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**IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO**

STATE EX REL OC LORAIN FULTON, LP
Plaintiff

CITY OF CLEVELAND, OHIO
Defendant

Case No: CV-16-871515

2018 FEB 13 P 4:32

Judge: MICHAEL J RUSSO

WILLIAM J. WINDO
CLERK OF COURTS
CUYAHOGA COUNTY

JOURNAL ENTRY

89 DIS. W/PREJ - PARTIAL

02/13/2018: MOTION FOR SUMMARY JUDGMENT OF DEFENDANT-RESPONDENT CITY OF CLEVELAND, FILED
07/07/2017, IS GRANTED AND DENIED IN PART. OSJ.

NO SIGNATURE REQUIRED

Judge Signature _____ Date _____

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:

This matter comes before the court on the motion for summary judgment filed by the City of Cleveland, Ohio (Cleveland); the brief in opposition of the State ex Rel. OC Lorain Fulton, LP (OC); the reply brief of Cleveland; and the evidentiary and other submissions of the parties.

OC's Complaint, filed November 7, 2016, seeks 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 and damages of 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).

FACTS

The dispute arises from the administrative actions of the Cleveland Board of Zoning Appeals and Planning Commission to deny zoning approval for OC's construction of a McDonald's restaurant at 3701 Lorain Avenue in Cleveland, Ohio. The property was purchased by OC in November 2012 for \$600,000 with the intent of developing and leasing the property to McDonald's USA for the construction of a fast food restaurant. OC, based on projections from a real estate expert, anticipated selling the property for \$1,500,000, and entered into a lease with McDonald's in March 2013. Pursuant to this lease, OC was responsible for the demolition and removal of an existing building on the property, as well as its own operating expenses.

The frontage of the property on Lorain Avenue is located in a Pedestrian Retail Overlay (PRO) District pursuant to section 343.23 et seq. of the City of Cleveland Ordinances. The PRO on Lorain Avenue, adopted in 2003, was established "to maintain the pedestrian-oriented character of older neighborhood shopping districts by preserving the pedestrian-oriented character of those districts and to protect public safety by minimizing conflicts between vehicles and pedestrians in neighborhood shopping districts." To accomplish this goal, the PRO requires buildings to abut the sidewalk and minimizes the distance between shop entrances. A "Conditional Use" allows a property owner to avoid the restrictions of the statute, such as for a non-retail use, a parking, area, and any building with more than 40 feet of frontage to the sidewalk.

In 2013, OC sought a conditional use permit from the Board of Zoning Appeals under these PRO zoning regulations to allow an 86-foot frontage, rather than the proscribed 40-foot frontage. Cleveland had discretion to determine whether the proposed use would adversely

impact the pedestrian nature of the neighborhood. After an evidentiary hearing on November 15, 2013 the City Planning Commission voted 5-0, with one abstention, to disapprove OC's conditional use request on the grounds that a drive-through restaurant would have an adverse effect. The Board of Zoning Appeals (BZA) affirmed the Planning Commission's decision and denied OC's appeal.

The ensuing denial of the conditional use became the subject of significant litigation in OC's R.C. 2506.01 administrative appeal (Cuyahoga County Case CV-14-822128) and subsequent appeal, which was dismissed on March 9, 2017. *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 this 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.

Cleveland argues that all of OC's constitutional claims are moot and should be dismissed; that all the claims are barred under the doctrine of *res judicata*; and that even if the claims are not moot or barred by *res judicata*, the claims are legally meritless and should be dismissed.

Cleveland brings forth the following evidence: A) the Eighth District's opinion from the appeal of the original litigation; B) Judge Brian J. Corrigan's opinion from the original litigation; C) the notice of appeal from the original litigation; D) the affidavit of Robert N. Brown, former city planner for the Cleveland City Planning Commission, and attached exhibits; E) the deposition of Russell H. Lamb, Civ.R.30(b)(5) witness for OC; F) the "Lost Benefit Calculation" for OC; G) a June 3, 2013 report to the Cleveland City Planning Commission by David B. Hartt; H) a "Lot Consolidation Plat" work order; I) Google Maps

images; and J) OC's motion for leave to introduce additional evidence in the original litigation. OC brings forth the following evidence: 1) Journal Entry and Opinion, No. 104561 of the Eighth District Court of Appeals (Defendant's Exhibit A, previously filed); 2) Order of Judge Brian J. Corrigan, Case CV-14-822128 (Defendant's Exhibit B); 3) July 8, 2016 McDonald's Lease Termination Letter (Defendant's exhibit E-K); 4) selected testimony of Robert Brown before the Cleveland Planning Commission on November 15, 2013 (Plaintiff's Exhibit 1); 5) Cimperman Ohio City meeting flyer (Plaintiff's Exhibit 2); 6) Affidavit and C.V. of Russell Lamb (Plaintiff's Exhibit 3); 7) McDonald's/OC Lorain Fulton Ground Lease and six Amendments; and 8) Complete Court Record of Case CV-1-822128. Cleveland specifically objects to the evidentiary nature of OC's exhibits 1, 2, and 8. Therefore, under *Biskupich v. Westbay Manor Nursing Home*, 33 Ohio App.3d 220, 222-23 (1986) and *Brown v. Casualty Insurance Co.*, 63 Ohio App. 2d 87 (8th Dist. 1978), this court will not consider those exhibits as evidence to be used on summary judgment.

OPINION

Cleveland seeks summary judgment under three theories: 1) OC's claims are moot; 2) OC's claims are barred by res judicata; and 3) OC cannot prevail on the merits of the claims.

Res Judicata

In order for res judicata to apply, a valid, final judgment must have been rendered upon the merits and an identity of parties or their privies must exist. *Ameigh v. Baycliffs Corp.*, 81 Ohio St.3d 247, 249, 1998-Ohio-467, 690 N.E.2d 872, citing *Whitehead v. Gen. Tel. Co.*, 20 Ohio St. 2d 108, 49 Ohio Op. 2d 435, 254 N.E.2d 10 (1969), (modified in part on other grounds in *Grava v. Parkman Twp.*, 73 Ohio St. 3d 379, 382, 653 N.E.2d 226, 229 (1995)). Res judicata also applies where an issue is litigated that has been "actually and necessarily

litigated and determined in a prior action.” *Ameigh* at 249 citing *Krahn v. Kinney*, 43 Ohio St. 3d 103, 107, 538 N.E.2d 1058, 1062 (1989).

In *Ameigh*, appellant property owners filed a complaint against a development corporation seeking declaratory judgment and injunctive relief against the developer’s plans to construct a marina in a residential district. *Id.* at 250. The appellee asserted a res judicata defense, arguing that the issue had been litigated or decided in two prior administrative appeals. *Id.* The court in *Ameigh* determined that the prior administrative appeals did not actually litigate the subject complaint, noting that “where the judgment of a court is not dispositive on issues which a party later seeks to litigate, res judicata is not applicable.” *Id.* Similarly, the prior litigation in this case only litigated OC’s zoning appeal, and was dismissed as moot by the Court of Appeals. A facial challenge to the constitutionality of a statute or ordinance is proper in a declaratory action but not in an administrative appeal. *See, e.g., Boice v Ottawa Hills* (6th Dist), 2007-Ohio-4471. OC did not seek a constitutional declaration nor did it request damages for an alleged unconstitutional taking in the previous litigation. In the dicta of the opinion, the Eighth District noted that even if OC had sought a declaration on the constitutionality of the PRO legislation, Judge Corrigan never should have reached a determination on it. Nor would it preclude other claims that may have been advanced, as a declaratory judgment determines only what it actually decides and does not preclude other claims that might have been advanced. *State ex rel. Shemo et al v. City of Mayfield Heights et al.*, 95 Ohio St. 3d 59, 2002-Ohio-1627 citing *Ketchel v. Bainbridge Twp.* 79 Ohio App.3d 174, 177-178, 607 N.E.2d 22 (1992). Because there has been no final determination of the merits of OC’s claims, none of the claims sought by OC are barred by *res judicata*.

Mootness

Cleveland argues that the Eighth District's mootness ruling means that Judge Corrigan's opinion in the previous is a "nullity" and should not be considered or applied to this case. This court agrees. When a case or controversy becomes moot during an appeal, the lower court's unreviewable rulings have no legal consequences on the parties. *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39 (1950). The initial litigation in this case became moot on appeal, and the decisions from that litigation have no legal consequences. As such, the court will consider all of OC's claims from the instant litigation.

Cleveland further argues that after OC sold its property in December 2016, the claims in this lawsuit became moot. Actions are moot when:

they are or have become fictitious, colorable, hypothetical, academic or dead. The distinguishing characteristic of such issues is that they involve no actual genuine, live controversy, the decision of which can definitely affect existing legal relations. A moot case is one which seeks to get a judgment on a pretended controversy, when in reality there is none, or a decision in advance about a right before it has been actually asserted and contested, or a judgment upon some matter which, when rendered, for any reason cannot have any practical legal effect upon a then-existing controversy.

State ex rel. Cincinnati Enquirer v. Hunter, 141 Ohio St.3d 419, 2014-Ohio-5457, 24 N.E.3d 1170, ¶ 4. Regardless of whether OC's claims regarding the specific application of the PRO are proper under *Community Concerned Citizens, Inc. v. Union Township Board of Zoning Appeals* (1993), 66 Ohio St. 3d 452, the court determines that OC's "as-applied" challenge to the PRO became moot upon the sale of the property, as there is no current right of OC that the court can enforce. While the court may be able to find that the statute was applied unconstitutionally to OC, such a finding would have no effect on the ongoing litigation. For

these reasons, summary judgment on this claim is granted against OC and in favor of Cleveland.

Cleveland seeks that the court dismiss OC's remaining claims on the same basis, but the court declines to do so. The court must still determine whether the statute is facially unconstitutional. Additionally, that OC sold the property at issue to mitigate its damages has no bearing on the taking it alleges Cleveland inflicted upon it. The court will consider both of these issues below.

The merits

Facial Constitutionality

OC alleges that the PRO enacted by Cleveland is unconstitutional on its face. The appropriate test for determination of constitutional issues in zoning cases is:

A zoning regulation is presumed to be constitutional unless determined by a court to be clearly arbitrary and unreasonable and without substantial relation to the public health, safety, morals, or general welfare of the community. The burden of proof remains with the party challenging an ordinance's constitutionality, and the standard of proof remains 'beyond fair debate.'

Goldberg Companies, Inc. v. Council of the City of Richmond Heights, 81 Ohio St. 3d. 207 (1998) (in which the Ohio Supreme Court re-establishes *Euclid v. Ambler*, 272 U.S. 365 (1926)). Cleveland presents evidence that the PRO is a common land use planning tool utilized in a number of municipalities. The PRO in Cleveland advances the legitimate purpose of maintaining the pedestrian nature of neighborhood shopping districts that promotes the safety and welfare of these districts. OC presents no evidence to show beyond fair debate that the ordinance is unconstitutional on its face. Summary judgment thus is granted on this claim in favor of Cleveland and against OC.

Takings Claims

OC seems to allege takings claims under three legal theories:

1. That a categorical regulatory taking occurred that completely deprived OC of all economically beneficial uses of its property.
2. That Cleveland's PRO Zoning Ordinances effect a regulatory taking of OC's property because the ordinances do not substantially advance legitimate state interests.
3. That a partial regulatory taking occurred pursuant to *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed. 631 (1978).

OC first alleges that a categorical taking occurred which completely deprived it of all economically beneficial uses of its property. The evidence shows that OC cannot meet this standard. OC sold the property for a profit following the adverse zoning decision and subsequent appeal process through the Eighth District Court of Appeals. Summary judgment is granted in favor of Cleveland and against OC on this claim.

OC brings its second theory of a regulatory taking under the authority of *State ex rel. Shemo v. Mayfield Hts.*, 95 Ohio St.3d 59, 63, 765 N.E.2d 345 (2002), which held that "the application of land-use zoning regulations to a piece of property is a taking only "if the ordinance does not substantially advance legitimate state interest . . . or denies an owner economically viable use of his land." This test, as originally set forth in *Agins v. Tiburon*, 447 U.S. 255, 100 S.Ct. 2138, 65 L.Ed.2d 106 (1980), and as adopted by *Shemo* and its predecessor cases, has been abrogated by *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 532, 125 S.Ct. 2074, 161 L.Ed.2d 876 (2005). In *Lingle*, the U.S. Supreme Court held that "the 'substantially advances' formula announced in *Agins* is not a valid method of identifying regulatory takings for which the Fifth Amendment requires just compensation. *Id.* at 545. The court grants summary judgment on this claim in favor of Cleveland and against OC.

Finally, OC seeks a declaration that a partial regulatory 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). 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. Cleveland argues that OC cannot establish a *Penn Central* takings claim as a matter of law, because it cannot show that Cleveland’s denial of a conditional use deprived OC of the complete beneficial use of the property or interfered with distinct and legitimate investment-backed expectations. The court disagrees. The testimony of Russell Lamb, offered in an affidavit in support of OC’s brief in opposition, avers: “the negotiated sale to Metro Health was solely necessitated by the loss of McDonald’s Ground Lease and although as favorable a transaction as circumstances allowed did not avert a substantial loss in valuation due to the loss of the McDonald’s Ground Lease.” Lamb further avers that “the property’s value with the McDonald’s lease substantially exceeded the price paid by Metro Health without the lease, and that the City’s actions directly caused such substantial loss of property value.” Combined with the evidence regarding the actions Cleveland forced OC to perform in an attempt to obtain a conditional use variance, this creates a dispute of material fact regarding OC’s ability to obtain a *Penn Central* takings claims. For these reasons, summary judgment is denied on this count (Count V).

JUDGMENT

The court therefore declares that Zoning Ordinance Section 343.23 *et seq.* of the City of Cleveland is not arbitrary, capricious, unreasonable, unrelated to the public health, safety, welfare and morals, and does not contravene OC's constitutional rights.

The court further declares that it is unable to determine whether Zoning Ordinance Section 343.23 *et seq.* of the City of Cleveland, to the extent that it prohibits OC from using its property as expressly zoned, is arbitrary capricious, unreasonable, unrelated to the public health, safety, welfare and morals, and does contravene OC's constitutional rights, as this controversy became moot when OC sold the property.

The court further declares that whether Zoning Ordinance Section 343.23 *et seq.* of the City of Cleveland substantially advanced a legitimate governmental interest and thereby constituted a taking of OC's property for which just compensation must be made is moot, as this is no longer a valid cause of action under *Lingle*.

The court further 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 endeavored to do, did not deny OC the viable economic use of its property and did not constitute a taking for which just compensation must be paid.

The court further 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 in conflict with state law and thereby constitutes a taking of OC's property for which just compensation must be paid.

Trial date maintained.

2-13-2018
Date



Judge Michael J. Russo

CERTIFICATE OF SERVICE

A copy of the foregoing Opinion and Order was sent on February 13, 2017 by e-mail through the Clerk of Courts to all counsel of record.