[Cite as *Toledo v. Kim's Auto & Truck Serv., Inc.*, 2003-Ohio-5604.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

City of Toledo

Appellee

v.

Kim's Auto & Truck Service, Inc., et al.

Appellant

Court of Appeals No. L-02-1318

Trial Court No. CI-00-2711

DECISION AND JUDGMENT ENTRY

Decided: October 17, 2003

* * * * *

Barbara E. Herring, City of Toledo Law Director, Gary R. Taylor and Adam Loukx, for appellee.

Terry J. Lodge, for appellant.

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PIETRYKOWSKI, J.

{¶1} This eminent domain case is before the court on appeal from the Lucas County Court of Common Pleas. Following an R.C.163.09 hearing, the court below held that appellee city of Toledo had a right to take appellant's property and that such taking was necessary. The trial court also held a trial to determine the proper valuation of the property. Appellant Kim's Auto & Truck Service, Inc. appeals both the right and necessity finding and an evidentiary ruling made at trial. Because we find that the trial

court did not err either in the R.C. 163.09 hearing or at the trial, we affirm the trial court's decision.

{¶2} In October 1997, Toledo City Council passed a resolution directing the Lucas County Planning Commission ("Commission") to develop an urban renewal plan in the area of the city bounded on the west by Stickney Avenue, on the east by the Ann Arbor Railroad tracks, on the north by the Ottawa River, and on the south by Interstate 75 and Manhattan Avenue ("urban renewal area" or "area"). The urban renewal area contains approximately 450 acres. According to Stephen Herwat, director of the Commission, appellee was interested in the plan for two reasons: first, to alleviate slum and blight conditions in the urban renewal area, and second, to allow for economic development in that area. Specifically, appellee was interested in persuading the DaimlerChrysler Corporation to build a new Jeep plant on the site. Appellant's automobile service garage is situated on a small parcel of land in the southwest corner of the urban renewal area.

{¶3} The Commission conducted a land use study of the urban renewal area in which it considered both the then-current use of the area and the proposed future improvements to the area. After holding several public hearings on the matter, the Commission prepared the Stickney Urban Renewal Plan ("plan"), which proposed clearing the entire area and making the necessary improvements to allow for construction of the Jeep plant. A memorandum authored by Herwat, the then-commissioner of building inspection, was attached as an appendix to the plan. In this memorandum, Herwat concluded that a majority of the structures in the area (52.2 percent) satisfied the

definition of "blight" in the Ohio Revised Code. As noted in the plan, contemporaneous with the Commission's study, appellee was in the process of negotiating sales with property owners in the urban renewal area. The plan was approved by the Commission in July 1998, and Toledo City Council adopted the plan in Ordinance 994-98 on August 6, 1998.

{¶4} Since appellee and appellant were unable to agree on the sale of appellant's property, on May 22, 2000, appellee filed in the trial court a petition to appropriate the property. Appellant answered, challenging appellee's right to take the property and the necessity of such taking. In March 2002, the trial court held an evidentiary hearing on the right and necessity questions as required by R.C. 163.09(B).[1] Following that hearing, the trial court found that appellee had a right to take the property and that the taking was necessary. The trial court then held a trial for the purposes of valuing the property.

{¶5} Following trial, the jury found the fair market value of the property to be $104,000. Appellant now appeals, setting forth the following assignments of error:

{¶6} "1. It was error for the trial court to allow the condemnation to proceed in light of significant procedural irregularities in the manner of passage of the Stickney Urban Renewal Plan.

{¶7} "2. It was error for the trial court to allow the condemnation to proceed in the absence of a valid public purpose.

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[1]R.C. 163.09 (B) provides, in pertinent part:

"(B) When an answer is filed pursuant to section 163.08 of the Revised Code and any of the matters relating to the right to make the appropriation, the inability of the parties to agree, or the necessity for the appropriation are specifically denied in the manner provided in such section, the court shall set a day, not less than five or more than

{¶8} "3. It was error for the trial court to allow the condemnation to proceed since the subject appropriation is an 'excess taking' and is nonessential to the Jeep project.

{¶9} "4. It is error for a trial court to limit the scope of an owner's opinion as to 'fair market value[.]'"

{¶10} The first three assignments of error challenge the trial court's judgment following the R.C. 163.09(B) right and necessity hearing. On appeal, we are limited to determining whether the trial court's judgment is supported by competent, credible evidence. *Erie-Ottawa-Sandusky Regional Airport Authority v. Orris* (Sept. 13, 1991), Ottawa App. No. 90-OT-039; *City of Huron v. Hanson* (July 28, 2000), Erie App. No. E-99-060; *Branford Village Condominium Unit Owners' Assoc. v. Upper Arlington* (1983), 12 Ohio App.3d 120, 121.

{¶11} In its first assignment of error, appellant contends that irregularities existed in the manner in which the plan was passed. Specifically, appellant contends that appellee consciously manipulated the conditions in the area so that a majority of the structures in the area met the definition of "blight."[2] Of the 115 structures in the area,

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fifteen days from the date the answer was filed, to hear such questions. Upon such questions, the burden of proof is upon the owner. ***."

[2]R.C. 725.01(B) defines "blighted area" as:

"an area within a municipal corporation, which area by reason of the presence of a *substantial number* of slums, deteriorated or deteriorating structures, predominance of defective or inadequate street layout, faulty lot layout in relation to size, adequacy, accessibility, or usefulness, unsanitary or unsafe conditions, deterioration of site or other improvements, diversity of ownership, tax or special assessment delinquency exceeding the fair value of the land, defective or unusual conditions to title, or the existence of conditions which endanger life or property by fire and other causes, or any combination of such factors, substantially impairs or arrests the sound growth of a municipal corporation, retards the provision of housing accommodations, or constitutes an economic or social liability and is a menace to the public health, safety, morals, or welfare in its present condition and use." (Emphasis added.)

Herwat determined that 60 (52.2 percent) met the definition of blight. This number was made up of 31 privately-owned structures, plus 29 purchased by appellee. Fourteen of the 29 structures purchased by appellee were demolished, and Herwat concluded that the vacant lots with their remnants of foundation were "blighting influences." Appellee purchased another 15 and then essentially abandoned them, leaving them to deteriorate and allowing vandals to strip them. Because they were further deteriorated or stripped, Herwat concluded that these 15 structures were blighting influences as well. According to appellant, appellee's own actions with the 29 structures it purchased caused the blight, and if one did not count these 29 structures appellee purchased, a majority of the structures in the area were not blighted.

{¶12} We cannot agree with appellant that appellee manipulated the area in such a way as to create blight and that the area would not have constituted a blighted area absent appellee's actions. First, neither the Toledo Municipal Code nor the Ohio Revised Code requires that a majority of structures be considered blighting influences before an area can be considered a blighted area. Both use the phrase "substantial number of structures." See R.C. 725.01(B); Toledo Municipal Code 1183.03(g). Even not counting the 29 structures purchased by appellee, Herwat found that 31 of the 115 structures were blighting influences. Moreover, deteriorated structures are not the only consideration when deciding whether an area is blighted; other factors such as "inadequate street layouts," "unsanitary and unsafe conditions," see R.C. 725.01(B); Toledo Municipal Code 1183.03(g), "substantially decreased tax or fair market values," and conditions that

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The Toledo Municipal Code defines "blighted area" in a similar manner. See Toledo Municipal Code 1183.03(g).

impede "the community's ability to generate or preserve jobs" and to "improve the economic welfare of the people of the community," id., should also be considered. Herwat, in his memorandum attached as an appendix to the plan, noted not only the deteriorated structures in the area but also the "defective/inadequate street layout, faulty lot layout, unsanitary and or unsafe conditions, impairment of growth, and incompatible land uses" in the area. Therefore, we cannot say that the trial court erred in not finding a procedural irregularity in appellee's finding of blight in the area.

{¶13} Appellant also contends in its first assignment of error that appellee acted improperly in purchasing property in the area before the plan's adoption. Appellant argues in its brief that appellee "unlawfully exercised its condemnation power well before, and thus without, the authority conferred by the Municipal Code in T.M.C. § 1183.14(a)-(c)." It is clear from the record that appellee did not formally condemn property before the passage of the ordinance adopting the plan. Appellee did, however, negotiate sales of some of the properties in the urban renewal area before passing the ordinance. Toledo Municipal Code provides: "*After the adoption of the community development plan* by Council, the Mayor, through the Director of the Department of Community Development, shall proceed to carry out the project operations in accordance with such plans."[3] (Emphasis added.) Toledo Municipal Code 1183.13. Appellee responds that nothing prevented it from negotiating and buying properties before passing the plan since, in doing so, it did not exercise any of the powers available to it under the

[3]Toledo Municipal Code 1183.14 outlines appellee's powers in carrying out the plan, including acquiring property by purchase or eminent domain.

Toledo Municipal Code. According to appellee, these were merely sales made between a willing buyer and willing sellers.

{¶14} We agree with appellee that nothing prevented it from negotiating with property owners in the urban renewal area before council adopted the plan. In fact, the Commission acknowledged in the plan that appellee was in the process of doing so. We therefore hold that the trial court did not err in not finding a procedural irregularity on these grounds. Appellant's first assignment of error is found not well-taken.

{¶15} In its second assignment of error, appellant contends that the trial court erred in finding that the taking was not for a valid public use. According to appellant, the land was taken primarily to benefit a private corporation and not the public. Appellant questions the public benefit of this project, noting that the new Jeep plant resulted in a net loss of about 800 jobs and that the tax abatements resulted in a loss of tax revenue. Appellant also argues that the project resulted in a "huge public debt."

{¶16} Section 19, Article I, Ohio Constitution provides:

{¶17} "Private property shall ever be held inviolate, but subservient to the public welfare. When taken in time of war or other public exigency, imperatively requiring its immediate seizure or for the purpose of making or repairing roads, which shall be open to the public, without charge, a compensation shall be made to the owner, in money, and in all other cases, where private property shall be taken for public use, a compensation therefor shall first be made in money, or first secured by a deposit of money; and such compensation shall be assessed by a jury, without deduction for benefits to any property of the owner."

{¶18} Similarly, the Fifth Amendment to the United States Constitution provides that "private property [shall not] be taken for public use, without just compensation." See, also, *Hawaii Hous. Auth. v. Midkiff* (1984), 467 U.S. 229, 231. The Fifth Amendment is made applicable to the states by virtue of the Fourteenth Amendment to the United States Constitution. Id.

{¶19} Judicial review of a municipality's determination to appropriate land is limited. Once a municipality has determined that appropriation is necessary for a public use, the trial court may not reverse that determination unless the municipality has abused its discretion. *City of Huron v. Hanson*, supra. See, also, *State ex rel. Gordon v. Rhodes* (1951), 156 Ohio St. 81, paragraph two of the syllabus (a municipality's determination of "municipal public purpose" for purposes of the home rule amendments to the Ohio Constitution shall not be reversed by a court unless the determination is "manifestly arbitrary or unreasonable.") Similarly, the United States Supreme Court has stated that, "where the exercise of eminent domain power is rationally related to a conceivable public purpose, the [Supreme] Court has never held a compensated taking to be proscribed by the Public Use Clause." *Midkiff*, 467 U.S. at 241. This is so because a municipality (or other political subdivision) is presumed to know what its own needs are. Id. at 244.

{¶20} The Ohio Supreme Court has taken a broad view of the term "public use." The Ohio Supreme Court has held that the term "public use" as used in the second sentence of Section 19, Article I of the Ohio Constitution should be read as being synonymous with the term "public welfare" in the first sentence of that same section. *State ex rel. Bruestle v. Rich* (1953), 159 Ohio St. 13, paragraph two of the syllabus, 25.

The court in *Bruestle* held that eminent domain was proper to clear a blighted area to allow for private development. The court noted that elimination of slums and guarding against their recurrence is conducive to the public welfare. Id. at 28, paragraph one of the syllabus. The court held that such private redevelopment is a public purpose despite the fact that at some point the public will not have a right to use the property and that some incidental

{¶21} non-public use or benefit would ensue. Id. at paragraphs three and four of the syllabus.[4]

{¶22} Since *Bruestle*, numerous courts both in Ohio and in other states have held that blighted areas may be lawfully appropriated for private redevelopment. See, e.g., *Eighth & Walnut Corp. v. Hamilton Cty.* (1977), 57 Ohio App.2d 137, 145; *Allerton*, 4 Ohio App.2d at 66; *City of Jamestown v. Leevers Supermarkets, Inc.* (N.D. 1996), 552 N.W.2d 365, 368-369 (economic development of unused or underused property is a valid public purpose, even if property is not technically blighted); *Poletown Neighborhood Council v. City of Detroit* (Mich. 1981), 304 N.W.2d 455, 458-459 (land may be appropriated for use by a private developer for the purpose of easing unemployment and alleviating "fiscal distress," even without a finding of blight).

{¶23} Appellant concedes in its brief that a municipality may lawfully appropriate urban redevelopment land for private development. However, it contends that the public

[4]Jurisdictions in the United States have variously followed two different approaches for determining pubic use: the "actual use theory," which requires that appropriated land actually be used by the public, and the "beneficial use theory," which requires only that the public benefit from the appropriated land. See, e.g., *State ex rel. Allerton Parking Corp. v. City of Cleveland* (1965), 4 Ohio App.2d 57, 64, affirmed (1966), 6 Ohio St.2d 165. Based on the holding of *Bruestle*, it is clear that the Ohio Supreme Court has adopted a beneficial use approach for determining public use.

benefit is incidental in this case, pointing to the loss of some 800 jobs and tax revenue. However, appellee apparently determined that, despite these losses, keeping the Jeep manufacturing jobs in Toledo and eliminating blight in the neighborhood was conducive to the public welfare. Our review of this determination is limited. The trial court found that appellee did not abuse its discretion in finding a valid public purpose. We find competent, credible evidence in the record to support the trial court's finding. Appellant's second assignment of error is found not well-taken.

{¶24} In its third assignment of error, appellant contends that the taking of its property was not necessary to construction and operation of the Jeep plant. Specifically, appellant contends that the Jeep plant is running without its land and that DaimlerChrysler has no immediate plans for the land. R.C. 163.09(B) provides that a municipality's determination that appropriation is necessary is prima facie evidence of such necessity. That section provides, in pertinent part:

{¶25} "A resolution or ordinance of the governing or controlling body, council, or board of the agency declaring the necessity for the appropriation shall be prima-facie evidence of such necessity in the absence of proof showing an abuse of discretion by the agency in determining such necessity."

{¶26} Necessity has been defined as "that which is an absolute physical necessity and also that which is 'reasonably convenient or useful to the public.'" *City of Huron v. Hanson*, supra, quoting *Dayton v. Keys* (1969), 21 Ohio Misc. 105, 112. See, also, *Erie-Ottawa-Sandusky Regional Airport Auth.*, supra.

{¶27} Ted Roberts, a DaimlerChrysler area manager, testified at the R.C. 163.09 hearing. A fair reading of his testimony is that various uses have been planned for appellant's land over the years as the Jeep plant was being designed and constructed. As of the date of the hearing, no particular use was planned for appellant's land, but Roberts indicated that Daimler/Chrysler has plans, in time, to use all of the land available to it depending on whatever their needs are at the time.

{¶28} The Ohio Eleventh District Court of Appeals encountered a similar situation. In the Eleventh District case, the city of Mentor sought to appropriate land for park land and recreational facilities, which the court held was a valid public purpose. The landowner objected on numerous grounds, one being that the city had no "definite or specific plans" for his property. The Eleventh District Court of Appeals stated,

{¶29} "[T]he fact that appellee [the city] has not created 'definite or specific plans' with respect to the land's eventual use, outside of the state purpose of parks, recreation, and environmental concerns, is not dispositive. There is no authority in Ohio requiring an appropriating agency to first prepare a development program for the land prior to its acquisition. This is even more true in a case such as this one where the city has provided a valid public purpose for the appropriation. R.C. 719.01(B). Thus, this is not the situation where land is being appropriated for some contemplated but undetermined future use.

{¶30} "As a result, whether the land is used for a playground, a marina, or athletic fields, or simply held in untouched pristine splendor, it is immaterial when the plans are

developed so long as the eventual use is related to the state public purpose." (Citation omitted.) *Mentor v. Osborne* (2001), 143 Ohio App.3d 439, 449.

{¶31} We find the reasoning in *Mentor* persuasive and applicable to the instant case. First, we have already affirmed that elimination of blight and economic development are public uses. Second, the record confirms that DaimlerChysler has plans to make use of all land available to it at some point in the future; it is irrelevant that it has no immediate plans for appellant's parcel of land. The trial court did not err in finding that appellee did

{¶32} not abuse its discretion in finding appropriation of appellant's property to be necessary.

{¶33} Nevertheless, appellant cites two Ohio Supreme Court cases purporting to stand for the proposition that land cannot be appropriated for some future, as yet unspecified purpose. See *State ex rel. Sun Oil Co. v. City of Euclid* (1955), 164 Ohio St. 265; *O'Neil v. Board of Commrs. of Summit Cty.* (1965), 3 Ohio St.2d 53. We find these cases distinguishable. First, both cases deal with the *right* to appropriate property, not the *need* therefor. Second, and more important, the facts of the two cases are vastly different from the instant case. In one, the city of Euclid sought to appropriate property for a freeway which was, in the words of the court, still in the "visionary stage." See *City of Euclid*, 164 Ohio St. at 271. Before the highway could be constructed, the city still needed to enter into a cooperation agreement with the county, the state, or the federal government. The court held in its syllabus that "[a] municipal corporation has no power or authority to appropriate lands for some contemplated but undetermined future use."

See *City of Euclid*, 164 Ohio St. 265, paragraph four of the syllabus. The only way this case would control in the instant case would be if the Jeep plant *itself* were merely in the "visionary stage." In fact, of course, it is not. It is already constructed, and the only question is how DaimlerChrysler will use a small tract of land in the corner of the 300 acres on which its plant sits.

{¶34} Similarly, in the *O'Neil* case, a private developer sought to have the county appropriate a parcel of land to build a public road that would serve only the developer's planned subdivision. The developer contended that it planned to develop the subdivision to contain a network of public roads that would connect with the specific tract of land that he sought. However, the court noted that the developer's petition was not "accompanied by a plat of his tract offering the proposed streets therein for dedication and a performance bond to insure their completion to the standards of construction adopted by the Summit County Commissioners." Id. at 58. So, again, the tract of land was sought for some future use which was still in an embryonic stage and the developer was not committed to actually using the land in the stated manner. The distinctions between *O'Neil* and the instant case are obvious. For all of the reasons stated above, we find appellant's third assignment of error not well-taken.

{¶35} In its fourth assignment of error, appellant contends that the trial court erred in instructing the jury on how to determine fair market value. We review this assignment of error under the abuse of discretion standard of review. *State v. Wolons* (1989), 44 Ohio St.3d 64, 68; *Prejean v. Euclid Bd. Of Educ.* (1997), 119 Ohio App.3d 793, 804-805. The Supreme Court of Ohio has stated that "[t]he term 'abuse of discretion'

connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable." *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, quoting *State v. Adams* (1980), 62 Ohio St.2d 151, 157.

{¶36} At trial, Kim Blankenship, appellant's president, was allowed to give her opinion of the fair market value of her property. Blankenship testified that, in her opinion, the value of her property was $530,000. However, the trial court instructed the jury to disregard Blankenship's testimony about the sale prices of properties in the urban renewal area that appellee purchased without having to resort to eminent domain proceedings, finding that the sales were "forced sales."

{¶37} Both parties agree that a landowner is allowed to give her opinion about the value of her land. However, appellee contends that a landowner is allowed only to give an opinion as to the fair market value, and evidence of sales prices from "forced sales" is not to be considered when calculating fair market value. We held as such in *City of Toledo v. Delbert* (June 16, 1989), Lucas App. No. L-88-213.[5] In that case we also cited Nichols on Eminent Domain for its examples of the types of sales that constitute forced sales. Essentially, forced sales are sales done under some form of compulsion, and the authors specifically mention property purchased by a condemning authority for public use as an example of a forced sale. 5 Nichols, Eminent Domain (Rev. 3 Ed.1997) 21-62 - 21-82, Section 21.05, 21.06. Calling it an "almost, if not quite, universal rule," id. at 21-

[5]In *Delbert*, we recognized that forced sales are inadmissible to establish fair market value but held that a sale to a neighboring corporation to allow for the corporation's expansion did not amount to a forced sale. The sale in question in *Delbert* was not done under the threat of eminent domain.

71, Section 21.06, the authors explain that evidence of sale prices in forced sales are generally not admissible to show fair market value. The authors stated:

{¶38} "Even in those jurisdictions where evidence of comparable sales is admitted it is generally held by the weight of authority that evidence of the sale of a parcel of land subject to condemnation to the proposed condemnor or to another potential condemnor may not be admitted as evidence of the value of the land condemned. Evidence showing what the company seeking to condemn has paid for other lands would probably be taken by the jury as indicating the market value when, as a matter of fact, it does not tend to show the market value of the land. A company condemning land might be willing to give more than it is worth, and the owner of land might be willing to take less than it is worth, that is, less than its market value, rather than have a lawsuit." Id. at 21-66 - 21-70, Section 21.06.

{¶39} We therefore conclude that the trial court did not abuse its discretion in excluding Blankenship's testimony of the sales prices of the properties appellee purchased in the area. Appellant contends that this conclusion is inconsistent with the conclusion that appellee did not improperly purchase property in the urban renewal area before city council approved the plan. According to appellant, if this court accepts appellee's argument that its pre-plan purchases of structures in the urban renewal area were freely negotiated, we cannot also say that these purchases were forced sales. However, we take the term "forced sale" to be a legal term of art meaning a sale made under compulsion but not necessarily a sale that the seller was legally obligated to make. In this case, appellee negotiated those sales without having to resort to any of the powers

available to it under the Ohio Revised Code or the Toledo Municipal Code. In that sense, the sellers of those properties were free to either deal with appellee or not. However, the sellers may well have felt compelled to enter into an agreement with appellee knowing that eminent domain proceedings were likely, and in that sense, these were forced sales. We do not find these two conclusions inconsistent, and we find appellant's fourth assignment of error not well-taken.

{¶40} Upon due consideration, we find that substantial justice was done the party complaining, and the judgments of the Lucas County Court of Common Pleas are affirmed. Appellant is ordered to pay the court costs of this appeal.

JUDGMENT AFFIRMED.

Peter M. Handwork, P.J. _____
JUDGE

Richard W. Knepper, J. _____
JUDGE

Mark L. Pietrykowski, J. _____
CONCUR.
JUDGE