

IN THE SUPREME COURT OF OHIO

STATE OF OHIO EX REL. SPEEDWAY LLC,
ET AL.,

Relators,

v.

JERRY WRAY, DIRECTOR
OHIO DEPARTMENT OF TRANSPORTATION,
ET AL.,

Respondents,

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: **Original Action in Mandamus**
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: Case No.: 2017-0813
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**MERIT BRIEF OF *AMICUS CURIAE* OHIO COUNCIL OF RETAIL MERCHANTS IN
SUPPORT OF RELATOR NEW WEN, INC.'S MERIT BRIEF AND PETITION FOR
WRIT OF MANDAMUS**

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INTRODUCTION

This case arises from the Ohio Department of Transportation's efforts to have it both ways. When the Ohio Department of Transportation ("ODOT") appropriates property for highway easements, ODOT contends that a landowner is limited to just compensation for ODOT's foreseeable use of the easement area as contemplated by its plans and specifications for the project. Yet, when ODOT later deviates from its plans and specifications – to use the easement area in a once unforeseeable manner – ODOT asserts that the landowner is not entitled to any additional compensation. ODOT cannot limit just compensation to foreseeable uses in the first instance and preclude just compensation for unforeseeable uses later on. Because ODOT's authority to acquire property is expressly conditioned upon ODOT providing landowners with just compensation and because ODOT's authority must be narrowly construed in favor of landowners, ODOT cannot have it both ways.

STATEMENT OF AMICUS CURIAE'S INTEREST

Founded in 1922, the Ohio Council of Retail Merchants ("OCRM") is Ohio's oldest and largest advocate for the retail and wholesale industries, representing more than 7,000 retailers and wholesalers across the state. Ohio's retail industry accounts for \$46.5 billion of Ohio's annual Gross Domestic Product and supports 1.5 million jobs, one in four of all Ohio jobs, more than any other industry. OCRM promotes the interests of the retail and wholesale distribution industries and helps these enterprises achieve lasting excellence in all areas of their business. OCRM is devoted to maintaining a legal environment that supports businesses and creates jobs, and it works closely with legislative and industry leaders to achieve that goal. OCRM also monitors important litigation in the courts and participates as an *amicus curiae* in carefully selected cases that are particularly important to Ohio's businesses and citizens.

Together, *Amicus's* members represent a significant portion of Ohio's economy. Their members range from small-business owners to national corporations, and they employ millions of employees in Ohio. In part, it is Ohio's strong protection of basic private property rights that allows *Amicus's* members to invest in properties and grow their businesses. *Amicus* seeks to protect the fundamental right to possess and preserve one's property and enforce the limitations on the state's power of eminent domain. Moreover, *Amicus* seeks to remove any incentive or avenue for the State's misuse of the power of eminent domain to its members' detriment.

STATEMENT OF THE FACTS

Amicus Curiae the Ohio Council of Retail Merchants adopts the Relator New Wen, Inc.'s ("New Wen") statement of the facts.

LAW AND ARGUMENT

- I. **Proposition of Law I: When the State uses a highway easement in ways unforeseeable from the plans and specifications in place at the time it acquired the easement, such that it damages the market value of the residue of the fee owner's property, it constitutes an additional taking for which the State must compensate the fee owner.**

Ohio law requires that the power of eminent domain be exercised fairly to protect landowners' inviolate property rights and prevent eminent domain abuse. The Court, as the guardian of landowners' constitutional property rights, must therefore correct the unlawful position that ODOT has taken against Ohio landowners in its appropriation of property for highway easements.

ODOT routinely contends that property owners cannot recover just compensation for a potential future use of a highway easement where that use is not reasonably foreseeable from the plans and specifications for the highway project at issue. Yet, ODOT also contends that when it subsequently uses the highway easement in a manner that is not reasonably foreseeable from its plans and specifications, the landowners are precluded from further compensation. Both

contentions cannot be true. When taken together, ODOT's positions manipulate the power of eminent domain in the condemnor's favor in order to deprive landowners of just compensation for the once unforeseeable use of the highway easement. ODOT's contentions cannot be reconciled with the strong constitutional protections given to property rights under Ohio law.

Rather, when ODOT uses a highway easement in a manner unforeseeable from the plans and specifications in place at the time the easement was acquired – such that it damages the residue of the fee owner's property – it constitutes an additional taking for which ODOT must compensate the fee owner.

A. Ohio Law Demands That ODOT's Power of Eminent Domain Be Narrowly Construed in Favor of Landowners.

Ohio law has long recognized the right of property as a fundamental right. *Reece v. Kyle*, 49 Ohio St. 475, 31 N.E. 747 (1892). As such, “the founders of our state expressly incorporated individual property rights into the Ohio Constitution in terms that reinforced the sacrosanct nature of the individual's ‘inalienable’ property rights . . . which are to be held forever ‘inviolable.’” *City of Norwood v. Horney*, 110 Ohio St.3d 353, 2006-Ohio-3799, 853 N.E.2d 1115, ¶ 37 (internal citation omitted). Thus, property rights “must be trod upon lightly, no matter how great the weight of other forces.” *Id.* at ¶ 38; *State ex rel. Merrill v. ODNR*, 130 Ohio St.3d 30, 43, 2011-Ohio-4612, 955 N.E.2d 935, ¶ 60 (“[t]his court has a history of protecting property rights”).

To protect these inviolable rights against the misuse of the power of eminent domain, the legislature placed two equitable limitations on the use of eminent domain: the “public use” requirement and the “just compensation” rule. *Norwood*, 110 Ohio St.3d at ¶ 40. The Fifth Amendment “confirms the sovereign's authority to take, but conditions the exercise of that authority upon” the requirement “that ‘just compensation’ for the taking is given to the property owner.” *Id.* “[J]ust compensation’ is that compensation that places the individual in ‘as good a

position pecuniarily as if his property had not been taken,’ to be ‘made whole,’ but no more.” *Id.* at n.9.

To further protect individuals’ fundamental property rights, eminent domain laws must be strictly construed in favor of landowners. *Covington & Cincinnati Bridge Co. v. Magruder* (1900) 63 Ohio St. 455, 475; *Norwood*, 110 Ohio St.3d at ¶ 70 (“[T]he courts must ensure that the grant of [eminent domain] authority is construed strictly and that any doubt over the propriety of the taking is resolved in favor of the property owner.”); *Pontiac Improv. Co. v. Board of Comm'rs*, 104 Ohio St. 447, 455, 135 N.E. 635 (1922) (“[a]ll grants of power by the government are to be strictly construed, and this is especially true with respect to the power of eminent domain, which is more harsh and peremptory in its exercise and operation than any other * * * to construe it liberally would be sinning against the rights of property” (quoting 1 *Lewis on Eminent Domain* (3 ed.), Section 388)). Therefore, heightened scrutiny must be applied in reviewing the state’s exercise of its eminent domain powers. *Norwood*, 110 Ohio St.3d 353, at syllabus 3. Courts hold the “traditional role as guardian of [these] constitutional rights and limits[;]” therefore, it is the courts’ role to ensure that exercise of eminent domain power is not beyond the narrow scope of authority given to agencies. *See id.* at ¶¶ 69- 70.

B. ODOT’s Closure of the Point of Access and the Closure of Cherry Valley Road Constitutes a Compensable Physical Taking.

1. A landowner is only entitled to just compensation for a highway easement based on what is reasonably foreseeable from ODOT’s plans at the time.

This Court has held that a landowner is only entitled to compensation for the taking of a highway easement based on “a consideration of the present intended use of the land taken by the Director of Highways for highway purposes, *as revealed by the plans and specifications for the improvement. . .*” *Masheter v. Blaisdell*, 30 Ohio St.2d 8, 282 N.E.2d 42, Syllabus at 2 (1972) (emphasis added). Thus, *Blaisdell* stands for the proposition that a property owner cannot

recover just compensation for a potential future use of a highway easement where that use is not reasonably foreseeable from the plans and specifications for the highway project at issue.

Here, because Ohio law limits just compensation for a highway easement to what is reasonably foreseeable from ODOT's plans at the time of the take, New Wen was only compensated for a highway easement based on the original plans and specifications for the project. At the time ODOT acquired the highway easements, ODOT's plans expressly established a "point of access" of "28 Ft. Width" through an open intersection at Cherry Valley Road and S.R. 16. Therefore, the law limited New Wen's predecessor to compensation for damages to the residue with the point of access in place – it was not permitted to seek compensation based on some hypothetical and unforeseeable future closure of the point of access or of Cherry Valley Road. Therefore, no landowner has been compensated for ODOT taking the right to close the point of access or Cherry Valley Road and the damages such a closure would cause to the residue.

2. When the government uses an easement in an unforeseeable manner beyond what was contemplated by the original plans and specifications, it constitutes a new taking.

On the other hand, a new compensable taking exists when ODOT damages a property by using a highway easement in ways unforeseeable from the original plans and specifications. In *Blaisdell*, this Court recognized that because just compensation is initially limited by the plans and specifications, if "future uses constitute[] additional compensable servitudes[,] the landowner is entitled to additional compensation. See 30 Ohio St.2d at 12 (describing the contention that "the landowner was precluded from further compensation, regardless of how burdensome future uses constituted additional compensable servitudes" as "erroneous"); see also *Filler v. City of Minot*, 281 N.W.2d 237 (N.D. 1979) ("If a landowner's property rights are interfered with by a lawful improvement of a street or road in a manner that could not have been

reasonably anticipated at the time of the condemnation or settlement, the landowner is entitled to damages arising from such interference.”); *Feuerborn v. State*, 59 Wash.2d 142, 146, 367 P.2d 143 (1961) (if a “condemnor deviates from its plans in such a way as to cause a further loss of property value, this constitutes another condemnation for which just compensation must again be assessed”).

Here, ODOT’s plans included the point of access, and New Wen improved its property based on that point of access. ODOT’s use of the easements to close the point of access was not reasonably foreseeable when the easement was acquired and constituted a new taking. New Wen is therefore entitled to compensation for the property rights taken and for damages to the residue. *See Wray v. Wessell*, 4th Dist. Scioto Nos. 15CA3724, 15CA3725, 2016-Ohio-8584, ¶ 50; *Cincinnati & S.G.A.S.R. Co. v. Cumminsville*, 14 Ohio St. 523, 547-48 (1863) (“[i]f, in the progress of improvement, the interests of the public require theirs to be enlarged, and [the property owner’s to be] diminished, it can only be done upon making him compensation to the extent of [the property owner’s] injury”).

3. ODOT’s position to the contrary cannot be reconciled with Ohio law or the law of other states.

ODOT has taken the position that when it acts in a way that is unforeseeable from its plans and specifications in place at the time the easement is acquired – such that the deviation has caused new damages to the property unforeseeable from the original plans – a landowner is not entitled to compensation. However, this position is contrary to Ohio law.

First, the Fifth Amendment expressly conditions ODOT’s exercise of its eminent domain authority upon the “just compensation” requirement. *Norwood*, 110 Ohio St.3d at ¶ 40. ODOT cannot appropriate property unless just compensation – that places the landowner in “as good a position pecuniarily as if his property had not been taken” – is given to the landowner. *Id.* at

¶ 40, n.9. Therefore, ODOT does not even have the authority to use an easement in a manner for which it has not compensated the landowner.

Second, Ohio law requires that ODOT's power of eminent domain be narrowly construed in favor of landowners. *Pontiac*, 104 Ohio St. at 455. As set forth above, a landowner's right to just compensation is limited by ODOT's plans and specifications. *Blaisdell*, 30 Ohio St.2d at Syllabus at 2. Therefore, ODOT's authority, too, should be limited by the plans and specifications. ODOT should not be permitted to use a highway easement in a manner unforeseeable by its original plans and specifications without paying further compensation.

Third, as the guardian of constitutional property rights, courts are charged with the responsibility to ensure that the power of eminent domain is not abused. *Norwood*, 110 Ohio St.3d at ¶¶ 69-70. If the Court were to adopt ODOT's position, ODOT would have the incentive to put into place plans and specifications that appear very favorable to landowners while they are negotiating or appropriating easements in order to minimize damages available to those landowners, but then unforeseeably deviate from those plans decades after acquiring the easements without ever having to compensate landowners for the additional impacts to the residue. ODOT's position begets improper, unlawful, and unfair takings of property rights that cannot be sanctioned by this Court.

Finally, other states that have considered this issue have found that an unforeseeable deviation from an agency's plans and specifications following the appropriation of an easement results in a second compensable take. *See, e.g., Grant v. State*, 560 P.2d 36, 39 (Alaska 1977) ("Where the plans are not implemented, any further economic interference constitutes a second taking for which the state must pay just compensation."); *Hall v. State*, 2011 S.D. 70, 806 N.W.2d 217, ¶16 ("the designation of access in the prior proceedings created a subsequent right to compensation because the landowners had not been fully compensated at the time of the initial

takings”); *Filler v. Minot*, 281 N.W.2d 237, 239 (N.D.1979) (finding that access points identified in plats and plans were relied upon and their closure constituted a second taking). Therefore, a ruling in favor of New Wen is not only consistent with the Ohio Constitution and this Court’s precedent, but it would be in accordance with multiple other states.

CONCLUSION

Consistent with its prior precedent, this Court should construe ODOT’s power of eminent domain narrowly and order ODOT to commence appropriation proceedings to pay just compensation for its taking of New Wen’s property.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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