[Cite as *State ex rel. Cuyahoga Lakefront Land, L.L.C. v. Cleveland*, 2015-Ohio-1637.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 101438

STATE EX REL., CUYAHOGA LAKEFRONT LAND, L.L.C.

RELATOR

vs.

CITY OF CLEVELAND

RESPONDENT

JUDGMENT:
WRIT GRANTED

Writ of Mandamus
Order No. 484960

RELEASE DATE: April 28, 2015

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KATHLEEN ANN KEOUGH, P.J.:

{¶1} On May 27, 2014, the relator, Cuyahoga Lakefront Land, L.L.C., ("Lakefront"), commenced this mandamus action against the respondent, the city of Cleveland, ("the City") to compel the City to commence appropriation proceedings to determine the amount of compensation due Lakefront for the taking of its property. Lakefront owns and operates a parking lot in the City, and between June 1, 2013, and June 16, 2013, the City closed one of the streets that has an entrance to the parking lot. Lakefront argues that this closing was a partial, temporary taking of their property for which they are owed compensation. Pursuant to this court's order, the parties have submitted evidence and briefs, and this matter is ripe for determination. For the following reasons, this court grants the writ of mandamus and orders the City to commence appropriation proceedings.

{¶2} The subject parking lot occupies a large depression at 600 Front Avenue in Cleveland, Ohio. It has entrances on West 3rd Street between Lakeside Avenue and Alfred Lerner Way and on West 9th Street. To access the parking lot, the motor vehicles or pedestrians must descend a rather steep incline at these entrances. Thus, the parking lot acquired the name "the Pit." Its most used entrance is the West 3rd one. Lakefront states that the Pit has a capacity of approximately 800 cars, and in September 2012, it installed automated parking attendant equipment, which provided more accurate tracking of the cars at each entrance.

{¶3} In Spring 2013, Vita-Ray Productions, L.L.C., obtained a permit from the City to close, inter alia, West 3rd Street between Lakeside Avenue and Alfred Lerner Way for the period of June 1, 2013, through June 16, 2013, to film scenes for "Captain America: The Winter Soldier." This closed the West 3rd entrance to the Pit for that time period, but the West 9th entrance remained open.

{¶4} The automated attendant equipment showed that between October 2012, through May 2013, the Pit had between 11,595 to 15,971 cars each month, with the highest total in May 2013. However, in June 2013, the number of cars dropped to 9,602. Lakefront's expert opined that at an average revenue of $3.69 per car, Lakefront lost approximately $13,000 for the month of June 2013.[1]

{¶5} The Pit had a total of 16,383 cars for July 2013, and over 15,000 cars for each of the next three months. Nevertheless, Lakefront's expert opined that the closing in June 2013, caused continued damage to Lakefront. As manifested by comparing the use of the West 3rd and West 9th entrances, many of the cars that found other parking during the closing never returned. The overall numbers are explained by the opening of a new office building near the West 9th entrance. He implies that had the closing not occurred, the overall number of cars would have been even higher. The expert concluded that the closing cost Lakefront approximately $63,000.

[1] This figure is based on the expert's conclusion that the Pit averaged 11,455 cars per month between October 2012 and May 2013.

{¶6} Mandamus is the appropriate action for compelling public authorities to commence appropriation proceedings when an involuntary taking of private property is alleged. Furthermore, takings may be partial, when the governmental action deprives the property of less than 100 percent of its economically viable use. *State ex rel. Shelly Materials, Inc. v. Clark Cty. Bd. of Commrs.*, 115 Ohio St.3d 337, 2007-Ohio-5022, 875 N.E.2d 59. Temporary takings are also compensable. *State ex rel. Shemo v. Mayfield Hts.*, 95 Ohio St.3d 59, 2002-Ohio-1627, 765 N.E.2d 345. To prevail, the relator must establish that there was a taking of its property by clear and convincing evidence. *Id.* at 63; *State ex rel. Wasserman v. Fremont*, 131 Ohio St.3d 52, 2012-Ohio-27, 960 N.E.2d 449.

{¶7} The court of appeals in *Smith v. Joseph*, 6th Dist. Wood No. WD-85-40, 1986 Ohio App. LEXIS 5495, 5*, (Jan. 24, 1986) articulated the applicable principle for determining a taking: "where an individual's property abuts a portion of the roadway that is actually vacated, there is an actionable interference with that individual's property."

{¶8} The Supreme Court of Ohio applied this principle in *State ex rel. OTR v. Columbus*, 76 Ohio St.3d 203, 1996-Ohio-411, 667 N.E.2d 8. In that case, the subject properties fronted on East Campus View Boulevard in Columbus, Ohio. Although the properties used roads other than East Campus View to provide access, the grade of the properties would have allowed access to be provided to the subject properties via East Campus View. Columbus, however, changed the grade of East Campus View to build an overpass over railroad tracks just to the east of the subject properties and, thus,

prohibited any access from the properties to the boulevard. On these facts, the Supreme Court of Ohio upheld the issuance of mandamus to commence appropriation proceedings. The court reasoned that the landowner's existing private right of access abutting East Campus View Boulevard had been destroyed by governmental action and that constituted a taking of private property within the meaning of Section 19, Article I of the Ohio Constitution and the Fifth Amendment to the United States Constitution.

{¶9} Similarly, this court applied the principles to find there was a compensable taking in *Castratoro v. Lyndhurst,* 8th Dist. Cuyahoga No. 60901, 1992 Ohio App. LEXIS 4352 (Aug. 27, 1992). In that case, the Castratoro's property fronted Mayfield Road and had entrances on the west side and on the east side of the property. The city of Lyndhurst installed barriers in front of the west entrance, completely blocking it, but the east entrance remained open. This court concluded that, in installing the barriers, Lyndhurst destroyed the Castratoro's access to the west driveway and effected a compensable taking of their property rights. Under similar facts, the Tenth District Court of Appeals also held that governmental action barring one of two entrances to a property constituted a compensable taking. *State ex rel. Thieken v. Proctor*, 180 Ohio App.3d 154, 2008-Ohio-6960, 904 N.E.2d 619 (10th Dist.) and *Hilliard v. First Indus., L.P.*, 158 Ohio App.3d 792, 2004-Ohio-5836, 822 N.E.2d 441 (10th Dist.).

{¶10} The instant case is analagous. The Pit has two entrances, and the City closed one of the entrances. The noticeable decline in business for June 2013 convinces this court that the closing of the West 3rd entrance constituted a compensable taking

under the Ohio and United States Constitutions. Thus, this court issues the writ of mandamus to compel the city to commence appropriation proceedings for this taking forthwith. Although this order does not limit Lakefront in the presentation of evidence for damages, it is difficult to discern how Lakefront was damaged after June 2013, when business rebounded to relative highs for July and the ensuing months.

{¶11} Accordingly, this court grants the writ of mandamus and orders the city to commence appropriation proceedings forthwith for the taking of Lakefront's property by closing the West 3rd entrance for the time period of June 1, 2013 through June 16, 2013. Respondent to pay costs.

{¶12} This court directs the clerk of courts to serve all parties notice of this judgment and its date of entry upon the journal as required by Civ.R. 58(B).

{¶13} Writ granted.

KATHLEEN ANN KEOUGH, PRESIDING JUDGE

TIM McCORMACK, J., and
EILEEN T. GALLAGHER, J., CONCUR