IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

STATE OF OHIO EX REL. MICHAEL E. WARNER and CRAIG E. LIEBEL,	:	APPEAL NO. C-060520 TRIAL NO. A-0509439
Plaintiffs-Relators/Appellees,	:	*JUDGMENT ENTRY.*
vs.	:	
CITY OF CINCINNATI,	:	
Defendant-Respondent/ Appellant.	:	

We consider this appeal on the accelerated calendar, and this judgment entry is not an opinion of the court.[1]

Defendant-respondent/appellant, the city of Cincinnati, appeals from the common pleas court's amended entry of partial summary judgment to plaintiffs-relators/appellees Michael E. Warner and Craig E. Liebel ("Warner") on their petition for a declaratory judgment that they possessed the right to vehicular access from their property to an abutting Cincinnati street.

Warner owns three undeveloped contiguous parcels of land located in the Mt. Adams neighborhood of Cincinnati. The hillside parcels abut property owned by the city. The city property is to the north of and at a higher elevation than Warner's parcels. The northern part of the city's property is paved as Carney Street. The southern portion is an

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[1] See S.Ct.R.Rep.Op. 3(A), App.R. 11.1(E), and Loc.R. 12.

unpaved "paper street." Warner's parcels are landlocked and cannot be developed because the city has denied Warner's repeated requests for vehicular access to the paved portion of Carney Street. In 2003, the Cincinnati City Council rejected Warner's tender of $21,000 to purchase the paper street.

Two walls, one atop the other, separate the paved portion of Carney Street from the paper street and the Warner parcels: a 14-foot retaining wall constructed in 1917, and a 45-inch concrete barrier with balustrades, resting at street level, on top of the retaining wall. The barrier serves as a guard rail for Carney Street. Warner's plan for access to Carney Street did not propose altering the retaining wall. Rather, only the 45-inch barrier would need to be breached to provide vehicular access to the Warner parcels.

In the trial court, Warner sought and received a declaration that, as an elemental right of ownership, Warner possessed the right to vehicular access to the abutting paved portion of Carney Street, including the right to construct improvements in the paper street to create vehicular access, and that the city could not deny that access without paying just compensation. As the outcome of Warner's remaining causes of action for inverse condemnation and mandamus to compel access or for an appropriation depended on the resolution of this issue, the trial court stayed the proceedings below and certified that there was no just reason for delay in the appeal of its declaration.[2]

In its sole assignment of error, the city contends that the trial court erred in declaring that Warner was entitled to direct vehicular access to Carney Street, because Warner had other means of access to his property, because the declaration usurped the city's authority to regulate development, and because Warner's claims were barred by the statute of limitations.

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[2] See Civ.R. 54(B).

Since summary judgment presents only questions of law, an appellate court reviews the entry of summary judgment de novo.[3] The parties' election to address the issue by cross-motions for partial summary judgment demonstrated their belief that there were no genuine issues of material fact remaining to be resolved, and that the trial court, was, and this court is, free to render a decision as a matter of law.[4]

The substantive law that governs the resolution of this case is found in the Ohio Supreme Court's determination that "[a]n owner of a parcel of real property has a right to access public streets or highways on which the land abuts. Therefore, any governmental action that substantially or unreasonably interferes with this right constitutes a taking of private property within the meaning of Section 19, Article I of the Ohio Constitution and the Fifth Amendment to the United States Constitution."[5]

The city first contends that because Warner "can walk around the retaining wall to [the] property, just as they could on the day they purchased it," the parcels are not landlocked. While Carney Street has no sidewalk, the city maintains that pedestrian access—not vehicular access—is all that is required to satisfy the access requirement, and that it is available over or around the guardrail barrier wall. This court has previously rejected that argument and labeled it "feckless." [6]

The city next asserts that Warner's parcels are not landlocked because he has vehicular access to Carney Street from Perpendicular Alley through the paper street. Perpendicular Alley lies to the west of Warner's property. The only access to it is over six other parcels or over the paper street that the city refuses to permit Warner to use. In

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[3] See *Polen v. Baker*, 92 Ohio St.3d 563, 564-565, 2001-Ohio-1286, 752 N.E.2d 258.
[4] See *Cincinnati v. Ohio Council 8* (1994), 93 Ohio App.3d 162, 638 N.E.2d 94; see, also, Civ.R. 56(C).
[5] *State ex rel. OTR v. Columbus*, 76 Ohio St.3d 203, 1996-Ohio-411, 667 N.E.2d 8, syllabus; see, also, *State ex rel. Hilltop Basic Resources, Inc. v. Cincinnati*, 167 Ohio App.3d 798, 2006-Ohio-3348, 857 N.E.2d 612, at ¶25.
[6] *State ex rel. Hilltop Basic Resources, Inc. v. Cincinnati*, 2006-Ohio-3348, at ¶33-37.

Hilltop, this court questioned the efficacy of circuitous access routes when direct access was available.[7] Moreover, the only facts of record, construed most strongly in the city's favor, reveal that the city's assistant director of city planning, in a letter to the director of public works, concluded that the paper street effectively "separates [Warner's] land physically from roadway access" no matter how circuitous. And the city's engineering division preferred that access to Carney Street be created over the retaining wall rather than around it.

The city and the amici curiae, the Mt. Adams Association, Inc., and the Mt. Adams Community Urban Redevelopment Corporation, next contend that the trial court's declaration usurped the city's authority to regulate the sale of city property and the development of hillside property. This argument is premature and is inapposite to the procedural setting of this appeal.

Nothing in the trial court's declaration requires the city to disregard the municipal code or city regulations, or to sell portions of the paper street or other city property. The mandamus and the inverse-condemnation causes of action were not resolved in the court below, in accordance with Civ.R. 54(B). The trial court's declaration merely provides that Warner possesses the right to vehicular access to the paved portion of Carney Street, including the right to construct improvements in the paper street to create vehicular access, and that the city cannot deny that access without paying just compensation. Warner had acknowledged the city's right to regulate the development of the property itself and the manner in which access to Carney Street is provided over the retaining wall.

Finally, the city maintains that the trial court erred in entering partial summary judgment, as the statute of limitations had run on Warner's cause of action. The city contends that the time in which to bring an action "to recover title to or possession of real

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[7] See id. at ¶38-42.

property"[8] following a physical taking of the property began to run in 1917 when the city constructed the retaining wall. Thus the city urges that Warner's right to bring suit expired at the end of the then 21-year statutory period in 1938.

We cannot agree with the city's construction of the statute of limitations in this case. First, the city never identified when Warner acquired the three parcels, stating only that it was at some time after 1977—some forty years too late to challenge access to Carney Street in the city's view. Warner urges that the city's taking is an ongoing process with new actions accruing continually.[9] The only date specifically reflected in the record on which Warner's cause of action could have accrued is the 2003 city council refusal to sell the paper street. In either case, Warner brought his action within the applicable four-year period. To construe the issue otherwise "would undermine the rights of all property owners who have yet to develop their land—the government could landlock undeveloped property with impunity" and prevent any future development not anticipated by the original owners.[10]

The assignment of error is overruled. Therefore, the judgment of the trial court is affirmed.

A certified copy of this judgment entry shall constitute the mandate, which shall be sent to the trial court under App. R. 27. Costs shall be taxed under App.R. 24.

HENDON, P.J., CUNNINGHAM and **DINKELACKER, JJ.**

To the Clerk:

Enter upon the Journal of the Court on September 26, 2007
per order of the Court _____.
Presiding Judge

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[8] See R.C. 2305.09(E) (now providing a four-year period to seek "relief on the grounds of a physical or regulatory taking of property").
[9] See *Boll v. Griffith* (1987), 41 Ohio App.3d 356, 358, 535 N.E.2d 1375.
[10] *State ex rel. Hilltop Basic Resources, Inc. v. Cincinnati*, 2006-Ohio-3348, at ¶32.