[Cite as *Newell v. Ohio Dept. of Transp.*, 2007-Ohio-4156.]

Court of Claims of Ohio
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RONALD L. NEWELL	Case No. 2005-11264-AD
Plaintiff	Judge J. Craig Wright
v.	ENTRY VACATING DETERMINATION OF THE CLERK
OHIO DEPARTMENT OF TRANSPORTATION	
Defendant	

{¶1} This cause came to be heard upon defendant's motion for court review of the clerk's determination pursuant to R.C. 2743.10(D). Pursuant to C.C.R. 6(B) the deputy clerk determined the claim administratively. On March 6, 2007, the deputy clerk issued an order granting plaintiff's claim on the basis that plaintiff had suffered an uncompensated taking of his property abutting US Route 23 in Wyandot County, after defendant had installed high mast lighting along that route. Plaintiff alleges in his complaint that a portion of his 2005 bean crop failed to mature because of the constant light that was emitted from the highway lighting. Upon careful consideration of the material contained in the case file and the decision of the deputy clerk, the court finds that there is substantial error in the decision. The deputy clerk correctly stated that the issue to be decided was whether defendant's act of installing high mast lighting constituted a taking of plaintiff's property. "Under Section 19, Article I, of the Constitution, which requires compensation to be made for private property taken for public use, any taking, whether it be physical or merely deprives the owner of an intangible interest appurtenant to the premises, entitles the owner to compensation." *Smith v. Erie RR. Co.* (1938), 134 Ohio St. 135, paragraph 1 of the syllabus. However, "[w]hen there is no taking altogether or *pro tanto*, damages consequential to the taking of other property in the neighborhood, or to the construction of the improvement, are not recoverable; under such circumstances, loss suffered by the owner is *damnum absque injuria* [loss without injury]." Id., paragraph 2 of the syllabus.

{¶2} The Supreme Court of Ohio has determined what evidence is required for a "taking" to have occurred under the Ohio Constitution. "It should be noted that this section [Section 19, Article I of the Constitution of Ohio] limits the right to compensation to cases where private property is *taken* for public use. If the framers of the Ohio Constitution intended to require compensation whenever property was damaged by governmental activity, they could have so provided in unmistakable language. Many states have done so. Their constitutions provide in substance that private property shall not be taken for *or damaged* by public use without compensation. See 2 Nichols, Eminent Domain, 376, Section 6.1(3) n. 29." *State ex rel. Fejes v. Akron* (1966), 5 Ohio St.2d. 47, citing *McKee v. Akron* (1964), 176 Ohio St. 282, 284, overruled on other grounds.

{¶3} "Consequential damages are generally noncompensable on the theory that: '* * * Whatever injury is suffered thereby is an injury suffered in common by the entire community; and even though one property owner may suffer in a greater degree than another, nevertheless the injury is not different in kind, and is therefore *damnum absque injuria*.'" *Richley v. Jones* (1974), 38 Ohio St.2d 64. (Citations omitted.) The court finds that although plaintiff suffered a loss of a portion of his 2005 bean crop, he has failed to prove that he incurred a harm that differed in kind rather than degree from the general public, and pursuant to *Richley v. Jones*, supra, plaintiff's claim must fail.

{¶4} The court finds that the deputy clerk's conclusion on page 9 of the memorandum decision that "the lights installed by DOT on US Route 23 resulted in an uncompensated taking of plaintiff's property which is actionable and compensable" was in error. Accordingly, the March 6, 2007 administrative determination granting plaintiff's claim is VACATED. Judgment is rendered in favor of defendant. Pursuant to R.C. 2743.10(D), no further appeal may be taken from this judgment. Court costs are assessed against plaintiff.

J. CRAIG WRIGHT
Judge

cc:

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HTS/cmd	

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