31; Ex. 12, Hairston, Cynthia Dep. at 69-70.)

Moreover, Plaintiff John Paul Mayle testified that his father requested water in the late 1950s or early 1960s from a City official. (Ex. 47, Mayle, John Paul Dep. at 28-29.) In 1963, Richard Kennedy, Sr. attended a meeting at the Washington Township fire station where he and other Plaintiffs specifically asked to be connected to the City and Washington Rural Water Authority waterline. They were told that it could not be done. (Ex. 38, Kennedy, Richard, Sr. Dep. at 48-50.)

The City admitted in a public report issued in 2000 that the requests by Coal Run residents for water service to the predominantly African American Coal Run neighborhood began in the 1950s and 1960s and continued for thirty-five years. (Ex. 64, 2000 City Report on Extension of Water to Coal Run Area; Ex. 76, 2001 BBS Coal Run-Langan Lane Waterline Improvement Study.)

From 1954 to 1967, the City and the Washington Rural Water Authority controlled who would be permitted to connect to the Old Adamsville line. The City and Washington Rural Water Authority allowed numerous white residents to connect, but they did not allow any of the Coal Run residents to connect. (Ex. 77, City Memorandum, re: Adamsville Road Waterline, Sept. 2, 1975; Ex. 2, Brock Dep. at 43; Figure 3, *infra* p. 38.)

3. Inadequate Water at the Martins' Home During the 1950s and 1960s

Without the water service that was being provided to their white neighbors, the Coal Run families were forced to be resilient and creative in their efforts to get water to their homes. For example, Rosa and Tommy Martin and their eight children dipped a bucket into a well, pulled it out with a rope, and dumped it into a bug-infested cistern. (Ex. 56, Norvet, Jaquelene Dep. at 50-52.) The Martins, who are African American, moved to Coal Run Road in 1935.[4] (Ex. 46, Martin, Tommy Dep. at 18.) Over the next seventy years, the Martins struggled with the lack of a safe and adequate water supply. (Ex. 46, Martin, Tommy Dep. at 23-27.) The Martin children remember the embarrassment of growing up emptying slop jars, sharing bath water heated on the stove, visiting friends' houses in order to bathe, and avoiding having friends over because they would have to use the Martins' outhouse or a "night pot." (Ex. 57, Page, Carolyn Dep. at 21-22; Ex. 56, Norvet, Jaquelene Dep. at 55-56.)

The makeshift methods for obtaining water did not come without risks. One of the Martins' daughters, Jacquelene Norvet, was badly burned around 1960 when a pot of water that the family was boiling for use spilled on her legs. (Ex. 56, Norvet, Jaquelene Dep. at 34-35 (explaining that the boiling water "tore all the skin off of [my legs] completely").) Another daughter, Carolyn Page, was repeatedly treated for sores caused by bathing and swimming in the nearby creek that had been contaminated by the outhouses everyone had to use in the community because of the lack of water. (Ex. 57,

[4] Attached as Exhibit 78 to this Opposition is a compilation of the dates and addresses of each Plaintiff's residency in the Coal Run neighborhood. (Ex. 78, Hall Decl.)

Page, Carolyn Dep. at 31 (testifying that "human waste would go into the creek and we would swim there").)

B. 1967-1978

1. The County Forms the East Muskingum Water Authority and the Coal Run Neighborhood Immediately Asks It to Provide Water

In 1967, the County formed the East Muskingum Water Authority to provide water service throughout the County. (Ex. 69, Order Establishing the East Muskingum Water Authority, Apr. 28, 1967; Ex. 11, Gormley Dep. at 23.) The East Muskingum Water Authority immediately began installing waterlines throughout the County and by 1980 had lines extending into Washington, Perry, Union, Wayne, Springfield, Falls, Hopewell, Licking and Muskingum townships. (Ex. 79, Wyles Map: Total Population, 2000 by Census Block, 2000 Showing Waterline Installation from 1951-2006.)

Shortly after the East Muskingum Water Authority was established, residents of Coal Run approached it and requested that water be provided to the Coal Run area. In 1968 or 1969, Plaintiff Richard Kennedy, Sr. attended a meeting where he and other Coal Run residents expressly sought water service from the newly formed East Muskingum Water Authority. (Ex. 38, Kennedy, Richard, Sr. Dep. at 54.) Plaintiff Kathleen Hill also attended a meeting at the Washington Township firehouse around the same time where one of her neighbors asked when water could be brought to the Coal Run neighborhood. (Ex. 22, Hill, Kathleen Dep. at 22-26.)

A few years later, a group of at least ten residents from the Coal Run neighborhood appeared at an East Muskingum Water Authority board meeting to request water service. (Ex. 80, East Muskingum Water Authority Board Meeting Minutes, Nov.

14, 1973; *see also* Ex. 11, Gormley Dep. at 28-29, 30-32 (stating that by 1976 the East Muskingum Water Authority was aware of the "water problem" in the "Mill Run" area[5]).) In a departure from its usual practice, the East Muskingum Water Authority did not respond to the request by conducting a preliminary engineering study to estimate likely costs, but instead, directed the Coal Run residents to return to the neighborhood and obtain signed contracts and deposits from homes that sought water service. (Ex. 80, East Muskingum Water Authority Board Meeting Minutes, Nov. 14, 1973; Ex. 42, Kullman Dep. at 28-29, 31-32.)

The Coal Run neighborhood residents, including several Plaintiffs, did as directed and signed contracts and paid deposits. (Ex. 81, list of residents from the "Coal Run Area" who paid deposits.)[6] However, despite the expressed interest, contracts, and deposits, the East Muskingum Water Authority took no action to pursue a water project in the Coal Run neighborhood and years later some of the deposits were returned. (Ex. 54, Newman, Goldie Dep. at 44; Ex. 38, Kennedy, Richard Sr. Dep. at 136; Ex. 33, Kennedy, Marvin Dep. at 39.)

2. Coal Run Residents Continue to Request Water from the City and Washington Rural Water Authority.

Meanwhile, the water requests from the Plaintiffs to the City and Washington Rural Water Authority continued. The Howard Kennedy family took turns throughout the 1960s attending the bi-monthly Washington Rural Water Authority meetings to ask

[5] Coal Run Road was formerly known as "Mill Run." (*See* Ex. 11, Gormley Dep. at 31-32.)
[6] *See also* (Ex. 38, Kennedy, Richard, Sr. Dep. at 54; Ex. 54, Newman, Goldie Dep. at 44; Ex. 33, Kennedy, Marvin Dep. at 38; Ex. 28, Kennedy, Dennis Dep. at 56; Ex. 82, East Muskingum Water Authority resolution setting a $10 tap fee, Sept. 21, 1967.)

for water. (Ex. 30, Kennedy, Jerry Dep. at 38.) Other Coal Run residents attended along with the Kennedys. (Ex. 30, Kennedy, Jerry Dep. at 41-42.)

When a request for water was made to the Washington Rural Water Authority, the its normal practice was to collect the $350 association fee and pass the applicant's name on to the City for a determination of whether a tap would be installed. (Ex. 2, Brock Dep. at 12-13, 35-36.) Once the City received the applicant's name, the City's policy for granting a tap-in request was to allow the tap if there was "sufficient water to serve additional customers." (Ex. 77, City Memorandum, re: Adamsville Road Waterline, Sept. 2, 1975.)

None of the requests for water from the residents of Coal Run was granted throughout the 1960s and 1970s. In contrast, the City and Washington Rural Water Authority allowed a number of white neighbors to connect to the Old Adamsville Road line, including white homes just up Langan Lane from Plaintiff Richard Kennedy, Sr.'s home at 1095 Langan Lane. (Ex. 77, City Memorandum, re: Adamsville Road Waterline, Sept. 2, 1975; Ex. 58, Pletcher Dep. at 154, 166, 169.) Specifically, in 1973 or 1974, the City allowed a white developer, Mr. Maxwell, to put a two-inch extension down Russell Street that would serve several homes. (Ex. 58, Pletcher Dep. at 154.) In 1975, the City extended water service to Kathie Sheperd, a white resident who resided at 1580 Langan Lane. (Ex. 77, City Memorandum, re: Adamsville Road Waterline, Sept. 2, 1975.)

C. 1978-1983

1. The County and City Promise to Explore Water Problems in the Predominantly White Adamsville Road Area

In 1978, the County began its own independent participation in water services in different parts of the County. (Ex. 72, County Journal Entry.) That year, the County

agreed to work with the City and Washington Rural Water Authority to research and provide assistance in meeting water needs in the predominantly white area of Old Adamsville Road, which is directly north of the Coal Run neighborhood. (Ex. 72, County Journal Entry.) The City engaged in a similar process and studied solutions for the water problem in the Old Adamsville Road area. (Ex. 58, Pletcher Dep. at 187; Ex. 83, Minutes of Meeting Between City and Washington Rural Water Authority, May 3, 1982.) The County and City efforts focused only on the Old Adamsville Road area where the predominantly white residents already had water service. These efforts did not result in any water being provided to the Coal Run area.

The County's study of the feasibility of bringing water to other predominantly white areas was not limited to the Old Adamsville Road area. For example, in 1982, the County contracted with an engineering firm to examine bringing water to the predominantly white Rix Mill area. (Ex. 84, Letter from County Commissioners, Jan. 28, 1982.)

2. The McCuen Family's Hopes for Water

While the City and County promised to study water issues in predominantly white areas, where there already was water service, the Coal Run neighborhood's pleas for water went unanswered and the struggle to live with contaminated ground water continued.

Wesley and Helen McCuen moved to 1685 Coal Run Road in 1947 and raised their seven children there. (Ex. 48, McCuen, Helen Dep. at 9-10.) Wesley and Helen never moved and for over fifty years they used an outhouse at their home. (Ex. 44, Lewis, Donna Dep. at 17.) The family had a washtub for bathing, sharing the bathwater

until the children were too big to fit in the washtub. (Ex. 5, Chatman, Barbara Dep. at 61.) When daughter Donna went to college in 1973, she did not even know how to use a shower. (Ex. 44, Lewis, Donna Dep. at 61.)

Wesley died in 1981, having never seen water service provided to his home. The sink Wesley bought in the hope that water would come was never used. (Ex. 5, Chatman, Barbara Dep. at 35.) In 2004, Helen finally received water — and stopped using the outhouse — at the age of eighty-nine and only after filing this discrimination case. (Ex. 48, McCuen, Helen Dep. at 12; Ex. 44, Lewis, Donna Dep. at 17.) Throughout their lives, the McCuens collected rainwater from their gutters, melted snow, and hauled water to a cistern that was infested with worms. (Ex. 50, McCuen, Saundra Dep. at 47.) Such conditions made it difficult to host company because when friends visited they would have to go up the street to another friend's house to use the bathroom or get a drink. (Ex. 59, Quarles Dep. at 16-17.) The humiliation endured by the McCuens was underscored when daughter Barbara visited a white neighbor less than a half-mile away and realized that he had public water. (Ex. 5, Chatman, Barbara Dep. at 57-58.)

D. 1984-1994

1. The East Muskingum Water Authority Removes the Coal Run Neighborhood from Its Jurisdiction

In 1984, the East Muskingum Water Authority, in an act that was entirely consistent with its disregard of the predominantly African-American neighborhood, voluntarily released the Coal Run neighborhood from its jurisdiction. (Ex. 85, Petition to Amend, Oct. 29, 1984.) The release of the territory was a result of a joint City and Washington Rural Water Authority effort to have the Washington Rural Water Authority become a legally constituted water authority, allowing it to apply for funding to upgrade

the existing Old Adamsville Road line that was serving the white homes neighboring Coal Run. (Ex. 83, Minutes of Meeting Between City and Washington Rural Water Authority, May 3, 1982; Ex. 86, Letter from City, Sept. 28, 1984; Ex. 58, Pletcher Dep. at 148-49 (stating that City Administrator "Fred Grant directed [the Washington Rural Water Authority] to the court system to get legally recognized so that they would be able to go after grant money for replacement and upgrade of their system").)

The East Muskingum Water Authority released the unserved Coal Run area without justification or analysis. The East Muskingum Water Authority's engineer concluded that adding lines to the area would "not be financially attractive for the Authority," (Ex. 87, Cerrone & Vaughn Letter, Oct. 23, 1984), and the Authority claimed that by excluding this area it was "primarily attempting to avoid any financial problems." (Ex. 88, Summary of the East Muskingum Water Authority's Position, Sept. 26, 2002.) Even the Washington Rural Water Authority recognized, however, that this assertion was incorrect, noting to the East Muskingum Water Authority that it could add customers from "an area of Mill Drive, Coal Run Road and Langland [sic] Lane with approximately 40-50 homes." (Ex. 89, East Muskingum Water Authority Board Meeting Minutes, Apr. 9, 1990, at 2.)

Despite the East Muskingum Water Authority's discriminatory release of the Coal Run neighborhood, it had no practical effect. The East Muskingum Water Authority pursued projects outside of its jurisdiction, when they were predominantly white areas, and a simple resolution by Washington Township could re-establish its jurisdiction. Ohio Rev. Code § 6119.05.

Throughout the 1980s and 1990s, making every effort to approach each entity that might provide water to the neighborhood, Coal Run residents continued their attempts to get water from the East Muskingum Water Authority. Coal Run residents attended an East Muskingum Water Authority meeting held to gauge interest for water in the area. (Ex. 40, Kreis Dep. at 34-35, 54.) The Coal Run residents expressed their need and desire for water, but the Coal Run neighborhood was excluded from the subsequent preliminary engineering reports as well as from attempts to recruit customers from the area. (Ex. 40, Kreis Dep. at 62-63.)

2. The City Constructs a Number of Waterlines Outside Its Corporate Limits

During the late 1980s and early 1990s, the City extended and improved waterlines in predominantly white areas outside the City limits. For example, the City of Zanesville installed a large line in Falls Township on Dresden and Military Roads that allowed residential tap-ins. (Ex. 58, Pletcher Dep. at 357-360.) Also in the mid 1990s, the City replaced its Coopermill Line in Springfield Township and allowed a number of residences in the predominantly white area to connect to the line. (Ex. 58, Pletcher Dep. at 385; Ex. 1, Bennett Dep. at 133-34.) In addition, the City replaced a water main in the Eagle Crest subdivision. (Ex. 58, Pletcher Dep. at 362; Ex. 1, Bennett Dep. at 86-87.)

The City at times would "butt heads" with other water providers over its plans for the development of waterlines outside its corporate limits. (See Ex. 41, Krischak Dep. at 27.) These disputes sometimes led to legal battles over the City's ability to provide water to an area in another water authority's jurisdiction. Undeterred, the City continued to pursue and construct such projects. (Ex. 41, Krischak Dep. at 27-29; Ex. 90, Letter on Behalf of the East Muskingum Water Authority to City, Nov. 15, 1995; *see also* Ex. 91,

Letter on Behalf of Falls Township Trustees to the East Muskingum Water Authority, Mar. 29, 1990.) During this period, the City made no effort to provide water to Coal Run where they would have faced no legal hurdles.

3. Coal Run Residents' Requests to the City and Washington Rural Water Authority Continue

During this time period, the Coal Run residents continued to request water from the City and Washington Rural Water Authority. In the late 1980s, Plaintiff Nancy Kennedy asked for water from the Washington Rural Water Authority and overheard the Washington Rural Water Authority representative say "[t]hose niggers will never have running water." (Ex. 35, Kennedy, Nancy Dep. at 28-29.) Plaintiff Helen McCuen testified about a meeting around 1981 on Old Adamsville Road where the Coal Run residents were told that "they couldn't bring [water] out here, out our way." (Ex. 48, McCuen, Helen Dep. at 17.)

Throughout the 1980s and 1990s, numerous Coal Run residents also requested water service from the City Water Superintendent, Robert Pletcher. (Ex. 92, Memorandum from Robert Pletcher to Jay Bennett, Nov. 12, 1998; Ex. 58, Pletcher Dep. at 256-257, 261-262, 270, 322, 344-346.) Mr. Pletcher, who later admitted that Coal Run residents had been requesting water for thirty-five years, gave varying explanations about why the City could not allow Coal Run residents to have water. Mr. Pletcher responded to James Hill's request by saying that he did not understand why the area could not get water. (Ex. 19, Hill, James Dep. at 32-33, 45-46.) When Richard Kennedy Sr. asked, Mr. Pletcher made some reference to pressure and discussed a planned pumping station and then said he was not in charge. (Ex. 38, Kennedy, Richard, Sr. Dep. at 60-61, 103-04; *see also* Ex. 39, Kennedy, Robert Dep. at 42-46.)

When John McCuen asked Mr. Pletcher for water, Mr. Pletcher told him that "there [were] two different sized lines and they wouldn't be able to match up." (Ex. 49, McCuen, John Dep. at 30-31.) Rather than merely accept the latest explanation, John McCuen suggested ways to resolve the difference in line sizes by using a "reducer," but Mr. Pletcher ignored his suggestions. (Ex. 49, McCuen, John Dep. at 40.) The City's Wastewater Superintendent had a similar response, directing Mr. McCuen to the East Muskingum Water Authority. (Ex. 49, McCuen, John Dep. at 41.) When Mr. McCuen called the East Muskingum Water Authority, however, he was told his request for water was a "City" problem. (Ex. 49, McCuen, John Dep. at 35-38.) Of course, when Mary Kennedy called the City seeking water for the Coal Run area, she was told "it was a county issue." (Ex. 34, Kennedy, Mary Dep. at 25.)

Meanwhile, the Coal Run residents' white neighbors continued to receive City water service. (Ex. 93, Letter from City, July 30, 1991; Ex. 94, Letter from City, May 9, 1990; Ex. 58, Pletcher Dep. at 165, 214, 215.) In 1990, James Lawyer, who is white, was given a water tap for 1820 Adamsville Road. (Ex. 94, Letter from City, May 9, 1990; Ex. 58, Pletcher Dep. at 212, 214.) In July of 1991 Janie Kotab, also white, was allowed to tap-in at 1663 Russell Street. (Ex. 93, Letter from City, July 30, 1991; Ex. 58, Pletcher Dep. at 215-16.) In 1991, the City extended water service to Terry Dobbins at 1675 Langan Lane. (Ex. 58, Pletcher Dep. at 165.)

4. The County Intensifies Its Efforts to Obtain Water for Commercial Projects and White Areas Throughout the County

Beginning around 1990, the County became very active in funding and constructing a host of water projects in the County. (Ex. 95, Muskingum Contributed Capital for Various Water Projects; Ex. 96, *Times Recorder* article: "Water Authority

Dissolved, County Takes Over," Mar. 4, 2003 ("Kenily said the county was instrumental in helping the association secure about $5 million for several waterline construction projects."); Ex. 53, Montgomery Dep. at 298-99.) For example, in 1991, the County agreed to cooperate in a project to construct an elevated water storage tank on Airport Road to serve the Wendy's New Bakery Plant to which the County contributed $1,296, 983.06. (Ex. 97, County Journal Entry; Ex. 98, County Journal Entry; Ex. 99, County Journal Entry; Ex. 95, Muskingum County Contributed Capital For Water Various Projects.) In addition, starting in 1994, the County constructed and funded a water project in the Sonora area to serve the Auto Zone business. (Ex. 100, County Journal Entry; Ex. 95, Muskingum County Contributed Capital For Various Water Projects.) As Commissioner Montgomery put it, "we paid for and built the line for Auto Zone, the County itself did, and then literally gave it to East Muskingum in order to get it done." (Ex. 53, Montgomery Dep. at 93.)

Some of these commercial projects, which the County generally pursued based on its own economic interest, were not limited to serving commercial entities. For example, the Sonora waterline constructed to serve Auto Zone also served residential users along Hicks Road. (Ex. 53, Montgomery Dep. at 194-95; Ex. 26, Kenily Dep. at 62.) Indeed, the County insisted on the allowance of residential taps as a condition of gifting the line to the East Muskingum Water Authority. (Ex. 53, Montgomery Dep. at 195-196.)

The County also pursued funding for projects serving residential areas in predominantly white areas of the County. In the mid- to late-1980s, the Commissioners approved the expenditure of Community Development Block Grant monies for engineering for the South Zanesville water well. (Ex. 101, County Journal Entry.) In the

early 1990s, the County contributed funds for water plant improvements in the Village of Frazeysburg. (Ex. 102, County Journal Entry; *see also* Ex. 103, County Journal Entry (County approves $9,500 in Issue 2 funds for waterline relocation in Roseville, Ohio).) Additionally, in the early to mid-1990s, the County funded and participated in a major water project in the Village of New Concord. (Ex. 104, County Journal Entry (County approving bid of $280,300 to build a 300,000 gallon elevated water tank for the Village of New Concord); Ex. 26, Kenily Dep. at 238.)

The County also advocated for other projects that it sought to have the East Muskingum Water Authority construct. For example, in 1993, County representatives made requests to the East Muskingum Water Authority to provide water to approximately forty-two homes in the predominantly white Lakeview Heights, which was experiencing acid water in its wells as a result of coal mining in the area. (Ex. 17, Hamilton Dep. at 65-66.)

Meanwhile, at that very time, the County Commissioners knew that the Coal Run neighborhood had similar water problems. Commissioner Montgomery stated that there was a long history of poor and failed wells in that area and was aware of the high sulfur content in the groundwater. (Ex. 53, Montgomery Dep. at 224, 284, 286.) Montgomery also noted that she received petitions and phone calls asking for water from Coal Run residents. (Ex. 53, Montgomery Dep. at 222.)

Commissioner Madden was similarly aware that the residents of the Coal Run neighborhood did not have water, having been a Washington Township trustee and attended East Muskingum Water Authority meetings where Coal Run residents sought water service. (Ex. 45, Madden Dep. at 114-15; *see also* Ex. 41, Krischak Dep. at 140-

41; Ex. 6, Coast Dep. 111-12, 175-76; Ex. 105, East Muskingum Water Authority Board Meeting Minutes, Mar. 13, 1995; Ex. 106, East Muskingum Water Authority Board Meeting Minutes, June 12, 1995.)

5. Jerry Kennedy and His Family, Like Other Coal Run Families, Suffer the Extreme Consequences of Not Having Water All the While in Sight of a Pumping Station

Coal Run residents like Jerry Kennedy and his family suffered severe consequences of not having water. In 1984, Plaintiffs Jerry Kennedy, his wife Marsha Kennedy, and their three children, moved to 1155 Langan Lane. (Ex. 30, Kennedy, Jerry Dep. at 56.) The family installed a cistern and Jerry hauled water to it in a truck he outfitted with a swimming pool liner. (Ex. 30, Kennedy, Jerry Dep. at 61-62.) The family also collected rainwater, melted snow, obtained water from a family member outside of the area, and purchased jugs of water. (Ex. 30, Kennedy, Jerry Dep. at 98.) The contaminated water from the cistern reeked of sewage and was undrinkable. (Ex. 36, Kennedy, Rebecca Dep. at 13.) At times, the family even found dead animals in the cistern. (Ex. 32, Kennedy, Marsha Dep. at 20.) Meanwhile the Kennedys' home was within sight of the water treatment plant that was pumping water to distant communities throughout the County. (Ex. 30, Kennedy, Jerry Dep. at 88; Figure 2, *supra* p. 16; Ex. 61, Pls. Expert Disclosure at Ex. B, Map S1.)

Jerry's children were the third generation of Kennedys who lived in the Coal Run Area without water. (Ex. 30, Kennedy, Jerry at 21-22.) Born and raised on Coal Run Road, Jerry had spent virtually his whole life without water. For years, Jerry's family had to take the children and the dishes to another home to be washed. (Ex. 32, Kennedy, Marsha Dep. at 31-32.) Their daughter Julia Landkrohn suffered from frequent illnesses,

including rashes and hives, while growing up. Despite the fact that treating doctors could not identify the cause of the rashes, the family dared not mention the lack of public water for fear that their children might be taken away. (Ex. 43, Landkrohn, Julia Dep. at 45-46.) As an adult, Julia was told by an employee of the Muskingum County Housing Rehabilitation, where she worked, that the Coal Run Area was not eligible for housing rehabilitation funds because the housing was considered "uninhabitable" due to the lack of good water. (Ex. 43, Landkrohn, Julia Dep. at 39.)

E. 1995-1999

1. Washington Township Begins Efforts to Obtain Water for Its Residents

In 1995, Washington Township Trustees became actively involved in seeking water for certain predominantly white areas in the Township. The Trustees went door-to-door collecting signatures on a petition for water service for an area just east of the Coal Run neighborhood. (Ex. 107, Timeline for Pleasant Grove-Adamsville Road Extension, 1995-96; Ex. 45, Madden Dep. at 67-69 (regarding petition).)[7] The Trustees presented the petition to the East Muskingum Water Authority, determined the contours of the requested project, and relayed information to the public regarding connection fees and how to sign-up. (Ex. 107, Timeline for Pleasant Grove-Adamsville Road Extension, 1995-96; Ex. 45, Madden Dep. at 67-69 (regarding petition).) As described in the East Muskingum Water Authority minutes:

> Washington Township Trustees, Don Madden and Doug Culbertson presented petitions of those in the area who desire to become customers of the Authority. They also

[7] Between 1994 and 2004, the Washington Township had four Trustees, Paul Bunting (1999-present); Clint Cameron (1994-present); Doug Culbertson (1986-present); and Don Madden (1994-1999). (Ex. 108, Township Interrogatory Responses.) Don Madden was subsequently elected a County Commissioner.

> had topo maps indicating where the houses are located. The Board instructed Mr. Vaughn [the East Muskingum Water Authority engineer] to go over these maps and come back as soon as possible with a cost of furnishing water to this area. At that time the Board will decide if it is feasible to extend service.

(Ex. 107, Timeline for Pleasant Grove-Adamsville Road Extension, 1995-96.) After an initial engineering report was completed, the East Muskingum Water Authority directed the Trustees "to call on those interested and see if they will sign up." (Ex. 107, Timeline for Pleasant Grove-Adamsville Road Extension, 1995-96.) The Township Trustees also participated in the public meetings held to encourage residents to sign-up for the line. (Ex. 107, Timeline for Pleasant Grove-Adamsville Road Extension, 1995-96.)

In determining who would be included in the petition and proposed project, Washington Township Trustees did not include the Coal Run Area, which Trustee Madden recognized had "a greater percentage of African-Americans" than other areas of the County. (Ex. 45, Madden Dep. at 17, 69-70, 120.)[8] This first attempt by the Trustees to bring water to the Adamsville Road/Pleasant Grove area failed because an insufficient number of households signed up for water service. (Ex. 107, Timeline for Pleasant Grove-Adamsville Road Extension, 1995-96.) Even then, knowing that Coal Run residents wanted and needed water, the Trustees still did not seek to include the Coal Run neighborhood in the petition or proposed project. (Ex. 45, Madden Dep. at 72-3.)

[8] *See also* (Ex. 4, Cameron Dep. at 31, 59-60; Ex. 7, Culbertson Dep. at 33, 86.)

2. The County Continues Funding Water Projects in Different White Areas of the County

During the second half of the 1990s, the County continued its efforts to improve water to certain white areas of the County. Among its projects was the "Adamsville Road Booster Station," which improved the water service for the almost exclusively white residents along Old Adamsville Road and halfway down Langan Lane. (Ex. 58, Pletcher Dep. at 221, 226; Ex. 53, Montgomery Dep. at 89-91, 189, 192-93; Ex. 45, Madden Dep. at 81.) The County contributed $6500 to the project and obtained $30,000 of federal funding for low- and moderate-income areas. (Ex. 109, Memorandum re: Financing the Adamsville Road Water Pump Station, Nov. 9, 1995; Ex. 159, Hamilton Ltr. to Michel, November 20, 1995.) The pump station only benefited those predominantly white residents on the Old Adamsville Road line, which ended next door to the first African-American family in Coal Run. (Ex. 110, Project Data for Booster Station; *see* Figure 3, *infra* p. 38.) Although not supplying water to them, the County used the relatively low incomes of the Coal Run residents to qualify for the federal funding. (Ex. 59, Quarles Dep. at 102-04.) The Washington Rural Water Authority and the City were also involved in the installation and funding of the pump station, with the Authority contributing funds and the City installing the pump. (Ex. 58, Pletcher Dep. at 225-26; Ex. 110, Project Data for Booster Station; Ex. 111, Water Supply Data-Ohio EPA.) After it was installed, the City owned and operated the pump station as a City facility. (Ex. 25, Jesse Dep. at 25, 32.)

The County also funded other residential projects during the mid- and late-1990s, including the installation of a water main for the predominantly white Village of Philo. (Ex. 112, Facsimile from B. Hamilton, Dec. 20, 1995; Ex. 58, Pletcher Dep. at 218.)

Later, the County "came to the rescue" of the residents of Philo by applying for and receiving funds to replace the community's water tank. (Ex. 53, Montgomery Dep. at 310-11.) Similarly, in 1997, the County authorized an expenditure of $41,328.22 for a waterline extension along the predominantly white Riley Road. (Ex. 113, County Journal Entry.)

The County also continued its funding of water projects for commercial entities throughout the County. (*See* Ex. 114, County Journal Entry (County contributed $100,000 to the Airport Industrial Park waterline project); Ex. 115, County Journal Entry (County contributed over $50,000 to the Norwich Water Line Extension project); *see also* Ex. 26, Kenily Dep. at 208-09; Ex. 95, Muskingum County Contributed Capital for Various Water Projects.) While the projects were primarily commercial, the County fully understood that these projects created opportunities to connect residences to the lines. For example, the County constructed a waterline to the East Pointe Industrial Park to serve the Dollar General warehouse. (Ex. 95, Muskingum County Contributed Capital for Various Water Projects; Ex. 116, County Journal Entry.) The County considered the possibility of providing water service to the predominantly white Adamsville Road area by connecting the area to this new Dollar General line. (Ex. 117, East Muskingum Water Authority Board Minutes, Aug. 9, 1999.)

Also in the late 1990s, the County continued its efforts to advocate for water service to predominantly white areas of the County. For example, in 1997, Commissioner Kenily dedicated himself to advocating for water to the Gaysport area in response to a *single* call seeking water for Gaysport. (Ex. 26, Kenily Dep. at 29, 33, 38-39, 40-43, 72-73, 172, 196.) Similarly, in 1997, the County began seeking its own

funding for waterline projects in the Adamsville, Chandlersville, and Licking Township areas — projects completed later when the County obtained its own water source. (Ex. 118, Muskingum County's 1997 FY Formula CDBG; Ex. 119, Muskingum County Water Master Plan, Mar. 2, 2004.)

Finally, beginning in 1998, the County began efforts to acquire the East Muskingum Water Authority, which the County believed was insufficiently responsive to requests for water. (Ex. 120, Letter to Kenily, June 8, 1998; Ex. 26, Kenily Dep. at 75.) Simultaneously, the County redoubled its own efforts to assess water needs in the County by hiring the engineering firm ME Companies to be its project manager for water and sewer projects. (Ex. 121, County Resolution, Apr. 23, 1998; Ex. 26, Kenily Dep. at 73-75; Ex. 53, Montgomery Dep. at 74.) The County also commissioned ME Companies to prepare the *Muskingum County Water & Sewer Plan* to assess water and sewer needs. (Ex. 121, County Resolution, Apr. 23, 1998; Ex. 53, Montgomery Dep. at 74.)

3. The East Muskingum Water Authority Again Revisits Providing Water to the Predominantly White Adamsville Road Area

In 1995, the East Muskingum Water Authority again considered commencing a water project in the predominantly white Adamsville Road area, which is adjacent to the Coal Run neighborhood. (Ex. 107, Timeline for Pleasant Grove-Adamsville Road Extension, 1995-96.) Again, despite Coal Run residents stating their desire for water at the public meetings held for residents to express interest in the project, the East Muskingum Water Authority did not consider including the Coal Run neighborhood. (Ex. 122, Preliminary Engineering Report, June 1995; Ex. 42, Kullman Dep. at 54, 72; Ex. 27, Kennedy, Bernard, Dep. at 47-48 (recounting his attendance at East Muskingum

Water Authority meetings and being told that water would only go as far as the top of the hill.)

Likewise, the East Muskingum Water Authority revisited the Adamsville Road project for a third time in 1998, and again did not consider including the Coal Run neighborhood despite its awareness of the need for water and the many requests made by its residents. (Ex. 123, Updated Cost Estimate, Feb. 25, 1998.)

4. The Washington Rural Water Authority Dissolves and the City Obtains Exclusive Control of the Old Adamsville Road Line

In 1996, the Washington Rural Water Authority approached the City about disbanding the Authority and allowing the City to exclusively own and operate the Old Adamsville Road line. (Ex. 124, City Memorandum, Oct. 3, 1996; Ex. 1, Bennett Dep. at 25.) In response, City Water Superintendent Pletcher stated that "[t]here is no need for [the Washington Rural Water Authority] to remain active. This association was only formed to attempt to get small system funding for the purpose of system upgrade such as was recently completed." (Ex. 124, City Memorandum, Oct. 3, 1996.) In fact, as Pletcher noted, the Ohio EPA had already concluded that the City was operating the Old Adamsville Road line. (Ex. 124, City Memorandum, Oct. 3, 1996.)

In April 1998, the Washington Rural Water Authority was formally dissolved. (Ex. 125, Judgment Entry Apr. 16, 1998.) As reflected in the dissolution order, the City "assumed and will continue to provide water service to the residents of the area served by [the Washington Rural Water Authority]." (Ex. 125, Judgment Entry Apr. 16, 1998.) Upon the Washington Rural Water Authority's dissolution, the City received all of its assets and records. (Ex. 126, Letter from City, Mar. 6, 2000; Ex. 51, Michel Dep. at 55.) Practically, however, the dissolution did not change the City's responsibility and it

merely continued its complete control over the line. (Ex. 58, Pletcher Dep. at 479) ("I ran it yesterday; I'll run'er tomorrow.").)

The City's policy of refusing tap-ins to Coal Run residents continued after the Washington Rural Water Authority dissolved in 1998, even though the City admits that the line had the capacity for additional users. (Ex. 64, 2000 City Report on Extension of Water to Coal Run Area; Ex. 58, Pletcher Dep. at 234, 251, 253 (testifying that as of 2003 the pump station still had capacity for five additional taps).) Nonetheless, the residents of the Coal Run neighborhood were still not allowed to tap-in. (Ex. 30, Kennedy, Jerry Dep. at 143-44.)

This remained true throughout the late 1990s, even though Coal Run residents regularly sought water from the City. Jerry Kennedy, for example, made multiple requests for water in the late 1990s. In 1998, he demanded to know why his white neighbors across the street were allowed to connect to the waterline. (Ex. 30, Kennedy, Jerry Dep. at 143-44.) Mr. Pletcher put him off, responding that he was not involved. (Ex. 30, Kennedy, Jerry Dep. at 143-44.) In a 1998 memorandum to the City's Public Service Director, Mr. Pletcher, the City's Water Superintendent, noted that he "had three inquiries in recent weeks on two different properties concerning a water main extension on Coal Run Road." (Ex. 92, Memorandum from Robert Pletcher to Jay Bennett, Nov. 12, 1998.) Pletcher also testified that Matilda Kimble from 1625 Coal Run Road asked for water service in the late 1990s. (Ex. 58, Pletcher Dep. at 256-57, 270.) In response to the request from Ms. Kimble, Pletcher actually drew up a proposal regarding how the City could extend a waterline down Coal Run Road. (Ex. 58, Pletcher Dep. at 255-56.)

Pletcher took this plan to City officials, but they did not follow up. (Ex. 58, Pletcher Dep. at 257, 259-60, 275-77.)

The City, however, continued to allow white residents to connect to the Old Adamsville Road line. (Ex. 30, Kennedy, Jerry Dep. at 143-44; Ex. 58, Pletcher Dep. at 166-67, 290, 294-95.) In 1998, Ray Lawson of 1595 Langan Lane was given permission to connect to the line. (Ex. 58, Pletcher Dep. at 166-67, 294-95; Ex. 127, Pre-Annexation Agreement for 1595 Langan Lane, Apr. 29, 1998.) The same year, John Bowers, who is white and lives across the street from Jerry Kennedy, was allowed to connect to the Old Adamsville Road line. (Ex. 58, Pletcher Dep. at 290, 444.)

As of 2000, the City's continuing differential treatment of requests from African Americans and whites continued the stark picture of whites with water and African Americans without. *See* Figure 3.

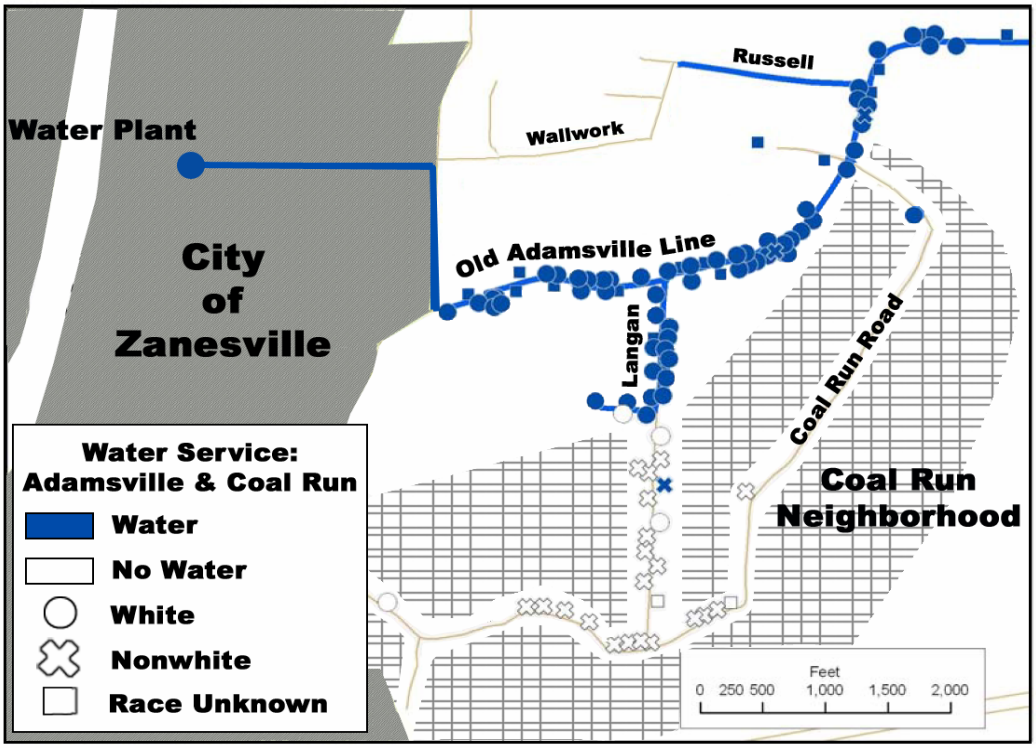

Figure 3. (Ex. 62, Ehler Decl.)

5. Richard Kennedy, Sr.'s Efforts to Provide His Family With Water.

Plaintiffs Richard Kennedy, Sr. and his wife Jeanene Kennedy moved to 1095 Langan Lane in 1961. (Ex. 38, Kennedy, Richard, Sr. Dep. at 15.) After raising their own children, they spent the 1990s raising their grandchildren in the same home. (Ex. 31, Kennedy, Marcus Dep. at 7.) Richard Kennedy, Sr. repeatedly paid for attempts to drill a well throughout the 1960s, but to no avail. (Ex. 38, Kennedy, Richard, Sr. Dep. at 74-75.) Instead, the family spent over $1,200 in 1962 to purchase and install a cistern. They also installed a waterline, pump, and tank to bring water from the cistern into the home. (Ex. 38, Kennedy, Richard, Sr. Dep. at 27.)

From 1962 to 2003, Richard Kennedy, Sr. purchased five trucks that he used solely to haul water to the family's cistern. (Ex. 38, Kennedy, Richard, Sr. Dep. at 26, 79-80.) From 1962 to 2003, Richard Kennedy, Sr. made almost daily trips to gather water from the City waterworks where City Water Superintendent Robert Pletcher worked. (Ex. 38, Kennedy, Richard, Sr. Dep. at 35.) The driveway to the residence was steep and when it was not passable in the winter, the family would not have water unless they carried water in buckets up the driveway. (Ex. 38, Kennedy, Richard, Sr. Dep. at 161.) As daughter Jessica Mirgon explained, the family would also have no water if the truck was having trouble. (Ex. 52, Mirgon, Jessica Dep. at 35.) Due to the corrosive effects of the contaminated water, the family had to replace pumps, pipes, and water tanks and heaters. (Ex. 38, Kennedy, Richard, Sr. Dep. at 77-78.)

Jeanene Kennedy saw how difficult it was for her children to grow up without water. (Ex. 29, Kennedy, Jeanene Dep. at 29.) As soon as she was able, Jeanene Kennedy's granddaughter, Plaintiff Jessica Mirgon, left the family because of the lack of

water. (*See* Ex. 52, Mirgon, Jessica Dep. at 40.) When Jessica Mirgon's grandparents offered her a free lot next to the family home at 1095 Langan Lane, she turned it down, because she would "never again live or raise her children without water." (Ex. 52, Mirgon, Jessica Dep. at 40.) At times, Marcus Kennedy had to miss school to help clear the driveway to haul water in the winter. (Ex. 31, Kennedy, Marcus Dep. at 17.) Even as a high school student in the late 1990s, Marcus Kennedy made his own requests for water at the City Water Department and the City waterworks and gathered a petition of requests for water in the area. (Ex. 31, Kennedy, Marcus Dep. at 18-19.)

F. 1999-July 2002

1. Certain City Employees Propose a Coal Run Waterline

In the fall of 1999, Joyce Hill, an employee with the State Department of Development, contacted Connie Quarles, the City's fair housing compliance officer, about the need for water in the Coal Run neighborhood. Ms. Hill suggested that the City might be able to help meet this need. (Ex. 59, Quarles Dep. at 49-50.) She explained the serious need for water and described both the use of cisterns to store hauled water and how residents often could not drink the stagnant and contaminated water from the cisterns. (Ex. 59, Quarles Dep. at 47-48, 59-60.) The City's Public Service Director at the time, Jay Bennett, recognized that a racial disparity existed in the delivery of water service and proposed that the City do something to fix it. (Ex. 59, Quarles Dep. at 63-64, 69-70.)

In response, City Water Superintendent Robert Pletcher conducted and drafted a new study for extending water from the City into the Coal Run neighborhood. (Ex. 64, 2000 City Report on Extension of Water to Coal Run Area.) In this March 2000 study,

Pletcher stated that "[f]or at least the last thirty-five years the residents of Coal Run Road, Langan Lane . . . have approached various members of the Zanesville Water Division as to the possibility of extending water into their neighborhoods." (Ex. 64, 2000 City Report on Extension of Water to Coal Run Area.) Pletcher proposed an improved water main that would serve the Coal Run neighborhood, and suggested that this new water main replace the water system that was already serving residents on Old Adamsville Road and the northern part of Langan Lane. (Ex. 64, 2000 City Report on Extension of Water to Coal Run Area.) Mr. Pletcher anticipated a cost of under $450,000 to complete the project. (Ex. 64, 2000 City Report on Extension of Water to Coal Run Area.) Mr. Pletcher concluded after considering the running of waterlines to the Coal Run neighborhood that "[t]he end to this dilemma is simple." (Ex. 64, 2000 City Report on Extension of Water to Coal Run Area.)

The City approached the County about seeking funding for this project. The City also conducted a preliminary engineering study and gave it to the County to review. (Ex. 60, Sims Dep. at 61; Ex. 1, Bennett Dep. at 41-42; Ex. 76, 2001 BBS Coal Run-Langan Lane Water Line Improvement Study.) The County Commissioners, however, rejected the proposal, stating that a Coal Run project "wasn't a priority for them" and the proposed project died. (Ex. 21, Hill, Joyce Dep. at 70-71, 104-05 (quoting Mike Sims, Public Service Director of the City of Zanesville); Ex. 128, Joyce Hill Notes; Ex. 60, Sims Dep. at 61.)

2. Coal Run Residents Continue Their Regular Water Requests to the City

The County's failure to pursue the Coal Run project proposed by the City did not relieve the City's obligations to provide water, but it took no action to construct the proposed project itself. Meanwhile, the Coal Run residents' requests for water to the City continued. In 2001, the Newmans had several conversations with Mr. Pletcher seeking water from the City. Initially, Mr. Pletcher said that the City was working on it but later told them to "talk to someone higher up." (Ex. 55, Newman, Judy Dep. at 30-32, 47-49, 69-75; Ex. 58, Pletcher Dep. at 261-262.) In 2002, the Fords attempted to move their Zanesville water service to their new home on Coal Run Road, but were told that there was no service in the area. (Ex. 10, Ford, Audrey Dep. at 12.) The Fords and the Newmans got no response, but the City did allow a nearby white household at 2093 Adamsville Road to connect to the City's waterline. (Ex. 58, Pletcher Dep. at 308.) Meanwhile, the City continued to extend and improve waterlines outside its corporate limits. The City went to the effort of hiring a boring company just to replace a line in the Quincy area of Springfield Township. (Ex. 58, Pletcher Dep. at 377-78.) In addition, the City installed a water main with spurs to serve residences outside the City's corporate limits in Wayne Township. (Ex. 58, Pletcher Dep. at 391-92.) The City waterlines now stretched in numerous directions surrounding the City, but not to Coal Run. *See* Figure 4.

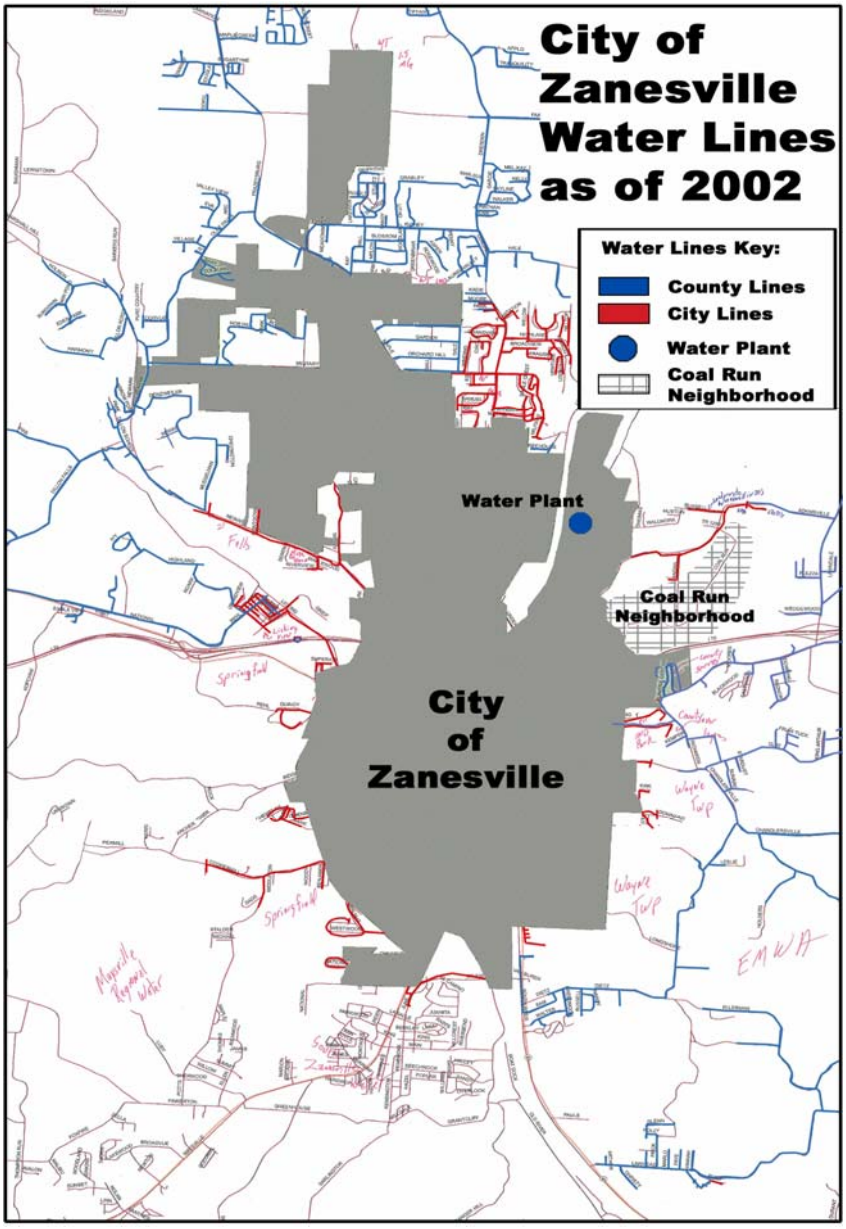

Figure 4. (Ex. 62, Ehler Decl.)

3. Washington Township Continues Its Efforts to Bring Water to the Predominantly White Adamsville Area

Despite the fact that the Washington Township Trustees' proposed Adamsville Road project had failed for lack of interest in 1995, Washington Township Trustees persisted in their efforts to bring water to the area through 2001. (Ex. 45, Madden Dep. at 72-73.) The Township's efforts resulted in the East Muskingum Water Authority

commencing the "Pleasant Grove" project, which was ultimately completed in 2002. (Ex. 41, Krischak Dep. at 42-43.) The project served all of the white residences directly to the east of the Coal Run neighborhood and would have only needed to be extended another 2,000 to 3,200 feet to reach the Coal Run neighborhood. (Ex. 7, Culbertson Dep. at 92-93.) The African-American Coal Run community was not included in the project. (Ex. 7, Culbertson Dep. at 92-93.)

One important aspect of the Trustees' efforts to bring water to the predominantly white Adamsville Road area was its legislative action to put a portion of the Pleasant Grove project area back in the East Muskingum Water Authority's jurisdiction. (Ex. 129, Washington Township Resolution, Apr. 19, 2001.) Under a law that permits a township to petition a regional water district for inclusion of part of their township into a district, s*ee* Ohio Rev. Code § 6119.05, Washington Township passed a resolution requesting the area's re-inclusion. (Ex. 129, Washington Township Resolution, Apr. 19, 2001 (resolution to file application with the East Muskingum Water Authority to add area to the East Muskingum Water Authority's jurisdiction as "an emergency measure necessary for the immediate preservation of the public health, safety, and welfare, because of the residents' immediate need for safe drinking water and fire suppression").) Although the area the Township put back into the East Muskingum Water Authority's jurisdiction was adjacent to the Coal Run neighborhood, which also had an immediate need for safe drinking water and fire suppression, no similar resolution was ever made to re-include the Coal Run Area in the jurisdiction of the East Muskingum Water Authority. (*See* Ex. 4, Cameron Dep. at 69-70; Ex. 7, Culbertson Dep. at 93, 104.)

The Trustees clearly knew at this time of the need for water in the Coal Run neighborhood. Jerry Kennedy directly asked Trustee Culbertson in 2002 when the Coal Run neighborhood would see water. (Ex. 7, Culbertson Dep. at 26.)

4. The County Continues Its Efforts to Extend Water to White Areas and Acquires the East Muskingum Water Authority

In 1999, the County created a Countywide Water and Sewer District and began working toward merging the East Muskingum Water Authority into this new district. (Ex. 130, County Resolution, Dec. 13, 1999.) In December 2000, the County entered into a formal cooperative agreement with the East Muskingum Water Authority. The Agreement gave the County a ten percent interest in the East Muskingum Water Authority's water treatment plants and well fields. (Ex. 71, Cooperative Water Agreement, Dec. 7, 2000.) In 2003, the County eventually acquired the entire East Muskingum Water Authority. (Ex. 74, Acquisition and Dissolution Agreement, Oct. 23, 2002; Ex. 75, Order Dissolving the East Muskingum Water Authority, Feb. 28, 2003; Ex. 131, County Resolution, June 26, 2003; Ex. 53, Montgomery Dep. at 49.)

Under the acquisition agreement, the East Muskingum Water Authority transferred all of its assets and liabilities to the County and then dissolved. (Ex. 74, Acquisition and Dissolution Agreement, Oct. 23, 2002.) The County continued operating the East Muskingum Water Authority's water system, serving its current customers, and employing its current personnel. (Ex. 74, Acquisition and Dissolution Agreement, Oct. 23, 2002.) The dissolution and assumption of liabilities became final on August 1, 2003.

On the eve of its dissolution, the East Muskingum Water Authority continued its efforts to provide water to white parts of the County. In June 2002, the Authority completed a project that ended a few thousand feet from the Coal Run neighborhood.

(Ex. 7, Culbertson Dep. at 92-93.) The predominantly African-American community was not, however, included in the project. (Ex. 7, Culbertson Dep. at 92-93; Ex. 132, Pleasant Grove/Adamsville Road Project 2001; Ex. 133, Certificate of Substantial Completion, June 10, 2002; Ex. 134, East Muskingum Water Authority Board Minutes, June 10, 2002.)

As of 2002, the County and East Muskingum Water Authority waterlines now spread throughout many parts of the County, all of which were predominantly white, but no lines reached Coal Run. *See* Figure 5.

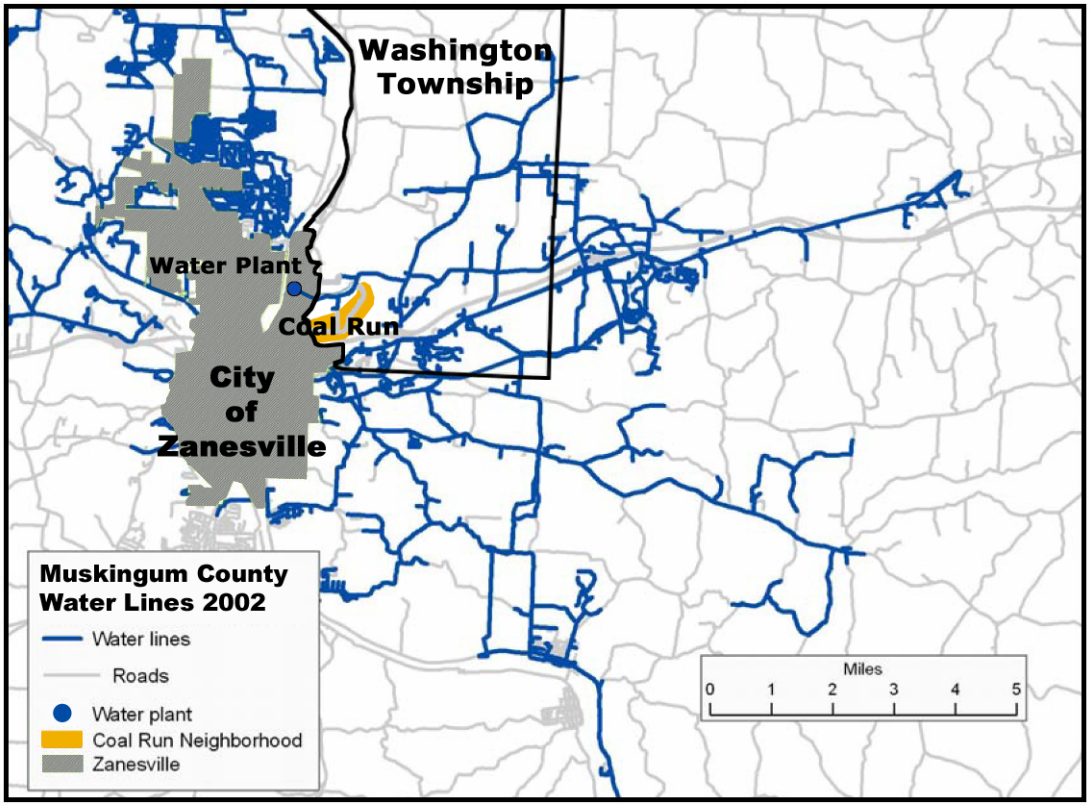

Figure 5. (Ex. 62, Ehler Decl.)

5. The County Begins Construction of Three Major Water Projects and Prioritizes Fourteen Others, But Coal Run Is Not on Either List

Upon its acquisition of a portion of the East Muskingum Water Authority, the County attempted to identify the areas where the County and the East Muskingum Water Authority could build new water projects. (Ex. 42, Kullman Dep. at 109-111; Ex. 41, Krischak Dep. at 81-84; Ex. 135, Handwritten List of Territory and Projects.) The result was a list of ten priority residential water projects to be completed by the County and four priority projects for the East Muskingum Water Authority. The areas reached into all parts of the County, but did not include the Coal Run area. (Ex. 136, Handwritten List of Territory and Projects, Sept. 19, 2000; Ex. 42, Kullman Dep. at 111; Ex. 41, Krischak Dep. at 84.) Each project was located in a predominantly white area.

The County's list of projects ultimately expanded and between January and April 2001, the County sought over seven million dollars to fund seventeen residential water projects including: (1) Adamsville Road, (2) Ballard Road, (3) Chandlersville Road, (4) Clay Pike/Millers Lane, (5) Clay Pike/Pleasant Grove Road, (6) Dillion Hills Road, (7) Gaysport Area, (8) Gorsuch Road, (9) Jackson Road, (10) Osborn Road, (11) Richvale Road, (12) Saint Mary's Cramery Road, (13) Sonora Road, (14) South Pleasant Grove Road, (15) U.S. 40 to New Concord, (16) Vista View Drive, and (17) Welsh Road. (Ex. 137, County Pre-Application, Jan. 10, 2001; Ex. 138, Letter to Senator Voinovich, Jan. 4, 2001.) Despite being well aware of the Coal Run area's need for water, the County Commissioners did not include Coal Run on the list. (*Compare* Ex. 138, Letter to Senator Voinovich, Jan. 4, 2001; Ex. 137, County Pre-Application, Jan. 10, 2001, *with* Ex. 45, Madden Dep. at 110-113, 135.)

The first three projects commenced by the County after obtaining its own water source were Chandlersville, Adamsville Road, and Gaysport — all predominantly white areas. (Ex. 53, Montgomery Dep. at 204, 212, 216.) While the County was declaring the lack of water in Gaysport, Chandlersville, and Adamsville "emergencies," the contaminated wells and complete absence of public water service in the Coal Run neighborhood did not rank it on the list of seventeen top priority areas. (Ex. 139, County Resolution, Apr. 23, 2001; Ex. 140, County Resolution, Apr. 23, 2001; Ex. 137, County Pre-Application, Jan. 10, 2001; Ex. 138, Letter to Senator Voinovich, Jan. 4, 2001; *see* Figure 6 (Map of County's Six Priority Projects, including Gaysport, Chandlersville, and Adamsville.)

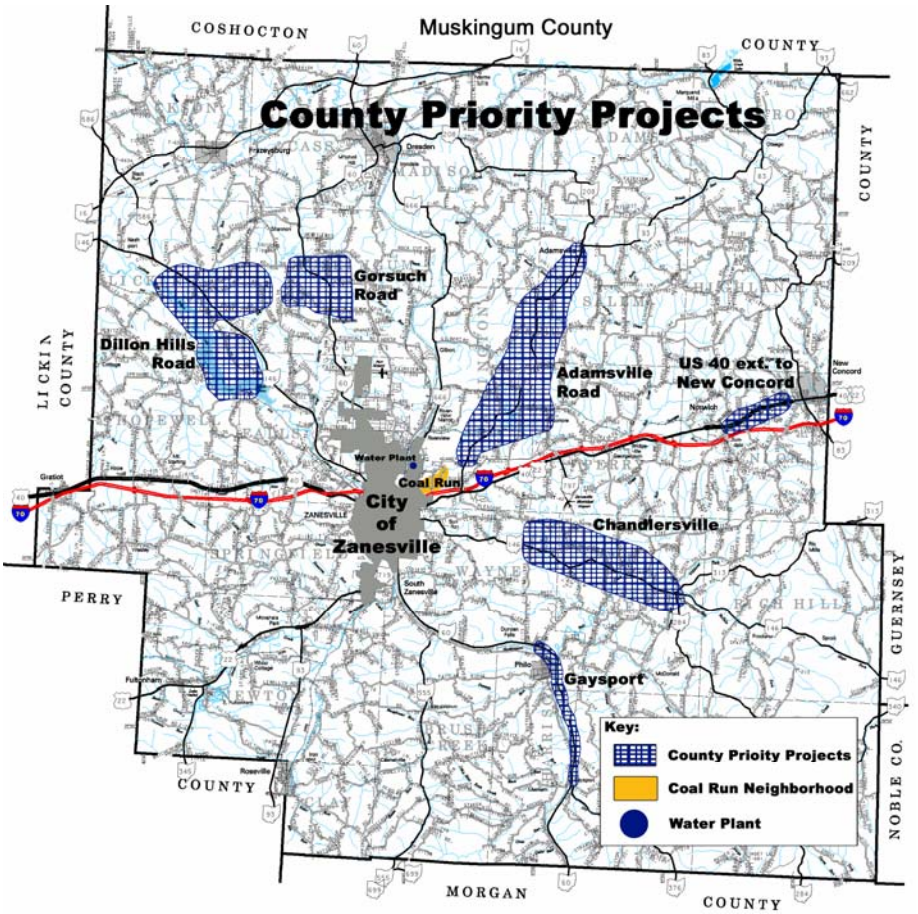

Figure 6. (Ex. 62, Ehler Decl.)

The County Commissioners prioritized these three projects in white areas even though the Commissioners knew that the East Muskingum Water Authority had earlier rejected the very same projects because of both a lack of interest by each area's residents and because none of the three projects was economically feasible. (*See, e.g.*, (Ex. 53, Montgomery Dep. at 49, 151; Ex. 45, Madden Dep. at 244-245.) As East Muskingum Water Authority officials described, the Chandlersville project, which the County made a first priority, was not completed by the East Muskingum Water Authority because of the "lack of people signing up for water." (Ex. 6, Coast Dep. at 78-80 (noting that the number of people that signed up for the project demanded the question "what's the need?").) Similarly, the Adamsville Road project was attempted twice by the East Muskingum Water Authority but was dropped each time for lack of interest. (Ex. 141, Letter from Attorney for the East Muskingum Water Authority, June 3, 1997 ("Unfortunately in this situation, the number of customers willing to commit was not sufficient to justify the expense of the project.").) The County, however, plowed ahead with the Adamsville Road project, prioritizing it because Commissioner Madden "knew" of the area's need for water. (Ex. 26, Kenily Dep. at 38-39, 91, 257-58.)

The Gaysport project not only had an insufficient number of interested residents, but was also difficult and expensive. As East Muskingum Water Authority Board Member Dinan said about the Gaysport area, "it didn't seem to us being on the [East Muskingum Water Authority] board that it was a feasible area for us to serve for two or three different reasons: The density of it, the length of the line to serve it. The customers, a lot of them were just weekenders that would go to the cottage sites on the

weekends." (Ex. 9, Dinan Dep. at 74; *see also* Ex. 42, Kullman Dep. at 43-44, 100-101; Ex. 6, Coast Dep. at 73.)

The difficulties and lack of interest drove up the costs for the projects. The Chandlersville project cost $1,488,850 and the cost per home was $9,305. (Ex. 119, Muskingum County Water Master Plan, Mar. 2, 2004.) Gaysport cost $1,218,408, and the cost per home was $9,230. (Ex. 119, Muskingum County Water Master Plan, Mar. 2, 2004.)

In comparison, when the Coal Run project was finally commenced after the filing of the discrimination complaints in this matter, it cost a total of $730,000 and only $5,140 per home. (Ex. 119, Muskingum County Water Master Plan, Mar. 2, 2004.) Moreover, while the eventual Coal Run project was almost fully funded with state and federal grants, the Gaysport and Adamsville Road projects received *no* grant funding. (Ex. 26, Kenily Dep. at 68.)

In addition to the Gaysport, Chandlersville, and Adamsville projects, the County also continued its advocacy efforts to have others bring water to certain areas in the County. In 2001, Commissioner Madden initiated the necessary steps to have the East Muskingum Water Authority run waterlines to the Mount Sterling area based on being approached from a representative of the EPA who suggested that the area was having trouble with its wells. (Ex. 142, East Muskingum Water Authority Board Minutes, May 14, 2001.) By 2002, with the Adamsville Road project completed, Coal Run was now completely surrounded by waterlines. Yet it still had no water. *See* Figure 7.

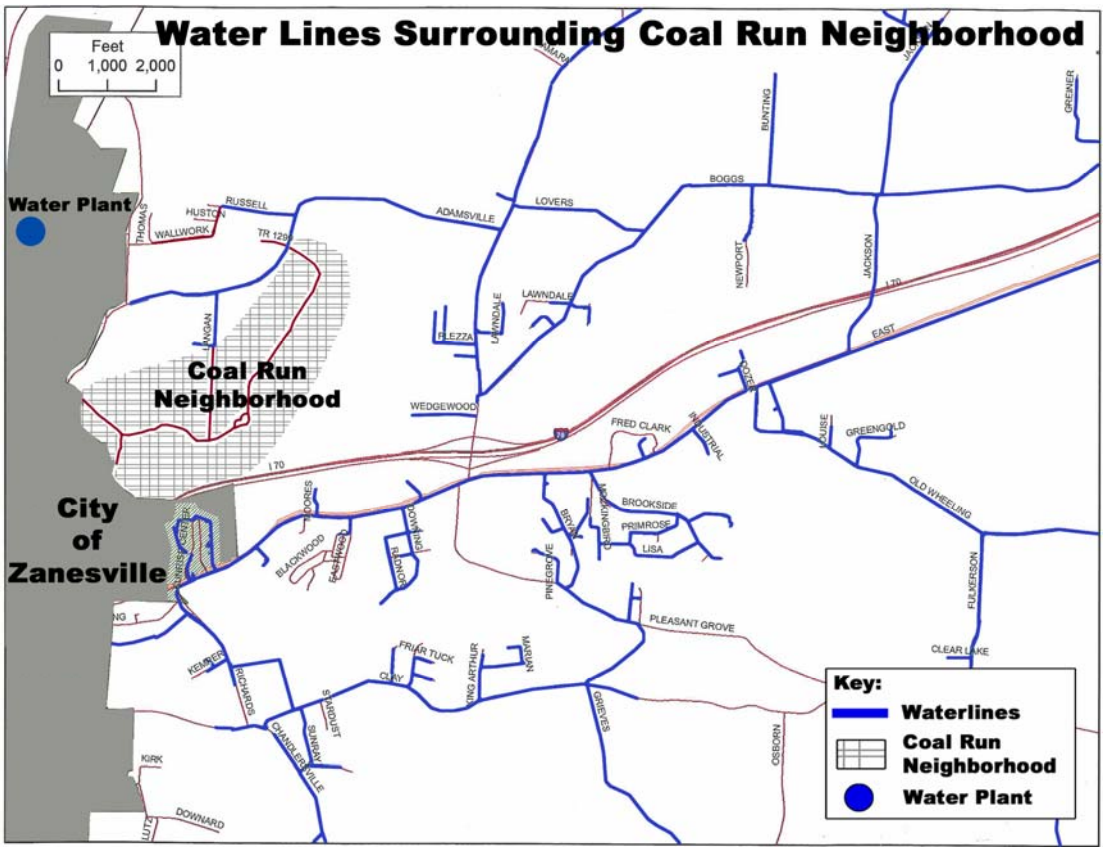

Figure 7. (Ex. 62, Ehler Decl.)

6. The County Rejects the Coal Run Residents' Requests for Water

While the County was engaged in all of this activity from 1999 to 2002 to bring water to far-flung, but predominantly white, areas, it explicitly rejected requests from the Coal Run area, which was only about a mile from the County's nearest water source. *See* Figure 2, *supra* p. 16. On December 13, 2001, Jerry Kennedy and Richard Kennedy, Jr., attended a County hearing on water projects. (Ex. 143, County Public Hearing, Dec. 13, 2001.) At that meeting, Jerry Kennedy asked about getting water in the Coal Run neighborhood. (Ex. 143, County Public Hearing, Dec. 13, 2001.) In response, Dorothy Montgomery summed up the County's long-standing position on the neighborhood. According to Commissioner Montgomery, the area "would not have water until the

President dropped spiral bombs and hopefully hit deep enough to hit good water." In Montgomery's view, maybe Coal Run's "great grandchildren would see water." (Ex. 144, Kennedy, Richard and Kennedy, Jerry Affs.)

Commissioner Madden responded to the Coal Run residents' requests by saying "that there weren't enough houses in the area to support a water project." Madden placed the cost at $3.5 million. (Ex. 144, Kennedy, Richard and Kennedy, Jerry Affs.) The County, though, had not conducted any cost analysis of serving the area, had not examined the number of homes that might seek service, and even the City's assessment from 2001, which the County had received, had only projected a cost of $1.9 million. (Ex. 76, 2001 BBS Coal Run-Langan Lane Water Line Improvement Study; Ex. 60, Sims Dep. at 61.)[9]

Other residents of Coal Run also sought water from the County in 2000 and in following years. When the Hairstons, who are African American, moved to 1800 Coal Run Road, they contacted the County Health Department about obtaining water service. (Ex. 12, Hairston, Cynthia Dep. at 66.) The County representative told them that they would have to dig a well. (Ex. 12, Hairston, Cynthia Dep. at 66.) Likewise, the Fords also discussed receiving water from the County with Gerald Howard, who is the assistant to the County Commissioners with responsibility for water. (Ex. 10, Ford, Audrey Dep. at 17-19; Ex. 24, Howard Dep. at 11, 14.)

[9] According to the County's own official account of the meeting, the Commissioners suggested that only the City had the power to bring water to the Coal Run area and that they would "check with the City to see the status of the water situation for the [Coal Run neighborhood]." (Ex. 143, County Public Hearing, Dec. 13, 2001.) The County, of course, did have the power to bring water to Coal Run, as demonstrated by its pursuit of projects seemingly everywhere else in the County. The County never did "check" with the City. (Ex. 45, Madden Dep. at 288-289.)

7. The Harms of No Water Continue as the Next Generation of Coal Run Residents, Like Cynthia Hale Hairston, Return Home

In 2000, Plaintiff Cynthia Hairston returned to Coal Run Road with her husband, Plaintiff Lynn Hairston, and son, Plaintiff Thomas King. (Ex. 12, Hairston, Cynthia Dep. at 25.) After being rebuffed in their efforts to obtain water, the Hairstons installed a well and pumping system. (Ex. 12, Hairston, Cynthia Dep. at 25.) Despite filters and softeners, the Hairstons still had to purchase bottled water for drinking and cooking. (Ex. 12, Hairston, Cynthia Dep. at 38.) The water was so contaminated by the mines in the area that it clogged the pumping systems and discolored clothes. (Ex. 12, Hairston, Cynthia Dep. at 43-46.) Ms. Hairston held numerous meetings with neighbors about the lack of water and on the morning of one of the meetings, she awoke to find a severed pig's head in her driveway. (Ex. 12, Hairston, Cynthia Dep. at 106-07.)

Cynthia had grown up on Coal Run Road, and her return as an adult in 2000 was a return to a childhood neighborhood that still had no public water service. (Ex. 12, Hairston, Cynthia Dep. at 26, 28.) Cynthia's parents, Plaintiffs Rodney and Doretta Hale, moved to 1775 Coal Run Road in 1956 and lived there continuously for over fifty years,[10] during which time they raised their children, Plaintiffs Cynthia Hairston, Mark Hale, and Karen Gilbert. (Ex. 14, Hale, Doretta Dep. at 9-11.) The Hales had a well and installed a system to bring water into their home, but the well never provided enough water for washing. (Ex. 16, Hale, Rodney at Dep. 16.) The contaminated water forced the Hales to buy bottled water for drinking, and to repeatedly replace the electric pump, kitchen and

[10] From 1948 until 1956, Rodney Hale lived in a home at the 1600 block of Coal Run Road with his family of origin. Rodney and Doretta Hale lived at a second address at that property in 1956 for several months prior to moving to the 1775 Coal Run Road address.

bathroom sinks, toilets, electric washers, hot water heater, faucets, faucet filters, toilet fixtures, sink valves, shower heads, and the entire steel plumbing system. (Ex. 16, Hale, Rodney Dep. at 33-37.)

G. July 2002-Present

1. Coal Run Residents Continue Seeking Water from All Defendants

In the spring of 2002, the residents of the Coal Run neighborhood retained counsel to assist them in obtaining water. On May 28, 2002, counsel sent a letter to the County, the City, and the East Muskingum Water Authority asking that they "immediately come together to take what ever steps are necessary" to bring water to the neighborhood. (Ex. 145, Letter from Equal Justice Foundation, May 28, 2002; *see also* Ex. 146, Letter to County, July 15, 2002.) In July, a meeting was held to discuss the desperate need for water in Coal Run. (Ex. 147, Letter from Equal Justice Foundation, July 12, 2002.) Present at the meeting were residents and government officials. (Ex. 59, Quarles Dep. at 96-97.) The residents asked for water service, and again pointed out the blatant racial disparity between the treatment of their neighborhood and the surrounding areas. (Ex. 59, Quarles Dep. at 101-02, 174; Ex. 12, Hairston Cynthia Dep. at 59-61; Ex. 13, Hairston, Lynn Dep. at 32-37; Ex. 30, Kennedy, Jerry Dep. at 108; Ex. 28, Kennedy, Dennis Dep. at 44-45.) The government officials provided no response to this request.

2. Plaintiffs File Discrimination Complaints Under the Antidiscrimination Laws and Water Finally Comes to Coal Run

On July 26, 2002, Plaintiffs filed discrimination complaints with the Ohio Civil Rights Commission alleging that the County, City, and Township had engaged in a pattern and practice of discrimination in violation of the fair housing laws by refusing to

provide water service to the Coal Run neighborhood. (*See* Ex. 148, OCRC Probable Cause Finding.) The discrimination complaints finally spurred a response. As Defendant Madden admitted, little had been done, "if anything, with the Coal Run project up until the time of the filing of the civil rights complaint." (Ex. 45, Madden Dep. 137, 219.) Madden explained that the eventual efforts to bring water to Coal Run were the result of wanting to be "responsive to the complaint." (Ex. 45, Madden Dep. at 295.)

On August 12, 2002, less than two weeks after the filing of the Plaintiffs' discrimination complaints, the County sought permission to tie into the neighboring East Muskingum Water Authority's Pleasant Grove line in order to bring water to Coal Run. (Ex. 149, East Muskingum Water Authority Board Minutes, Aug. 12, 2002; Ex. 41, Krischak Dep. at 111, 121, 134; Ex. 9, Dinan Dep. at 118; Ex. 42, Kullman Dep. at 129-30.) Commissioner Madden candidly admits that the request was prompted by the discrimination complaints:

> Q. What was it that led you to go down there on August 12, 2002 and make this request?
>
> A: As, obviously, reflected here, the Civil Rights Commission letters and certainly the meeting with the residents, the July 26 meeting. This would probably have been their first regular meeting after that date.

(Ex. 45, Madden Dep. at 308.)

On August 14, 2002 the Governor's office convened representatives of all of the area governments "to find a way to get water to these people."[11] (Ex. 41, Krischak Dep.

[11] The August 14, 2002 meeting was attended by Jack Fenton, the Mayor of the City of Zanesville, Mike Sims, the Public Service Director for the City of Zanesville, County Commissioner Madden, Washington Township Trustee Culbertson, Tom Kullman, East Muskingum Water Authority President, James Krischak, East Muskingum Water Authority counsel, Jill Lengler, OMEGA, and Joy Padgett and Jennifer Simon,

at 112.) The question being asked was "how fast people could get geared up to construct and deal with the problem of lack of water-service in that area." (Ex. 41, Krischak Dep. at 112, 115, 119-120.) The answer was that with discrimination complaints pending, "very fast." Within days of the meeting, the County commenced a water project for Coal Run that would be covered almost entirely by state and federal grants. Construction began shortly thereafter, and in early 2004, after fifty years of requests, denials, excuses, finger-pointing, and suffering, water finally flowed to Coal Run.

LEGAL STANDARD

Summary judgment is governed by Rule 56(c) of the Federal Rules of Civil Procedure. The Rule provides:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

"[T]his standard provides that the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986) (emphasis in original); *Kendall v. Hoover Co.*, 751 F.2d 171, 174 (6th Cir. 1984).

Summary judgment will not lie if the dispute about a material fact is genuine. "[T]hat is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson*, 477 U.S. at 248. The purpose of the procedure is not to

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from the Governor's Office of Appalachia. (Ex. 150, Meeting Sign-in Sheet, Aug. 14, 2002; Ex. 41, Krischak Dep. at 113.)

resolve factual issues, but to determine if there are genuine issues of fact to be tried. *Lashlee v. Sumner*, 570 F.2d 107, 111 (6th Cir. 1978). Therefore, summary judgment will be granted "only where the moving party is entitled to judgment as a matter of law, where it is quite clear what the truth is, . . . [and where] no genuine issue remains for trial, . . . [for] the purpose of the rule is not to cut litigants off from their right of trial by jury if they really have issues to try." *Poller v. Columbia Broad. Sys., Inc.*, 368 U.S. 464, 467 (1962) (internal citation omitted); *accord County of Oakland v. City of Berkeley*, 742 F.2d 289, 297 (6th Cir. 1984).

In a motion for summary judgment the moving party bears the "burden of showing the absence of a genuine issue as to any material fact, and for these purposes, the [evidence submitted] must be viewed in the light most favorable to the opposing party." *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970) (footnote omitted.) Inferences to be drawn from the underlying facts contained in such materials must be considered in the light most favorable to the party opposing the motion. *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962); *Watkins v. Northwestern Ohio Tractor Pullers Ass'n, Inc.*, 630 F.2d 1155, 1158 (6th Cir. 1980).

Simply put, as long as a decision in favor of the non-moving party would not be "the result of sheer surmise and conjecture," a district court shall not grant judgment as a matter of law. *LeBlanc-Sternberg v. Fletcher*, 67 F.3d 412, 429 (2d Cir. 1995).

ARGUMENT

Defendants raise three general categories of arguments in support of their Motions for Summary Judgment. First, Defendants make procedural arguments related to statutes of limitations and standing. Second, Defendants assert that the evidence is insufficient to support Plaintiffs' claims of discrimination. Third, Defendants raise minor legal arguments related to the reach of certain Plaintiffs' claims. Each argument is based on a misapplication of the relevant law or a misunderstanding of the record developed in the case. Plaintiffs address each argument in turn.

DEFENDANTS' PROCEDURAL ARGUMENTS

Defendants make three initial, procedural assertions in opposition to Plaintiffs' claims: (1) that the individual Plaintiffs' claims are time-barred; (2) that the Ohio Civil Rights Commission's complaint was untimely; and (3) that some Plaintiffs do not have standing to bring their claims because they are not minorities or did not make sufficiently individualized and specific requests for water. All three arguments fail. The arguments are contrary to controlling case law and misapprehend the factual basis for Plaintiffs' claims. As Plaintiffs describe in the next three sections, Defendants have engaged in a continuing discriminatory practice of denying the Coal Run neighborhood water service, which tolls the running of the statute of limitations for each of the individual Plaintiffs; the Ohio Civil Rights Commission issued a complaint in a timely manner; and all Plaintiffs have standing based on the injuries they have suffered resulting from the discriminatory denial of water to Coal Run.

I. Defendants Have Engaged In a Continuing Violation of the Fair Housing Laws

The evidence establishes that Defendants have engaged in a continuous and ongoing discriminatory practice of denying water to the Coal Run neighborhood because the neighborhood is predominantly African American. That practice, which commenced decades ago and continued until after Plaintiffs filed discrimination complaints in this matter, constitutes a continuing violation. As Plaintiffs will now explain, the continuing violations doctrine allows them to pursue claims beyond the limitations period and back to the beginning of Defendants' discriminatory practice.

A. *Havens Realty v. Coleman* Controls the Consideration of an Alleged Continuing Violation of the Fair Housing Act

The analysis of a continuing violation under the fair housing laws is controlled by the Supreme Court's decision in *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 380-81 (1982). In *Havens*, the Court found that "where a plaintiff, pursuant to the Fair Housing Act, challenges not just one incident of conduct violative of the Act, but an unlawful practice that continues into the limitations period, the complaint is timely when it is filed within [two years][12] of the last asserted occurrence of that practice." *Havens*, 455 U.S. at 380-81. The *Havens* plaintiffs alleged that a realty company, which owned and operated two apartment complexes in Henrico County, Virginia, maintained a continuing practice of "steering" African-American apartment seekers away from those complexes by giving them false information about the availability of units. *Id.* at 366. The Court found that acts of steering that occurred outside the limitations period were actionable because

[12] When *Havens* was decided the statute of limitations period under the Fair Housing Act was 180 days. Subsequently, the Act was amended to provide for a two-year statute of limitations. 42 U.S.C. § 3613(a)(1)(A).

plaintiffs challenged "a continuing violation manifested in a number of incidents — including at least one . . . that is asserted to have occurred within the [limitations] period." *Id.* at 381. The *Havens* decision exclusively controls the interpretation of the Fair Housing Act's limitations period because it is the Supreme Court's sole opinion examining the operation of the Act's statute of limitations provision and both the Act and the provision are unique.

As an initial matter, the *Havens* decision was based on the explicit recognition that "Petitioners' wooden application of [the Act's statute of limitations provision], which ignores the continuing nature of the alleged violation, only undermines the broad remedial intent of Congress embodied in the Act." *Id.* at 380. The Court has long recognized that the Act must be given "a generous construction" because it embodies a "policy of the United States that Congress considered to be of the highest priority." *Trafficante v. Metro Life Ins. Co.*, 409 U.S. 205, 209, 212 (1972) (citation omitted); *see also City of Edmonds v. Oxford House*, 514 U.S. 725, 731 (1995) (reaffirming *Trafficante*'s recognition of the Act's "broad and inclusive compass" and its entitlement to a "generous construction"); *United States v. Edward Rose & Sons*, 384 F.3d 258, 264 (6th Cir. 2004) (noting that the Fair Housing Act serves an "overriding societal priority") (citation omitted).

In addition, unlike Title VII, the limitations provision of the Fair Housing Act statutorily incorporates the continuing violations doctrine by stating that a civil action must be commenced not later than two years after "the occurrence *or the termination* of an alleged discriminatory housing practice . . . whichever occurs last." 42 U.S.C.

§ 3613(a)(1)(A) (emphasis added); *see* 24 C.F.R. § 103.40(c) (interpreting parallel limitations period as providing that "[w]here a complaint alleges a discriminatory housing practice that is continuing, as manifested in a number of incidents of such conduct, the complaint will be timely if filed within [two years] of the last alleged occurrence of that practice."); *compare* 42 U.S.C. § 2000e-5(e)(1) (Title VII limitations provision requiring the filing of a complaint within "one hundred and eighty days after the alleged unlawful employment practice *occurred. . .*").

Following *Havens*, a number of courts, including the Sixth Circuit, have routinely applied the continuing violations doctrine in fair housing cases to allow plaintiffs to pursue acts that occurred beyond the limitations period.[13] For example, in *Heights Community Congress v. Hilltop Realty, Inc.*, 629 F. Supp. 1232, 1250 (N.D. Ohio 1983), the plaintiffs alleged that the defendants had engaged in the unlawful racial steering of customers based on race. Many of the alleged specific incidents of steering occurred outside the limitations period, and the defendants argued that those incidents were time-barred. *Id.* at 1250-51. The district court, however, disagreed because the plaintiffs alleged that each of the alleged discriminatory acts was part of "an unlawful practice that extended into the limitations period" and that *Havens* compelled the consideration of those acts under the continuing violation doctrine. *Id*. at 1251. The trial court eventually found that eight incidents of steering over the course of several years did indeed constitute a "continuing practice" and a "continuing violation" under the Act. *Id*. at 1293-1294, 1303. The Sixth Circuit explicitly affirmed the district court's application of

[13] Ohio courts have similarly applied the *Havens* continuing violations doctrine to claims arising under the Ohio fair housing law. *See Graves v. Van Buskirk*, C.A. No. 14785, 1991 Ohio App. Lexis 759 (Ohio Ct. App., Feb. 20, 1991).

the *Havens* continuing violation doctrine. *Heights Cmty. Cong. v. Hilltop Realty, Inc.*, 774 F.2d 135, 141 (6th Cir. 1985).

The Sixth Circuit again applied *Havens* in its recent decision in *Fair Housing Council, Inc. v. Village of Olde St. Andrews*, No. 05-0862, 2006 U.S. App. Lexis 31217, at *7 (6th Cir. Dec. 15, 2006). There, the plaintiffs claimed that the defendants had failed to design and construct three housing developments in compliance with the accessibility construction requirements of the Fair Housing Act, 42 U.S.C. § 3604(f). *Id.* at *2. Although two of the three developments were still under construction when suit was filed, the third had been constructed and its last unit had been sold beyond the two-year limitations period. The defendants argued that any claim involving this earlier development was time-barred. But citing *Havens* and the continuing violation doctrine, the Sixth Circuit disagreed:

> [W]here the plaintiff can show that the owner of several housing developments engaged in a continuous policy or practice with regard to the noncompliant design and construction of each of the developments, the continuing violation doctrine may toll the running of the limitations period until the last unit of *all* of the implicated developments is sold.

Id. at *37; s*ee also United States v. City of Parma*, 661 F.2d 562, 571 (6th Cir. 1981) (finding continuing violation based on a variety of acts taken pursuant to City's overarching policy of discouraging minority residents and maintaining segregation).

In this case, Plaintiffs similarly challenge a practice that was manifested through a long history of discriminatory acts by each of the Defendants that continued into the limitations period. *Havens*, therefore, mandates a finding that the numerous incidents of discrimination, which, as described in the following sections, were taken by each Defendant pursuant to its discriminatory practice, are actionable.

B. Plaintiffs Have Adduced Substantial Evidence of Defendants' Ongoing Discriminatory Practices

In this action, Plaintiffs challenge Defendants' long-standing discriminatory practice of denying water services to the Coal Run neighborhood. The practice generally manifested itself in three forms: (1) passing over the predominantly African-American Coal Run neighborhood to construct water projects in predominantly white neighborhoods; (2) refusing requests for water service to the Coal Run neighborhood while simultaneously granting requests for water to predominantly white neighborhoods; and (3) allowing white households, but not African-American households, to connect to the Old Adamsville Road line.

Plaintiffs will now discuss each of these forms of discrimination, which constitute a singular discriminatory practice, jointly engaged in by all Defendants, of denying water to the Coal Run neighborhood. *See City of Parma*, 661 F.2d at 571 (finding continuing violation based on a variety of acts taken pursuant to City's overarching policy of discouraging minority residents and maintaining segregation); *Bradley v. Carydale Enter.*, 707 F. Supp. 217, 220-21 (E.D. Va. 1989) (finding that a series of different types of discriminatory acts taken against tenant constitute a continuing violation).

1. Defendants Regularly Constructed Water Projects in Predominantly White Areas While Disregarding the Coal Run Neighborhood

The first manifestation of Defendants' discriminatory practice is reflected in the overwhelming body of evidence demonstrating repeated and regular decisions to pursue water projects in predominantly white neighborhoods while passing over Coal Run. The evidence supports a finding that these decisions were made with full knowledge of Plaintiffs' urgent need and desire for water service. Defendants' practices were based on

race and therefore constitute a continuing violation of the fair housing laws. The Plaintiffs will discuss the facts showing how each Defendant disregarded the Coal Run neighborhood each time it considered water projects in the County.

i. The City Constructed Water Projects in Areas All Around the City But Never to the Coal Run Neighborhood

The evidence shows that since at least 1954, the City has been aware of the need for water in the African-American Coal Run neighborhood but has continuously ignored that need in favor of constructing water projects in predominantly white areas. The evidence permits, therefore, a finding that the City has engaged in a continuing violation of the fair housing laws from 1954 until 2002.

The City admits that Coal Run residents began seeking water in the 1950s and 1960s: "[f]or at least the last thirty-five years the residents of Coal Run Road, Langan Lane, . . . have approached various members of the Zanesville Water Division as to the possibility of extending water into their neighborhoods." (Ex. 64, 2000 City Report on Extension of Water to Coal Run Area at 00063). Plaintiffs have testified to requests for water from the City as early as 1954 when Plaintiff Marvin Kennedy and a number of his neighbors approached the City and Washington Rural Water Authority about extending the Old Adamsville Road line, which was only in the planning stages at the time. (*See, e.g.*, Ex. 33, Kennedy, Marvin Dep. at 21, 23-24.) The City continued to be aware of the need for water in the Coal Run neighborhood over the next fifty years. (*See, e.g.*, Ex. 145, Letter from Equal Justice Foundation, May 28, 2002 (noting need for water in Coal Run area as recently as May 2002).) Nonetheless, the City continued to pursue water projects in predominantly white areas adjacent to the City and by the time the complaints

were filed in this matter, the City's waterlines extended outside of the City and into every township surrounding it. *See* Figure 4, *supra* p. 43.

The water projects the City actually undertook were often more difficult than a Coal Run project would have been and caused significant legal and political battles. For example, the City built the Joe's Run project in a white neighborhood in the face of threats by the East Muskingum Water Authority that the City was encroaching on its territory. (Ex. 90, Letter on Behalf of Falls Township Trustees to City, Nov. 15, 1995; Ex. 41, Krischak Dep. at 27-28.) Falls Township challenged the City's annexation of the predominantly white Big Bear area of the Township for the purpose of providing water. (Ex. 91, Letter on Behalf of Falls Township Trustees to the East Muskingum Water Authority, Mar. 29, 1990.) Coal Run posed no such legal obstacles to the delivery of water.

ii. The East Muskingum Water Authority Constructed Waterlines in White Areas for Nearly Four Decades But Never Even Considered the Coal Run Neighborhood

Since its establishment in 1967, the County's predecessor — the East Muskingum Water Authority — considered and constructed water projects in predominantly white areas all over the County. *See* Figure 5, *supra* p. 46. The East Muskingum Water Authority was always aware of the Coal Run area's need for water, but never even considered a water project in that neighborhood. The evidence, therefore, supports a finding that the East Muskingum Water Authority maintained a discriminatory practice since at least 1967. As described in more detail in Plaintiffs' Partial Motion for Summary Judgment on the Liability of Muskingum County for the East Muskingum Water Authority, the County assumed the liabilities of the East Muskingum Water Authority

and is therefore liable for the Authority's continuing violation, which extended into the limitations period.

By 2003, when the East Muskingum Water Authority was acquired by the County, its waterlines reached miles from its water sources, creating a web of water across much of the County. *See* Figure 5, *supra* p. 46. Those waterlines came up to the Coal Run neighborhood, but never in it.

The East Muskingum Water Authority had been aware of the Coal Run neighborhood's need and desire for water since 1968 or 1969 when Coal Run residents approached the Authority, seeking water service. (Ex. 38, Kennedy, Richard, Sr. Dep. at 52-54.) The residents kept the Authority on notice of their need for water over the next four decades. *See* Factual Background *supra* and Discussion *infra.*

Each waterline laid by the East Muskingum Water Authority, therefore, reflects a decision to prioritize bringing water to a white area over bringing water to the Coal Run neighborhood. Those discriminatory decisions continued into 2002 as the East Muskingum Water Authority constructed the Pleasant Grove project in the predominantly white area bordering the eastern edge of the Coal Run neighborhood. (Ex. 132, Pleasant Grove/Adamsville Road Project 2001; Ex. 145, Letter from Equal Justice Foundation, May 28, 2002; Ex. 133, Certificate of Substantial Completion, June 10, 2002.)

iii. The County Consistently Passed Over Coal Run When Constructing and Funding Water Projects

The County's direct involvement in the provision of water began in 1990 when it began constructing and funding water projects in predominantly white areas in the County. (Ex. 73, County Journal Entry.) From that time until Plaintiffs filed discrimination complaints in this matter, the County knew of the Coal Run area's need

for water but consistently ignored it while pursuing projects in a variety of other areas in the County. The evidence, therefore, demonstrates a continuing violation by the County since 1990.[14]

The County constructed and funded numerous residential and commercial projects throughout the 1990s and 2000s. *See* Discussion *supra* pp. 27-30, 33-35, 46-51. The County Commissioners took pride in having contributed over five million dollars to the East Muskingum Water Authority for these joint projects. (Ex. 96, *Times Recorder* article: "Water Authority Dissolved, County Takes Over," Mar. 4, 2003 ("Kenily said the county was instrumental in helping the association secure about $5 million for several waterline construction projects.").) Examples of residential projects before 2000 notably include providing grant and matching funding for a booster station to improve pressure on the Old Adamsville Road waterline — but only for the white residents who were already tapped into the line. (Ex. 110, Project Data for Booster Station.) None of those efforts was directed toward the Coal Run neighborhood until the discrimination complaints were filed in this matter.

County representatives were always aware of the need for water in the Coal Run neighborhood. (Ex. 72, County Journal Entry; Ex. 45, Madden Dep. at 115-117 (testifying that he knew there was no water in the Coal Run area before he became a County Commissioner in 1998); Ex. 53, Montgomery Dep. at 284-286 (testifying that she lives in the neighboring Adamsville Road area and that the contamination of water in the

[14] In addition, the County, as described in Plaintiffs' Motion for Partial Summary Judgment, assumed the liabilities of the East Muskingum Water Authority, which includes the East Muskingum Water Authority's own discriminatory practice, a practice that extends back to 1967.

Coal Run area was "very obvious;" Montgomery became a County Commissioner in 1993).)

In predominantly white areas, Defendants pursued water projects based on the mere knowledge or belief that the area needed water. On the other hand, Defendants took no steps to provide water to the African-American Coal Run neighborhood despite their long-standing knowledge of the area's desperate need and often-expressed desire for water. For example, in 1997, Commissioner Kenily devoted himself to providing water to the predominantly white Gaysport area in response to a *single* call from a resident seeking water for that area. (Ex. 26, Kenily Dep. at 29, 33, 38-39, 40-43, 72-73, 172, 196.) In addition, the projects attempted by Defendants in predominantly white areas were often more difficult and more expensive than a Coal Run project. *See* discussion of Gaysport, Chandlersville, and Adamsville Projects, *supra* pp. 48-51. For example, the East Muskingum Water Authority had found serving the Gaysport area financially unfeasible because of lack of density of customers, many of whom were just "weekenders," the length of the line necessary to reach the area, and the need to bore through rock and cross a creek. (Ex. 9, Dinan Dep. at 74; *see also* Ex. 42, Kullman Dep. at 43-44, 100-101; Ex. 6, Coast Dep. at 73.) Nonetheless, the County found a way to construct a project in the Gaysport area in response to that single call.

The County's practice of funding and constructing waterlines throughout predominantly white areas of the County and disregarding the need in Coal Run continued until July 2002 when Plaintiffs filed discrimination complaints.

iv. From 1995 to 2002, Washington Township Pursued Water for Predominantly White Areas of the Township, But Not for the Coal Run Neighborhood

Washington Township began its active pursuit of water for its residents in approximately 1995. Since that time, the Township's practice was to pursue projects in the predominantly white areas of the Township while ignoring the equal or greater needs for water in the Coal Run neighborhood. The evidence supports a finding that the Township's continuing violation began in 1995 and continued into 2002.

In 1995, the Trustees determined the contours of a water project they proposed for the Pleasant Grove-Adamsville Road area, sought potential customers, and represented the community in their attempts to receive water from the East Muskingum Water Authority. (Ex. 107, Timeline for Pleasant Grove-Adamsville Road Extension, 1995-96; Ex. 45, Madden Dep. at 67-69 (regarding petition).) The Trustees continued to advocate to bring water to the area even after the project failed for lack of interest from the residents. (Ex. 107, Timeline for Pleasant Grove-Adamsville Road Extension, 1995-96, at 2-3 (Mar. 12, 1996 entry).) The Township's efforts continued through 2002 when it succeeded and water was brought by the East Muskingum Water Authority to the predominantly white Pleasant Grove area. (Ex. 41, Krischak Dep. at 43; Ex. 133, Certificate of Substantial Completion, June 10, 2002.) That water project was a direct result of the Township Trustees' advocacy. (Ex. 41, Krischak Dep. at 42-43) (indicating Township Trustees Cameron and Culbertson initiated the project.)

Throughout the time the Township Trustees worked to bring water to Pleasant Grove and Adamsville Road, they were aware of the Coal Run area's need for water. (Ex. 45, Madden Dep. at 115-117.) Nonetheless, the Township made no effort to bring

water to its Coal Run residents before Plaintiffs filed the discrimination complaints that led to this action.

Defendants' discriminatory, regular, and continuous decisions to pass over Coal Run and bring water to predominantly white areas despite being on notice of the Coal Run neighborhood's need for water establish a continuing violation of the fair housing laws.

2. Defendants Regularly Ignored and Otherwise Failed to Act Upon Requests for Water Service to the Coal Run Neighborhood

The second manifestation of Defendants' discriminatory practice was their explicit rejection or simple disregard of requests for water to the Coal Run neighborhood. It is undisputed that Coal Run residents have long sought water service to the neighborhood. The City concedes this point in the March 2000 report issued by its own Water Superintendent: "For at least the last thirty-five years the residents of Coal Run Road, Langan Lane . . . have approached various members of the Zanesville Water Division as to the possibility of extending water into their neighborhoods." (Ex. 64, 2000 City Report on Extension of Water to Coal Run Area, at 00063.) The continuous discriminatory refusals of those requests by all of the Defendants constitute a continuing violation. *See, e.g.*, *United States v. Gorman Towers Apts.*, 857 F. Supp. 1335, 1340 (W.D. Ark. 1994) (finding a continuing violation where defendants' consistent refusals to provide plaintiffs, who had disabilities, with a designated parking space continued into the limitations period).

i. Requests for Water to the City for the Coal Run Neighborhood Began in 1954 and Continued Consistently for the Next Fifty Years

The requests for water to the Coal Run neighborhood began in 1954 when a host of Coal Run residents, including Plaintiffs, made multiple requests to the City and Washington Rural Water Authority for water. (*See, e.g.*, Ex. 33, Kennedy, Marvin Dep. at 21, 23-25 (recalling attending a Washington Rural Water Authority meeting with his father Howard Kennedy, his brothers Plaintiffs Robert and Dennis Kennedy, and Wesley McCuen (husband of Helen McCuen and father of Plaintiffs James McCuen, John McCuen, Saundra McCuen, Donna Lewis, Barbara Chatman, and Glenna McConnell) and being asked by a Washington Rural Water Authority "what us boys were doing at the water meeting").) Those requests were denied, but the Coal Run residents continued pursuing water from the City and Washington Rural Water Authority for the next fifty years. For example, Plaintiff Jerry Kennedy testified about attending bi-monthly City and Washington Rural Water Authority meetings with his father and his siblings and other Coal Run residents in the 1960s where they asked for water service. (Ex. 30, Kennedy, Jerry Dep. at 38-42.) Other Plaintiffs also testified about numerous other requests for water service to the Coal Run neighborhood throughout the 1950s and 1960s. For example, Marvin Kennedy attended another Washington Rural Water Authority meeting in 1958 because he had gotten married, but both his and his neighbors' requests were again ignored. (Ex. 33, Kennedy, Marvin Dep. at 30-35.)[15]

The Coal Run residents' requests for water to the City and Washington Rural Water Authority continued throughout the 1980s. (Ex. 48, McCuen, Helen Dep. at 14-

[15] *See also* (Ex. 16, Hale, Rodney Dep. at 30-31; Ex. 12, Hairston, Cynthia Dep. at 69-70; Ex. 47, Mayle, John Paul Dep. at 28-29.)

18.) Shifting explanations were given as to why the area could not be served, but Helen McCuen was provided the bottom-line response: "water cannot be brought out your way." (Ex. 48, McCuen, Helen Dep. at 17.)[16] When Nancy Kennedy sought water from the Washington Rural Water Authority she overheard the representative saying "[t]hose niggers will never have running water." (Ex. 35, Kennedy, Nancy Dep. at 28-29.)

Despite repeated denials throughout the 1990s, the Coal Run residents continued to make regular requests to the City. Many were directed to the City's Water Superintendent, Robert Pletcher, whose office was at the City's water plant, the same place Plaintiffs routinely filled containers with water to take home. The City's misrepresentations continued. For example, Jerry Kennedy and Richard Kennedy, Sr. both recalled being told by Pletcher that once the Old Adamsville Road waterline booster station was installed, they would be allowed to tap into the line. (Ex. 30, Kennedy, Jerry Dep. at 92-93; Ex. 38, Kennedy, Richard, Sr. Dep. at 59-61.) Of course, neither he nor any other resident of the Coal Run neighborhood was allowed to tap into the line, despite the facts that the water pressure on the line was turned *down* after the booster station was installed in the late 1990s and that Pletcher testified in this litigation that there was enough pressure for more taps. (Ex. 58, Pletcher Dep. at 232, 253, 256-57, 270; *see also* Ex. 39, Kennedy, Robert Dep. at 42.)

The requests to the City continued into the 2000s. In 2001 and 2002, the Fords and the Newmans, who are both Plaintiffs, approached the City about water service to the Coal Run neighborhood. The Newmans, who had requested water approximately twenty-five years earlier when they moved into their home, had several conversations with Mr.

[16] *See also* (Ex. 49, McCuen, John Dep. at 31, 35-38, 40-41; Ex. 34, Kennedy, Mary Dep. at 25; Ex. 38, Kennedy, Richard, Sr. Dep. at 60-61, 103-04; Ex. 19, Hill, James Dep. at 32-33, 45-46.)

Pletcher seeking water from the City. The Newmans explained that their son, Plaintiff Bryan Newman, is disabled and is medically required to soak in water to relieve pain. (Ex. 55, Newman, Judy Dep. at 47-49.) Initially, Mr. Pletcher said that the City was working on it but later told her to "talk to someone higher up." (Ex. 55, Newman, Judy Dep. at 30-32, 47-49, 69-75; Ex. 58, Pletcher Dep. at 261-262; *see also* Ex. 10, Ford, Audrey Dep. at 12.) In 2002, representatives of Coal Run residents sought water from Defendants by letter and meetings. (Ex. 145, Letter from Equal Justice Foundation, May 28, 2002.)

Other non-residents also sought water on behalf of the Coal Run neighborhood. (Ex. 59, Quarles Dep. at 49-50, 205-206 (City of Zanesville Fair Housing compliance officer seeking to have the City provide water to the Coal Run neighborhood).)

This evidence supports a finding that the City engaged in a continuing violation of the fair housing laws from 1954 to the present.

ii. Coal Run Residents Consistently Sought Water from the East Muskingum Water Authority from Its Establishment in 1967 Until at Least 2002

Immediately after the County established the East Muskingum Water Authority in 1967, Coal Run residents began asking the Authority for water in their neighborhood. (Ex. 38, Kennedy, Richard Sr. Dep. at 52-56 (recalling attending an East Muskingum Water Authority meeting in the late 1960s and paying a deposit for water service that was returned over two decades later after water service had not been provided; *see also* Ex. 22, Hill, Kathleen Dep. at 22-26.) Over the following four decades, Plaintiffs' regular requests to the East Muskingum Water Authority continued and most are undisputed. *See* Factual Background *supra*. Examples of these requests are listed below:

- 1970s: "Approximately 10 people from the Langdon [sic] Lane, Coal Run Area appeared before the board concerning their need for water." (Ex. 80, East Muskingum Water Authority Board Meeting Minutes, Nov. 14, 1973.)
- 1980s: Washington Township Fire Chief David Kreis testified that residents from the Coal Run Area attended East Muskingum Water Authority meetings seeking water during discussions about the Adamsville Road project. (Ex. 40, Kreis Dep. at 54-55.)
- 1990s: Residents attend East Muskingum Water Authority meetings seeking water and Plaintiff Bernard Kennedy is told that water will only go as far as the top of the hill — where the Coal Run neighborhood (and the African-American households) began. (Ex. 27, Kennedy, Bernard Dep. at 47-48.) The East Muskingum Water Authority is reminded that 40-50 houses in the Coal Run neighborhood could be served. (Ex. 89, East Muskingum Water Authority Board Meeting Minutes, Apr. 9, 1990, at 2.)
- 2000s: Representatives of Coal Run residents write to the East Muskingum Water Authority requesting water for the area. (Ex. 145, Letter from Equal Justice Foundation, May 28, 2002.)

Despite these and other regular requests over thirty-five years, the East Muskingum Water Authority did not act on a single one.

iii. Coal Run Residents Also Sought Water from the County

As the County started acquiring the East Muskingum Water Authority, the Coal Run residents began seeking water from County representatives. For example, when the Hairstons moved to the Coal Run neighborhood in 2000, they spoke to County representatives about obtaining water service, but were told they would have to dig a well because water service was unavailable. (Ex. 12, Hairston, Cynthia Dep. at 66.) Around 2000, the Fords also discussed receiving water from the County Water Supervisor, Gerald Howard. (Ex. 10, Ford, Audrey Dep. at 17-19.)

In December 2001, Richard and Jerry Kennedy attended a County public hearing about funding water projects and they asked the County Commissioners to fund a project in Coal Run. They were told, however, that water would not be brought to their area. (Ex. 143, County Public Hearing, Dec. 13, 2001; Ex. 30, Kennedy, Jerry Dep. at 97-104; Ex. 37, Kennedy, Richard, Jr. Dep. at 48-54.) Dorothy Montgomery summarized the County's position in response to requests for water in Coal Run: "She said that the area would not have water until the President dropped spiral bombs and hopefully hit deep enough to hit good water. She continued to say that maybe our great grandchildren would see water." (Ex. 144, Kennedy, Richard and Kennedy, Jerry Affs.)

Plaintiffs' requests to the County that it provide water to the Coal Run neighborhood, coupled with earlier requests to the East Muskingum Water Authority, establishes a continuing violation extending back to 1967.

All Defendants had a singular response to these regular and continuous requests for water in the Coal Run neighborhood — a race-based "no." Each discriminatory

refusal to respond to a request for water to the Coal Run neighborhood represents a part of a continuous discriminatory practice of refusing water to the neighborhood.

3. The City Maintained a Practice of Refusing Coal Run Household Requests to Tap into or Extend the Old Adamsville Road Line

The third and final manifestation of Defendants' discriminatory practice only applies to the City. Beginning in 1956, when the City and Washington Rural Water Authority installed the Old Adamsville Road line, the City refused to allow residents of the Coal Run neighborhood to connect to the line but regularly allowed whites to connect.

The Coal Run residents who lived adjacent to the Old Adamsville Road line frequently sought permission to connect their homes to the line. For example:

- In 1973, the Newmans requested a connection to the Adamsville Road Line, but their request was denied although their white next-door neighbors had tapped-in. (Ex. 54, Newman, Goldie Dep. at 20; Ex. 151, Second Stip. at 7-8.)
- In the early 1990s, Robert Kennedy, who lived only 50 yards from the Adamsville Road line, asked the City if he could extend the line to his home at his own expense. (Ex. 39, Kennedy, Robert Dep. at 42.) His request was denied.
- Jerry Kennedy also repeatedly requested — and was repeatedly denied — the opportunity to tap into the Adamsville Road Line, despite the fact that the home directly across the street was connected and despite agreeing to pay a $1,500 tap-in fee to the City. (Ex. 30, Kennedy, Jerry Dep. at 91-93,

128-135.) Robert Pletcher told Jerry Kennedy that once a pumping station was put into the Adamsville Road Line, he could tap-in. (Ex. 30, Kennedy, Jerry Dep. at 93.) Of course, he was never allowed to do so.

- Robert Pletcher also denied Richard Kennedy, Sr.'s repeated requests to tap into the Adamsville Road Line. (Ex. 38, Kennedy, Richard, Sr. Dep. at 57-61.) Even when the Adamsville Road line pumping station was installed, he was *still* not allowed to tap-in. (Ex. 38, Kennedy, Richard, Sr. Dep. at 60.)

During all of these time periods, white residents up and down the Old Adamsville line were allowed to connect their homes. *See supra* pp. 20-21, 26-27, 37-38. This evidence is but a part of the facts that demonstrate the City's continuing violation stretching back multiple decades.

* * *

The facts highlighted above support the conclusion that each of the Defendants maintained a long-standing discriminatory practice of denying water to the Coal Run neighborhood. The City's practice began in 1954; the County's practice began in 1990 and it is also liable for its predecessor, the East Muskingum Water Authority's practice, which began in 1967; and the Township's practice began in 1995. It is equally clear that those practices continued into the relevant limitations period, which is where the discussion turns next. The beginning point is an examination of the applicable limitations period.

C. Defendants' Continuing Violation Extends into the Relevant Limitations Periods

Defendants do not dispute that the limitations periods for the Federal Fair Housing Act, 42 U.S. C. § 3601, *et seq.*, and 42 U.S.C. §§ 1982 and 1983 are two years.[17] Further, as Defendants concede, Plaintiffs are entitled to a tolling of the statute of limitations period for the time their administrative complaints were pending. Plaintiffs filed their administrative complaints on July 26, 2002. As a result, under the continuing violations doctrine Plaintiffs need only show that at least one act of each Defendant's continuing violation occurred after July 26, 2000.[18]

Plaintiffs have made this showing:

- City of Zanesville: As described above, the City denied taps to the Newmans and Fords in 2001 and 2002. (Ex. 55, Newman, Judy Dep. at 30-32, 47-49, 69-75; Ex. 58, Pletcher Dep. at 261-262; *see also* Ex. 10, Ford, Audrey Dep. at 12.) The City received a request for water for the Coal Run neighborhood from counsel Rachel Robinson, dated May 28,

[17] Defendants erroneously assert that the limitations period for Plaintiffs' § 1981 and Title VI claims are one year. Defendants however rely on *Sutton v. Bloom*, 710 F.2d 1188 (6th Cir. 1983), which cites *Warner v. Perrino*, 585 F.2d 171 (6th Cir. 1978). The Supreme Court overruled *Warner* on this issue in *Burnett v. Grattan*, 468 U.S. 42 (1984). After *Burnett*, and in reliance on the clarification provided by the Supreme Court in *Goodman v. Lukens Steel Co.*, 482 U.S. 656 (1987), the Sixth Circuit announced that the statute of limitations for claims under 42 U.S.C. § 1981 in Ohio was the state's statute of limitations for personal injury claims. *Black Law Enforcement Officers' Ass'n v. City of Akron*, 824 F.2d 475, 482 n.6 (6th Cir. 1987). As Defendants acknowledge, Ohio's statute of limitations for personal injury claims is two years. *See, e.g.*, County Mot. for Summ. J. at 13. Accordingly, the limitations period for § 1981 claims in Ohio is two years. Similarly, claims under Title VI, like claims under 42 U.S.C. § 1981, are "governed by the most appropriate state law limitations period." Township Mot. for Summ. J. at 26; *see also* City Mot for Summ. J. at 23; County Mot. for Summ. J. at 14. Under the reasoning of *Akron*, the appropriate state law limitations period is a two-year period that applies to personal injury claims. Accordingly, the Title VI claims in this case have a two-year limitations period.

[18] The City Defendants assert that the tolling period only extends from the date of the filing of the administrative complaint until the OCRC found probable cause to conclude that Defendants' discriminated against Plaintiffs. There is no basis to conclude that a probable cause finding terminates the administrative proceeding and therefore stops the tolling. To the contrary, upon a probable cause finding, the administrative action simply proceeds to the next step of the Commission issuing a complaint stating the charges involved and containing a notice of an opportunity for a hearing. Ohio Rev. Code § 4112.05(B)(5).

2002. (Ex. 145, Letter from Equal Justice Foundation, May 28, 2002.) On July 26, 2002, four County officials — Public Service Director Mike Sims, Water Superintendent Robert Pletcher, Law Director Scott Hillis, and fair housing and contract compliance administrator Connie Quarles — attended a meeting at which the Coal Run neighborhood again requested water. (Ex. 59, Quarles Dep. at 96.)

- Muskingum County: It is undisputed that Plaintiffs Jerry and Richard Kennedy, Jr. requested water from the County Commissioners on December 13, 2001. (Ex. 143, County Public Hearing, Dec. 13, 2001.) In addition, the County received a request for water for the Coal Run neighborhood from counsel Rachel Robinson dated May 28, 2002. (Ex. 145, Letter from Equal Justice Foundation, May 28, 2002.) The County received a second request from counsel Robinson on July 15, 2002. (Ex. 146, Letter to County, July 15, 2002.) On July 26, 2002, three County officials — CDBG Coordinator Hamilton and Commissioners Madden and Montgomery — attended a meeting at which the Coal Run neighborhood again requested water. (Ex. 59, Quarles Dep. at 97.) Finally, the County continued pursuing the Gaysport, Chandlersville, and Adamsville water projects to the exclusion of the Coal Run project through 2002.
- East Muskingum Water Authority: On June 10, 2002, the East Muskingum Water Authority completed its Pleasant Grove project, which abutted the Coal Run neighborhood. (Ex. 133, Certificate of Substantial

Completion, June 10, 2002.) The Coal Run residents also sought water from the East Muskingum Water Authority in May 2002. (Ex. 145, Letter from Equal Justice Foundation, May 28, 2002.)

- Washington Township: The Township Trustees passed a resolution to re-include the Pleasant Grove area in the East Muskingum Water Authority's jurisdiction in order to allow the neighborhood to be provided water service in April 2001. (Ex. 129, Washington Township Resolution, Apr. 19, 2001.) In addition, Township Trustee Douglas Culbertson testified in his deposition that Plaintiff Jerry Kennedy requested water from him in the summer of 2002. (Ex. 7, Culbertson Dep. at 26, 110.)

The evidence establishes, therefore, that Defendants engaged in a continuing violation of the fair housing laws and that it continued into the applicable limitations period.

D. Defendants' Attempts to Avoid Liability for a Continuing Violation Are Legally and Factually Flawed

Defendants argue that the facts here are not subject to a theory of continuing violations for three reasons. According to Defendants: (1) Plaintiffs challenge a series of isolated and discrete discriminatory acts and not a discriminatory practice; (2) Plaintiffs claims involve the effects of past discrimination and not ongoing discriminatory acts or practices; and (3) Plaintiffs who moved from the Coal Run neighborhood before the limitations period cannot benefit from a continuing violations theory. For the reasons discussed below, each of these arguments is legally and factually flawed.

1. Plaintiffs Challenge a "Practice" of Discrimination, Not a Series of Acts

Defendants first argue that Plaintiffs cannot show a continuing violation because they have challenged isolated and discrete acts and not a discriminatory practice. Defendants' argument fails.

First, Defendants have a fundamental misunderstanding of the factual basis for Plaintiffs' claims. Plaintiffs challenge a specific discriminatory *practice* by each Defendant — the discriminatory denial of water to the Coal Run neighborhood. As other courts have recognized, the acts that make up a continuing violation need not be identical or even taken by the same actors. Instead, the determinative question is whether the acts were undertaken as part of a "practice." *See Havens*, 455 U.S. at 380-81 (finding continuing violation where realty company representatives steered various customers as part of a discriminatory practice). In *City of Parma*, the Sixth Circuit applied a continuing violations analysis to a "pattern and practice" of legislative acts,[19] which were quite different and distinct from each other but part of a single practice of excluding blacks and maintaining the segregated "character" of the City. *City of Parma*, 661 F.2d at 565-66, 573. Likewise, in *Heights Community Congress*, the Sixth Circuit affirmed a finding of a continuing violation where the challenged series of acts of steering were taken by different representatives of a real estate company, but all as part of an overall discriminatory corporate policy. *Heights Cmty. Cong.*, 774 F.2d at 141; s*ee also Tyus v.*

[19] The acts that made up a pattern and practice or continuing violation in *City of Parma* were: (1) the rejection of a fair housing resolution; (2) the consistent refusal to sign a cooperative agreement with housing authority; (3) the adamant and long-standing opposition to any form of public or low-income housing; (4) the denial of the building permit for Parmatown Woods; (5) the passage of the 35-foot height restriction ordinance; (6) the passage of the ordinance requiring voter approval for low-income housing; and (7) the refusal to submit an adequate housing assistance plan in the Community Block Development Grant application. *City of Parma*, 661 F.2d at 565-66.

Urban Search Mgmt., 102 F.3d 256, 265-66 (7th Cir. 1996) ("In a suit claiming that the defendant engaged in a continuous course of conduct that causes damages . . . a plaintiff can recover for damages that preceded the limitations period if they stem from a persistent process of illegal discrimination.").

The acts challenged by Plaintiffs were all taken as part of a single practice of denying water service to the Coal Run neighborhood. As shown by the evidence, Defendants' actions included regularly favoring white neighborhoods over the Coal Run neighborhood, even though they had equal needs and desire for water; favoring requests for water to white neighborhoods over requests for water to Coal Run; and favoring white households' requests to connect to the Old Adamsville Road line. Plaintiffs, therefore challenge a discriminatory practice that is properly considered a continuing violation. *See Havens*, 455 U.S. at 380-81.

Defendants' argument is also based on a misunderstanding of the controlling precedent. Defendants cite to *National Railroad Passenger Corp. v. Morgan*, 536 U.S. 101 (2002), a case decided under Title VII that does not affect the *Havens* continuing violations analysis. As noted above, the statute of limitations language under the Fair Housing Act is unique. By allowing parties to bring claims within two years of the *termination* of a practice, the Fair Housing Act statutorily incorporates the continuing violations doctrine. As a result, in this context the Fair Housing Act and Title VII are distinct. Title VII, the statute *Morgan* interprets, establishes specific procedures and dates for commencing those procedures after each discriminatory act. The Fair Housing Act, on the other hand, in a manner consistent with congressional intent, creates a broad cause of action and the explicit right to bring claims challenging practices that have not

terminated. The Supreme Court has recognized the Act's "broad and inclusive compass" and its entitlement to a "generous construction." *City of Edmonds*, 514 U.S. at 731. The facts here lend themselves to precisely what *Havens* was talking about: a pattern of decisions, requests, and denials that had been ongoing for decades and that did not terminate until Plaintiffs filed discrimination complaints. The broad remedial purpose of the Act demands that Plaintiffs be permitted to seek redress for the decades of injuries suffered.

Any analysis of continuing violations under Title VII cannot be assumed to apply to the Fair Housing Act and there is absolutely no basis to assume that *Morgan* overruled *Havens* or the precedent interpreting it. The conclusion that *Morgan* is inapplicable in the housing context is supported by the Sixth Circuit's decision in *Fair Housing Council, Inc. v. Village of Olde St. Andrews, Inc.*, 2006 WL 3724128 (6th Cir. Dec. 15, 2006), where the court considered the availability of a continuing violation under the Fair Housing Act and did not even cite *Morgan*. *Id.* at *12 (applying *Havens* to hold that a continuing violation tolled the statute of limitations).

Importantly, even if *Morgan* were to apply, Plaintiffs would still be entitled to a finding of a continuing violation. *Morgan* recognized that a continuing violation can be shown where a plaintiff challenges the maintenance of a discriminatory system both within and without of the limitations period — precisely what Plaintiffs do here. *See Morgan*, at 536 U.S. at 107. Accordingly, Plaintiffs' evidence would support a finding of discrimination under *Morgan* and certainly under the actual controlling precedent of *Havens*.

2. Plaintiffs Challenge Multiple, Ongoing Discriminatory Practices and Not Continuing Effects of Past Acts

Defendants next argue Plaintiffs challenge the discriminatory "effects" of a past discriminatory decision and not continuing acts of discrimination. Courts considering continuing violations have drawn a distinction between a "continuing violation," which requires unlawful *acts* that continue into the limitations period, and "continuing effects," which are merely the later *consequences* of an old violation. The factual basis of Plaintiffs' claims establishes that Plaintiffs challenge continuing violations and not continuing effects.

Plaintiffs allege and have adduced evidence showing that Defendants made regular and consistent decisions to pass over the Coal Run neighborhood in favor of predominantly white neighborhoods for water projects and to disregard requests for water in the Coal Run neighborhood. These numerous and regular discriminatory acts make up a continuing violation.

Defendants rely heavily on *Tolbert v. State of Ohio Department of Transportation*, 172 F.3d 934 (6th Cir. 1999), in support of their continuing effects argument, but *Tolbert* simply illustrates why Plaintiffs' claims involve a continuing violation and not continuing effects. In *Tolbert*, the plaintiffs claimed that the Ohio Department of Transportation discriminatorily chose to build sound barriers along the portion of a highway that passed through a predominantly white neighborhood and not along the portion that passed through a predominantly African-American neighborhood. *Id*. at 936. The decision regarding locating the barriers occurred at a single specific time, which was before the applicable limitations period. That one-time decision was never revisited. *Id*. at 940. As a result, the court concluded that "the continuing lack of [the

sound barriers] constitutes a 'continuing ill effect,' and is not the result of continuing unlawful acts." *Id.* at 940.

The analysis in *Tolbert* does not apply here because Plaintiffs do not allege a one-time decision to deny water to the Coal Run neighborhood. Instead, Plaintiffs allege and the evidence shows that Defendants repeatedly and continuously revisited the question of whether to provide water in the Coal Run neighborhood over a decades-long period of time. Defendants revisited the question both in response to Plaintiffs' many requests and when they assessed where they should use their resources to bring water to County residents. Defendants "acted" each time they rejected Coal Run residents' requests to bring water to their neighborhood and each time they passed over the Coal Run neighborhood in favor of a predominantly white area.

Defendants' reliance on *Middlebrook v. City of Bartlett*, 341 F. Supp. 2d 950, 956-57 (W.D. Tenn. 2003), is also misplaced. In *Middlebrook*, *none* of the acts challenged by the plaintiff occurred within the applicable one-year limitations period. The plaintiff therefore could not meet the critical element of a continuing violation — that the violations extend into the limitations period. *Id.* at 957 n.5. The Sixth Circuit affirmed the district court in *Middlebrook*, but the plaintiff offered no argument or citation in support of his argument. *Middlebrook v. City of Bartlett*, 103 F. App'x. 560, 562 (6th Cir. June 10, 2004). The Sixth Circuit did not address continuing violations, but simply asserted that the plaintiffs claims were barred by the one-year statute of limitations. *Id.* The *Middlebrook* cases have no application here.

Here, Plaintiffs challenge numerous occurrences of Defendants' practices that happened within and without the limitations period and not the mere effects of old discriminatory decisions, and therefore are entitled to a finding of a continuing violation.

3. Plaintiffs Who Moved From the Coal Run Area Before the Statute Of Limitations Period May Also Pursue Claims Under a Continuing Violations Theory

Defendants finally suggest that even if Plaintiffs have established a continuing violation, Plaintiffs who moved from Coal Run before the limitations period are necessarily barred from pursuing a claim. This argument misapprehends the continuing violations doctrine under the Fair Housing Act. In *Havens*, two different individuals were permitted to pursue claims under the Fair Housing Act — plaintiffs Willis and Coleman. Both Willis and Coleman's claims were based "not solely on isolated incidents involving the two respondents, but a continuing violation manifested in a number of incidents" that caused them injury. *Havens*, 455 U.S. at 381. The Court only found that one incident occurred during the limitations period, an act of steering against plaintiff Coleman. Nonetheless, plaintiff Willis, who was subjected to the discriminatory practices *before* the limitations period was also able to pursue his claims under the continuing violations doctrine. *Id.* This conclusion is consistent with the Court's finding that "[s]tatutes of limitations . . . are intended to keep stale claims out of the courts. Where the challenged violation is a continuing one, the staleness concern disappears." *Id.* at 380 (internal citation omitted).

Here, evidence regarding Defendants' continuing discriminatory practices continued into 2002, removing any concern about staleness. The staleness concern addressed by statutes of limitations relates to evidence of the violation, not to evidence

about who is affected by the violation. For statute of limitations purposes, therefore, there is no relevant distinction here between a Plaintiff who was injured in 1999 as part of Defendants' continuing violation and still lives in Coal Run and a Plaintiff who was injured in 1999 and then left the neighborhood. In both cases, any concern about staleness of claims is eliminated by the fact that the practice continued into the statute of limitations period.

In short, under *Havens* any person injured by a challenged discriminatory practice may pursue claims under a continuing violation theory based solely on acts taken before the limitations period. Accordingly, Plaintiffs who moved from the Coal Run neighborhood before the limitations period may still pursue redress for their injuries caused by the Defendants' continuing violation.

Plaintiffs now turn to Defendants' final statute of limitations argument, which relates solely to the Ohio Civil Rights Commission's claim.

II. The Ohio Civil Rights Commission Timely Filed Its Claim

The City argues in its brief that that the Commission's complaint was untimely because it issued more than a year after Plaintiffs filed a charge with the Commission. (City Mot. for Summ. J. at 23.) The Commission's complaint, however, issued within a year of the Plaintiffs' charges.

Ohio law provides that the Commission shall issue an administrative complaint within one year of a complainant filing a charge of discrimination with the Commission:

> (5) If the commission fails to effect the elimination of an unlawful discriminatory practice . . . the commission shall issue . . . . a complaint . . . .

> (7) Any complaint issued pursuant to division (B)(5) of this section …shall be so issued *within one year after the complainant filed the charge* with respect to an alleged unlawful discriminatory practice.

Ohio Rev.Code § 4112.05(B)(5), (B)(7) (emphasis added).[20]

In this case, the Commission did issue an administrative complaint within one year of the date the plaintiffs filed charges with the Commission. The individual Plaintiffs filed charges of discrimination on July 26, 2002, and the Fair Housing Advocates Association filed a charge of discrimination on August 5, 2002. (Ex. 152, Plaintiffs' State of Ohio Discrimination Charge; Ex. 153, at 3, FHAA State of Ohio Housing Discrimination Charge.) On July 10, 2003, the Commission issued its complaint — within one year of the date the charges were filed. (Ex. 154, OCRC Complaint, July 10, 2003.) Therefore, the Commission's complaint was timely.

The City's confusion stems from the fact that *after* the Commission issued its administrative complaint, Defendants "elected" to have a judicial resolution of the matter, pursuant to Ohio Rev. Code § 4112.051. As a result of that election, the Attorney General was obligated to file a complaint in Common Pleas Court. Ohio Rev. Code § 4112.051(A)(2)(b). The Attorney General complied and on December 19, 2003, filed that complaint. Contrary to the City's suggestion, the filing of that judicial complaint by the Attorney General is not subject to the one-year requirement contained in Ohio Rev. Code § 4112.051(B)(7). That requirement only applies to the issuance of the Commission's administrative complaint, which was timely issued.

[20] The City cites to *Ohio Civil Rights Comm. v. Countrywide Home Loans, Inc.,* 794 N.E.2d 56 (Ohio 2002) which merely found this one-year filing requirement to be mandatory. In *Countrywide* the Court noted that Ohio Rev. Code § 4112.05(B)(7) states that any complaint issued by OCRC based on the filing of a charge of unlawful discriminatory practice "shall be so issued within one year after the complainant filed the charge." *Id*. at 523.

Plaintiffs now turn to Defendants' third procedural argument, which relates to the standing of the individual Plaintiffs.

III. All Plaintiffs Have Standing to Pursue Claims Against Defendants

Defendants make two related arguments regarding the standing of Plaintiffs to challenge Defendants' discriminatory denial of water to the Coal Run neighborhood. First, as articulated by the County, Defendants assert that certain of the Plaintiffs have "no evidence of membership in a minority class, and therefore cannot avail themselves of the protections of the civil rights laws." (*See, e.g.*, County Mot. for Summ. J. at 22-23.) Second, Defendants argue that only those Plaintiffs who made a direct and explicit request for water from a particular Defendant have standing to sue that Defendant. Each of Defendants' two standing arguments ignore well-established and controlling precedent under the Fair Housing Act and misapprehend the factual basis of Plaintiffs' claims.

A. General Standing Principles Under the Fair Housing Act

Standing in this case does not turn on a Plaintiffs' race or the making of a request for water. Instead, it turns on whether a Plaintiff has suffered a cognizable injury. The Fair Housing Act permits any "aggrieved person" — defined as anyone who "claims to have been injured by a discriminatory housing practice" — to bring an action under the Act. 42 U.S.C. §§ 3602(i)(1), 3613(a)(1)(A). This definition confers standing as broadly as is permitted by Article III of the Constitution and does not require the plaintiff to be within a protected class or undertake an affirmative act to seek housing or a housing-related service. *See, e.g., Gladstone Realtors v. Vill. of Bellwood*, 441 U.S. 91, 103-04 n.9 (1979).

B. Non-Minorities May Pursue Claims Under the Fair Housing Act

Defendants' first standing argument, that only minorities can pursue claims under the fair housing laws, is directly contrary to forty years of jurisprudence under the Fair Housing Act. Under the Act, "any person harmed by discrimination, *whether or not the target of the discrimination,* can sue to recover for his or her own injury." *See Trafficante,* 409 U.S at 208. Discriminatory conduct directed at racial minorities that indirectly injures whites can violate the Fair Housing Act. *See, e.g.*, *Gladstone,* 441 U.S. at 103 n.9 ("The central issue at this stage of the proceedings is not who possesses the legal rights protected by [the Fair Housing Act], but whether respondents were genuinely injured by conduct that violates *someone's* [Fair Housing Act] rights, and thus are entitled to seek redress of that harm.") (emphasis added); *Stewart v. Furton*, 774 F.2d 706, 709-10 (6th Cir. 1985) (upholding relief ordered in Fair Housing Act case brought by white mother who alleged that defendants refused to rent to her because her daughter was mixed race); *Cousins v. Bray*, 297 F. Supp. 2d 1027, 1041-42 (S.D. Ohio 2003) (Marbley, J.) (finding likelihood of success on the merits and granting plaintiffs' motion for preliminary injunction where white parents alleged under the Fair Housing Act that defendants' attempt to evict plaintiffs was impermissibly based on the presence of their two biracial sons); *Old West End Ass'n. v. Buckeye Fed. Sav. & Loan*, 675 F. Supp. 1100, 1102 (N.D. Ohio 1987) ("This court has previously found that non-minorities have standing to maintain discrimination actions for injuries suffered by them as a result of racially discriminatory practices.").

There is simply no basis for Defendants' argument that only minorities have standing to bring claims for discrimination under the Fair Housing Act. The touchstone

here is whether the Plaintiffs were injured by the Defendants' practices. All clearly were, insofar as they were denied water because they lived in a predominantly African-American neighborhood. As such, each has standing under the Fair Housing Act.

C. The "Neighborhood Standing" Doctrine Permits Injured Residents to Bring Claims Challenging Discriminatory Acts Directed At the Neighborhood

Defendants' second standing argument, which would require every individual Plaintiff to have made a request for water in order to have standing, is directly contrary to the Supreme Court's extensive standing jurisprudence under the Fair Housing Act. Under that jurisprudence, standing in this case is determined by whether a Plaintiff suffered an injury and not whether a Plaintiff made a request for water.

The Supreme Court has long recognized that injury caused by racial discrimination directed at a neighborhood can confer standing on the residents of that neighborhood. For example, in *Gladstone*, the Supreme Court found that where a defendant steered prospective African-American residents away from a particular neighborhood of the Village of Bellwood, the residents of that neighborhood had standing under the Fair Housing Act to challenge the harm — a loss of social and professional benefits and a diminution in value of their homes — caused by that steering. *Gladstone*, 441 U.S. at 111-15.

In *Havens*, individual residents of Richmond, Virginia had "neighborhood standing" based on their allegations that the defendant real estate company's steering of African Americans away from their neighborhood deprived them of "the right to the important social, professional, business and economic, political and aesthetic benefits of interracial associations that arise from living in integrated communities free from

discriminatory housing practices." *Havens*, 455 U.S. at 376; *see also Trafficante*, 409 U.S. at 208-10 (holding that white and African-American tenants had standing to bring claim against landlord who steered African Americans away from their community thereby creating a "white ghetto").

Lower courts have similarly found under a variety of anti-discrimination laws that residents of a neighborhood targeted by a defendant's discrimination have standing to challenge that discrimination. For example, in *Old West End Ass'n*, 675 F. Supp. at 1102, plaintiffs alleged that defendants had discriminated in the financing of a home based upon the racial composition of the neighborhood in which the property was located. The Court concluded that the fact that the housing sought was in a minority neighborhood was sufficient to meet the initial requirement of a *prima facie* case. *Id.* at 1103; *see also Neighborhood Action Coal. v. City of Canton*, 882 F.2d 1012, 1017 (6th Cir. 1989) (finding that Fourteenth Amendment is violated "when a police department fails to respond to calls from a neighborhood because of the racial make-up of the neighborhood"); *Dowdell v. City of Apopka*, 698 F.2d 1181, 1184 (11th Cir. 1983) (upholding district court's determination that city's disparate provision of water, paving, and storm drainage along racial lines was result of intentional discrimination in violation of Title VI).

In this case, Plaintiffs allege that Defendants denied the Coal Run neighborhood water service because of the racial composition of the neighborhood. That denial indisputably harmed the Coal Run residents. In an area of contaminated ground water and no viable means to obtain water other than from a governmental entity, the denial of water creates a host of injuries. All residents discriminatorily denied water because of

the actions taken by Defendants against the Coal Run neighborhood, therefore, have standing to seek redress of their injuries because those residents were injured, even if they did not make an explicit request for water.

The evidence establishes that Defendants discriminatorily denied the Coal Run neighborhood water in three ways. First, Defendants regularly passed over the Coal Run neighborhood and decided to construct a water project in predominantly white neighborhoods, despite their knowledge of the equal or greater need for water in the Coal Run area. As discussed above, the record is replete with examples of each Defendant, on its own accord, constructing, considering, or advocating for projects in predominantly white areas with a similar or lesser need for water than the Coal Run neighborhood. *See* Factual Background *supra*. Second, Defendants denied the Coal Run neighborhood water each time they rejected or disregarded a request for water to the neighborhood. As described herein, Plaintiffs have adduced evidence of numerous requests for water to the Coal Run neighborhood. *See* Factual Background *supra*. The evidence shows that these requests were not for a particular home, or as Defendants would have it, for a particular resident of a home; instead they were requests on behalf of the neighborhood.[21]

The illogical nature of Defendants' standing arguments is illustrated by the experiences of Plaintiffs Richard and Jeanene Kennedy. Richard and Jeanene are a married couple who have lived together at 1095 Langan Lane for over forty years. (Ex. 38, Richard Kennedy Sr. Dep at 9, 15; Ex. 29, Kennedy, Jeanene Dep. at 6-7). Richard

[21] *See, e.g.*, (Ex. 33, Kennedy, Marvin Dep. at 21, 23-24, 30-35; Ex. 38, Kennedy, Richard Sr. Dep. at 48-50, 54; Ex. 22, Hill, Kathleen Dep. at 22-26; Ex. 80, East Muskingum Water Authority Board Meeting Minutes, Nov. 14, 1973; Ex. 30, Kennedy, Jerry Dep. at 38, 41-42, 108; Ex. 143, County Public Hearing, Dec. 13, 2001; Ex. 144, Kennedy, Richard and Kennedy, Jerry Affs.; Ex. 59, Quarles Dep. at 101-02, 174; Ex. 12, Hairston Cynthia Dep. at 59-61; Ex. 13, Hairston, Lynn Dep. at 32-37; Ex. 28, Kennedy, Dennis Dep. at 44-45) (all describing meetings spanning from 1954 to July 2002 at which multiple neighborhood residents attended requesting water on behalf of the Coal Run neighborhood).)

is African American and Jeanene is white. (Ex. 29, Kennedy, Jeanene Dep at 60-61.) Richard made a number of requests for water to various Defendants when Jeanene was not present. (Ex. 38, Richard Kennedy Sr. Dep at 29, 48-54, 63-65.) Under Defendants' argument, Jeanene would have no standing, even though when Defendants turned down each of her husband's requests they also denied her water and even though Jeanene suffered the same harms of not having water. Under the Fair Housing Act, Defendants' discrimination affected the neighborhood and suffering as a result of being part of that neighborhood confers standing.

Defendants' assertion that every *individual* member of every family in Coal Run must make a request for water in order to have standing, is nonsensical, contrary to the law, and fails to recognize the factual basis for Plaintiffs' claims. Under the Fair Housing Act, the relevant questions are: did Defendants engage in differential treatment and were Plaintiffs harmed? Like the plaintiffs in *Gladstone* and *Havens*, the Coal Run residents were residents of a neighborhood injured by Defendants' discriminatory practices. Here, that discrimination and resulting harm occurred regardless of whether each Plaintiff made an explicit request to each Defendant for water. That discrimination and resulting harm would not have occurred if Coal Run were predominantly white because if it had been a white neighborhood, it would have received water decades ago.

Plaintiffs now turn to the standing of the organizational Plaintiff, the Fair Housing Advocates Association.

D. The Fair Housing Advocates Association Has Standing Under the Fair Housing Laws

The Supreme Court has made clear that fair housing organizations, like the Fair Housing Advocates Association, have standing to sue under the Fair Housing Act. In *Havens*, the plaintiff organization, HOME, alleged that it had "been frustrated by defendant's racial steering practices in its efforts to assist equal access to housing through counseling and other referral services . . . [and] had to devote significant resources to identify and counteract the defendants' racially discriminatory steering practices." *Havens*, 455 U.S. at 379 (internal citation omitted). The *Havens* Court concluded that "[i]f, as broadly alleged, petitioners' steering practices have perceptibly impaired HOME's ability to provide counseling and referral services for low- and moderate-income home-seekers, there can be no question that the organization has suffered injury in fact. Such concrete and demonstrable injury to the organization's activities-with the consequent drain on the organization's resources-constitutes far more than simply a setback to the organization's abstract social interests. . . ." *Id*; *see also Vill. of Olde St. Andrews*, 2006 U.S. App. Lexis 31217, at *10-15 (interpreting *Havens* to hold fair housing organization had standing insofar as resources that the organization directed toward training and employing testers to investigate the defendant constituted a concrete injury).

The Fair Housing Advocates Association has diverted its resources and had its mission impaired as a result of Defendants' discrimination. The organization's mission is:

> to eliminate housing discrimination, lending and homeowners insurance discrimination, and racial and sexual harassment and ensure housing opportunities for all people. Specifically, the FHAA seeks to eliminate

> housing discrimination against all persons because of race, color, religion, national origin, sex, disability, or familial status. In furthering this goal, FHAA engages in activities designed to encourage fair housing practices through educational efforts; assists persons who believe they have been victims of housing discrimination; identifies barriers to fair housing in order to help counteract and eliminate discriminatory housing practices; works with elected and government representatives to protect and improve fair housing laws; and takes all appropriate and necessary action to ensure that fair housing laws are properly and fairly enforced throughout Summit County, City of Barberton, and Ohio.

(Ex. 153, FHAA State of Ohio Housing Discrimination Charge.)

Defendants' discriminatory denial of water service to a predominantly African-American neighborhood in Ohio has caused a setback to the Fair Housing Advocates Association's mission of eliminating housing discrimination against all persons because of race and color.

In addition, the Fair Housing Advocates Association was forced to divert its resources from its typical activities in order to identify and counteract Defendants' discrimination. *See Havens*, 455 U.S. at 379 (noting that organization's allegations that it had to devote significant resources to identify and counteract the defendant's discrimination were the basis for standing of the organization). The Fair Housing Advocates Association began investigating the discriminatory provision of water to the Coal Run neighborhood in 2002 after being told that "there was a street where the white people had public water but the people — the majority of the people of color on that street did not. So [the waterline] basically ended where the white folks' houses stopped." (Ex. 8, Curry Dep. at 15-17.)

The Executive Director of the Fair Housing Advocates Association, Vince Curry, traveled to the Coal Run neighborhood and interviewed the residents. (Ex. 8, Curry Dep. at 18-19.) The Fair Housing Advocates Association sent letters to government officials

and Mr. Curry made additional trips to the Coal Run neighborhood, during which he distributed fliers that explained the residents' rights under the Fair Housing Laws. (Ex. 8, Curry Dep. at 19-20, 24-25; Ex. 155, FHAA Flier.) The Fair Housing Advocates Association conducted door-to-door interviews and surveys, mapped existing waterlines, and made a videotape showing where new waterlines were being installed. (Ex. 8, Curry Dep. at 20.) As a part of Fair Housing Advocates Association's investigation, Mr. Curry spoke with representatives of the City and attended a meeting of public officials regarding the Coal Run neighborhood's need for water. (Ex. 8, Curry Dep. at 37-38, 39.) The Fair Housing Advocates Association filed a charge of discrimination with the Ohio Civil Rights Commission on August 5, 2002. (Ex. 153, FHAA State of Ohio Housing Discrimination Charge.)

These efforts to investigate and counteract Defendants' discrimination, combined with the frustration of the Fair Housing Advocates Association's mission, confer standing on the organization to bring its claims under the fair housing laws.

DEFENDANTS' SUFFICIENCY OF THE EVIDENCE ARGUMENTS

Defendants' second category of arguments in support of their Motions for Summary Judgment amounts to a broad and unsupported contention that the evidence adduced in this case is not sufficient to prove differential treatment on the basis of race. Plaintiffs describe in this section how the extensive evidence regarding the treatment of the Coal Run neighborhood amply supports a finding of discrimination. Plaintiffs begin by noting the well-established principle that summary judgment is generally not the correct means for resolving an intentional discrimination claim.

I. Summary Judgment Is Ill-Suited to Cases Involving Intent

Summary judgment is rarely appropriate where discriminatory intent is at issue. *See, e.g.*, *Lowe v. City of Monrovia*, 775 F.2d 998, 1009-10 (9th Cir. 1985); *Sweat v. Miller Brewing Co*., 708 F.2d 655, 657 (11th Cir. 1983). Any examination of intent or motivation, which requires assessing the totality of the relevant facts shown by all available direct and circumstantial evidence and assessments of credibility, typically falls within the province of the jury. *See Pullman-Standard v. Swint*, 456 U.S. 273, 289-90 (1982) (holdng that "discriminatory intent is a finding of fact" to be made by the trier of facts); *see also*, *Anderson*, 477 U.S. at 255 ("Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge.").

II. Framework for Considering Plaintiffs' Discrimination Claims

Claims of discrimination supported by circumstantial evidence typically proceed under the familiar *McDonnell Douglas* burden-shifting framework.[22] Under this framework, the plaintiff first has the burden of presenting sufficient evidence to permit a finding of what courts call a *prima facie* case of discrimination or inference of discrimination. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973); *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248 (1981). If the evidence allows an inference of discrimination, the defendant must present evidence of a legitimate, non-discriminatory reason for the challenged actions. *See Burdine*, 450 U.S. at 248, 252. The

[22] As Defendants concede, this framework applies to all of Plaintiffs' claims. *See, e.g.*, *Maki v. Laakko*, 88 F.3d 361, 367 (6th Cir. 1996) (applying Fair Housing Act framework to claims under §§ 1981 and 1985); *Pollitt v. Bramel*, 669 F. Supp. 172, 175 (S.D. Ohio 1987) (applying *McDonnell Douglas* framework to plaintiffs' Fair Housing Act, § 1981, and § 1982 claims that were based on the same evidence).

plaintiff may then show that the reason offered by the defendant was merely a "pretext" for discrimination. *McDonnell Douglas*, 411 U.S. at 804.

Plaintiffs first examine the specific standard for showing an inference of discrimination and then turn to the evidence produced in this case that establishes that Plaintiffs can meet that standard.

III. The Evidence Supports an Inference of Discrimination

A. The Standard for Determining Whether a Plaintiff Can Meet the Burden of Establishing an Inference of Discrimination

The standard for establishing an inference, or *prima facie* case, of discrimination is necessarily flexible and varies with the facts presented in different cases. *See Burdine*, 450 U.S. at 253 n.6. As noted by the Supreme Court, "[t]he *prima facie* case method established in *McDonnell Douglas* was 'never intended to be rigid, mechanized, or ritualistic. Rather, it is merely a sensible, orderly way to evaluate the evidence in light of common experience as it bears on the critical question of discrimination.'" *U.S. Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 715 (1983) (quoting *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 577 (1978)). Simply put, an inference of discrimination can be established under the *McDonnell Douglas* framework if a plaintiff demonstrates that a set of acts, if otherwise unexplained, are more likely than not based on the, at least partial, consideration of an impermissible factor.[23] *Furnco Constr. Corp.*, 438 U.S. at 577.

[23] *See, e.g., Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 265 (1977) (holding that plaintiff need only establish that the protected characteristic was *one* factor in the challenged decisions and is not required "to prove that the challenged action rested *solely on* . . . discriminatory purposes") (emphasis added); *see also*, *Cousins v. Bray*, 297 F. Supp. 2d 1027, 1038 (S.D. Ohio 2003) (Marbley, J.) ("In order to succeed on their Fair Housing Act claim, Plaintiffs need not show that race was the sole factor in Defendants' decision to terminate the tenancy; they need only establish that race was one motivating factor in the decision.") (citing *Green v. Century 21*, 740 F.2d 460, 464 (6th Cir.

Examining whether a plaintiff has presented sufficient evidence to permit an inference of discrimination requires a "sensitive inquiry into such circumstantial and direct evidence of intent as may be available." *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 266 (1977). An inference of discrimination is frequently shown using statistical evidence, comparative evidence, evidence of a suspect sequence of events, or evidence of a subjective decision-making process. *See id*. at 265-68 (noting numerous factors, including the impact and the sequence of events that are relevant to inferring the motivation of the defendant); *United States v. City of Birmingham*, 727 F.2d 560, 565 (6th Cir. 1984) (adopting *Arlington* factors as probative of discrimination); *Bauer v. Bailar*, 647 F.2d 1037, 1045 (10th Cir. 1981) (strong inference of discrimination if there is subjective decision-making coupled with showing a significant disparity in representation of a particular group).

The list of factors noted by the Supreme Court and other courts is by no means "exclusive or mandatory but merely a framework within which a court conducts its analysis." *Tsombanidis v. West Haven Fire Dep't*, 352 F.3d 565, 580 (2d Cir. 2003). Courts have repeatedly rejected defendants' attempts to analyze each fact in isolation and have mandated that all evidence proving discriminatory intent be considered as a whole. *See*, *e.g.*, *Paschal v. Flagstar Bank*, 295 F.3d 565, 584 (6th Cir. 2002); *Reg'l Econ. Cmty. Action Program, Inc. v. City of Middletown*, 294 F.3d 35, 49 (2d Cir. 2002).

Plaintiffs now turn to the specific evidence in this case that permits an inference of discrimination.

1984) ("[O]ther circuits have clearly and repeatedly found liability when race was only one factor, rather than the sole reason for refusal to sell.")).

B. Plaintiffs Have Presented Substantial Statistical Evidence of Discrimination

The first category of evidence that supports an inference of discrimination here is the statistical evidence that has been presented. The statistical evidence shows that the overwhelming majority of households affected by Defendants' actions are African-American.

A significant disparity in the statistical picture is sufficient standing alone to support an inference of discrimination. *See Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 339 (1977) (holding that statistics alone can prove intentional discrimination); *Barnes v. GenCorp. Inc.*, 896 F.2d 1457, 1468 n.15 (6th Cir. 1990) (same); *Segar v. Smith*, 738 F.2d 1249, 1267 (D.C. Cir. 1984) (holding that statistical evidence can create an inference of disparate treatment); *see also, Arlington Heights*, 429 U.S. at 266 ("Sometimes a clear pattern, unexplainable on grounds other than race, emerges from the effect of the state action even when the governing legislation appears neutral on its face."); *City of Birmingham*, 727 F.2d at 565 (finding that the racial impact of a decision is probative of discriminatory intent).

The statistical picture in this case clearly establishes that the disparity in water service that existed for over fifty years did not occur merely by chance. It is undisputed that Coal Run is an overwhelmingly African-American neighborhood within an almost exclusively white county and township. The majority of Defendants in this case freely admitted in their deposition testimony that the Coal Run neighborhood is predominantly African-American and the rest of the County is predominantly white. "[C]ompared to other areas of Muskingum County, which would be predominantly white, there's a greater percentage of African-Americans living in [the Coal Run neighborhood]." (Ex.

45, Madden Dep. at 17; *see also* Ex. 53, Montgomery Dep. at 25; Ex. 3, Bunting Dep. at 40; Ex. 7, Culbertson Dep. at 34; Ex. 58, Pletcher Dep. at 480-81.)

A current survey of households in the Coal Run neighborhood confirms the Defendants' admissions: approximately 86% of Coal Run households, which do not have water service, are non-white. In contrast, Muskingum County as a whole is approximately 98% white. (Ex. 61, Pls. Expert Disclosure at Ex. B.) Similarly, both Washington Township and the area immediately surrounding the City of Zanesville are approximately 97% white. (Ex. 61, Pls. Expert Disclosure at Ex. B.)

Courts have found much lower disparities to be significant. For example, in *Keith v. Volpe*, the Ninth Circuit found a significant disparity where two-thirds of the persons affected by the challenged act were minorities and therefore that the act had twice the rate of adverse impact on minorities than it had on whites. *See Keith*, 858 F.2d 467, 484 (9th Cir. 1988).

The clear pattern of a virtually all African-American community being deprived of water service for fifty years while being surrounded by waterlines serving nearly all-white areas is simply unexplainable on grounds other than race, and permits, if not demands, an inference of racial discrimination.[24] *See Arlington Heights*, 429 U.S. at 266.

[24] Defendants have submitted the expert report of James C. Wyles, who in his deposition claimed to have concluded that there was no correlation between the provision of water and race in the County. Not only did Mr. Wyles' report fail to express this conclusion, which will be the basis for a motion to strike Mr. Wyles' testimony, but his analysis is entirely unreliable and provides no basis for reaching any conclusion regarding the statistical picture of water service and race in the County. Incredibly, when Mr. Wyles reached his conclusion, he did not know what households had water and what households did not. (*See* Ex. 63, Wyles Dep. at 70.) In addition, he did not know the race of any households. Mr. Wyles reached his conclusion simply by looking at colors on a map. Mr. Wyles himself recognized the deficiencies and admits that in a "perfect world" he would be able to "put addresses along the water lines" and would know the race of each resident in the area. (Ex. 63, Wyles Dep. at 70, 75.) Of course, Plaintiffs' evidence does link race and water by household and shows that in the Coal Run neighborhood and surrounding area there is an almost perfect correlation between those who have water and those who are white. (*See* Ex. 61, Pls. Expert Disclosure at Ex. A, p. 2.)

C. Defendants' Subjective Decision-Making, Differential Treatment, and Departures from Established Procedures Further Support an Inference of Discrimination

The difference between the complete absence of water in the Coal Run neighborhood and Defendants' regular provision of water to similarly situated, but predominantly white neighborhoods, combined with subjective decision-making and departures from established procedures, also permits an inference of discrimination. *Teamsters*, 431 U.S. at 335 (holding that discriminatory motive can be inferred from differences in treatment). The evidence shows that each Defendant treated the Coal Run neighborhood differently, employed purely subjective decision-making procedures, and departed from those procedures when dealing with Coal Run. Plaintiffs now discuss those forms of evidence as they relate to each Defendant.

1. The City's Differential Treatment of the Coal Run Neighborhood

The City treated the Coal Run neighborhood differently when it brought water to other areas surrounding the City as well as when it refused individual requests to connect to the Old Adamsville Road line.

i. The City Provided Water to Numerous Areas Adjacent to the City, but Always Disregarded the Coal Run Neighborhood

The City provides water to numerous areas adjacent to the City limits. In fact, over ten percent of its customers are outside the City limits. (Ex. 58, Pletcher Dep. at 89-90.) The City's waterlines reach into all of the townships surrounding the City, including Washington, Springfield, Wayne, and Falls Townships. (Ex. 58, Pletcher Dep. at 87; Ex. 156, List of City Waterlines Outside City Limits; Figure 4, *supra* p. 43.) One of the City's lines — the Old Adamsville Road line — comes within feet of the Coal Run

neighborhood. (*See, e.g.*, Ex. 39, Kennedy, Robert Dep. at 42 (indicating that he lived 50 yards from the Old Adamsville Road line; Ex. 30, Kennedy, Jerry Dep. at 91-93, 128-135 (indicating that his home was directly across the street from a connected white home); Ex. 54, Newman, Goldie Dep. at 20; Ex. 151, Second Stip. at 8 (indicating that his next-door neighbor was on the Old Adamsville Road waterline).)

The City gladly served areas that were outside the City limits and even pursued difficult projects that had legal obstacles and created controversy. For example, when the City annexed the "Big Bear" portion of Falls Township in order to provide water to the residents in the area, Falls Township trustees and the East Muskingum Water Authority sought to challenge the City's actions. (Ex. 91, Letter on Behalf of Falls Township Trustees to the East Muskingum Water Authority, Mar. 29, 1990.) Similarly, the East Muskingum Water Authority objected to the City's annexing Joe's Run, another area where the City sought to provide water outside its boundaries. (Ex. 90, Letter on Behalf of the East Muskingum Water Authority to City, Nov. 15, 1995.) Later City annexations for the purpose of serving water created similar controversy. (Ex. 157, Internal EMWA Correspondence Regarding City Annexation Efforts, 1998; Ex. 41, Krischak Dep. at 28.)

The City admits that a waterline to Coal Run would have been simple, consisting of a mere connection to the existing Old Adamsville Road line. (Ex. 58, Pletcher Dep. at 230-32 (indicating that the existing Old Adamsville Road system could have served the Coal Run neighborhood).) In addition, there were no technical reasons that a line could not be run to Coal Run. (Ex. 58, Pletcher Dep. at 230-32 (indicating that there were no technical obstacles to laying a waterline in the Coal Run neighborhood).) However, when Coal Run residents asked whether they could get water, Mr. Pletcher, the City's

Water Superintendent, merely responded "[w]ell, I hope so. I don't know." (Ex. 58, Pletcher Dep. at 261.)

ii. The City Refused Coal Run Residents' Requests to Connect to the Old Adamsville Road Line While Simultaneously Allowing Whites to Connect

Not only did the City disregard the Coal Run residents' requests to extend the line to the whole neighborhood, but it also refused individual residents' requests to have their homes connected to the existing Old Adamsville Road line. The line was constructed in 1956 and Coal Run residents immediately sought to connect to it. The requests continued for the next fifty years. And, the City admits as much. (Ex. 64, Extension of Water Service Area, March 2000; Ex. 76, Coal Run Langan Lane Water Improvement Study, Dec. 2001.) Mr. Pletcher testified about multiple requests for water from members of the Kennedy family seeking water, but their requests were always denied. (Ex. 58, Pletcher Dep. at 317, 322.) When the Newmans asked for water to the Coal Run neighborhood, Pletcher referred them to the County. (Ex. 58, Pletcher Dep. at 336-338; *see also* Ex. 92, Memorandum from Robert Pletcher to Jay Bennett, Nov. 12, 1998 (referencing requests for water from Coal Run residents).)

On the other hand, numerous white residents around the Coal Run neighborhood were allowed to connect to the City's lines. Plaintiff Jerry Kennedy's next-door neighbor was connected and freely watered his lawn with water pumped in by the City while Jerry's water came off his roof or he and his family filled tanks in the back of their trucks and hauled it home. (*See, e.g.*, Ex. 28, Kennedy, Dennis Dep. at 88; Ex. 30, Kennedy, Jerry Dep. at 73; Ex. 18, Harvey, Ellen Dep. at 17.)

Despite all of the requests and the City's willingness to allow white households to tap into the line and to take water to other non-City residents, requests to the City to connect to existing lines or to run new lines to the Coal Run neighborhood were always refused. (Ex. 58, Pletcher Dep. at 312.)

The City's long history of ignoring the plight of the Coal Run residents while providing water to other areas adjacent to the City and its refusal to allow Coal Run residents to connect to the existing Old Adamsville Road line is sufficient to raise an inference of discrimination. *See Ammons v. Dade City*, 645 F.Supp. 571, 579 (11th Cir. 1986) ("The above historical findings are significant and relevant to this case because the very nature of this litigation calls into scrutiny generations of municipal decisions, practices and activities relating to the financing, paving, and maintenance of streets. Such matters are clearly probative in determining whether intentional discrimination has been demonstrated because the present conditions of which plaintiffs complain are directly rooted in past events and specifically the past decisions and practices of the City of Kissimmee.").

2. Muskingum County's Differential Treatment of the Coal Run Neighborhood

Muskingum County provided water services throughout the county, but never even made an attempt to bring water to the Coal Run neighborhood. The County treated the Coal Run neighborhood differently and maintained a purely subjective process for determining where water would be provided. This left the Coal Run residents about a mile from the nearest water treatment plant without water, even as the County brought water to some of the farthest reaches of the County. (*Compare* Ex. 30, Kennedy, Jerry Dep. at 88 (indicating his home is approximately one mile from the City water plant),

with Ex. 158, Madden Ltr. To Carnes, Jan. 29, 2001 (describing Chandlersville community as being approximately six miles from the nearest waterline).)

i. The County Commenced and Prioritized Numerous Projects Throughout the County but Disregarded the Coal Run Neighborhood

The stark difference between the County's treatment of the Coal Run neighborhood and similar but predominantly white areas is most starkly illustrated by the first three projects commenced by the County after gaining an interest in a water source — Gaysport, Chandlersville, and Adamsville Road.

These projects were far from existing water sources, lacked population density, and had insufficient community support. (*See, e.g.*, Ex. 9, Dinan Dep. at 74 (noting the numerous obstacles to the Gaysport project including a lack of density of houses, the length of trunk line necessary to reach existing water sources, and the lack of interest from the area's residents); Ex. 158, Madden Ltr. to Carnes, January 29, 2001 (Commissioner Madden describing Chandlersville project as presenting "unique challenges" in part because the "community is approximately 6 miles from the nearest water line"); Ex. 107, Timeline for Pleasant Grove-Adamsville Road Extension, 1995-96, at 2, Dec. 11, 1995 entry (noting the failures of the Adamsville project because of a lack of community interest in the project).)

Despite the lack of interest and the obstacles, the County still made these three projects the County's number one priorities, but at substantial cost and without federal funding to defray the costs. (Ex. 26, Kenily Dep. at 68; Ex. 119, Muskingum County Water Master Plan, Mar. 2, 2004.)

At the same time, Defendants were aware of the need for water in the Coal Run neighborhood. (Ex. 45, Madden Dep. at 134-135 (testifying that all County Commissioners knew of the need for water in the Coal Run neighborhood by December 2000).) Furthermore, the Coal Run project was closer to existing water sources, presented few if any physical obstacles, was a cheaper project, and was eligible to be funded by grant money. (*See* Ex. 58, Pletcher Dep. at 231 (noting that there were no technical obstacles for extending water to the Coal Run neighborhood); Ex. 45, Madden Dep. at 264 (admitting knowledge that Coal Run neighborhood would qualify federal grant monies).)

Indeed, every word the Commissioners used to describe the Chandlersville project applied equally to the Coal Run neighborhood: "its residents suffer with wells which are low in volume and some suffer with contamination problems. Many residents with this area are forced to haul water or rely on secondary sources of water, which will pose health risks." (Ex. 158, Madden Ltr. to Carnes, January 29, 2001.) Nonetheless, Chandlersville was the County's "number one water project for the year 2001" but the Coal Run project was rejected because it was simply not a "priority." (*Compare* Ex. 158, Madden Ltr. to Carnes, January 29, 2001, *with* Ex. 128, Joyce Hill Notes; and Ex. 21, Hill, Joyce Dep. at 70-71.) Further, the residents were told that they would be lucky if their great grandchildren saw water in the neighborhood. (Ex. 144, Kennedy, Richard and Kennedy, Jerry Affs.)

The comparison of the treatment of the Gaysport, Chandlersville, and Adamsville neighborhoods and the Coal Run neighborhood is startling, but Coal Run was also treated worse than many other predominantly white areas. In 1999 and 2000, using nothing but

their combined anecdotal knowledge regarding water needs in the area, the County and East Muskingum Water Authority chose ten areas throughout the County in which they might provide water in the coming years. The Coal Run neighborhood did not make the top ten list. (Ex. 136, Handwritten List of Territory and Projects, Sept. 19, 2000; *see also* Ex. 135, Handwritten List of Territories and Projects; Ex. 45, Madden Dep. at 302-304.) In fact, in discussing the territory to be served, no mention was even made of the Coal Run Area even though Coal Run had a demonstrated need and desire for water and was only approximately a mile from the primary water source. (*See* Ex. 42, Kullman Dep. at 110-11; Ex. 41, Krischak Dep. at 84-85; Ex. 30, Kennedy, Jerry Dep. at 88; Ex. 61, Pls. Expert Disclosure at Ex. B, Map S1.)

Later, the County expanded its list of priority water projects to seventeen and sought upwards of seven million dollars to fund them. (Ex. 138, Letter to Senator Voinovich, Jan. 4, 2001; Ex. 137, County Pre-Application, Jan. 10, 2001.) Again, Coal Run did not rank. In fact, the evidence is clear that the County had no intention of *ever* bringing water to the Coal Run neighborhood.

ii. Muskingum County Disregarded Coal Run as It Sought to Bring Water to Its Other, Predominantly White Residents

The differential treatment of the Coal Run neighborhood by the County began long before the County's priority project lists and the commencement of the Gaysport, Chandlersville, and Adamsville projects. Since at least 1978, the County has been involved in multiple aspects of the provision of water. The County sought and provided funding for areas facing water "emergencies," but never for the Coal Run neighborhood, where the only water was from contaminated wells, rain from rooftops, or trucked in by

the residents. (*See, e.g.*, Ex. 53, Montgomery Dep. at 310-11 (explaining that the Commissioners "came to the rescue" of the people of Philo by providing funding for a water project); Ex. 15, Hale, Mark Dep. at 33-34 (testifying that his well was condemned as unsafe to drink); Ex. 46, Martin, Tommy Dep. at 19 (explaining that the family caught rain and snow off the house to the cistern); Ex. 38, Kennedy, Richard, Sr. Dep. at 35 (testifying that he hauled water every day for four decades).) In the 1990s, the County attempted to improve water services in the Village of Philo, Frazeysburg, New Concord, and out Riley Road — all in the predominantly white areas of the County. (Ex. 112, Facsimile from B. Hamilton, Dec. 20, 1995 (regarding Village of Philo); Ex. 58, Pletcher Dep. at 218 (regarding Village of Philo); Ex. 102, County Journal Entry (regarding Frazeysburg); Ex. 104, County Journal Entries (regarding New Concord); Ex. 113, County Journal Entry (regarding Riley Road).)

In addition, between 1990 and 2000, the County contributed five million dollars to other water projects throughout the County. (Ex. 96, *Times Recorder* article: "Water Authority Dissolved, County Takes Over," Mar. 4, 2003; Ex. 53, Montgomery Dep. at 298-299; Ex. 73, County Journal Entry.) In fact, in the mid-1990s the County sought and obtained funding from the federal government for a pumping station that served the area neighboring Coal Run. (Ex. 159, Hamilton Ltr. To Michel, November 20, 1995 (identifying County contribution of $6250 of its own funds and $30,000 of its CDBG funds to the purchase and installation of the Adamsville Road Booster Pump Station); Ex. 53, Montgomery Dep. at 89-91.) Incredibly, the line only served the white residents along Old Adamsville Road, but the County used the incomes of the predominantly

African-American residents in Coal Run in order to qualify for the funding. (Ex. 59, Quarles Dep. at 102, 177-179.)

In addition to actually funding water projects for residents throughout the County, the Commissioners also advocated for water projects in predominantly white areas, sometimes based on as little as a single request. (Ex. 26, Kenily Dep. at 29-30; *see also* Ex. 53, Montgomery Dep. at 329-331.) County representatives also asked the East Muskingum Water Authority to provide water to residents in Lakeview Heights who were experiencing acid water in their wells as a result of coal mining in their area. (Ex. 17, Hamilton Dep. at 65-66.)

The County has had a long history of providing water to predominantly white areas of the County, but it did not even consider bringing water to the Coal Run neighborhood until discrimination complaints were filed against the County. The difference in treatment and the unguided discretion the County wielded when considering water projects are more than sufficient to support an inference of discrimination.

3. The East Muskingum Water Authority Departed from Its Usual Practices When It Refused to Even Consider Providing Water to the Coal Run Area

The County's predecessor water authority, the East Muskingum Water Authority, also treated the Coal Run neighborhood differently and departed from its usual procedures when requests came from the predominantly African-American community.

For most, the process for seeking and obtaining water services from the East Muskingum Water Authority was simple: a request to the East Muskingum Water Authority and an indication that at least a few people in an area were interested in water.

That would lead to a preliminary engineering study to estimate the cost. (Ex. 42, Kullman Dep. at 28-29, 31-32.)

The East Muskingum Water Authority would then set a tap fee. (Ex. 42, Kullman Dep. at 31-32.) If the tap fee was high but there was a great need for water, the East Muskingum Water Authority might contribute to the project in order to lower the fee. (Ex. 42, Kullman Dep. at 36-37.) Once the tap fee was established, the East Muskingum Water Authority would approach the residents of the area to determine whether a sufficient number of residents would be willing to pay the estimated fee. (Ex. 42, Kullman Dep. at 35.) The *sole* reason the East Muskingum Water Authority would not do the project after the preliminary engineering report was if the project was not financially feasible. (Ex. 42, Kullman Dep. at 40.)

The East Muskingum Water Authority, however, never followed its usual process with the Coal Run neighborhood. Residents of the Coal Run neighborhood sought water from the East Muskingum Water Authority on numerous occasions. Plaintiffs testified about attending meetings in 1968 and 1969 immediately after the Authority was established. (Ex. 22, Hill, Kathleen Dep. at 22-26; Ex. 38, Kennedy, Richard, Sr. Dep. at 54.) The Authority's own records reflect that at least ten residents from the Coal Run neighborhood appeared at an East Muskingum Water Authority meeting in 1973 seeking water. (Ex. 80, East Muskingum Water Authority Board Meeting Minutes, Nov. 14, 1973.) The East Muskingum Water Authority did not, however, conduct a preliminary engineering report in response to any of these requests.

Subsequent requests throughout the years met with similar inaction from the East Muskingum Water Authority. In 1989, a number of Coal Run families attended East

Muskingum Water Authority meetings, signed petitions and otherwise expressed interest in obtaining East Muskingum Water Authority water services in the Coal Run area. (Ex. 40, Kreis Dep. at 32-35, 54-55 (noting that Coal Run neighborhood residents attended the meetings and that petitions were signed at the meetings). Others confirmed that the Coal Run neighborhood could provide new water customers to the East Muskingum Water Authority: "There is an area of Mill Drive, Coal Run Road and Langland [sic] Lane with approximately 40-50 homes in this area that could be added with new lines." (Ex. 89, East Muskingum Water Authority Board Meeting Minutes, Apr. 9, 1990, at 2.)

In 1995, Coal Run residents joined meetings where Washington Township Trustees lobbied the East Muskingum Water Authority regarding water services to the neighboring Adamsville Road area. (Ex. 107, Timeline for Pleasant Grove-Adamsville Road Extension, 1995-96; Ex. 27, Kennedy, Bernard Dep. at 47-48 (testifying about his attendance at East Muskingum Water Authority meetings and being told that water would not extend to the Coal Run neighborhood).)

The East Muskingum Water Authority considered the requests from the predominantly white Adamsville Road area and conducted a preliminary engineering study, but again excluded the Coal Run neighborhood. (Ex. 122, Preliminary Engineering Report, June 1995; Ex. 42, Kullman Dep. at 54, 72.) Even when insufficient numbers of residents of the Adamsville Road area signed up for water services to make the project feasible, the East Muskingum Water Authority still did not consider adding the Coal Run neighborhood. The East Muskingum Water Authority officials recognized the Coal Run neighborhood as being a dense area, which could lower the tap fee and encourage more people to sign up for water service. (Ex. 42, Kullman Dep. at 32 (noting

that including a dense area in a project would help lower tap fee); Ex. 9, Dinan Dep. at 43 (recognizing the Coal Run area as "pretty dense"); *see also* Ex. 61, Pls. Expert Disclosure at Ex. B, Map S1.)

In 1984, the East Muskingum Water Authority went a step further and voluntarily released the area from its jurisdiction for no identifiable reason. The East Muskingum Water Authority concluded without any analysis that the area was not financially attractive but the engineer who reached that conclusion could articulate no basis for the conclusion. (Ex. 87, Cerrone & Vaughn Letter, Oct. 23, 1984.) *See Hawkins v. Town of Shaw*, 437 F.2d 1286, 1289 (5th Cir. 1971) (in action under the Equal Protection Clause alleging discriminatory provision of a variety of municipal services to African American residents, rejecting defendants' defense that paving was done according to traffic needs and usage where town engineer never actually conducted such an analysis).

The East Muskingum Water Authority even built the Pleasant Grove project, which included a line far down Adamsville Road that stopped just short of Coal Run Road. (*See* Ex. 132, Pleasant Grove/Adamsville Road Project 2001; Ex. 160, Maps of Pleasant Grove/Adamsville Road Project 2001.) The Pleasant Grove project completed the circle of lines around the Coal Run neighborhood, but still the residents were not permitted to connect. *See* Figure 7, *supra* p. 51.

The long history of the East Muskingum Water Authority's refusal to provide water to the Coal Run neighborhood demonstrates clear differential treatment. The Coal Run neighborhood was the only area where residents expressed an interest in water but where the East Muskingum Water Authority did not even take the initial step of conducting a preliminary engineering study. It was also the only area that the East

Muskingum Water Authority released from its jurisdiction without any analysis of the economic feasibility of serving the area. (Ex. 42, Kullman Dep. at 30.)

This evidence is more than sufficient to support an inference of discrimination.

4. Washington Township Trustees' Treatment of the Coal Run Neighborhood Was Different from Their Treatment of White Areas For Which They Actively Sought to Obtain Water

Washington Township Trustees obtained water for predominantly white areas of the Township, but never sought water for the Coal Run neighborhood. In their efforts to bring water to the white areas, the Trustees lobbied and negotiated with the water authorities, sought out potential customers, initiated and attended meetings, took legislative action, and otherwise led the efforts to obtain water. (*See generally* Ex. 107, Timeline for Pleasant Grove-Adamsville Road Extension, 1995-96.) The Coal Run neighborhood was mere feet from the areas where the Trustees sought to bring water and the Trustees knew that the residents wanted and needed water. (Ex. 7, Culbertson Dep. at 92-93; Ex. 45, Madden Dep. at 114-15). Nonetheless, the Trustees made no effort to include the Coal Run neighborhood in their efforts to bring water to Township residents. (*See, e.g.*, Ex. 45, Madden Dep. at 69-70, 120.) Instead, the best the Trustees could do for the Coal Run neighborhood was to say: "Our only hope is that people will have pride in their homes and repair them." (Ex. 161, CDBG Subrecipient Application Form at 3.)

i. The Township Trustees Were Active in Seeking Water for Predominantly White Areas

In general, the Township Trustees were "very active asking for water where there's not a line." (Ex. 41, Krischak Dep. at 149; *see also* Ex. 41, Krischak Dep. at 30-31, 140-14; Ex. 6, Coast Dep. at 111-112, 175-176 (noting that "Don Madden was heavily involved in Adamsville Road" in his role as a Washington Township Trustee);

Ex. 53, Montgomery Dep. at 43-45 (testifying Defendant Madden was "extremely active" "as a Township Trustee" in addressing the contamination of wells in the area).)[25] The Trustees were "inactive" in the Coal Run area of the Township.

The Washington Township Trustees' regular involvement in seeking water for Township residents began in 1995 when they conducted a door-to-door petition drive to collect signatures for water service in the Adamsville Road/Pleasant Grove Area — a predominantly white area directly adjacent to the Coal Run neighborhood. (*See generally* Ex. 107, Timeline for Pleasant Grove-Adamsville Road Extension, 1995-96, at 1 (Mar. 13, 1995 entry); Ex. 45, Madden Dep. at 67-69 (regarding petition); Ex. 53, Montgomery Dep. at 174, 204) (describing the area as white).) The Trustees took their petitions to the East Muskingum Water Authority and asked for water for an area that they defined. (Ex. 107, Timeline for Pleasant Grove-Adamsville Road Extension, 1995-96, at 1 (March 13, 1995 entry) ("Washington Township Trustees, Don Madden and Doug Culbertson presented petitions of those in the area who desire to become customers of the Authority.").)

The Trustees contacted people in the area to determine who would sign up for water service. After conducting an analysis and estimating likely costs, the East Muskingum Water Authority directed the Trustees "to call on those interested and see if they will sign up." (Ex. 107, Timeline for Pleasant Grove-Adamsville Road Extension,

[25] Township trustees in Muskingum County regularly advocate for water for their residents. The Chandlersville project became a priority for the County because it was brought to the County Commissioners by the Salt Creek Township Trustees. (Ex. 45, Madden Dep. at 234-237.) Similarly, County employee Gerald Howard testified that other township trustees have requested water from the County via letter. (Ex. 24, Howard Dep. at 24.) A Licking Township Trustee testified that the East Muskingum Water Authority had advised the Licking Township Trustees that if the township laid waterlines and handled billing, the East Muskingum Water Authority would supply water. (Ex. 162, Crittenden Dep. at 56-57.)

1995-96, at 1 (June 12, 1995 entry).) "It was decided to call a community meeting . . . at the Washington Township fire house on Adamsville Road. Some of the Board members, Mr. Peyton, Mr. Coast and *the Township Trustees* will try to relay information to the public and answer any question." (Ex. 107, Timeline for Pleasant Grove-Adamsville Road Extension, 1995-96, at 1 (July 10, 1995 entry) (emphasis added).) Although Coal Run residents appeared at the meeting, expressing interest for water in the neighborhood, they were not included among those considered for water services. (Ex. 42, Kullman Dep. at 54, 72; Ex. 27, Kennedy, Bernard Dep. at 47-48.)

After the initial Adamsville Road/Pleasant Grove project failed because insufficient numbers of people signed up from the area the Trustees helped define, the Trustees still did not pursue including the adjacent and densely populated Coal Run area, which could have made the project economically feasible for everyone. (Ex. 107, Timeline for Pleasant Grove-Adamsville Road Extension, 1995-96, at 2 (Dec. 11, 1995 entry) (indicating project failed for lack of sign-up); Ex. 42, Kullman Dep. at 32 (noting that including a dense area in a project would help lower tap fee); Ex. 9, Dinan Dep. at 43 (recognizing the Coal Run area as "pretty dense"); Ex. 61, Pls. Expert Disclosure at Ex. B, Map S1.) Instead the Trustees negotiated for a scaled down project and a reduction of tap-in fees. (Ex. 107, Timeline for Pleasant Grove-Adamsville Road Extension, 1995-96, at 3 (Mar. 12, 1996 entry) ("The Washington Township Trustees requested $500.00 be accepted at the time contracts are signed and $1,000.00 paid after construction begins.").)

ii. The Township Trustees Successfully Obtained Water for the Predominantly White Adamsville Road/Pleasant Grove Area

In the late 1990s, Township Trustees Cameron and Culbertson redoubled efforts to bring water to the Adamsville Road/Pleasant Grove area. (Ex. 41, Krischak Dep. at 43.) By this time, Trustee Cameron had even joined the East Muskingum Water Authority Board (*Id.* at 21-22, 39-40.) The Township Trustees' efforts to bring water to the Adamsville Road area were successful, and the East Muskingum Water Authority agreed to do the project. As part of their efforts, the Trustees passed a resolution petitioning the East Muskingum Water Authority to include portions of the Adamsville Road area back into its district. (Ex. 129, Washington Township Resolution, Apr. 19, 2001.) Notably, the Coal Run neighborhood had been included in the area when it was *removed* from the East Muskingum Water Authority's jurisdiction in 1984, but in a continuation of the discriminatory disregard of the neighborhood it was left out when the Township Trustees petitioned to have the area re-established to allow the East Muskingum Water Authority to provide water services for the neighboring white area. (Ex. 129, Washington Township Resolution, Apr. 19, 2001 ("This Resolution is declared to be an emergency measure necessary for the immediate preservation of the public health, safety, and welfare, because of the residents' immediate need for safe drinking water and fire suppression within the territory described above.").)

The Township's differential treatment of the Coal Run neighborhood and purely subjective process for determining who would receive the benefit of the Trustees' legislative and advocacy efforts is sufficient to support an inference of discrimination.

D. Defendants' Assertion that Plaintiffs Cannot Establish a *Prima Facie* Case Is Unfounded

Defendants limit their discussion of Plaintiffs' evidence supporting an inference of discrimination to a rigid, formalistic *prima facie* case standard they develop. Defendants try to isolate the numerous forms of evidence that permit an inference into this rigid structure and conclude that Plaintiffs can only establish a *prima facie* case if they are minority and made an explicit request for water. As described *supra* pp. 89-94, there can be no requirement that each Plaintiff be a minority or have made a request. Any suggestion to the contrary simply ignores the unmistakable directive of the Supreme Court as discussed above.

Although individual requests for water are not necessary to an inference of discrimination or a *prima facie* case of discrimination here, it is worth noting that courts recognize that plaintiffs can be excused from any requirement to make an "application" when such an application would be futile. *See Pinchback v. Armistead Homes, Corp.*, 907 F.2d 1447, 1451-52 (4th Cir. 1990); *Dowdell v. City of Apopka*, 511 F. Supp. 1375, 1378 (M.D. Fla. 1981) (in challenge to City's discriminatory provision of municipal services to black residents, suggesting that requests for services decreased over time because residents recognized that requests would be futile.) After nearly five decades of being denied water and having requests disregarded and ignored, it was certainly reasonable for residents to conclude that making further requests would be simply futile.

Having established that the evidence is sufficient to support an inference of discrimination, Plaintiffs now show that Defendants' asserted justifications for taking the actions against the Coal Run neighborhood are pretexts.

IV. The Evidence Demonstrates that Defendants' Justifications for Their Actions Are Pretexts for Discrimination

A. Proof of Pretext May Be Established Through Comparative, Statistical, and Anecdotal Evidence

The statistical and comparative evidence and the evidence regarding the sequence of events and unguided discretion wielded by Defendants, as described above, not only allow an inference of discrimination but also demonstrate that Defendants' asserted justifications for refusing water service to the Coal Run neighborhood are pretextual. *Reeves v. Sanderson Plumbing Prods*., 530 U.S. 133, 143 (2000) (holding that trier of fact may determine that defendants' explanation is a pretext for discrimination based upon the evidence presented in support of plaintiffs' *prima facie* case and inferences drawn therefrom); *Miles v. M.N.C. Corp*., 750 F.2d 867, 870 (11th Cir. 1985) (holding that pretext may be proven through comparative evidence, statistical evidence, and direct evidence of discrimination). In addition, however, as Plaintiffs now discuss, the evidence also shows that each of the Defendants' asserted justifications are also contradicted by the record.

B. The Record Contradicts Muskingum County's Asserted Justifications for Failing to Serve the Coal Run Neighborhood

The County attempts to explain its post-2000 refusal to provide water to the Coal Run area with three assertions: (1) the County did not want to force the Coal Run residents to service loans to cover the cost of the Coal Run project; (2) the County wanted to wait until the East Muskingum Water Authority completed the Pleasant Grove project before beginning the Coal Run project; and (3) the County ultimately provided water to the Coal Run residents. Each is pretextual.

1. The Evidence Establishes That the Cost of the Coal Run Project Was Not a Factor in the County's Refusal to Consider Running Waterlines to the Neighborhood

The County first suggests that the County did not pursue the Coal Run project because it believed, based on a City preliminary report, that such a project would cost $1.9 million and that such a cost would have forced the Coal Run and neighboring residents to shoulder excessive costs. (County Mot. for Summ. J. at 41.) The evidence contradicts this assertion and makes clear that the County fabricated this excuse *after* it had rejected the possibility of ever running waterlines to Coal Run.

First, one County Commissioner actually disputes the assertion himself. Commissioner Kenily testified that any cost estimate for a water project should have been presented to the community for consideration, including the City's $1.9 million estimate for the Coal Run neighborhood and surrounding area. (Ex. 26, Kenily Dep. at 228.) In fact, Commissioner Kenily noted that a proposed project with exorbitant costs was presented to the predominantly white Chandlersville residents for them to assess. (Ex. 26, Kenily Dep. at 229-31.)

Second, the County had rejected the possibility of a Coal Run neighborhood project before even seeing the City's projected costs. By the time the City completed its preliminary cost analysis and presented it to the County, the County had already identified seventeen other projects it wanted to pursue and Coal Run was not among them. (Ex. 137, County Pre-Application, Jan. 10, 2001 (describing in January 2001, the seventeen projects for Muskingum County.) In fact, Coal Run was not even considered in the County's process of prioritizing water projects. (Ex. 42, Kullman Dep. at 111; Ex. 41, Krischak Dep. at 84.) This indicates a fundamental lack of interest in serving this

predominantly African-American community, not a fear of creating excessive costs for the residents.

Third, the County made no independent assessment of the cost of the project until after Plaintiffs had filed discrimination complaints. Instead, the County asserts that with no critical review, it simply accepted that a project in the Coal Run neighborhood and surrounding area would cost $1.9 million. (Ex. 45, Madden Dep. at 280-81.) In fact, however, when the County completed the project after Plaintiffs filed their discrimination complaints, it cost a total of $730,000 and served 142 residents at a cost of $5,140 per home. (Ex. 119, Muskingum County Water Master Plan, Mar. 2, 2004.)

The County did not blindly accept another jurisdiction's cost estimates with any of its other projects. (Ex. 9, Dinan Dep. at 74 (testifying that the East Muskingum Water Authority told Commissioner Kenily before the County commenced the Gaysport project why the project was not financially feasible.) In addition, the City had conflicting estimates regarding the cost of a project in the Coal Run area. The City engineer had conducted his own study and estimated that the cost would be approximately $435,000 for a water project in the Coal Run and surrounding area. (Ex. 64, 2000 City Report on Extension of Water to Coal Run Area.)

Significantly, when the County was forced to consider running water to Coal Run in response to the Plaintiffs' discriminations complaints, the County no longer found it sufficient to rely on the City's numbers, but instead immediately had its engineers conduct a cost analysis. (Ex. 59, Quarles Dep. at 112-113.)

Fourth, the County made no attempt to determine what grant funding could be obtained for the Coal Run project. The County knew that the Coal Run area had

qualified for federal funding in the past and was likely aware that state monies would be available because of the contamination of the ground water. (Ex. 45, Madden Dep. at 264 (testifying that he was aware that Coal Run area would qualify for low to moderate income grants from federal government).) If the County had truly been concerned about the cost of a water project to the residents in the Coal Run neighborhood, it would have considered these funding sources and discovered that the Coal Run residents would pay *nothing* to obtain water services. (*See, e.g.*, Ex. 12, Hairston, Cindy Dep. at 158; Ex. 38, Kennedy, Richard, Sr. Dep. at 39-40.)

Fifth, at the very same time that the County was supposedly rejecting the Coal Run project because of excessive costs, it was commencing projects in predominantly white areas with similar costs — Chandlersville at approximately $1.5 million and Gaysport at approximately $1.2 million and initial per household estimates as high as over $11,000 — without concern for the costs to those areas. (Ex. 163, Preliminary Engineering Costs for Chandlersville, Adamsville Road, and Gaysport, December 18, 2000.) Indeed, the County did not even know whether the per household costs for Gaysport and Chandlersville would be more or less than the per household costs at Coal Run because the County made no attempt to determine the number of homes that could be served in the Coal Run neighborhood and surrounding area. Further, on its priority list for water projects, the County had projects with costs as high as $25,000 per household. (*See* Ex. 119, Muskingum County Water Master Plan, Mar. 2, 2004 (describing the following projected costs for projects that the County had considered long before the County rejected the proposed Coal Run Road project: Rural Dale area, $25,555 per house, Norwich/Rix Mill Road, $12,252 per house, Cutler Lake/Sugar Grove, $10,345

per house).) Even at the cost estimated by the City and without even considering the availability of federal or state grant funding, the Coal Run project would have had a similar per house cost. (Ex. 119, Muskingum County Water Master Plan, Mar. 2, 2004 (indicating 142 homes served by eventual Coal Run project, making per house cost for City's proposed $1.9 million approximately $13,380).)

Based on this evidence, a jury could easily conclude that the County's supposed concerns for the expense to the Coal Run residents — who of course could decide for themselves whether they wanted to shoulder the costs of the project — is merely an after-the-fact pretextual explanation.

2. The Record Contradicts the County's Assertion that It Was Merely Waiting for the East Muskingum Water Authority to Complete a Nearby Project Before Commencing Coal Run

The County's second explanation for refusing water to the Coal Run residents is that the County was awaiting completion of the East Muskingum Water Authority's Pleasant Grove waterline before commencing a Coal Run project, which would connect to that line. This excuse is also contradicted by the evidence.

First, the explanation is again contradicted by the County's own officials. The County relies on a recently drafted affidavit from Commissioner Madden to make the assertion, but in his deposition testimony, Commissioner Madden had a very different story, stating that the County only requested to tap into the Pleasant Grove line as a response to the discrimination complaints filed by Plaintiffs.

> Q. What was it that led you to go down there on August 12, 2002 and make this request?
>
> A. As, obviously, reflected here, the Civil Rights Commission letters and certainly the meeting with the residents, the July 26 meeting.

> This would probably have been their first regular meeting after that date.

(Ex. 45, Madden Dep. at 308.)

In fact, Commissioner Madden explicitly admitted in his deposition that no decision had been made about waiting for the Pleasant Grove line before commencing a Coal Run project.

> Q. Did you make the conscious decision of not pushing forward with any efforts to start getting water on Coal Run until the Pleasant Grove line was done?
>
> A. I don't know if, in my own mind, a decision was really made. We had other projects that were – I was devoting a lot of attention to, and I'm not sure that it's fair for me to say I made a conscious effort. I was aware of another opportunity coming, but I don't know that I necessarily made a conscious decision to say, okay, by fall of '02, we are going to have another water line and that's the point to – to start.

(Ex. 45, Madden Dep. at 286-287.)

Second, even if the County planned on connecting to the Pleasant Grove line, nothing prevented it from commencing the numerous necessary steps before beginning actual construction. The County did not conduct any cost analysis, did not do the preliminary income surveys, and did not seek funding sources while awaiting the completion of the Pleasant Grove project. (Ex. 45, Madden Dep. at 204-206 (testifying that the County had not done any engineering or preliminary work on the Coal Run project as of July 26, 2002); Ex. 7, Culbertson Dep. at 71-72 (indicating that he was asked to conduct income survey in September 2002).) Notably, on the eve of Plaintiffs' filing their discrimination complaints, the County was pursuing preliminary steps for other projects on its priority list. (*See, e.g.*, Ex. 164, Letter from County Engineer June 28, 2002 (County's Engineer discussing engineering design for Nashport Water

Extension Project with County Commissioners on June 28, 2002); Ex. 165, County Engineer's Billing Report, May 2002 (County Engineer indicating in May 2002, development of engineering estimates for potential water and sewer service projects in the areas of Dresden and Lakeland Hills).)

Third, the County did not even approach the East Muskingum Water Authority about the possibility of connecting to the Pleasant Grove line until after the discrimination complaints had been served. The first request to tie into the East Muskingum Water Authority's Pleasant Grove waterline to serve the Coal Run Area was made on August 12, 2002, after the discrimination complaints were served. (Ex. 45, Madden Dep. at 307-308.) As described in the East Muskingum Water Authority's minutes, the request was in direct response to Plaintiffs' discrimination complaints:

> Mr. Madden has received calls and letters from Ohio Civil Rights Commission regarding Coal Run Rd, Langan Ln., Wallwork Ave. and Russell St. Residents there [sic] are filing claims of discrimination because they do not have public water service. Mr. Madden wants the board's permission to allow the County Water System to hook up on our lines on Old Adamsville Rd., in order to possibly serve this area.

(Ex. 149, East Muskingum Water Authority Board Minutes, Aug. 12, 2002.)

The County was not waiting for the Pleasant Grove line to begin construction of a Coal Run project. This is just another pretextual explanation for the County's refusal to bring water to Coal Run.

3. The Running of Waterlines to Coal Run After the Residents Accused the County of Discrimination Does Not Explain Its Persistent Refusals to Serve the Area

The County finally suggests that it could not have discriminated because it eventually brought water to the Coal Run neighborhood. The County neglects to mention that its efforts to serve the Coal Run neighborhood only began after the Plaintiffs' discrimination complaints in this matter were filed. Within days of being served with the discrimination complaints, the County began its first efforts to bring water to the community. Commissioner Madden even admits that the County efforts to run water to Coal Run were taken in response to the discrimination complaints. (Ex. 45, Madden Dep. at 308). Actions taken by a defendant in response to the filing of a discrimination complaint do not rebut an inference of discrimination. *See, e.g., Baker v. City of Kissimmee*, 645 F. Supp. 571, 584 -585 (M.D. Fla. 1986) (rejecting evidence of paving in African-American area after filing lawsuit as evidence that city was responsive to African-American residents' needs).

The County's attempts to explain their refusals to bring water to Coal Run are contradicted by the evidence and it is absolutely clear that a jury could conclude that the County's explanations are merely pretextual.

C. The City's Explanations for Refusing Water to Coal Run Residents Are Disputed by the Record

The City presents four categories of reasons for failing to bring water to the Coal Run neighborhood: (1) the City was not permitted to run waterlines into other water authorities' jurisdiction; (2) no Coal Run resident requested a pre-annexation agreement; (3) the City did not own the Old Adamsville Road line; and (4) the existing Old

Adamsville Road line was insufficient to carry additional Coal Run residents. No evidence *supports* any of these assertions, but ample evidence *contradicts* them.

1. The Evidence Establishes that the City Was Not Prohibited From Extending Waterlines Outside the City and into Other Water Authorities' Jurisdictions

The City first asserts that it could not run waterlines to the Coal Run area because it was not permitted to provide water in other water authorities' jurisdiction. This assertion is flatly contradicted by the record. The City does not cite to any record evidence suggesting that the City was prevented from providing water services in any area. (City Mot. for Summ. J. at 40.) On the other hand, Plaintiffs have identified multitudes of waterlines that the City has run outside its border and into other authorities' jurisdictions. The City may have "butted heads" with other jurisdictions over its aggressive pursuit of projects outside the City, but that did not slow its efforts to run the lines and certainly did not lead to any conclusion that the City was legally barred from completing the lines. (Ex. 42, Kullman Dep. at 118-119.)

In addition, the City's assertion is contradicted by the fact that it operated the Old Adamsville Road line without any legal limitations. (Ex. 125, Judgment Entry Apr. 16, 1998; Ex. 58, Pletcher Dep. at 479 ("I ran it yesterday; I'll run'er tomorrow.").) That line was directly adjacent to the Coal Run neighborhood and also outside the City limits. *See* Figure 2, *supra* p. 16. It is also disputed as to whether the Coal Run neighborhood was actually within any other water authority's jurisdiction. (Ex. 85, Petition to Amend, Oct. 29, 1984.)

The fact that the Coal Run neighborhood was outside the City is simply of no significance when it was regularly running lines outside its borders: "[w]hile a city may

have no obligation in the first instance to provide services to anyone outside its geographical limits, once it begins to do so, it must do so in a racially nondiscriminatory manner." *United Farmworkers of Fla. Hous. Project, Inc. v. City of Delray Beach*, 493 F.2d 799, 808 (5th Cir. 1974).

2. The Suggestion that the Coal Run Residents Were Not Provided Water Because They Failed to Seek "Pre-Annexation Agreements" Finds No Support in the Record

The City suggests that Coal Run residents were not connected to waterlines because no resident requested a pre-annexation agreement. There is no basis in the record for this assertion. First, no City representative has even suggested that they refused to connect any applicant for water because they had not requested annexation. Instead, if a household sought water services, the City would explain the process, which at certain times throughout the history of Coal Run requesting water might have included a pre-annexation agreement. (Ex. 58, Pletcher Dep. at 136 (noting that if a household requested water service it would be asked to sign a pre-annexation agreement).) There is also no evidence that any of the whites who were permitted to tap into waterlines were required to ask for a pre-annexation agreement. Indeed, it appears that the form of the whites' requests were no different from the African Americans' except that whites only had to ask once while no number of requests could bring water to a Coal Run resident.

3. Record Evidence Demonstrates that the City Controlled Who Would be Permitted to Extend or Tap into the Old Adamsville Road Line

The City attempts to explain its failure to allow tap-ins or extensions of the Adamsville line to Coal Run residents by asserting that it did not "own" the lines that came within yards of the Coal Run residents. The explanation fails for a number of reasons.

First, it is undisputed that after 1998, the City did "own" the lines. (Ex. 125, Judgment Entry Apr. 16, 1998.) Accordingly, this attempted explanation is irrelevant to the refusals to allow water into Coal Run homes after 1998.

Second, regardless of ownership, the evidence supports a finding that the City *always* controlled who would be allowed to tap into the line. (Ex. 2, Brock Dep. at 14, 35-36.) As a final decision-maker on requests to tap into the Adamsville line, the City maintained responsibility for the refusals to allow Coal Run residents to tap into the line.

Third, the evidence shows that the City was involved with every aspect of the Old Adamsville Road line. (Ex. 51, Michel Dep. at 30 (Q: Are there any responsibilities that the water association had that they didn't share with the city? A: No).) This also supports a finding that the City was involved in connection and extension decisions.

4. The Record Supports a Finding that The Old Adamsville Road Could Accommodate More Users in the Coal Run Neighborhood

The City next asserts that it could not allow tap-ins or extensions of the Old Adamsville Road line because the line did not have the capacity to support the additional users. Several facts contradict this assertion.

First, white households were allowed to tap into the line at various times during the history of the line regardless of what effect it might have on the line and other users. (Ex. 58, Pletcher Dep. at 164-165, 166, 212, 214-216; Ex. 77, City Memorandum re: Adamsville Road Water Line, Sept. 2, 1975; Ex. 94, Letter from City, May 9, 1990; Ex. 93, Letter from City, July 30, 1991.) Indeed, requests by Coal Run residents were turned down at the very same time whites were being allowed onto the line. (*Compare, e.g.*, Ex. 54, Newman, Goldie Dep. at 20 *and* Ex. 151, Second Stip. at 8 (indicating the Newmans requested and were denied a tap in 1973), *with* Ex. 58, Pletcher Dep. at 154 (indicating a white individual was allowed several taps in 1973 or 1974) *and* Ex. 77, City Memorandum re: Adamsville Road Water Line, Sept. 2, 1975 (allowing another white household to tap in 1975).) The City even allowed a developer to extend the line into his development where multiple taps were expected. (Ex. 58, Pletcher Dep. at 154.) In addition, the Coal Run residents, who were at a lower elevation, could have had sufficient pressure. (Ex. 58, Pletcher Dep. at 316-17.)

Second, it is undisputed that after the pump station was installed in 1995 the Old Adamsville Road line had excess capacity. (Ex 58, Pletcher Dep. at 234, 253 (noting that when Plaintiffs' discrimination complaints were served, the line had the capacity for at least five more taps.)

The evidence supports a finding that there was capacity on the Coal Run line to allow more users and the fact that whites were allowed to tap into the line could support a jury finding that the "capacity" explanation is pretextual.

A jury could readily find that each of the City's attempted explanations for refusing to bring water to the Coal Run neighborhood is pretextual.

D. Washington Township's Attempts to Explain Its Failures to Obtain Water for the Coal Run Area Are Not Supported by the Record

Washington Township asserts that it did not obtain water for the Coal Run neighborhood because: (1) it has no authority to construct, maintain, or operate waterlines; (2) the Township has no duty to provide water; and (3) the Coal Run residents never sought water from the Township. These explanations are all contradicted by the extensive efforts taken by the Trustees to get water to white areas of the Township.

1. A Lack of Authority to Construct Water Projects Does Not Insulate the Township From Liability for Its Differential Treatment

The Township first argues that it does not have the authority to "construct" water projects. That fact is not determinative of its liability. The evidence establishes that Washington Township obtained water for its residents, negotiated with water authorities, sought out potential customers, initiated and attended meetings for water services, took legislative action, and otherwise led the efforts to ensure that its white residents received water services. In fact, in the predominantly white Adamsville Road area the Township's efforts were successful. In the Coal Run neighborhood, the Township took absolutely no efforts to bring water to its African-American residents.

The Township's efforts in the Adamsville Road area were a necessary predicate to Township residents receiving water. The East Muskingum Water Authority *required* the Township's actions in re-establishing its jurisdiction in order to provide water services to the Pleasant Grove area. (Ex. 41, Krischak Dep. at 55.) The Township's lack of authority to *construct* water projects does not insulate it from liability for taking official actions to bring water to white areas of the Township while ignoring the needs of the African-American Coal Run neighborhood.

2. Once the Township Chose to Assist Residents to Obtain Water, It Could Not Do So in a Discriminatory Manner, Regardless of Its Water Duties

The Township next argues that its actions were permissible because it had no *duty* to provide water to the Coal Run area. The Township's duty is also not determinative of its liability. Even if the Township is not required to advocate for water for its residents, it cannot refuse to do it for predominantly African-American neighborhoods while advocating for predominantly white neighborhoods. "If the motive is discriminatory, it is of no moment that the complained-of conduct would be permissible if taken for nondiscriminatory reasons." *LeBlanc-Sternberg*, 67 F.3d at 425; *see also United Farmworkers*, 493 F.2d at 808 (noting that although city had no obligation to provide water outside its borders, once it began to do so it was obligated to do it in a non-discriminatory manner). The evidence permits a finding that the Township took official actions and used its official influence to obtain water for some residents even absent a duty to do so. Those efforts, however, were made in a differential matter.

3. The Township's Assertion that Plaintiffs Did Not Make Requests For Water to the Township Is Factually Incorrect and Legally Irrelevant

The Township finally attempts to argue that it made no efforts on behalf of the Coal Run residents because they did not make any requests for water. This assertion is again flatly contradicted by the record. Coal Run residents made direct requests to Township Trustees for water. (Ex. 7, Culbertson Dep. at 26, 110). Coal Run residents also appeared at meetings with the Trustees about gauging interest in water projects in the Township. (Ex. 107, Timeline for Pleasant Grove-Adamsville Road Extension, 1995-96, at 1 (July 10, 1995 entry); Ex. 27, Kennedy, Bernard, Dep. at 47-48.) These forms of

requesting water were sufficient to get the Township to advocate on behalf of predominantly white areas, but not enough for the Coal Run residents.

The evidence supports a finding that the Township's unexplained refusal to obtain water for the predominantly African-American Coal Run neighborhood, while expending efforts on behalf of the predominantly white Adamsville Road area supports a finding of discrimination.

DEFENDANTS' ADDITIONAL ARGUMENTS

I. As a Recipient of Federal Funds, the City Is Subject to the Prohibitions of Title VI

Plaintiffs bring claims under Title VI of the Civil Rights Act of 1964, which prohibits discrimination on the basis of race, color, and national origin in federally funded programs and activities. 42 U.S.C. § 2000d. The City asserts that because it spent no federal funds on water projects outside of the City it is not liable under Title VI for its discrimination against individuals living outside of the City. This assertion is contrary to well-established law. Title VI prohibits discrimination in any of the activities of an entity receiving funds, not just activities directly funded with the federal monies. As courts have held, "entire entities receiving federal funds — whether governmental entities, school systems, or universities — must comply with Title VI, rather than just the particular program or activity that actually receives the funds." *Grimes v. Superior Home Health Care of Middle Tenn., Inc.*, 929 F. Supp. 1088, 1091-92 (M.D. Tenn. 1996) (citing *Stanley v. Darlington County Sch. Dist.*, 879 F. Supp. 1341, 1365 (D.S.C. 1995), *rev'd in part on other grounds*, 84 F.3d 707 (4th Cir. 1996); *see also D.J. Miller & Assocs., Inc. v. Ohio Dep't of Admin. Servs.*, 115 F. Supp. 2d 872, 878 (S.D. Ohio 2000) (relying on

Grimes and rejecting defendant's argument that plaintiff's Title VI claim failed because the particular program that plaintiff challenged was not federally funded.)

Further, Plaintiffs need not be the intended beneficiaries of the federal funding. *See, e.g.*, *Farm Labor Org. Comm. v. Ohio State Highway Patrol*, 95 F. Supp. 2d 723, 742 (N.D. Ohio 2000) ("[E]ven if [plaintiffs] were not the intended beneficiaries of money flowing to the [defendant], they nevertheless can bring a Title VI claim on the grounds that the [defendant] qualifies as a "program or activity" that allegedly subjected them to discrimination."); s*ee also Moss v. Columbus Bd. of Educ.*, No. 2:00-cv-855, 2001 WL 1681117, at *9 (S.D. Ohio Sept. 27, 2001).

To pursue a Title VI claim against the City, therefore, Plaintiffs need only show it received federal funds — a fact that is undisputed. Plaintiffs therefore may pursue their Title VI claim against the City.

II. The Individual Defendants Are Not Entitled to Qualified Immunity

The individual Defendants contend that they are entitled to qualified immunity. In order to defeat a claim for qualified immunity, a plaintiff is only required to show that an official had "fair warning" that his or her actions violate the law. *Hope v. Pelzer*, 536 U.S. 730, 740-41 (2002) (internal quotations omitted). General statements of law can be sufficient to put an official on notice, and the Supreme Court has specifically rejected any qualified immunity standard that would require the facts to be "fundamentally similar," or even "materially similar." *Id.* at 741 (internal quotations omitted).

As the Sixth Circuit has held, when purposeful discrimination is an element of a claim, inquiry into the officials' motive or intent is essential. *Poe v. Haydon*, 853 F.2d 418, 431 (6th Cir. 1988). In such a case, therefore, summary judgment on a qualified

immunity defense is not appropriate if there is a genuine issue of material fact concerning the official's motivation. *Id.* at 432.

There can be no question that the individual Defendants in this case were under fair warning that their refusal to provide the Coal Run neighborhood with water services with the purpose and foreseeable effect of denying this service to African Americans violated the Equal Protection Clause; 42 U.S.C. §§ 1981 and 1982; Title VI; and the Fair Housing Act.

It is well-established law that municipal officials' actions that exclude African-American communities from important municipal services contravene the mandates of the federal anti-discrimination laws. *See, e.g., Neighborhood Action Coal.*, 882 F.2d at 1012 (finding that Fourteenth Amendment is violated "when a police department fails to respond to calls from a neighborhood because of the racial make-up of the neighborhood"); *Southend Neighborhood Imp. Ass'n v. St. Clair County*, 743 F.2d 1207, 1209 (7th Cir. 1984) (noting that Fair Housing Act prohibits discrimination in services generally provided by governmental units); *United Farmworkers*, 493 F.2d at 811 (finding violations of Equal Protection Clause where members of city council and county planning board discriminatorily refused to allow housing project to tie into City's existing water and sewer system).

Moreover, the actions by the individually named Defendants were objectively unreasonable. The record clearly indicates that Defendants provided water services to predominantly white areas while not even considering the Coal Run neighborhood's need and requests for water.

Material factual disputes exist over the individual Defendants' discriminatory intent in denying water to the Coal Run neighborhood. Accordingly, qualified immunity should be denied.

III. Plaintiffs Are Entitled to Injunctive Relief Necessary to Ensure Defendants Do Not Repeat Their Discriminatory Practices.

The City argues that Plaintiffs' claim for injunctive relief is moot because all Plaintiffs still living in the Coal Run neighborhood now have water service. (City's Mot. for Summ. J. at 37.) Defendants' argument fails to recognize that bringing water to the neighborhood is not the sole available injunctive relief. In a case such as this with the decades-long practices of discrimination, a permanent injunction prohibiting further discrimination is necessary to ensure Defendants do not revert to their discriminatory ways. In addition, requiring Defendants to adopt anti-discrimination policies and to receive training will help ensure that Plaintiffs and future residents are not subjected to further discrimination.

Here, for over fifty years, a succession of actors operating under a singular discriminatory practice led to unequal treatment of a predominantly African-American neighborhood. There is no question but that Defendants will in the future face decisions related to providing municipal services to the Coal Run neighborhood and a permanent injunction is critical to ensure that Defendants treat it equally and not revert to differential treatment of the area.

Other courts have recognized the importance of permanent injunctions in the context of fair housing claims even where the offending practice or policy has been changed. For example, an Ohio court denied a defendant's argument that a plaintiff's request for injunctive relief should be stricken for mootness due to the policy in question

being changed. *Toledo Fair Hous. Ctr. v. Nationwide Mut. Ins. Co.*, 704 N.E.2d 1289, 1289 (Ohio Ct. Com. Pl. 1997). The forms of injunction sought by Plaintiffs have also been ordered in fair housing cases. *See Smith v. Schermerhorn*, No. 85C07372, 1989 U.S. Dist. LEXIS 1571, at *3-5 (N.D. Ill. Feb. 13, 1989) (enforcing injunctive relief that contained provisions for requiring that the phrase "equal opportunity housing" be included in the defendant's advertising and rental applications, that the defendant's Leadership Council and employees submit to training and that the defendant submit all its rental applications for mandatory review).

In support of its argument, the City cites to *City of Los Angeles v. Lyons*, 461 U.S. 95, 97-98 (1983), a case involving a motorist injured by the city police when he was subjected to a choke hold after being stopped for a traffic violation. The decision in *Lyons* denying injunctive relief was based on the failure to show the likelihood that the injured motorist would be targeted by the municipality in the future. *Id*. at 105. *Lyons* is not applicable here where the governmental Defendants will necessarily revisit questions related to municipal services to the residents of Coal Run.

As a result, Plaintiffs' request for injunctive relief is not moot.

IV. Defendants' Argument That Plaintiffs' Claims Are Barred By Laches Fails

Defendants argue that Plaintiffs claims are barred by the doctrine of laches. To prevail on a laches defense, Defendants must show that a reasonable jury would find: (1) a lack of diligence by Plaintiffs, and (2) prejudice to Defendants' ability to defend its case. (*See* City Mot. for Summ. J. at 44.) Importantly, laches does not lie where there has merely been a long passage of time. Instead, laches principally involve "a question of the inequity of permitting the claim to be enforced." *Ford Motor Co. v. Catalanotte*,

342 F.3d 543, 550 (6th Cir. 2003) (internal quotations, citation omitted); *see also Rehkoph v. Rems, Inc.*, 40 Fed. App'x 126, 129 (6th Cir. 2002) ("Prejudice is not inferred from the mere lapse of time. . . . In order to successfully invoke the equitable doctrine of laches it must be shown that the person for whose benefit the doctrine will operate has been materially prejudiced by the delay of the person asserting the claim.") (internal quotation, citation omitted). Importantly, where Plaintiffs have demonstrated a continuing violation, the affirmative defense of laches is even less appropriate. *See, e.g.*, *Bradley v. Carydale Enter.*, 707 F. Supp. 217, 223 (E.D. Va. 1989).

Defendants fail to demonstrate how enforcing Plaintiffs' claims will prejudice them. Defendants' arguments fall into two categories. First, Defendants note that a substantial amount of time has passed since the earliest actions challenged. As described above, the passage of time does not demonstrate prejudice. Second, Defendants note that some witnesses have died. This also does not demonstrate prejudice. Here, the City has access to contemporaneous records regarding deceased City employee's activities regarding the City's water-related activities, as well as records related to the activities of the Washington Rural Water Authority. Those records also demonstrate where the waterlines were installed and who was connected to them.

Defendants' scant laches argument simply gives no basis for concluding either that Plaintiffs were dilatory or that Defendants will be prejudiced in their ability to defend the claims.

V. Defendants Are Not Entitled to Sovereign Immunity

Defendants attempt to escape liability by asking this Court to grant them sovereign immunity under Ohio Revised Code § 2744.02(A). However, this statute does not offer municipalities blanket immunity. To the contrary, Ohio Revised Code § 2744.02(5) clearly states that "a political subdivision is liable . . . when civil liability is expressly imposed upon the political subdivision by a section of the Revised Code." The statute expressly imposes liability on "all political subdivisions" for discriminatory conduct. Ohio Rev. Code § 4112.01(A)(1); *see also* § 4112.02(H) (describing prohibited discrimination); *Albert v. Trumbull County Bd. of Mental Retardation*, 98-T-0095, 1999 Ohio App. Lexis 4136 (Ohio App. Ct. Sept. 3, 1997) ("[A] political subdivision may be liable for discriminatory practices pursuant to various provisions within R.C. Chapter 4112.").

In addition, the City erroneously contends that sovereign immunity should apply to its conduct before 1982. (*See* City Mot. for Summ. J. at 37-38.) The City claims that prior to the Ohio Supreme Court's decision in *Haverlock v. Portage Homes*, 442 N.E.2d 749 (Ohio 1982), municipalities enjoyed complete immunity, and, therefore, the City should not be liable for any conduct prior to this decision. However, the City fails to recognize that prior to *Haverlock*, the Ohio legislature abrogated municipal sovereign immunity in 1965 by including "political subdivisions" among those liable for discrimination under Ohio Rev. Code § 4112. *See* 131 Laws of Ohio 980 (1965). Moreover, the Ohio Supreme Court has applied sovereign immunity retroactively. *See Strohofer v. Cincinnati* 451 N.E.2d 787, 789 (Ohio 1983) (applying *Haverlock* retroactively to a plaintiff's claim against a municipal corporation). Therefore, neither

Ohio's statutes nor Ohio Supreme Court precedent support Defendants' plea for immunity.

None of Defendants' additional arguments have merit and should be denied.

CONCLUSION

For the above-stated reasons, Defendants Motions for Summary Judgment should be denied in their entirety.

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Respectfully Submitted,

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