

IN THE COURT OF COMMON PLEAS
CLARK COUNTY, OHIO

State of Ohio Ex Re.	:	Case No.	08 CV 0866
Relator, Ltd.	:		
Plaintiff	:		
vs.			
City of Springfield, et al.	:		
Defendants	:	ENTRY	
	:		

The matter before this Court is a land appropriations case and originates with the July 27th, 2008 filing of a Complaint for Mandamus and Damages by Relator, Relator, Ltd., against the City of Springfield, Ohio, its City Commission, and its respective Commissioners---the latter subsequently dismissed. Filed originally in the General Division, the matter was subsequently transferred to this Court on March 5th, 2010. At the request of Counsel, the parties were afforded the opportunity to file respective motions for summary judgment by October 18th, 2010. The parties were then afforded an opportunity for oral argument which was conducted on January 31st, 2011. The matter is now before this Court to consider the two competing motions for summary judgment.

Rule 56(C) of the Ohio Rules of Civil Procedure provides that Summary Judgment may be granted when, after reviewing the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations: (i) there is no genuine issue of material fact, (ii) the moving party is entitled to judgment as a matter of law, and (iii) reasonable minds can come to but one

conclusion, and viewing such evidence most strongly in favor of the nonmoving, that conclusion is adverse to the nonmoving party.

The party seeking summary judgment bears the initial burden of informing the trial court of the basis for its motion and identifying those portions of the record that demonstrate the absence of a genuine issue of material fact. The moving party may not make a conclusory assertion that the non-moving party has no evidence to prove its case. The moving party must specifically point to some evidence that demonstrates the non-moving party cannot support its claim. If the moving party satisfies this requirement, the burden shifts to the non-moving party to set forth specific facts demonstrating there is a genuine issue of material fact for trial. *Vahila v. Hall* (1997), 77 Ohio St. 3d 421, 429, citing *Dresher v. Burt* (1996), 75 Ohio St.3d 280. With this in mind, the Court proceeds.

In its Complaint, as amended March 22nd, 2010, Relator seeks a Writ of Mandamus from this Court directing the City of Springfield, Ohio and/or its Commissioners (hereinafter, jointly the “City”) to either make an offer of fair market value for “property” (other than the real property) and the “Bundle of Rights” purportedly owned by the Relator, or to file a petition pursuant to RC Sec. 163.01 et seq to appropriate this property. Additionally, the Relator seeks Damages in excess of \$25,000, plus punitive Damages.

The ultimate question in this case is whether Relator’ situation demands a writ of mandamus to order the City to begin appropriation proceedings because of the City’s moratorium against the issuance of building permits on Relator’s property, and its subsequent denial of Relator’s request for an exception thereto.

At the heart of this question is whether or not the Relator has suffered a compensable taking as a result of the City's moratorium. If there has been such a taking, this Court can fairly move forward to consider the matter of the requests for mandamus and damages. If there has not been a compensable taking, then the matter is ended.

Upon review, the Court finds that the facts are largely not in dispute. On April 1st, 2002, the Relator purchased an operating nursing facility, Pillars Nursing Home, and the land on which it was located---generally, the corner of West Columbia Street and Plum St, in downtown Springfield, Ohio. As to the subject property, on September 1st, 2003, Relator gave Notice to the nursing home's residents that the nursing facility would close for renovation, which it then did in October of 2003. The decision was made not just to renovate, but to actually build a new facility; and on September 29th, 2003, Relator petitioned for and was granted by the City a zoning change for this real property. This was followed by three setback variances issued by the City's Board of Zoning Appeals for this property on January 22, 2004, July 20, 2004, and January 21, 2005, purportedly for the building project of the nursing home. As well, Relator sought and received from the Ohio Department of Health a "Certificate of Need"---a necessary prerequisite to said building project--- effective October 16th, 2004.

The Relator's property was near, but not in, an area the City had delineated as the Southwest Downtown Urban Renewal Area---a generally blighted area which was intended to be developed to house a newly-consolidated regional hospital, which would then serve as the sole general hospital within the city. To this end, and beginning February 24th, 2004, the City instituted in this Renewal Area three moratoria on the issuance of building permits---the principle purpose of which was to preserve the status

quo pending the implementation of a development plan. The third of these, issued April 12th, 2005, expanded the Renewal Area to include the property in question. (Def. Ex. 24) This last moratorium was ultimately extended until August 31st, 2007. (Def. Ex. 28 and 41) On September 6th, 2005, the City gave the Relator written notice that it intended to acquire the entirety of the subject property (Def. Ex. 25); and thereafter made a written offer to purchase the same for \$755,000 on February 15, 2006. (Rel. Ex. Aff. of Wagschal)

On May 2, 2006, fifteen months into the third and applicable moratorium, and eight months after learning of the City's intention to acquire the subject property, Relator filed a written request with the City Manager to grant an exception to the moratorium to permit Relator to commence the building of its new nursing home. (Pl. Ex. I) This request was denied. On June 5th, 2006, Relator appealed the Manager's denial to the City Commission; which denied the same on June 27th, 2006. (Rel. Ex. 14) No further appeals were perfected by Relator, despite its legal right to appeal the same to the Common Pleas Court. (see R.C. 2506.01 et seq)

Instead, the City appropriated the real property on December 28th, 2009; and by agreed Entry in Civ. 20094011, stipulated with Relator as to the amount of compensation to be paid for the *real* property in question. What remains, then, is Relator's claim that, in addition to its general interests that would naturally run with the subject real property, it also owned a "Bundle of Rights" which included the following, to wit: the willingness and ability to commence the construction of a new nursing home on the site; the "Certificate of Need" required before a nursing home construction project may

commence; the rights to operate the nursing home and the business enterprise; and the development plans.

Relator claims that this “Bundle of Rights” had a value in and of itself---above and beyond the real property; and that this “Bundle”, said to be of great value, was rendered worthless by the said third moratorium of the City and the City’s denial of its request for an exception to the same. To that end, Relator alleges that this “property”--- that is, this “Bundle of Rights”--- was *taken* by the City for public use *without compensation*. Thus, the instant action.

The Takings Clause of the Fifth Amendment, made applicable to the States through the Fourteenth, see *Chicago, B. & Q.R. Co. v. Chicago*, 166 U.S. 226 (1897), provides that private property shall not "be taken for public use, without just compensation." As its text makes plain, the *Takings Clause* "does not prohibit the taking of private property, but instead places a condition on the exercise of that power." *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 314 (1987). In other words, it "is designed not to limit the governmental interference with property rights *per se*, but rather to secure compensation in the event of otherwise proper interference amounting to a taking." *Id.*, at 315 (emphasis in original). While scholars have offered various justifications for this regime, the United States Supreme Court emphasized its role as "bar[ring] Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960); see also *Monongahela Nav. Co. v. United States*, 148 U.S. 312, 325 (1893).

Traditionally, the “taking” which would require just compensation was in the nature of a direct government **appropriation or physical invasion** of private property. See, e.g., *United States v. Pewee Coal Co.*, 341 U.S. 114.. Beginning with *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), however, the Supreme Court recognized that **government regulation** of private property, as well, might be so onerous that its effect would be tantamount to a direct appropriation or ouster. Thus, Justice Holmes' storied but cryptic formulation: "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." *Id.*, at 415. The question, always: how far is too far.

As a starting point, regulatory actions generally will be deemed “**per se**” takings requiring compensation under Fifth Amendment purposes in but two instances, to wit: (1) where government regulation requires an owner to suffer a permanent physical invasion of his or her property, see *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), or (2) where regulations completely deprive an owner of "**all** economically beneficial us[e]" of his or her property, *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1019 (1992). In the case at bar, there is no suggestion that any permanent physical invasion of the property had occurred with the imposition of the moratorium.

Relator, however, has claimed that it has been completely deprived of “all economically beneficial use” of its property. In support of this position, Relator claims that the moratorium prevented any development of the property whatsoever; and as the nursing facility operations had been temporarily suspended, there could be no economically viable use of the property.

This Court finds this position to be untenable. The Ohio Supreme Court has indicated that when evaluating whether the subject property has been stripped of all economically beneficial uses, “the complete elimination of a property’s value is the determinative factor.” *State ex rel. Shelly Materials, Inc. v. Clark County Board of Commissioners* (2007), 115 Ohio St.3d 337, at 342 (citing *Lingle, supra*, at 539). The focus of this second “per se” inquiry, should not then be whether the specific business use contemplated by the owner might be thwarted; but rather whether the real property, itself, would be stripped of all possible economic use. On this point, the Court notes that the moratorium, even as extended, was temporary in nature. While the subject property was eventually appropriated, the moratorium served not to strip the land of all economically beneficial uses, but merely to delay the same. Moreover, as to this second per se inquiry, the potential effect of the regulation on the “bundle of rights” is rendered irrelevant, as that “bundle” involved only a particular business use of the land and not the land itself. And, as already stated, the appropriation of the land itself is not an issue before this Court.

A more complicated analysis of this “per se” inquiry requires the following: to compare the value of the property that has been taken by the regulation against the value of the property that remains. *Keystone Bituminous Coal Assn. v. DeBenedictis* (1987), 480 U.S. 470.. “[O]ne of the critical questions is determining how to define the unit of property 'whose value is to furnish the denominator of the fraction.' ” *Id.*, quoting Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law* (1967), 80 Harv.L.Rev. 1165, 1192. The denominator, or the “relevant parcel,” is the property interest that is subject to the regulation. See *The*

Relevant Parcel Issue (1993), C872 ALI-ABA 167. The numerator of this fraction is the value of the property that has been taken due to the regulation. If this fraction equals one (i.e., the value of the property taken equals the value of the relevant parcel), then there has been a categorical taking as defined in *Lucas* and compensation is due unless the use of the property conflicts with background principles of the state's law of property and nuisance. *Lucas*, supra at 1027. But if the fraction equals anything less than one, then there has been no categorical taking.

This Court concludes that the subject property in this case was not stripped of all economically beneficial use.

Penn Central Analysis

The Supreme Court, nevertheless, recognized that even beyond these two *per se* categories, regulatory takings might still occur and be compensable. *Penn Central Transp. Co. v. New York City*, 438 U.S. 104(1978). The high Court, then, found it appropriate to weigh various considerations in reviewing a regulatory takings challenge. The factors that are particularly significant in determining whether a regulation affects a taking: the regulation's economic impact on the claimant; the extent to which the regulation interferes with distinct investment-backed expectations; and the character of the government regulation. The cases of *Loretto*, *Lucas*, and *Penn Central*, supra, all aimed to identify regulatory actions that were functionally equivalent to a direct appropriation of or ouster from private property. To that end, each of them focused upon the **severity of the burden** that the government regulation imposed upon property rights. With this in mind, this Court now considers these factors as they might apply in the case at bar.

Character of the Governmental Action

It is appropriate that the Court first consider the character of the governmental action, that is, the nature of the city's moratorium herein. The "character of the governmental action"---for instance whether it amounts to a physical invasion or instead merely affects property interests through "some public program adjusting the benefits and burdens of economic life to promote the common good"---is relevant in discerning whether a taking has occurred. *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528 (2005) (O'Connor, p. 539). In this case, the genesis of the moratorium was the decision to combine the two hospitals then serving the City, and to relocate this new hospital into an area described as the "Southwest Downtown Urban Renewal Area", which originally did not encompass the subject property in question herein. The City's Ordinance described the importance of the following goals in establishing the same:

1. To Centralize emergency care and to optimize patient travel times;
2. To encourage development in surrounding neighborhoods;
3. To revitalize downtown with the influx of employees working downtown;
4. To remove blighted structures and improving aesthetics;
5. To remove vacant industrial structures and remediate any contamination;
6. To attract new businesses ancillary to the hospital to the downtown;
7. To create sources of employment near to the urban poor;
8. To attract the return of retail and food service businesses to the downtown.

(Def. Ex. 12).

The Court notes first that the moratorium at issue in this matter was the third moratorium to be executed with respect to the development of a site for the new hospital. As previously observed, that moratorium, enacted by the City herein April 12, 2005 by way of Ordinance 05-116, served to preclude the issuance of any building permits in the area for a particular amount of time. The stated purpose of this moratorium was to

preserve the status quo of the named area so that, in its efforts to “renew” this “blighted” urban area---the centerpiece which was to be the construction of a new hospital---the City might accomplish ten tasks as toward the development of a comprehensive set of land use regulations. Those tasks:

1. Study and determine traffic patterns;
2. Study public transportation impacts;
3. Study parking requirements and impacts;
4. Identify environmental issues and concerns;
5. Assure adequate utility service including water, sewer, gas, electric and telecommunications;
6. Adopt the most prudent and effective land use regulations;
7. Consider protection of architectural assets;
8. Develop and pursue design objectives
9. Measure impacts on surrounding residential neighborhoods and mitigate adverse impacts; and
10. Evaluate the impact on existing plans for real estate development and transportation.

(Def. Ex. 24)

In short, the City was attempting to create a comprehensive development plan that would facilitate and compliment the construction of a new hospital in this area---which ultimately affected the subject property. (Def. Ex.24) Though an inconvenience for the benefit of the entire City, the moratorium affected not just the subject property, but over two hundred other properties in the “blighted” area. (Whitmore Aff. p.39) While recognizing the inconvenience posed by this moratorium, the City specifically wished to avoid the financial consequences---both to the land owner and to the public---of permitting new construction only to subsequently discover the necessity of public acquisition and demolition. (Def. Ex. 24)

The Relator does not contest the *reasonableness* of the moratorium herein. Indeed, the United States Supreme Court has found that “[m]oratoria are an essential tool of successful development.” *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302 (2002). Interestingly, in finding that a moratorium did not constitute a Taking subject to compensation, the *Tahoe* Court approved a much broader moratorium than that by the City herein, with **no** exceptions, that lasted for thirty-two months. In the case at bar, the City’s moratorium was narrower in scope, lasted approximately 28 months, and did permit land owners to seek exceptions.

The Court thinks it significant that the moratorium set in place herein provided that a property owner could apply to the City for an “exception” to the moratorium in the event of special circumstances. (Def. Ex. 24) An owner was directed to demonstrate that the peculiar effect of the moratorium on the subject property justified relief and/or caused undue burden; and then attach “supporting data and explanation” as to how the moratorium might deny to the owner “all economically viable use of the subject property; or how the economic impact and/or the character of the moratorium might negatively effect the specific investment backed expectation of the owner for the subject property (ie., the *Penn Central* analysis)”. (Def. Ex. 24)

It is this “exception” provision which has become a significant part of this case. On May 5th, 2006, thirteen months into the moratorium, the Relator, pro se, filed a letter requesting that an exception be granted for his property so that Relator might secure a building permit. (Rel. Ex. 12) This letter did advise the City of the Relator’s plan to build a “state of the art” nursing home within the area encompassed by the moratorium; that a

nursing home had not been operating on the site since October 3, 2003; that the Relator was still seeking financing for this construction; that the Relator had successfully applied for a Certificate of Need from the Ohio Department of Health, which was to expire on September 14th, 2006; and which if expired would be rendered “worthless.”

However, the Relator’s letter failed to advise the City of a number of vital and required particulars. It failed to present any details of the proposed construction and design of the new facility. It failed to demonstrate how the denial of the exception would deprive the owner of all economically viable use of the subject property. It failed to sufficiently establish the circumstances and alleged non-transferability of the CON. It generally ignored the *Penn Central* analysis contemplated in the ordinance. And, while it made reference to the “substantial” investment of time and money toward its business goals, it failed to afford any documentation or figures in support of the same. (Def. Ex. 32) In short, the letter was deficient. Even the Supreme Court seems to suggest that more is needed by the landowner:

“[A] takings claim based on a law or regulation which is alleged to go too far in burdening property depends on the landowner’s first having followed reasonable and necessary steps to allow regulatory agencies to exercise their full discretion in considering development plans for the property, including the opportunity to grant any variances or waivers allowed by law. As a general rule, until these ordinary processes have been followed the extent of the restriction on property is not known and a regulatory taking has not yet been established.” (*Tahoe, supra, p. 304*)

In his May 24, 2006 denial of this request for an exception to the moratorium, the City Manager noted said deficiencies and further explained that the City was on the verge of concluding its negotiations with Community Mercy Health Partners to construct a new hospital in the Renewal Area, necessitating the demolition of all structures in that area---

including those on the Relator's subject property. He added that the City had already secured financing for the project of over \$17 million and had amended its zoning code to facilitate the same. He concluded that granting an exception to the moratorium would be detrimental to the City's efforts; and would result in significant financial waste. (Def. Ex. 34) This was true especially in light of the fact that the City had already announced its intention as of September of 2005 to acquire the entire subject property in furtherance of said hospital project. (Def. Ex. 25)

After due consideration, the essence of the governmental action herein---the restriction of the issuance of a building permit to the Relator---strikes this Court as measured and reasonable under the circumstance of the City's stated urban renewal plan. The action was temporary and non-intrusive. It provided landowners the opportunity to seek an exception---an opportunity of which Relator did not avail itself for over one year. It fairly preserved the status quo until such time as the City could finalize its development plans. This finalization came merely five months into the moratorium in question, when the City indicated its intention to acquire the subject property. Finally, had there been no moratorium against the issuance of building permits on the subject property, and had Relator actually commenced construction, the ultimate acquisition by the City would have resulted in the wasteful demolition of the same.

The Court also thinks it noteworthy that during the time of the moratorium, the City accomplished the tasks of developing a comprehensive land use plan surrounding the construction of a new hospital (Chappell, Meadows and Whitmore Affs., Def. Ex. 35B)---suggesting good faith on behalf of the City rather than needless delay.

Economic Impact

Nevertheless, the Court must consider the impact of the City's moratorium on Relator's economic interests in the real estate. At the outset, the Court notes that Relator does not contend that there were any immediate lost profits by the nursing facility in place as a result of the moratorium. Indeed, the Court has found no evidence that the Relator ever, in and of itself, owned any license to operate this nursing home; but rather was merely operating the home in question through the license of the previous landowner, Pillars Nursing Home Ltd. And in fact, Pillars Nursing Home Ltd. had voluntarily ceased operations as a nursing home as of October, 2003. (Wagschal Aff.) When the moratorium went into effect for the subject property on April 12, 2005, Relator did not hold the necessary license to operate a nursing home on the real property in question pursuant to RC Sec. 3721.02-.07. Indeed, the nursing home already had been closed for eighteen months. Accordingly, the Court finds that neither the imposition of the moratorium nor the denial of an exception had any significant and immediate economic impact on the Relator. Thus the immediate economic impact from the government regulations on the operation of a nursing home was non-existent.

Relator, however, sites this Court to the Ohio Supreme Court case of *State ex rel R.T.G.Inc. v. State of Ohio* (2002), 98 Ohio St.3d 1 in support of its proposition that the loss of its 'bundle of rights' should nevertheless be considered to be a taking. In *R.T.G.*, *supra*, the Ohio Supreme Court found coal mining rights to be a compensable interest separate and apart, or severable, from the ordinary interests inherent with the ownership of any real property. Relator contends that, like coal mining rights, its "bundle of rights" should be considered separate and severable, and therefore compensable on its own.

The Ohio Supreme Court, however, seems to suggest otherwise, finding a distinct difference between the general rights comprising a “bundle of rights” and mineral rights: “**Unlike** other individual rights within the bundle of rights that make up a complete property estate, mineral rights are recognized by Ohio law as separate property rights.” (*Id.*, p.11, emphasis added) Thus, unlike coal mining rights, which are “severable”, and thus compensable, other interests in the property may well not be severable. As such, the bundle of rights herein may not be compensable.

The Court, however, must make a closer examination of Relator’s investment backed expectations.

Investment Backed Expectations.

The third *Penn Central* factor is related to the second. Relator contends that it had a very specific investment-backed plan for the subject property with significant return expectations. It represents that it purchased the operating rights to the nursing home already in place for \$984,000, and the real estate and buildings thereon for \$776,000. (Def. Ex. 1) It claims that it expended “more than a million dollars” in the “development of a state of the art nursing home” which it then intended to construct; and projected “over \$3 million dollars worth of investment-backed expectations.” (Wagschal Aff.) Before it could proceed with this construction project, however, it apparently discovered that it would be necessary to secure a “Certificate of Need” from the Ohio Department of Health.

A “Certificate of Need” (“CON”) is the written approval from the Director of the Ohio Department of Health for the establishment, development, construction, or

renovation of a long-term health facility, such as the nursing facility in question. (RC Sec. 3702.51) As such, it is a necessary prerequisite to the construction of any new nursing facility. The Director has the authority to oversee an application process for the same. Once granted, a CON remains in effect for a two year period of time to permit the holder of the certificate, within those two years, the opportunity to meet two conditions: first, to secure and demonstrate the financial commitment for the project; second, commence construction that continues without interruption. (Def. Ex. 7, RC Sec. 3702.525) Failure to demonstrate either this commitment or this construction generally will lead to an expiration of the CON. However, if the demonstration is made, the holder need only demonstrate that “reasonable progress” is being made toward the completion of the project. (RC Sec. 3702.526) Moreover, a holder may appeal any decision by the Director regarding the issuance or termination of the CON to the Tenth District Court of Appeals. (RC Sec. 3702.60)

Relator was not able to secure this CON until September 16, 2004. (Wagschal Aff.) Thus began a two year time limit which would come due for expiration on September 16, 2006. Relator, albeit with some difficulty, apparently secured the proper financial commitment in February of 2005. (Rel. Ex. 8) However, when the City imposed the moratorium in April of 2005, and then denied the sought-after exception in May of 2006 for the issuance of a building permit, it then precluded the Relator from commencing construction of the nursing home. In doing so, the Relator argues, the City prevented the Relator from satisfying the *construction* condition of the CON; and the CON, therefore, expired. Relator contends that this expiration thwarted the plan for the

construction of the new nursing home facility, and therefore deprived the Relator of its investment backed expectations for use of the property. (Wagschal Aff.)

It is this CON, then, which is the cornerstone of Relator's "bundle of rights" for which it seeks compensation; and therefore is at the center of the storm. Relator has represented to the Court that the State of Ohio has imposed a moratorium on the issuance of new CONs---where there is not already an established nursing home---and that once issued, a CON is non-transferable and cannot be extended beyond its two year life. (Wagschal Aff.) Therefore, Relator asserts, the CON has intrinsic value unique to the subject property---the site of an established nursing home. With it, Relator explains, a nursing home may be constructed. Without it, there can be no nursing home construction.

Interestingly enough, however, and as Relator stated in the affidavit of its managing member, its specific intention upon purchasing Pillars Nursing Home was, in fact, to **move** the fifty "licensed and certified beds to some undetermined location within Clark County". (Wagschal Aff. ¶4). As such, the clear investment plan does not seem to originally have involved the construction of a new nursing home on the subject property; but rather contemplated this construction at a *different* location---this, despite Relator's claims that the CON could not transfer from the subject property to a different property. (Wagschal Aff.) It remains puzzling to the Court, then, as to just how the Relator intended to secure a CON---if unique and limited to the subject property--- to permit construction of the nursing home at a different location. And in light of this intention, did the moratorium have any effect at all on the *initial* investment plan? That is to say, did the moratorium affect the Relator's *initial* plan to construct a nursing facility at a

different location? The answer would necessarily be “no”. The case at bar involves the moratorium *only* on the subject property. Likewise, did the moratorium affect the Relator’s *initial* investment plan to *secure or otherwise transfer* a CON to a different property to commence construction thereon? Again, the answer would necessarily be “no”. The moratorium in this case precluded only the issuance of a building permit on the *subject* property. It did not, in and of itself, preclude the issuance and/or transfer of a CON to a different property.

Relator maintains, however, that it was this restriction on the subject property which caused the CON to expire; and thwart its apparently *revised* investment plan to build on the subject property. Perhaps. Still, even this position seems tenuous in light of the statutory language concerning the second condition of a CON, to wit: that the applicant demonstrate uninterrupted construction, “except for interruptions or *delays* that are *unavoidable* due to reasons beyond the person’s control, *including* labor strikes, natural disasters, material shortages, or comparable events.” [RC 3702.525(A) (2)] (emphasis added) It strikes this Court that the facts of this case---to wit: a moratorium by the City which yielded no exception to the Relator---might well have fit into this exception and merited an application by the Relator to the Department of Health to extend the life of the CON.

This, unfortunately, is precisely what the Relator did not seek. On September 28, 2006, the Director of the Ohio Department of Health issued a notice to the Relator of its intention to withdraw the CON because of Relator’s failure to satisfy the conditions of the same. (Rel. Ex. 16) The Director invited the Relator to respond to this intention.

Despite having thirty days to advise the Director of the circumstances of the City's moratorium---a circumstance beyond its control---Relator neither forwarded any response nor submitted any other request for an extension. (Rel. Ex. 17) Moreover, upon the expiration of the CON on December 21st, 2006, it appears that the only action taken by the Relator was to file a notice of "appeal." (Re. Ex. 18) The Court is afforded no evidence that the Relator ever prosecuted that appeal.

The Court observes here that the CON holds value *only* if there is, indeed, a moratorium on the issuance of CONs for new sites, and if it is, once issued, non-transferable and/or non-extendable. In other words, the intrinsic value of the CON is found in the rarity and difficulty of its issuance. Nevertheless, Relator submits merely an affidavit (Wagschal Aff.) in support of this representation. The Court has been afforded no other basis to make this finding. To the contrary, as the Court has already noted, there remains an internal inconsistency between Relator's representation of the exclusivity of a CON on the one hand, and its initial plan to build the nursing home elsewhere, on the other. Additionally, the Court is not persuaded by Relator's position that it could not secure the extension of the CON. This seems contrary to the more permissive statutory language and to Relator's unexplained inaction.

This notwithstanding, even should the court *arguendo* find the CON to be non-transferable and non-extendable, and thereafter assign value to the CON, it is not clear that the same constitutes a severable and compensable interest. The United States Supreme Court has generally rejected attempts to sever property interests in determining the relevant parcel for regulatory taking under the Fifth Amendment. (See *Tahoe, supra*

p. 327: considering “the nature and extent of the interference with rights in the parcel as a whole.”) That Court has found, for instance, that where an owner possesses a full “bundle” of rights, “the destruction of one ‘strand’ of the bundle is not a taking.” (*Id.*, p. 327)

The Ohio Supreme Court, too, has shown its reluctance to find such interests to be severable and compensable. In its case of *Shelly, supra*, the Ohio Supreme Court found that sand and gravel mining rights did not constitute a severable interest from those that ran with the land. Like the case at bar, *Shelly* presented a landowner who apparently had purchased the subject land with the investment plan of pursuing a specific business operation: in *Shelly*, mining sand and gravel; in the case at bar, operating a nursing home. In both cases, that specific investment plan was thwarted by a governmental regulation. That notwithstanding, the high Court declined compensation for this economic taking.¹

Relator might counter, however, that even in *Shelly*, the Court’s dicta left open the possibility of a different outcome had the landowner specifically purchased the mining rights separately from the balance of the real property. (See *Shelly, supra*, p. 344) And in the case at bar, Relator claims to have purchased the rights to operate the nursing home “separately” from the underlying real property. (Wagschal Aff.) This Court, however, would yet not be persuaded. Mining rights have always enjoyed a special status with respect to issues of real property. Thus, it is not surprising that the Ohio Supreme Court

¹ The courts have generally been reluctant to award compensation for “personal “ losses, such as lost profits, loss of business goodwill, or injury to a business. *United States v. General Motors Corp.*, 323 U.S. 373 (1945). Indeed, while the Plaintiff has referred to a “bundle of rights”, the Supreme Court has stated that “the Fifth Amendment concerns itself solely with the “property” -- *i.e.*, with the owner’s relation as such to the physical thing, and not with other collateral interests which may be incident to his ownership.” (*Gen. Motors, supra*, p. 378, emphasis added). It is this relationship to the real property, to wit: the “fee simple”, that the Court ascribed the words “group of rights”. (*Gen. Motors, supra*, p. 378)]

would find a taking when the right to mine coal was compromised, as in the *R.T.G.* case, *supra*. But this Court sees a distinct difference between mining rights and a certificate and a license to construct and operate a nursing facility. The latter, for example, is part and parcel to the business use of the land, and not the land itself.

And what of Relator's knowledge of the allegedly rigid circumstances of the CON? Again, in the *Shelley* case, the Court opined that a landowner's awareness of the regulations in place at the time of purchase may be a relevant factor when weighing the extent to which regulations have interfered with distinct investment-backed expectation. (*Shelley, supra*, at p. 345). The same might be said of the awareness of the circumstances surrounding certificates of need. As a participant in the nursing home industry, (Wagschal Aff.) Relator undoubtedly was aware of the CON requirements at the time it purchased the subject real property. To no small extent, the Relator would be subject to the regulatory decisions of the Department of Health with respect to the issuance and/or transfer of the CON. Its conceivable, for instance, that absent any moratorium, the Director may still have denied a CON on the subject property, or any other site.

This Court is inclined to find that the better course is to follow the lead of the high Court; and find that the CON is not a severable and compensable interest for purposes of the *Penn Central* analysis.

Summary of Penn Central Analysis

The Supreme Court has directed the trial courts to balance the aforementioned three factors in determining whether a governmental regulation has led to a compensable

taking. In this case, the regulation in question was the moratorium imposed by the City against the issuance of building permits, and the subsequent denial to the Relator of an exception to the same. The Court has found that the nature of the moratorium was temporary, non-intrusive, justified in its purpose, fair in its application, appropriately limited in its duration, and not unnecessarily broad in its scope. The City's denial of Relator's request for an exception was supportable---particularly in light of the failure of the Relator to make a case to justify the same. There was no economic impact upon Relator's business, which, at the time, was nonexistent for all intents and purposes. As to Relator's specific investment backed plans, other than the CON, the balance of Relator's "bundle of rights", to wit: the development plans, the right to operate the nursing home and the business enterprise, and the willingness and ability to commence construction of a new nursing home, albeit delayed, was not ultimately compromised by the moratorium.

If there was a loss as a result of the moratorium, then it was the Certificate of Need, which arguably expired, in part, as a result of the timing of the moratorium. However, Relator's *initial* investment plan anticipated construction of a new nursing home at a *separate* location. To that end, the moratorium was of no consequence. As to the Relator's plan to construct the home on the subject property, then the Relator must hurdle the issue of whether the CON was a severable strand of the "bundle of rights" in this case. In light of the aforementioned decisions of the higher courts, however, this Court is not inclined to find the same to be a separate and compensable right.

Relator, moreover, has not demonstrated that the CON was unique to the subject property so much as it was personal to the Relator. Indeed, the Ohio Department of

Health issued the CON to the applicant, Relator, which then became the “holder” of this CON. (Def. Ex. 17) While certain representations have been made about the nature of the CON, the Court has received no evidence---other than the Affidavit of the managing member of Relator---that the CON could not successfully be issued at another location, or transferred from the subject property to another site, or extended beyond the two year time period.

Other Factors

In its *Penn Central* case, *supra*, the Supreme Court acknowledged the above three factors as being of “particular significance” when considering any regulations taking case. However, the Court did not limit such a review to solely those three factors. The Court left open the appropriateness of the consideration of other factors with the ultimate goal of determining the **severity of the burden** that governmental regulations impose upon the landowner’s private property rights.

It first strikes this Court as appropriate to consider the natural order of developments had the city not imposed its moratorium. According to the Relator, it would have proceeded to construct a multi-million dollar new facility to house its nursing home operation. As discussed, however, the City ultimately decided that it was necessary to acquire the subject property for purposes of building a road through this area in furtherance of its renewal development plan. Had this happened, the parties would then have been faced with the acquisition and destruction of a new facility, leading to more disruption and cost to the nursing home business, and greater expense to the taxpayers. Thus the burden would have been more severe; and the issue of compensation regarding the CON and Relator’s “bundle of rights” would yet have remained unresolved.

The Court, too, thinks it noteworthy to consider the City's efforts to accommodate a seamless and fair relocation of the business. In this case, the City offered in March of 2006 to exchange land with the Relator, affording it "bare land ready to develop" which would likewise be in close proximity to the location of the new hospital. (Def. Ex. 52) In fact, the offered land was located but one block to the south of the subject property. (Def. Ex. 53) Apparently, this offer was rejected by the Relator. (Burkholder Aff.)

The Court further observes that the Relator failed to exhaust its legal remedies in this matter. This is of import not only with respect to the Mandamus action (see, *E.G. Jones v. Chagrin Falls*, (1997) 77 Ohio St.3d 456), but also as it betrays Relator's less than zealous efforts to protect its "bundle of rights." It failed to adequately seek an exception to the moratorium. It failed to appeal the decision of the City Commission to the Common Pleas Court. It failed to address the decision of the Director of the Ohio Department of Health to terminate the CON. It failed to appeal the termination of the CON to the Tenth District Court of Appeals.²

Conclusion

Relator seeks a writ of mandamus in this case. Mandamus, an extraordinary remedy, is a writ that commands the "performance of an act which the law specially enjoins as a duty resulting from an office, trust, or station." The Ohio Supreme Court has held that "[m]andamus is the appropriate action to compel public authorities to institute appropriation proceedings where an involuntary taking of private property is alleged." *State ex rel. Shemo v. Mayfield Hts.* (2002), 95 Ohio St.3d 59. For a writ of mandamus to issue, Relator needed to establish (1) a clear legal right to compel the city to

² **The Court does not deem the Statute of Limitations to be a viable issue in this case.]**

commence an appropriation action, (2) a corresponding legal duty for the city to institute such an action, and (3) the lack of an adequate remedy in the ordinary course of the law.

The Court has conducted a *Penn Central* analysis with respect to the City's moratorium restricting building permits to be issued on the subject property, and has considered all of the circumstances and the related factors with the goal of ascertaining the severity of the burden imposed by the same. After due consideration, this Court finds that with respect to the subject property herein, the group of rights that are inherently tied to that fee simple estate, and the additional "Bundle of Rights" herein, the regulatory effect of the moratorium, including the denial of the request for an exception, did not cause such a burden to the landowner as to render the same a compensable taking.

For these reasons, the Court finds that there remain no genuine issues of material fact, that reasonable minds can come to but one conclusion based on the law and those facts, and that the City is entitled to judgment as a matter of law. Accordingly, the Court finds in favor of the Defendants, City of Springfield and its City Commission, , and against the Relator, MSI Pillars, Ltd., and awards Summary Judgment to the City of Springfield and its City Commission with respect to the pending claims for mandamus and damages herein. Costs to the Relator.

IT IS SO ORDERED.

This is a final appealable Order.

RICHARD P. CAREY, JUDGE

cc: Thomas H. Lagos, Esq.
Jerome M. Strozdas, Esq.

IN THE COURT OF COMMON PLEAS

CLARK COUNTY, OHIO

State of Ohio Ex Re. : Case No. 08 CV 0866
MSI Pillars, Ltd. :
Plaintiff :

vs.

City of Springfield, et al. :
Defendants : **ENTRY**
:

This Entry shall correct a scrivener's error in the caption of the final appealable order filed March 25, 2011. The caption should read "State of Ohio Ex Re. MSI Pillars, Ltd., Plaintiff vs. City of Springfield, et al." instead of State of Ohio Ex Re. Relator, Ltd. Plaintiff vs. City of Springfield, et al."

IT IS SO ORDERED.

RICHARD P. CAREY, JUDGE

cc: Thomas H. Lagos, Esq.
Jerome M. Strozdas, Esq.