THE STATE EX REL. BALUNEK *v.* MARCHBANKS, DIR., ET AL.

[Cite as *State ex rel. Balunek v. Marchbanks*, 173 Ohio St.3d 34, 2023-Ohio-2517.]

Mandamus—Ohio Department of Transportation's construction project constitutes a taking in that it deprives relator's property of all access to an abutting roadway—Relator's potential ability to obtain city permit that would allow access to property does not extinguish taking—Writ ordering Ohio Department of Transportation to commence appropriation proceedings granted and relator's request for attorney fees denied.

(No. 2021-1469—Submitted May 16, 2023—Decided July 25, 2023.)

IN MANDAMUS.

Per Curiam.

{¶ 1} Relator, Jondavid Balunek, filed this action seeking a writ of mandamus ordering respondents, Ohio Department of Transportation and its director, Jack Marchbanks (collectively, "ODOT"), to begin appropriation proceedings for the taking of real property that Balunek owns. ODOT argues that appropriation proceedings are not necessary, because Balunek can obtain a permit from the city of Cleveland to allow access to his property from an abutting road. For the reasons that follow, we grant the writ and order ODOT to commence appropriation proceedings. We deny Balunek's request for attorney fees.

I. FACTUAL AND PROCEDURAL BACKGROUND

{¶ 2} Balunek owns real property located at 2525 East 93rd Street in Cleveland, constituting Cuyahoga County permanent parcel No. 126-10-002 ("the property"). The property consists of vacant industrial land with site improvements. When Balunek acquired the property, it had two curb-cut driveways off East 93rd

Street as well as a right-of-way easement across a neighboring property to Woodland Avenue.

{¶ 3} In 2013, ODOT published a right-of-way table showing that the property would be affected by a roadway-construction project. ODOT commissioned three appraisals of the property to determine the value of a portion of the property in fee simple, the value of a utility easement, and the value of a temporary work easement.

{¶ 4} One of the appraisals stated that "[i]n the before situation, the subject * * * has access to / from East 93rd Street" and that "[i]n the after situation, the subject will continue to * * * have access to / from East 93rd Street." The other appraisals stated that the driveways would be replaced or reconstructed when work was finished. Balunek avers that because of these appraisals, he believed that the property would again be accessible from East 93rd Street upon completion of the work.

{¶ 5} ODOT offered to purchase the appraised property interests—a portion of the property in fee simple, a utility easement, and a temporary work easement—from Balunek. Balunek rejected ODOT's offer, and in March 2016, ODOT initiated appropriation proceedings regarding the property in the Cuyahoga County Probate Court. *See Wray v. Balunek*, Cuyahoga Probate No. 2016ADV214882. This case is still active; ODOT is seeking to appropriate not the entire property in fee simple but a portion of the property in fee simple, a utility easement, and a 30-month temporary work easement.

{¶ 6} Meanwhile, ODOT began its work on and around the property. When ODOT finished its work, it did not replace the driveways connecting the property to East 93rd Street. Nor did it provide any alternate driveway onto East 93rd Street or another road. In addition, because of ODOT's construction, the property no longer has easement access to Woodland Avenue. As a result, the property is now inaccessible from any road. ODOT does not dispute that the property is currently

inaccessible, but it argues that access could be established if Balunek obtains a "street opening permit" from Cleveland. Balunek avers that because of ODOT's elimination of access to the property, he is unable to develop, sell, or use the property and that the property has no market value.

{¶ 7} On December 3, 2021, Balunek filed this action in this court, seeking a writ of mandamus ordering ODOT to commence appropriation proceedings pursuant to R.C. Chapter 163. Balunek also seeks an award of reasonable attorney fees. ODOT filed an answer and a motion for judgment on the pleadings. We denied ODOT's motion and issued an alternative writ ordering the submission of evidence and briefs. 168 Ohio St.3d 1461, 2022-Ohio-4268, 198 N.E.3d 880.

{¶ 8} As its sole argument in favor of denial of the writ, ODOT argues that Balunek could obtain a permit from Cleveland to connect the property to East 93rd Street and that Balunek must apply for and be denied such a permit before he could be entitled to a writ of mandamus.

II. LEGAL ANALYSIS

A. ODOT committed a taking

{¶ 9} The Takings Clauses of the Ohio and United States Constitutions require an owner of real property to be compensated when private property is taken for public use. *State ex rel. New Wen, Inc. v. Marchbanks*, 159 Ohio St.3d 15, 2020-Ohio-63, 146 N.E.3d 545, ¶ 14. "When a property owner alleges the taking of private property, mandamus is the correct action to force the state to institute appropriation proceedings." *Id.* at ¶ 15. To obtain a writ of mandamus, a petitioner "must establish, by clear and convincing evidence, (1) a clear legal right to the requested relief, (2) a clear legal duty on the part of the respondent to provide it, and (3) the lack of an adequate remedy in the ordinary course of the law." *Id.*

{¶ 10} A landowner's right of access to abutting roadways is "[o]ne of the elemental rights growing out of the ownership of a parcel of real property." *State ex rel. OTR v. Columbus*, 76 Ohio St.3d 203, 207, 667 N.E.2d 8 (1996); *New Wen* at ¶ 17. Therefore, "any governmental action that substantially or unreasonably interferes with this right constitutes a taking of private property." *OTR* at syllabus.

{¶ 11} When a state action completely deprives a property owner of all access to an abutting roadway, the state has substantially or unreasonably interfered with the right of access. *State ex rel. Thieken v. Proctor*, 180 Ohio App.3d 154, 2008-Ohio-6960, 904 N.E.2d 619, ¶ 15 (10th Dist.); *see also State ex rel. Hilltop Basic Resources, Inc. v. Cincinnati*, 118 Ohio St.3d 131, 2008-Ohio-1966, 886 N.E.2d 839, ¶ 41 (denial of curb-cut and driveway-construction permit to only abutting road constituted substantial and unreasonable interference with property owner's right of access). In such instances, the landowner does not need to establish the deprivation of all economically viable uses of the land; the denial of access is sufficient to constitute a taking. *Hilltop Basic Resources* at ¶ 28-29.

{¶ 12} Balunek has clearly and convincingly established that ODOT took property beyond that for which it has already commenced appropriation

proceedings. Prior to ODOT's construction project, the property had access to abutting roads through driveways and an easement. ODOT, however, destroyed the property's driveways that connected it to East 93rd Street and did not replace those driveways or provide alternative curb-cut access. The project also eliminated the property's easement access to Woodland Avenue. The property is thus currently inaccessible to lawful vehicular traffic; to obtain access, Balunek would need to apply for and be granted a street-opening permit from Cleveland and then rebuild the driveways himself. ODOT's construction project has deprived the property of all access to an abutting roadway and thus constitutes a taking.

B. Balunek's potential ability to obtain a permit does not negate his entitlement to a writ of mandamus

{¶ 13} As its sole argument that Balunek is not entitled to a writ of mandamus, ODOT states that he would "likely" be granted a permit to access the property and that such a permit "would effectively negate the underlying loss-of-access basis of his claim."

{¶ 14} As evidence in support of its assertion that Balunek could obtain a permit to access the property, ODOT submitted an affidavit from Richard Switalski, a manager in the Mayor's Office of Capital Projects. Switalski avers that he is familiar with the property and with Cleveland's requirements governing access to abutting roads and that to get access to an abutting road, Balunek must apply to the city for a street-opening permit. He avers that the "property may be eligible for, and would likely get, a Permit to access an abutting street, if [Balunek] properly applies to the City of Cleveland for such a Permit and meets all the requirements contained in Section 503.01 of Cleveland Codified Ordinances and other relevant City ordinances and standards." Balunek admits that he has not applied for such a permit.

{¶ 15} ODOT's evidence is highly conditional. Switalski acknowledges that a street-opening permit would be granted only if the property meets the

requirements of Cleveland's ordinances and standards. But neither Switalski's affidavit nor any other evidence in the record addresses whether the property actually meets these requirements. In addition, to obtain such a permit, Balunek must pay a fee and submit a performance bond of up to $250,000. Cleveland Codified Ordinances 503.01(a) and (d). At most, ODOT's evidence shows that if Balunek files an application, pays a fee, and has the ability to post a bond and does so, he might qualify for the permit. ODOT's assertion that Balunek would "likely" get the permit is not supported by the evidence.

{¶ 16} ODOT argues that requiring a property owner to obtain a permit to use his property does not constitute a taking. To support this argument, ODOT relies primarily on a case in which a property owner asked this court to compel appropriation proceedings after a county denied it a permit to mine gravel and sand from its property. *See State ex rel. Shelly Materials v. Clark Cty. Bd. of Commrs.*, 115 Ohio St.3d 337, 2007-Ohio-5022, 875 N.E.2d 59. *Shelly Materials* quotes a decision of the United States Supreme Court stating that " '[a] requirement that a person obtain a permit before engaging in a certain use of his or her property does not itself 'take' the property in any sense: after all, the very existence of a permit system implies that permission may be granted, leaving the landowner free to use the property as desired.' " *Id.* at ¶ 20, quoting *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 127, 106 S.Ct. 455, 88 L.Ed.2d 419 (1985). ODOT argues that under this principle, requiring Balunek to apply for a permit is not a taking of his property.

{¶ 17} In *Shelly Materials*, however—and in other cases ODOT has cited—the taking was the denial of the permit itself. *See Hilltop Basic Resources*, 118 Ohio St.3d 131, 2008-Ohio-1966, 886 N.E.2d 839, at ¶ 41; *State ex rel. BSW Dev. Group v. Dayton*, 83 Ohio St.3d 338, 340, 699 N.E.2d 1271 (1998). In contrast, here, the taking has already occurred—ODOT eliminated the property's access to abutting streets by removing its driveways. ODOT argues that an obligation to

compensate for a taking is somehow extinguished if the landowner can, at his own cost, potentially obtain a permit to access his property from a roadway; ODOT has cited no authority for such a proposition.

{¶ 18} ODOT also argues that the permit process constitutes an adequate remedy in the ordinary course of the law that defeats Balunek's mandamus claim. But here, Balunek is seeking to compel appropriation proceedings, not to obtain a right to build driveways to abutting streets. Because the permit process cannot compel ODOT to begin appropriation proceedings, it is not an adequate remedy in the ordinary course of the law for purposes of this mandamus action. *See, e.g., State ex rel. Gilmour Realty, Inc. v. Mayfield Hts.*, 119 Ohio St.3d 11, 2008-Ohio-3181, 891 N.E.2d 320, ¶ 14 (injunctive relief to prevent a taking is not an adequate remedy in the ordinary course of the law in place of a mandamus action, because the injunctive relief could not compel appropriation proceedings); *see also State ex rel. Coles v. Granville*, 116 Ohio St.3d 231, 2007-Ohio-6057, 877 N.E.2d 968, ¶ 30-32 (civil action for trespass and slander of title is not a complete remedy instead of a mandamus action, because civil action could not compel appropriation proceedings).

{¶ 19} Balunek has shown by clear and convincing evidence that he is entitled to a writ of mandamus compelling ODOT to institute appropriation proceedings for the taking consisting of ODOT's elimination of access to the property. ODOT deprived the property of all access to an abutting roadway, which constitutes a taking for which it owes compensation.

C. Scope of the writ

{¶ 20} We must next determine the scope of the writ and the property at issue in the appropriation proceedings that we compel ODOT to commence today.

{¶ 21} A property owner whose access to property has been taken is entitled to compensation "to the extent of his loss." *OTR*, 76 Ohio St.3d at 207, 667 N.E.2d 8, quoting *State ex rel. McKay v. Kauer*, 156 Ohio St. 347, 102 N.E.2d 703 (1951),

paragraph two of the syllabus. Here, Balunek asserts that ODOT's elimination of access to the property has resulted in the complete loss in market value of the property. We need not determine the value of the loss here. A writ ordering ODOT to commence appropriation proceedings for the taking caused by its elimination of access to the property is sufficient.

{¶ 22} In addition, we note that ODOT has already brought appropriation proceedings for some interests in the property, and it should not be required to compensate Balunek twice for the same interests. Thus, the writ should order appropriation proceedings for the taking resulting from ODOT's destruction of access to the property except for interests in the property for which ODOT has already instituted appropriation proceedings in *Marchbanks v. Balunek*, Cuyahoga Probate No. 2016ADV214882.

{¶ 23} Finally, although the parties disagree about the size of the property, we need not resolve that dispute. Both parties identify the property as Cuyahoga County permanent parcel No. 126-10-002, and Balunek submitted as evidence a deed to this parcel, which is sufficient to identify the property at issue.

D. Attorney fees

{¶ 24} Finally, Balunek also seeks an award of reasonable attorney fees. Attorney fees, however, are not available in mandamus actions to compel appropriation proceedings. *State ex rel. New Wen, Inc. v. Marchbanks*, 163 Ohio St.3d 14, 2020-Ohio-4865, 167 N.E.3d 934, ¶ 1. We thus deny the attorney-fee request.

III. CONCLUSION

{¶ 25} ODOT took Balunek's property by eliminating all of its access to abutting roads. His potential ability to obtain a permit from the city of Cleveland that would allow access to the property does not extinguish the taking that has already occurred. Balunek is therefore entitled to a writ compelling ODOT to commence appropriation proceedings.

{¶ 26} We grant a writ of mandamus compelling ODOT to commence appropriation proceedings for the taking resulting from ODOT's destruction of access to Cuyahoga County permanent parcel No. 126-10-002 except for interests in the property for which ODOT has already instituted appropriation proceedings in *Marchbanks v. Balunek*, Cuyahoga Probate No. 2016ADV214882. We deny Balunek's request for attorney fees.

Writ granted.

KENNEDY, C.J., and FISCHER, DEWINE, DONNELLY, STEWART, BRUNNER, and DETERS, JJ., concur.

Dooley, Gembala, McLaughlin & Pecora Co., L.P.A., Ryan M. Gembala, and Patrick M. Ward, for relator.

Dave Yost, Attorney General, and William J. Cole and Justine A. Allen, Assistant Attorneys General, for respondents.
