



IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

STATE EX REL OC LORAIN FULTON, LP
Plaintiff

Case No: CV-16-871515

Judge: MICHAEL J RUSSO

CITY OF CLEVELAND, OHIO
Defendant

JOURNAL ENTRY

83 DISP.COURT TRIAL - FINAL

07/02/2018: D1 CITY OF CLEVELAND'S MOTION FOR INVOLUNTARY DISMISSAL UNDER CIV.R. 41(B)(2), FILED 03/20/2018, IS DENIED. JUDGMENT IS RENDERED IN FAVOR OF THE DEFENDANT AND AGAINST THE PLAINTIFF. OSJ. FINAL.

COURT COST ASSESSED TO THE PLAINTIFF(S).

PURSUANT TO CIV.R. 58(B), THE CLERK OF COURTS IS DIRECTED TO SERVE THIS JUDGMENT IN A MANNER PRESCRIBED BY CIV.R. 5(B). THE CLERK MUST INDICATE ON THE DOCKET THE NAMES AND ADDRESSES OF ALL PARTIES, THE METHOD OF SERVICE, AND THE COSTS ASSOCIATED WITH THIS SERVICE.

NO SIGNATURE REQUIRED

Judge Signature

Date

FILED
2018 JUL - 3 P 4: 21
CLERK OF COURTS
CUYAHOGA COUNTY

STATE OF OHIO)
) SS:
CUYAHOGA COUNTY)

IN THE COURT OF COMMON PLEAS
CASE NO. CV-17-871515

STATE EX REL. OC LORAIN)
FULTON, LP)
Plaintiff)

vs)

CITY OF CLEVELAND, OHIO)
Defendant)

OPINION AND ORDER

MICHAEL J. RUSSO, JUDGE:

The complaint filed on November 7, 2016 by State ex rel. OC Lorain Fulton, LP (OC), sought the following relief: 1) a declaratory judgment regarding the constitutionality of Cleveland Zoning Ordinance Section 343.23 et seq. as applied to its property; 2) a declaratory judgment regarding the facial constitutionality of Cleveland Zoning Ordinance Section 343.23 et seq.; 3) a declaration of and damages for a regulatory taking of OC's property; 4) injunctive relief for the taking of its property for wrongful denial of an expressly permitted use; and 5) a petition for a writ of mandamus to commence appropriation proceedings for the regulatory taking of its property pursuant to *Penn Central Transportation Co. v. New York*, 438 U.S. 104 (1978).

BACKGROUND AND FACTS

The case arises from the city of Cleveland's (City) denial of a conditional use permit for a building-length variance. This denial became the subject of significant litigation in OC's R.C. 2506.01 administrative appeal (Cuyahoga County Case CV-14-822128) and the City's subsequent appeal to the Eighth District Court of Appeals. *See OC Lorain Fulton, LP v. Board of Zoning Appeals of the City of Cleveland*, 8th Dist. Cuyahoga No. 104561, 2017-Ohio-971.

OC did not bring a constitutional challenge or takings claim in that original litigation. After OC sold the subject property in December 2016 for \$1,175,000, the original litigation was dismissed as moot by the Eighth District Court of Appeals on March 9, 2017. OC subsequently filed the complaint in this matter.

On February 13, 2018, the court granted summary judgment in favor of the City on claims one through four. On March 19, 2018, the court held a bench trial on OC's sole remaining claim—a declaration that a taking occurred under the authority of *Penn. Central Transp. Co. v. City of New York*, 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed. 631 (1978).

At trial, OC presented the testimony of Russell Lamb, a founding principal of Allegro Realty Advisors, a commercial real estate brokerage firm in Cleveland. Tr. 31:7-9; 32:6-7. Lamb also is a principal in Blue Water Capital Partners, an investment company that holds real estate assets and is serviced by Allegro. Tr. 32: 8-12. Blue Water is the general partner in OC Lorain Fulton. Tr. 33: 3-5. McDonald's Corporation (McDonald's) approached Blue Water in 2012 to identify a property in Ohio City to which it could relocate a restaurant. Tr.36:20-37:03. While negotiating with the property owner of the parcel at issue in this case, OC entered into a letter of intent for a ground lease of the property with McDonald's USA. Tr. 37:4-7. OC's intention was to build, operate, and then sell the McDonald's restaurant. Tr. 38:13-16.

OC created a letter of intent to buy the parcel at issue in June 2012 for \$625,000. Tr. 40:3-8. The purpose of that letter was to outline the terms of a potential purchase agreement. Tr. 42:9-13. OC also received a letter of intent from McDonald's in the summer of 2012 to purchase the property from OC. Tr. 43:15-17. This letter of intent was reduced to a purchase agreement in October 2012, and the ground lease between OC and McDonald's was executed on March 8, 2013. Tr. 43:19-21; 46: 12-15. OC paid \$600,000 for the property. Tr. 94:14.

Lamb was aware that the property was located within a local retail business zoning district and had a pedestrian retail overlay (PRO) at the time of purchase. Tr. 95:2-13.

Lamb believed that this McDonald's investment opportunity was lucrative for the investors in the project because there is a national market for investors who want to buy triple net bondable leases. Tr. 51: 14-16. Such leases place no requirement on the landlord for maintenance of the property, and the owner receives almost the full value of the rent on an annual basis. Tr. 51:20-22. On October 15, 2012, McDonald's applied for a permit for regulated buildings with the City's Department of Building and Housing. Tr. 47:22-48:1. Lamb believed that OC would have to obtain conditional use approval through the City Planning Commission. Tr. 98:1-11; 100:6-11.

OC recognized there was a risk in getting permit approvals from the City, but OC had planned the site in concert with Ohio City Incorporated, a local development corporation that is influential in the Ohio City neighborhood. Tr. 52:14-18; 55:2-10. OC was confident that its site would be permitted after a neighboring business, the Hansa Haus, had received approval to expand its site in November 2012 to allow for 84 feet of frontage on Lorain Avenue. Tr. 52:14-53:11. When OC's permit was heard at the Planning Commission, however, the meeting was "a zoo" and the acting chair solicited the audience to vote on approval of OC's variance. Tr. 62:13-18. Additionally, the City never required Hansa Haus to go to the Planning Commission regarding its PRO variances. Tr. 65:6-9

On November 28, 2012, and during the pendency of OC's application, the City amended the PRO ordinance to prohibit drive-thru businesses in the district. Tr. 68:11-25; 69:8-17. The City also required OC to provide a traffic study. Tr. 69:21. The only variance that OC was subject to at the time of the application was the 40-foot width requirement. During three

hours of testimony by residents in the neighborhood, there was no testimony about the 40-foot width expansion impacting the neighborhood. Tr. 70:13-25. The members of the Planning Commission did not raise any questions about the 40-foot width requirement. Tr. 71:23. Similarly, once the matter was heard by the Board of Zoning appeals in January 2014, no one could articulate how the 40-foot width extension would adversely impact the neighborhood. Tr. 72:8-12.

In July 2016, McDonald's terminated the ground lease with OC after the City appealed Judge Brian Corrigan's decision reversing the Board of Zoning Appeals. Tr. 80:4-11. Based upon the market conditions for a McDonald's ground lease, calculated based on a return of investment calculation, OC expected to be paid \$1.5 million for the property after OC received the necessary permits. Tr. 82:15-83:9. Lamb was of the opinion that OC did not receive the necessary permits because the councilman for that district opposed the project. Tr. 83:23-87:12. To mitigate its losses, OC sold the property to MetroHealth on November 14, 2016 for \$1.175 million. Tr. 89:13-14; 90:8, 17. While OC profited on the sale to MetroHealth, the profit fell far short of its expectations. Tr. 91:11. When combined with the time loss of the investment due to the protracted litigation with the city, Lamb calculated the total loss to OC as \$636,186. Tr. 91:23-92:3.

Following OC's case in chief, the City moved for an involuntary dismissal under Civ.R. 41(B)(2). Pursuant to that rule, the court declined to render any judgment until the close of evidence, and allowed the parties to brief the issue following the close of all evidence. For the reasons that follow, the City's motion for involuntary dismissal is denied, but judgment is granted in favor of the City.

LAW AND ANALYSIS

To be entitled to a writ of mandamus, the relator must show: 1) a clear legal right to the relief requested; 2) respondents are under a clear legal duty to perform the act sought; and 3) relator has no plain and adequate remedy at law. *State ex rel. Fain v. Summit Cty. Adult Probation Dept.* (1995), 71 Ohio St.3d 658, 1995 Ohio 149, 646 N.E.2d 1113, citing *State ex rel. Howard v. Ferreri* (1994), 70 Ohio St. 3d 587, 589, 1994 Ohio 130, 639 N.E.2d 1189. To constitute an adequate remedy at law, the alternative must be complete, beneficial, and speedy. *State ex rel. Mackey v. Blackwell*, 106 Ohio St.3d 261, 2005 Ohio 4789, at ¶21, 834 N.E.2d 346, quoting *State ex rel. Ullmann v. Hayes*, 103 Ohio St.3d 405, 2004 Ohio 5469, at ¶8, 816 N.E.2d 245, reconsideration denied, 104 Ohio St. 3d 1442, 2004 Ohio 7033, 819 N.E.2d 1124. *State ex rel. Anderson v. The Village of Obetz*, 10th Dist. Franklin No. 06AP-1030, 2008-Ohio-4064, ¶ 5. To determine whether OC has a clear legal right to the relief requested, the court must examine whether OC could recover under *Penn Central*.

As the Ohio Supreme Court has held, *Penn Central* requires an examination of the following three factors: “1) the economic impact of the regulation on the claimant, 2) the extent to which the regulation has interfered with distinct investment-backed expectations, and 3) the character of the government action.” *State ex rel. Gilbert v. Cincinnati*, 125 Ohio St. 3d 385, 2010-Ohio-1473, 928 N.E.3d 706, ¶ 17.

Facially, OC meets the requirements of *Penn Central*. Lamb presented evidence that the regulation by the City cost OC as much as \$640,000. OC’s profit from the eventual sale of the property was far less than the expectations of its investors, especially considering the consistency in value of a McDonald’s lease. The City appears to have treated OC differently than it did the Hansa Haus, a neighboring business, regarding the same zoning issue. The

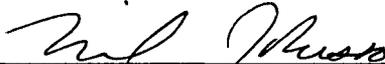
conduct of the government officials in this matter seems extreme and purposefully frustrated OC's intended and best use of its property. Yet, while the character of City's interference with OC's business contract can be viewed as draconian, or even abusive, the City cannot be held liable under the line of *Penn Central* cases.

The City's denial of a use variance to OC only foreclosed OC from one proposed use of its property. OC had alternative uses for the property, and did sell the property at a profit, despite the actions taken by the City. While the City undeniably cost OC a portion of its expected profit, the denial of zoning approval for one proposed use does not result in a *Penn Central* taking where there are other productive uses available under the applicable zoning regulations; that is, "something more than loss of market value or loss of the comfortable enjoyment of the property is needed to constitute a taking." *BSW Dev. Group v. City of Dayton*, 83 Ohio St.3d 338, 344, 1998-Ohio-287, 699 N.E.2d 1271. OC has presented no authority that would allow the court to balance the factors of *Penn Station* or to weigh one element more heavily than the others, and the court is unaware that any such authority exists. As a result, this court cannot ignore binding precedent that forecloses OC's recovery under *Penn Central*.

JUDGMENT

The court declares that Zoning Ordinance Section 343.23 et seq. of the City of Cleveland, to the extent that it prohibited OC from developing its property as zoned, and as OC has expressly endeavored to do, is not in conflict with state law and thereby does not constitute a taking of OC's property for which just compensation must be paid. Accordingly, neither a writ of mandamus to commence appropriation proceedings nor an injunction shall issue.

7-3-2018
Date



Judge Michael J. Russo

CERTIFICATE OF SERVICE

A copy of the foregoing Opinion and Order was sent on July 3, 2018 by e-mail through the Clerk of Courts to all counsel of record.