

IN THE
SUPREME COURT OF OHIO

BOARD OF COMMISSIONERS
OF HAMILTON COUNTY, OHIO

and

City of Cincinnati

Appellants

vs.

OTR, an Ohio General Partnership,
Nominee for the State Teachers'
Retirement Board of Ohio

Appellee

NO. _____

07 - 0795

On Appeal from the Hamilton County
Court of Appeals, First Appellate
District

Court of Appeals Case Numbers:

C-060074

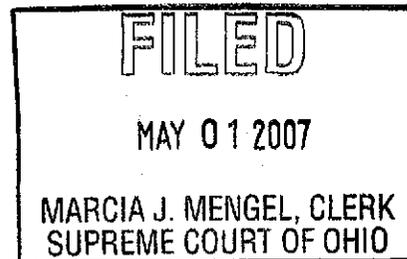
C-060104

MEMORANDUM IN SUPPORT OF JURISDICTION OF THE APPELLANTS, THE
BOARD OF COUNTY COMMISSIONERS, HAMILTON COUNTY, OHIO,
AND THE CITY OF CINCINNATI

JOSEPH T. DETERS
Prosecuting Attorney
Hamilton County, Ohio
Christian J. Schaefer (0015494)
Mark C. Vollman (0007040P)
Assistant Prosecuting Attorneys
Hamilton County, Ohio
230 E. Ninth Street, Suite 4000
Cincinnati, Ohio 45202
DDN: (513) 946-3041 (Schaefer)
(513) 946-3144 (Vollman)

JULIA L. McNEIL
City Solicitor
Terrance A. Nestor (0065840)
Assistant City Solicitor
Room 214 City hall
801 Plum Street
Cincinnati, Ohio 45202
(513) 352-3350

**Attorneys for Appellants Board of County
Commissioners of Hamilton County, Ohio
and City of Cincinnati**



C. Francis Barrett
M. Michelle Fleming
105 E. Fourth Street
Suite 500
Cincinnati, Ohio, 45202

**Attorneys for OTR, Nominee for State
Teachers' Retirement Board of Ohio
Appellee**

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**EXPLANATION OF WHY THIS CASE IS A CASE OF
PUBLIC OR GREAT GENERAL INTEREST**

This case affords the opportunity for the Supreme Court to clearly define for all subordinate courts of Ohio the property interests to be evaluated when real estate is appropriated. It is one of great public interest because left unchanged the decision of the First Ohio District Court of Appeals will permit juries to consider alterations of traffic flow and access to public parking as components of an award in contravention of existing principles of law. Public officials would be unable to calculate potential costs of public improvements in appropriation proceedings because a jury would be able to find that the project had an adverse impact upon a property owner even when the property owner had no property rights taken.

In attempting to apply the recent appellate case of *Proctor v. Thieken*, (reiterating a simple principle that a court has no jurisdiction to value a property interest not taken in an appropriation case), the Court of Appeals became so mired in the concept of diminution of fair market value of the residue of the property that juries in this state will now have to be instructed to both value and not value the same nearby public facilities. Appraisers, whose work leads to the amicable settlement of most appropriation cases, will now have to value and not value the same nearby public facility.

This case began with a mandamus action to determine what, if any, rights were taken from the owner of the Atrium Two building in downtown Cincinnati. After voter approval, Riverfront Stadium and associated walkways and public parking were demolished and Great American Ball Park and Paul Brown Stadium were built in its place. OTR, which owned Atrium Two, claimed a property interest in the public parking. This resulted in *OTR v Cincinnati*, 1st Dist. No. C010658, 2003-Ohio-1549 ("*OTR I*") which found that the Atrium Two building had no right to public parking at Riverfront Stadium, no right to access to public parking at riverfront stadium, no rights from a development agreement or urban renewal plan. The only property

interest impaired was “access at the 530 level” from the rear plaza of the Atrium Two plaza on the south side of the building.

The trial court in the appropriation case which followed OTR I, allowed every witness for OTR to place a value on the lost availability of public parking and access to public parking at Riverfront Stadium. While the jury instruction recited that OTR had no rights to public parking at Riverfront Stadium, it allowed the jury to consider loss of public parking as part of the loss of fair market value in arriving at the verdict. Despite the fact that the Riverfront Stadium parking was public parking, the trial court refused to instruct the jury that they could award no damages for the loss of public parking shared in common with the general public.

The Court of Appeals in the case now before this Court, Bd of Commissioners et al v. OTR 1st Dist. No. C-060074, C-060104, 2007-Ohio-1317 {¶18}, (“OTR II”) in trying to apply Proctor v. Thielen, *infra*, adopted the confusion expressed in the musings of the trial court who stated:

[T]he longer I sit here, the more convinced I become that the two are intertwined. It is a difficult thing that’s been left here, you have to value access to something you have no right to.”

The Court of Appeals approved this concept and held that it was proper to tell the jury not to value “loss” of public parking” directly, but to value the same “loss” of public parking indirectly as part of a loss of fair market value because the “lost of public parking” is not a loss shared in common with the public.

The Court of Appeals decision is not just wrong. It also demonstrates the confusion created by Proctor v. Thielen 4th Dist. No. 03 CA 33, 2004-Ohio-7281. Proctor v. Thielen makes it a jurisdictional error for a trial court in an appropriation case to allow a jury to value property interests not taken. The diminution of fair market value, which affects every appropriation case, necessarily implicates factors which may not be part of the take. This vagary

in the law affects not only the cases, like this one, which are litigated, it also affects the many more instances when public entities are able to negotiate prices in appropriation cases. If appraisers have no guidance on what items to value, settlements will be unlikely, if not impossible. The Supreme Court has not spoken on this issue. Guidance on this issue is required so that all members of the general public can be fairly compensated when appropriation of property is necessary.

Jurisdiction should be granted as this is a matter of general public interest affecting not only the parties to this case, but also every property owner who loses a property interest to eminent domain on public projects throughout this state.

STATEMENT OF THE CASE AND FACTS

The City of Cincinnati (“City”) and the Hamilton County Board of Commissioners (“County”) revitalized the Cincinnati Riverfront in the 1990's and early 2000's. Riverfront Stadium (Cinergy Field) was demolished, Paul Brown Stadium and Great American Ball Park were built, the trench containing Fort Washington Way (Interstate 71) was narrowed, and the downtown street grid was extended to over Fort Washington Way to the Ohio river. As part of the demolition of Riverfront Stadium to make room for the Great American Ball Park, one of the two Walkways connecting Riverfront Stadium to Downtown was demolished. The walkway could be accessed directly from the south plaza of the Atrium Two Building.

OTR, the nominee for the State Teachers Retirement Fund, filed a mandamus action to compel the City and County to file an appropriation action to condemn whatever property interests OTR had in Walkway. The mandamus action was decided in *OTR I*. While finding that OTR had an implied right of access at the 530' level on the south side plaza of their Atrium Two building, *OTR I* held that OTR had no rights to public parking at Riverfront stadium, no rights to access to public parking at Riverfront Stadium, no rights derived from an urban renewal plan and

no rights from negotiations between Nell Surber and David Warner which culminated in a Contract for Sale of Land for Private Redevelopment, and no right to have the walkway maintained in perpetuity. OTR I {¶53}.

The City and County attached and incorporated OTR I in the Complaint filed in this case, OTR II to appropriate the implied right of access at the 530' level. (T.d.2). The City/County appraisers found that some retail space on the first floor of Atrium Two had to be converted to office space at a cost of \$180,000. (T.p. 1302, 1668) This amount was paid to OTR as provided by law.

The City and County also obtained and introduced by way of a chart at trial the internal appraisals of the Atrium Two building used to report its value to the State Teachers Retirement System. These appraisals showed the value of the building has increased from \$83,700,000 to \$102,000,000 after the walkway was closed. (T.p. 794, 852, 868, City/County Exh. 73). The owner's representative, Mr. Honeycutt, testified that in 1999 and 2000, A.T.&T. abandoned 10 of the 27 floors of the Atrium Two building and all ten floors were quickly leased to other tenants. (T.p. 820). The net operating income of the building went from \$7,600,000 before the walkway was closed to \$8,300,000 after the walkway was closed. (T.p. 843, 844). According to Mr. Honeycutt, in the five years after the walkway closed, the impact was minimal. (T.p. 889). In fact, OTR conducted no study, either before or after the walkway closed, to determine if any tenant employees used the walkway or Riverfront parking. (T.p. 895). The occupancy rate of Atrium Two increased after the walkway was closed. (City/County Exh. 73). The City and County appraisals, Shawn Wilkins, and Neil Notestine, both agreed with OTR's representative that the numbers show no effect of the walkway closure on the office space. (T.p. 1284, 1701).

OTR determined that, despite not having a property interest in the public parking existing at Riverfront Stadium, it would "value" public parking. All six lay witnesses and both appraisers

presented by OTR were allowed, over objection, to testify concerning the value of public parking at Riverfront Stadium. This created a quandary for counsel for the City and County. On cross examination, they would have to ask about public parking to show the basis of opinions and testimony. When asked about this issue, the trial judge assured them that cross examination about public parking would not constitute a waiver of their continuing objection. (T.p. 282 -285).

Michael Hartmann, a realtor representing OTR, over objection, was permitted to state:

Atrium II has access to inexpensive parking but the whole purpose of this trial is we used to have amazing access to inexpensive parking." (T.p. 303).

Other objections to the evidence concerning public parking were interposed throughout the testimony of Mr. Hartman and OTR's building manager, Mr. Richter. (T.p. 306, 307, 330, 331, 391). Mr. Richter also testified about an Entry Agreement and fire exit needs which were not found to be property rights taken in OTR I. (T.p. 400, 401, 433, 467, 488, 490).

By the afternoon session on November 15, the fourth day of trial, the matter of the value of public parking had become so confused that the trial court decided to give an instruction to the jury about the matter. The instruction, in pertinent part, was as follows:

So it is a little bit of a difficult thing. There is an obligation there for the right of access but on the other side of the skywalk, there was no right they had to any parking garage. The City and County were within their rights to tear down Cinergy Field and the parking garage attached to it. (T.p. 588).

Despite this interim jury instruction, on redirect examination, Mr. Richter, again over objection, was permitted to discuss the access to the public parking at Riverfront Stadium over a covered skywalk. (T.p. 604 - 608, 618).

The next witness, Anita Schafer, was permitted to testify over objection that the pedestrian bridges was important because of the public parking facility. (T.p.665). Despite the fact that OTR I found no property interest created in their discussions, Nell Surber, the former

City Economic Development Director followed with testimony about the importance of public parking and how the City wanted the office workers to use stadium parking instead of having developers build parking garages. (T.p. 685, 688, 692, 693). She also was permitted to testify about the urban renewal plan which OTR I had already found provided no rights to public parking. (T.p. 707-709, 711, 720, 1131, and 1132). Mr. Warner, the building's developer was also permitted to testify at length about the reliance on stadium parking and that loss of stadium public parking diminished the value of the building. (T.p. 915, 920, 921, 922, 925, 926, and 929).

On November 17, the sixth day of trial, the trial Court again admitted testimony concerning the value of stadium public parking. Before the testimony of the second appraiser for OTR, the trial court again recognized that the issues were again confused. (T.p. 966 to 969). The trial court decided that evidence of replacement public parking would be allowed to determine fair market value of Atrium Two before and after closure. Objections were allowed to both sides. (T.p. 983 to 985).

Despite allowing OTR's appraisers to include the consequential damages of reconfigured public parking and traffic flow in their opinions of fair market value, the final jury instruction excluded the requested instruction on Consequential Damages set out in OJI 301.09(4). (T.d. 95, page 10). The City and County interposed the appropriate objection. (T.p. 1778).

The jury returned a verdict which was consistent with the testimony of Appraiser Jackson's amounts for cost of cure, lost public parking and lost pedestrian traffic flow. (T.d. 126). The Court incorporated these amounts in its judgment. (T.d. 143)

The injustice of this result is demonstrated because, according to annual appraisals of the building used to prepare annual reports for the State Teacher's Retirement System, the occupancy

rate and net income of the building has only increased since the walkway was closed.
(City/County Exh. 74 and 75).

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law No. I:

In an appropriation action, the Court of Common Pleas has no subject matter jurisdiction to allow the jury to value property rights not listed as being taken in the Complaint.

Proctor v. Thieken (4th Dist) No.03CA33, 2004-Ohio-7281 reversed a judgment in an appropriation case because the trial court allowed the jury to value an item which was not alleged to be a property right taken in the Complaint. The Court found that the Court of Common Pleas had no subject matter jurisdiction. The matter was raised *sua sponte* by the Court of Appeals. In this case, the trial court did exactly the same thing by allowing OTR's experts and the jury to give value to Riverfront Stadium Parking.

The lead cases on eminent domain were decided in the 1950's and 1960's when the interstate highway system was built. In State, ex Rel. Merritt v. Linzell (1955) 163 Ohio St. 97 held that "an inconvenience shared in common with the general public and is necessary in the public interest to make travel safer and more efficient" is not compensable. Elimination or reconfiguration of public parking, like traffic flow, has been held to be such an "inconvenience" that cannot be valued. Norwood v. Forest Converting Co. (1984) 16 Ohio App. 3d 411, 415.

The Court of Appeals misapplied this well established case law. OTR I, the decision which set out the property right taken, held:

{¶ 53} Unlike the property owner in CEA, **OTR presented no documents in the trial court providing it with any specific right to parking.** The 1982 Amended Urban Renewal Plan, the provisions of which expired in January 1987, merely specified how the Block N properties, which later would become the Atrium Two building, were to be developed for office use, directly connected to the elevated walkway from the stadium plaza, and made a part of the city's skywalk system. **Moreover, we cannot say that the language contained in the Contract for Sale of Land for Private Redevelopment for Parcel N-2 relating to the public use**

of the elevated walkway provided OTR with any express right to parking or obligated the city to maintain the walkway in perpetuity. OTR additionally relies on language in the 1995 agreement with the city relating to the Fourth Street Skywalk, as well as the 1999 entry agreement with the city. The 1995 walkway agreement is irrelevant because it concerns only the skywalk over Fourth Street. Additionally, the 1999 entry agreement merely provided that the city would relocate and reattach the pedestrian bridge upon completion of the necessary work on the Fort Washington Way project. The city completed this work and reattached the bridge. Because none of these documents provided OTR with any express property rights, we cannot say the trial court erred in holding that **OTR did not have any express contractual right of access to riverfront parking.**

(Emphasis added). The holding in the *OTR I* decision, which was attached to the Complaint, directly conflicts with this case, *Hamilton County v. OTR* (1st Dist) C-060074 and C-060104 (“*OTR II*”).

OTR II {¶19} states: “Evidence concerning access to parking was admitted during trial.

But, as explained below, this evidence was admitted for a particular purpose.” *OTR II* {¶22} and {¶23} read in pertinent part:

But the loss suffered by OTR was not shared with the general public. As this court determined in *OTR v. Cincinnati*, Atrium Two was specifically built in reliance upon access at the 530-foot elevation.

{¶23} Other downtown buildings with employees who used the elevated walkway to access riverfront parking were not similarly built in reliance upon such access. **Because Atrium Two was designed to connect to the walkway at the 530-foot elevation, it was granted a variance from the city to be constructed with a smaller parking garage than required.** Thus, the elimination of access at the 530-foot elevation affected Atrium Two more significantly than it affected other downtown buildings.

{¶24} Further, **because Atrium Two was required to grant the city an easement through its lobby, it became a pedestrian hub.** The case law relied upon by the city and county regarding loss of traffic flow concerns loss of traffic flow *past* a premise, generally due to the relocation or elimination of a roadway. But OTR experienced a loss of traffic flow *through* its premises. Such a loss was experienced by OTR alone. “[C]ircuity of travel to and from real property is not compensable, but circuity of travel created within the owner’s property is compensable.” Accordingly, we conclude that OTR suffered a loss different than that suffered by the general public.

{¶25} When determining fair-market value, “every element that can fairly enter into the question of value, and which an ordinarily prudent business man

would consider before forming judgment in making a purchase, should be considered.” **Given that Atrium Two was built in reliance upon access at the 530- foot elevation and was constructed with only approximately 150 parking spaces, we conclude that evidence concerning available parking around Atrium Two, as well as the amount of pedestrian traffic flow through the building, would be relevant considerations to an ordinarily prudent businessperson.** The trial court did not err in so determining, and it did not exceed its subject-matter jurisdiction in allowing evidence concerning parking and traffic flow for such a purpose.

Clearly, *OTR I* and *OTR II* are inconsistent. *OTR I* found a right of access to the 530 level, not a right to public parking or access to public parking at Riverfront Stadium. In fact there was not even a right or obligation to have the access to the Riverfront Stadium “. . . maintained in perpetuity.” Nonetheless, *OTR II* allowed the jury to value public parking and access to public parking because in its agreements with Cincinnati it was granted a parking variance and was required to provide easements. The disconnect in the logic is that the documents granting the variance and the easements secured no right to even keep the walkway open or to access any parking. The basis for *OTR II* to allow the jury to value public parking was as fair market value was based upon “rights” found not to exist in *OTR I*.

Clearly, the Court in *OTR II* exceeded its subject matter jurisdiction by letting the jury value lost public parking based upon rights that did not exist and were not listed in the complaint.

Proposition of Law No. II:

In an appropriation case where loss of public parking is claimed to diminish the value of the residue of the property involved, the Court must limit those consequential damages by giving the instruction to the jury set out in *OJI 301.09(4)* that “Consequential damages such as circuity of travel, loss of traffic volume suffered by the owner in common with the public are not to be considered.”

The City and County requested, but were denied, a jury instruction limiting the consideration of consequential damages. The requested instruction was as follows:

Damage to the property resulting from the exercise of eminent domain may be recovered only for damages not common to the public. Consequential damages

such as circuity of travel, loss of traffic volume suffered by the owner in common with the public are not to be considered. (T.d. 95, page 10, T.p. 1778).

See *OJI* 301.09(4); *State ex Rel. Merritt v. Linzell* (1955), 163 Ohio St. 97; 126 N.E.2d 53;

Richey v. Jones (1974) 38 Ohio St. 2d 64, 310 N.E. 2d 695.

The Court of Appeals in *OTR II*, believing that reasonable business people routinely pay millions of dollars for property interests they can not own, held that this instruction was not required because:

{¶ 21} We first note that a calculation of fair-market value was necessary to determine OTR's damages. The jury was instructed that, "[t]o determine what damages are to be awarded you must determine what decrease there was in fair market value of the Atrium [Two] building as a result of the taking that occurred."

{¶ 22} To support their contention that loss of parking and loss of traffic flow were not relevant in a fair-market value calculation, the city and county rely on a series of cases that they argue establish that inconveniences and losses shared with the general public are not compensable.FN7 But the loss suffered by OTR was not shared with the general public. As this court determined in *OTR v. Cincinnati*, Atrium Two was specifically built in reliance upon access at the 530-foot elevation.

{¶ 23} Other downtown buildings with employees who used the elevated walkway to access riverfront parking were not similarly built in reliance upon such access. Because Atrium Two was designed to connect to the walkway at the 530-foot elevation, it was granted a variance from the city to be constructed with a smaller parking garage than required. Thus, the elimination of access at the 530-foot elevation affected Atrium Two more significantly than it affected other downtown buildings.

The Court of Appeals in *OTR II* went astray. As stated above, in *OTR I* {¶53} OTR had (1) no right to public parking, (2) no right to access to public parking, and (3) no right to expect that the walkway would be maintained indefinitely. One would think that a reasonable business person, doing due diligence would figure out what property rights existed, and which did not. The Court of Appeals in *OTR II* {¶23} and {¶24} found that because OTR obtained a variance from the parking requirements and granted certain easements to the City, they had a superior claim on the County owned public parking at Riverfront Stadium. This reasoning is unsupportable. The right

to use public parking was a right shared in common with the general public. Once Riverfront Stadium was demolished, no one from any downtown office building could use it.

While to 530 access point was not shared with the occupants of other downtown buildings, the public parking was. This holding by the court of appeals is also mistaken in that the City and County appraisers as well as OTR appraiser Jackson opined that because of the internal lost of traffic, a portion of the first floor retail area of Atrium Two would have to be converted from retail use to office use. The highest appraisal for this cost was \$180,000 by the City/County appraiser.

The “cost to cure” evidence admitted regarding public parking by the OTR appraisers was the cost of building a new parking garage or cost of buying an existing one. These cost ranges from OTR appraiser Jackson were:

Acquire Surface Parking	\$3,300,000
Build Parking Garage	\$9,620,000
Purchase Existing Garage	\$4,375,000
Subsidize Parking Cost	\$1,580,000

Evidence of these values was admitted.

Yet, OTR could not show that any office tenant ever left or was given lower rent due to the demolition of the walkway. In fact, according to annual appraisals of the building used to prepare annual reports for the State Teacher's Retirement System, the value of the building has increased from \$83,700,000 to \$102,000,000 after the walkway was closed. (T.p. 794, 852, 868, City/County Exh. 73). The owner's representative, Mr. Honeycutt, testified that in 1999 and 2000, A.T.&T. abandoned 10 of the 27 floors of the Atrium Two building and all ten floors were quickly leased to other tenants. (T.p. 820). The net operating income of the building went from \$7,600,000 before the walkway was closed to \$8,300,000 after the walkway was closed. (T.p. 843, 844). According to Mr. Honeycutt, in the five years after the walkway closed, the impact was minimal. (T.p. 889).

In short the “loss” of public parking had no impact on the Atrium Two building that was any greater than the loss of public parking had on any other building. The jury, however, was given no instruction on how to handle the matter of lost public parking as a consequential damage.

The Court of Appeals, in OTR II, confused the difference between valuing the loss of a property interest and valuing consequential damages. The only property interest lost was access at the 530 level. That could be valued. The consequential damages could consider the loss of retail space inside the building which were unique to the Atrium Two building. The consequential damages could not include “loss” of public parking which affected Atrium Two in the same *de minimus* fashion as it affected other downtown Cincinnati office buildings.

Proposition of Law No. III:

Evidence of the benefit of nearby public parking to an office building is inadmissible in an appropriation case setting the compensation for loss of access at the 530 level when (1) the owner of the office building has secured no property interest in the public parking or access to public parking; and, (2) the public parking is used in common with the general public.

The most important issues in appropriation cases are the items valued. The cases generally settle because the appraisers are valuing the same items of damages. The appraisers value the property interest taken. The appraisers also value any diminution in fair market value of the residue of the property, so long as the items resulting in diminished value are not shared in common with the general public. In order that all owners of property are treated fairly, these rules must be followed in every case.

In OTR II {¶42} through {¶45} allowed testimony that the Atrium Two owner granted easements to the City and the City granted variances to the owner of Atrium Two. OTR I {¶53}, which was the basis for the Complaint had already determined that the agreements between the City and the Atrium Two owner created no property interest in the Walkway, the access to public

parking or the public parking itself. Mr. Richter also testified about an Entry Agreement and fire exit needs which were not found to be property rights taken in OTR I {¶53}. (T.p. 400, 401, 433, 467)

The calculation of every OTR appraiser was based upon "lost" public parking as part of a cost to cure or diminution of fair market value of the residue of the Atrium Two building. Appraiser Fletcher¹ was permitted to opine that since the Atrium Two building is no longer directly connected to inexpensive public parking, Atrium Two lost \$6,000,000 in value. (T.p. 1023). Appraiser Jackson was again called as a witness to restate the cost of cure of \$1,000,000. (T.p. 1080, 1081, 1094). After considering loss of public parking at Riverfront Stadium, Appraiser Jackson determined that the damage to the residue, after reconnecting the Atrium Two Plaza to Third Street, would be \$3,200,000. (T.p. 1063, 1092). This valuation included at least \$2,000,000 to pay OTR to find a "parking solution" and \$600,000 for loss of pedestrian traffic. (T.p. 1162, 1178, 1179, 1186, 1187, 1204, 1205, 1224, 1228, 275, 1223, 1224, 1228, 1229). Since OTR I {¶53} found no right to public parking or access to public parking and by its very nature, loss of public parking is shared with the public, it had no place in the case at all.

But the appraisers were not the only ones to testify about public parking on behalf of OTR over objection. Michael Hartmann, a realtor representing OTR, over objection, was permitted to state:

Atrium II has access to inexpensive parking but the whole purpose of this trial is we used to have amazing access to inexpensive parking." (T.p. 303).

¹OTR II {¶32} to {¶36} finds a waiver ignoring the reassurance given by the trial court that cross examination about parking would not constitute a waiver of their continuing objection. (T.p. 282 -285).

Other objections to the evidence concerning public parking were interposed throughout the testimony of Mr. Hartman and OTR's building manager, Mr. Richter. (T.p. 306, 307, 330, 331, 391).

Near the conclusion of Mr. Richter's testimony, after a series of objections about public parking were interposed and a conference with counsel occurred (T.p. 468 to 472), the Court limited Mr. Richter's testimony as follows:

Let's be clear about the question. As a matter of law, nobody but the government owns the skywalk or Cinergy Field, or the parking garage around Cinergy Field. We are talking about any south access when he asked the question. (T.p. 470).

Despite this ruling, Mr. Richter was still permitted to testify about public parking on the Riverfront via the skywalk over objection. (T.p. 488, 490).

Despite the fact that the Complaint in this had the decision in OTR I attached to it to identify what rights were and were not appropriated when the walkway to Riverfront Stadium was demolished as part of the demolition of Riverfront Stadium and construction of Paul Brown Stadium and Great American Ballpark, the OTR II in the appropriation case permitted every reference to the value rights not appropriated to stand and be valued. It permits the valuation of loss of the public parking as part of the diminution in value of the residue of the Atrium Two building even though that public parking was shared with the public.

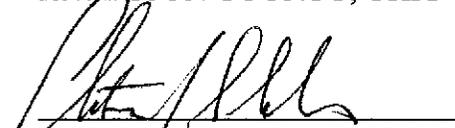
The results of this case will be to discourage settlements in appropriation matters. Instead, it will encourage the litigious. Any conceivable item, whether appropriated or no will be thrown at the jury to see how much the irrelevant and immaterial evidence can confuse them when paired with an instruction to value and not value the same item.

CONCLUSION

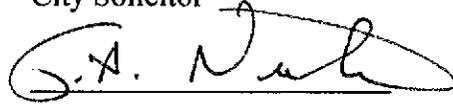
This Court should exercise jurisdiction in this matter.

Respectfully,

JOSEPH T. DETERS
PROSECUTING ATTORNEY
HAMILTON COUNTY, OHIO


Christian J. Schaefer, (0015494)
Mark C. Vollman (0007040)
Assistant Prosecuting Attorneys
230 E. Ninth Street, Suite 4000
Cincinnati, Ohio 45202-2174
Chris.Schaefer@hcpros.org
513/946-3041
FAX 513/946-3018

JULIA L. McNEIL
City Solicitor


Terrance A. Nestor (0065840)
Assistant City Solicitor
Room 214 City hall
801 Plum Street
Cincinnati, Ohio 45202
(513) 352-3350

**Attorneys for Appellants Board of
County Commissioners of Hamilton
County, Ohio and City of Cincinnati**

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing Memorandum in Support of
Jurisdiction was served upon the following by regular U.S. Mail on this 1st day of May, 2007:

C. Francis Barrett
Michelle Fleming
Barrett & Weber LPA
500 Fourth & Walnut Centre
105 East Fourth Street
Cincinnati OH 45202 4015


Christian J. Schaefer, 0015494
Assistant Prosecuting Attorney

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



D72571713

HAMILTON COUNTY BOARD OF	:	APPEAL NOS. C-060074
COUNTY COMMISSIONERS,	:	C-060104
	:	TRIAL NO. A-0400434
and	:	
	:	JUDGMENT ENTRY.
CITY OF CINCINNATI,	:	
	:	
Plaintiffs-Appellants/Cross-	:	
Appellees,	:	
	:	
vs.	:	
	:	
OTR, an Ohio General Partnership,	:	
Nominee for the State Teachers'	:	
Retirement Board of Ohio,	:	
	:	
Defendant-Appellee/Cross-	:	
Appellant,	:	
	:	
and	:	
	:	
ROBERT A. GOERING, TREASURER,	:	
HAMILTON COUNTY, OHIO, et al.,	:	
	:	
Defendants.	:	



This cause was heard upon the appeal, the record, the briefs, and arguments.

The judgment of the trial court is affirmed for the reasons set forth in the Decision filed this date.

Further, the court holds that there were reasonable grounds for this appeal, allows no penalty and orders that costs are taxed under App. R. 24.

The court further orders that 1) a copy of this Judgment with a copy of the Decision attached constitutes the mandate, and 2) the mandate be sent to the trial court for execution under App. R. 27.

To The Clerk:

Enter upon the Journal of the Court on March 23, 2007 per Order of the Court.

By: 
Presiding Judge

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

HAMILTON COUNTY BOARD OF COUNTY COMMISSIONERS,	:	APPEAL NOS. C-060074 C-060104
and	:	TRIAL NO. A-0400434
CITY OF CINCINNATI,	:	<i>DECISION.</i>
Plaintiffs-Appellants/Cross- Appellees,	:	PRESENTED TO THE CLERK OF COURTS FOR FILING
vs.	:	MAR 23 2007
OTR, an Ohio General Partnership, Nominee for the State Teachers' Retirement Board of Ohio,	:	COURT OF APPEALS
Defendant-Appellee/Cross- Appellant,	:	
and	:	
ROBERT A. GOERING, TREASURER, HAMILTON COUNTY, OHIO, et al.,	:	
Defendants.	:	

Civil Appeal From: Hamilton County Court of Common Pleas

Judgment Appealed From Is: Affirmed

Date of Judgment Entry on Appeal: March 23, 2007

OHIO FIRST DISTRICT COURT OF APPEALS

Joseph T. Deters, Hamilton County Prosecuting Attorney, *Christian J. Schaefer* and *Mark C. Vollman*, Assistant Prosecuting Attorneys, *Julia L. McNeil*, City Solicitor, and *Geri Hernandez Geiler* and *Terrance A. Nestor*, Assistant City Solicitors, for Plaintiffs-Appellants/Cross-Appellees,

Barrett & Weber, *C. Francis Barrett* and *M. Michele Fleming*, for Defendant-Appellee/Cross-Appellant.

Please note: This case has been removed from the accelerated calendar.

SYLVIA S. HENDON, Judge.

{¶1} Plaintiffs-appellants/cross-appellees the Hamilton County Board of Commissioners and the City of Cincinnati (“city and county”) appeal from the jury verdict in an appropriation action awarding \$3.5 million to defendant-appellee/cross-appellant OTR, the statutory nominee for the State Teachers’ Retirement Board of Ohio. The damages were awarded to compensate OTR for the taking of its right of access where an elevated walkway had connected the Cincinnati riverfront to Atrium Two, an office building owned by OTR.

{¶2} The city and county have raised five assignments of error for our review. OTR has raised two assignments of error in a cross-appeal. For the following reasons, we affirm the jury’s award of damages.

Factual Background

{¶3} This is not the first time that a dispute between these parties pertaining to Atrium Two has appeared before this court. In *OTR v. Cincinnati*,¹ we determined that OTR was entitled to a writ of mandamus to compel the appropriation action that is the subject of the current appeal. *OTR v. Cincinnati* contains a detailed explanation of the factual history between these parties. In the present case, a brief summary of the events leading up to this litigation will suffice.

{¶4} OTR is an entity that handles the investments of the State Teachers’ Retirement System. Included in these investments are numerous properties and office buildings. OTR owns and invests in these properties to generate income used to pay benefits to members of the State Teachers’ Retirement System.

¹ *OTR v. Cincinnati*, 1st Dist. No. C-010658, 2003-Ohio-1549.

{¶5} As relevant to this litigation, OTR owns the Atrium Two office building in downtown Cincinnati. Atrium Two is located at the intersection of Fourth and Sycamore Streets and is a Class A office building. Class A buildings are the highest recognized class of office structures, have a prominent appearance, and generally attract high-profile tenants. Atrium Two was constructed in 1983-1984 and, as a part of the city's Urban Renewal Plan, was built with an elevated walkway connecting its southern entrance to the Cincinnati riverfront. The walkway spanned Fort Washington Way and provided direct access to parking and events on the river. Atrium Two was designed to accommodate a connection to the walkway and was built in reliance upon the walkway providing access to riverfront parking. Consequently, the building was granted a variance from the city and was built with a parking garage containing only approximately 150 spaces, substantially fewer spaces than a building the size of Atrium Two would normally require. Atrium Two was also required to grant the city a public easement, allowing pedestrian access through its lobby and to the elevated walkway 24 hours a day.

{¶6} The plaza and lobby of Atrium Two surrounding the entrance to the elevated walkway were decorated and accessorized with greenery. This southern entrance, at the 530-foot elevation level, became the building's premier access point.

{¶7} In the mid- to late 1990s, the city revised its urban renewal plan. The revised plan completely redesigned Fort Washington Way. The highway was narrowed considerably, freeing up land to its south. The city's street grid was altered, providing additional access to the riverfront over Fort Washington Way. Pedestrian access to the riverfront via the continuation of existing streets became more feasible.

{¶8} The amended urban renewal plan also called for the elimination of the elevated walkway connecting Atrium Two to the riverfront. The walkway was closed on October 2, 2000. OTR sought a preliminary injunction prohibiting the

destruction of the walkway, but the trial court denied its request. OTR then asked the trial court to issue a writ of mandamus to compel the city and county to initiate an appropriation action to compensate OTR for the taking of its property rights in the elevated walkway. The trial court refused, and OTR appealed to this court. We determined that OTR did have a right of access at the 530-foot elevation, and that the demolition of the elevated walkway had substantially interfered with this right.²

{¶9} But we further determined that OTR had no specific contractual right of access to any riverfront parking.³ Following our conclusion that OTR was entitled to a writ of mandamus compelling the city and county to initiate an appropriation action for the loss of access at the 530-foot elevation, we remanded the cause for further proceedings.

{¶10} The city and county commenced the appropriation action. At trial, OTR presented testimony from three witnesses regarding the loss in value to Atrium Two following the removal of the elevated walkway. These witnesses stated the loss in value to be \$4.2 million, \$6 million, and \$10 million, respectively. The city and county also presented valuation testimony from two witnesses, who stated the loss in value to Atrium Two to be \$160,000 and \$180,000. The jury awarded OTR damages in the amount of \$3.5 million. The present appeal ensued.

Subject-Matter Jurisdiction

{¶11} In their first assignment of error, the city and county argue that the trial court exceeded its subject-matter jurisdiction by allowing the jury to directly value property rights that had not been appropriated, specifically, the right to parking on Cincinnati's riverfront.

² Id. at ¶50.

³ Id. at ¶53.

{¶12} In support of their argument, the city and county rely on *Proctor v. Thieken*.⁴ In *Thieken*, also an appropriation case, the Fourth Appellate District concluded that the trial court had exceeded its subject-matter jurisdiction by permitting the jury to determine if there had been a taking of the defendant's property and rights in addition to the taking described in the complaint.⁵

{¶13} Thieken owned property that had been affected by a project conducted by the Ohio Department of Transportation ("ODOT"). ODOT had installed concrete curbs along various state routes, one of which ran along Thieken's property. ODOT had filed a complaint to appropriate both a portion of Thieken's acreage and a temporary easement in his property. But Thieken argued that ODOT's actions had also unreasonably interfered with his right of access to the property. In response, ODOT argued that the trial court lacked jurisdiction to consider Thieken's argument. Despite ODOT's objection, the trial court specifically instructed the jury to consider whether ODOT had substantially interfered with Thieken's right of access.

{¶14} On appeal, the Fourth Appellate District reversed. It determined that the trial court did not have jurisdiction to determine if there had been an additional taking outside of the takings listed in the complaint. It further stated that Thieken should have pursued a mandamus action to compel appropriation proceedings for the loss of access.⁶

{¶15} Contrary to the city and county's assertion, *Thieken* is not factually analogous to the case at bar, and it does not support their argument. OTR had already filed a mandamus action, in which this court determined that the only right that had been appropriated was OTR's right of access at the 530-foot elevation. Unlike *Thieken*, the trial court in this case did not instruct the jury to consider

⁴ 4th Dist. No. 03CA33, 2004-Ohio-7281.

⁵ *Id.* at ¶22.

⁶ *Id.*

whether additional rights had been appropriated. In fact, the trial court repeatedly instructed the jury that OTR had no right to riverfront parking and was not to be compensated for any such loss. During the trial, the court attempted to aid the jury by framing the issue. It instructed the jury that "OTR had no right, contractual or otherwise[] inherent right to the parking across the street any more than anybody else did or anywhere else along the riverfront. So it is a little bit of a difficult thing. There is an obligation there for the right of access, but on the other side of the skywalk, there was no right they had to any of that parking garage. The City and County were perfectly within their rights to tear down Cinergy Field and the parking garage attached to it."

{¶16} Later in the trial, the court further stated, "[T]here is no agreement in this case or otherwise for the County to provide any parking for this building. Obviously, the building was constructed. The reasons for its construction I allowed to be heard in evidence but there isn't an obligation for the County to provide any parking nor any right [or] expectation for them to have any parking * * * But there is no right that Atrium [Two], regardless who owns it, has to any parking in any particular spot on the Riverfront in the before scenario or now, in the after scenario."

{¶17} And in its jury instructions, the court stated, "[t]he property right that was taken is the access to the elevated walkway of the public right away at the 530-foot elevation * * * [n]either Hamilton County nor the City of Cincinnati had any obligation at any time to provide the Atrium [Two] building with parking that from time to time existed on Cincinnati's central riverfront. OTR did not have any express contractual right to access to riverfront parking at any time."

{¶18} These are just a few excerpts from a lengthy trial. But we are convinced that the trial court went to great lengths to ensure that the jury was aware that OTR was not entitled to compensation for any loss of parking. The issue before the jury was complicated, which the trial court recognized during a side-bar

conference with counsel: “[T]he longer I sit here, the more convinced I become that the two are intertwined. It is a difficult thing that’s been left here, [] you have to value access to something that you have no right to.” The trial court clarified this intricate relationship by providing the above instructions.

{¶19} Evidence concerning access to parking was admitted during trial. But, as explained below, this evidence was admitted for a particular purpose. Given that the trial court repeatedly instructed the jury that OTR had no right of access to riverfront parking and could not be compensated for the loss of such parking, we conclude that the trial court did not exceed its subject-matter jurisdiction by allowing the jury to directly value loss of parking.

{¶20} The city and county further argue in this assignment of error that the trial court exceeded its jurisdiction by allowing the jury to indirectly value loss of parking and loss of traffic flow as part of a fair-market-value calculation. They contend that it was improper for Raymond Jackson and Jerry Fletcher, appraisers hired by OTR, to testify concerning the availability of inexpensive parking when discussing fair-market value. The city and county specifically argue that, because the losses of parking and traffic flow were shared in common with the general public, they may not be considered in determining fair-market value.

{¶21} We first note that a calculation of fair-market value was necessary to determine OTR’s damages. The jury was instructed that, “[t]o determine what damages are to be awarded you must determine what decrease there was in fair market value of the Atrium [Two] building as a result of the taking that occurred.”

{¶22} To support their contention that loss of parking and loss of traffic flow were not relevant in a fair-market value calculation, the city and county rely on a series of cases that they argue establish that inconveniences and losses shared with

OHIO FIRST DISTRICT COURT OF APPEALS

the general public are not compensable.⁷ But the loss suffered by OTR was not shared with the general public. As this court determined in *OTR v. Cincinnati*, Atrium Two was specifically built in reliance upon access at the 530-foot elevation.⁸

{¶23} Other downtown buildings with employees who used the elevated walkway to access riverfront parking were not similarly built in reliance upon such access. Because Atrium Two was designed to connect to the walkway at the 530-foot elevation, it was granted a variance from the city to be constructed with a smaller parking garage than required. Thus, the elimination of access at the 530-foot elevation affected Atrium Two more significantly than it affected other downtown buildings.

{¶24} Further, because Atrium Two was required to grant the city an easement through its lobby, it became a pedestrian hub. The case law relied upon by OTR regarding loss of traffic flow concerns loss of traffic flow *past* a premise, generally due to the relocation or elimination of a roadway. But OTR experienced a loss of traffic flow *through* its premises. Such a loss was experienced by OTR alone. “[C]ircuitry of travel to and from real property is not compensable, but circuitry of travel created within the owner’s property is compensable.”⁹ Accordingly, we conclude that OTR suffered a loss different than that suffered by the general public.

{¶25} When determining fair-market value, “every element that can fairly enter into the question of value, and which an ordinarily prudent business man would consider before forming judgment in making a purchase, should be considered.”¹⁰ Given that Atrium Two was built in reliance upon access at the 530-foot elevation and was constructed with only approximately 150 parking spaces, we

⁷ See *In Re Appropriation for Hwy. Purposes of Lands of Williams* (1968), 15 Ohio App.2d 139, 239 N.E.2d 412. See, also, *State ex rel. Merritt v. Linzell* (1955), 163 Ohio St. 97, 126 N.E.2d 53.

⁸ *OTR v. Cincinnati*, *supra*, at ¶50.

⁹ *Hilliard v. First Indus., L.P.*, 165 Ohio App.3d 335, 2005-Ohio-6469, 846 N.E.2d 559, at ¶26.

¹⁰ *Norwood v. Forest Converting Co.* (1984), 16 Ohio App.3d 411, 415, 476 N.E.2d 695, quoting *In Re Appropriation for Hwy. Purposes of Land of Winkelman* (1968), 13 Ohio App.2d 125, 138, 234 N.E.2d 514.

conclude that evidence concerning available parking around Atrium Two, as well as the amount of pedestrian traffic flow through the building, would be relevant considerations to an ordinarily prudent businessperson. The trial court did not err in so determining, and it did not exceed its subject-matter jurisdiction in allowing evidence concerning parking and traffic flow for such a purpose.

{¶26} The city and county's first assignment of error is overruled.

Evidentiary Issues

{¶27} In their second assignment of error, the city and county challenge the trial court's admission of allegedly irrelevant and prejudicial evidence. They first argue that the trial court erred in admitting evidence concerning the value of public parking in relation to compensation, the cost to cure the problem, and fair-market value. They next argue that it was error to admit evidence concerning a prior agreement between the city and the developer of Atrium Two.

{¶28} The trial court has broad discretion concerning the admission and exclusion of evidence, and we will not reverse in the absence of a clear abuse of discretion.¹¹

1. Public Parking

{¶29} The city and county specifically argue that the trial court erred in admitting "evidence of the value of public parking as both compensation for a right taken and as part of a cost to cure." They also reiterate their argument that the cost of public parking was not relevant to a fair-market-value analysis.

{¶30} But, as we have explained, the trial court repeatedly instructed the jury that OTR had no right to riverfront parking and could not be directly compensated

¹¹*Bernal v. Lindholm* (1999), 133 Ohio App.3d 163, 176, 727 N.E.2d 145.

for its loss. We have also already determined that, based on the unique facts associated with the construction of Atrium Two, the availability and cost of public parking was a relevant factor in a fair-market-value analysis. Evidence concerning the cost of parking was properly admitted for this purpose.

{¶31} The city and county argue the impropriety of appraiser Raymond Jackson's testimony concerning the cost to correct Atrium Two's parking problem. Jackson's testimony was summarized in an exhibit and put on display for the jury. Jackson testified about four potential "parking solutions" for Atrium Two. He opined that Atrium Two could acquire nearby land at a cost of approximately \$3.3 million; it could build a parking garage at a cost of approximately \$9.6 million; it could purchase an existing parking garage at a cost of approximately \$4.4 million; or it could subsidize parking for approximately \$1.6 million.

{¶32} The city and county correctly assert that OTR was not entitled to damages for the cost to cure its parking problem. But Jackson's testimony was not offered as an assertion that OTR should receive compensation for the cost to cure the problem. Jackson stated that he was aware that Atrium Two had no express or contractual right to riverfront parking. Rather, he felt cost-to-cure information would be an important consideration to a willing buyer. In other words, it was a relevant factor in a fair-market-value determination.

{¶33} Direct testimony regarding the cost to cure Atrium Two's parking problem was provided by OTR's appraiser Jerry Fletcher. But the city and county elicited this testimony and cannot claim resulting error on appeal.

{¶34} Before Fletcher testified, he was subject to a voir dire examination in which he stated that he had utilized four approaches to calculate the loss in value to Atrium Two: a cost-to-cure approach, a cost approach, a sales-comparison approach, and an income approach. Following the voir dire examination, the trial court determined that Fletcher's cost-to-cure approach had been predicated on

Atrium Two having a right of access to riverfront parking. The trial court accordingly prohibited OTR from questioning Fletcher regarding this approach. OTR complied with the trial court's order and solely questioned Fletcher about his three remaining approaches to valuation.

{¶35} But, shortly after beginning cross-examination, the city and county asked Fletcher, "And then in addition to the standard three [approaches], which [are] cost, sales comparison and income, I understand you also did a cost to cure which you are saying you didn't put any weight on?" The trial court responded by stating, "Go ahead and answer the question. It has been raised now." The city and county proceeded to question Fletcher further regarding the cost-to-cure approach.

{¶36} Because the city and county elicited the testimony on the cost to cure, they cannot now claim resulting error from its admission. "A party will not be permitted to take advantage of an error which he himself invited or induced the trial court to make."¹²

{¶37} We have conducted a detailed review of the record and have determined that the vast majority of evidence regarding parking (other than the cost-to-cure evidence, which we have already discussed) was relevant to a fair-market-value analysis and was not offered as proof that OTR was entitled to direct compensation for loss of parking. In fact, all of OTR's witnesses who provided valuation testimony stated that they were aware that Atrium Two had no right to riverfront parking.

{¶38} But one witness' testimony concerning parking did give us pause. OTR presented the testimony of Anita Schaefer, an employee of Atrium Two's tenant Cinergy Services. Among other topics, Schaefer testified regarding her experiences

¹² *Lester v. Leuck* (1943), 142 Ohio St. 91, 50 N.E.2d 145, paragraph one of the syllabus; accord *Hal Artz Lincoln-Mercury, Inc. v. Ford Motor Co., Lincoln-Mercury Div.* (1986), 28 Ohio St. 3d 20, 28, 502 N.E.2d 590.

accessing parking via the elevated walkway and, following the elimination of the walkway, via downtown streets. Schaefer testified that she had felt safe while using the elevated walkway, and that the covered walkway had sheltered her from the outdoor elements. But Schaefer testified that after the removal of the walkway, she no longer felt as safe traveling to and from her car. She stated that she had been followed, and that she had almost been hit by a vehicle while she was using a cross-walk.

{¶39} We fail to see how this testimony relates to Atrium Two's loss of access or the affect of such loss on the building's value. Atrium Two had no right to the physical walkway or to parking on the riverfront, and Schaefer's testimony was irrelevant to the issue at bar. But despite the impropriety of Schaefer's testimony, we conclude that its admission was harmless error, and that the city and county were not prejudiced.¹³ Schaefer did not provide valuation testimony for the jury to consider. And her testimony concerning the covering over the walkway was duplicative of other evidence adduced at trial.

{¶40} Accordingly, we conclude that the trial court did not abuse its discretion in admitting evidence of public parking because, other than the exceptions discussed above, the evidence was relevant to a fair-market-value analysis.

2. Prior Agreement

{¶41} The city and county next argue that the trial court erred in admitting testimony from Nell Surber and David Warner regarding the construction of Atrium Two and the city's desire that employees of Atrium Two use riverfront parking. The city and county argue that this testimony was improper because Atrium Two had no right of access to riverfront parking.

¹³ See *Brooks v. Bell* (Apr. 10, 1998), 1st Dist. No. C-970548.

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{¶42} Nell Surber testified that she had been the city's Director of the Department of Economic Development when Atrium Two was constructed. Surber had been involved with the urban renewal that took place in the 1970s and 1980s, particularly with the construction of downtown parking and the development of the "skywalk" system. Regarding parking, Surber testified that new buildings were required to have approximately one parking spot for every thousand square feet in the building. But the city did not want surface parking constructed because it was unsightly.

{¶43} With these concerns in mind, the city modified its skywalk system to connect directly from the riverfront to Atrium Two, providing the building with direct access to riverfront parking. The connection of the skywalk in this manner was provided for in the city's urban renewal plan. The city additionally passed an ordinance granting Atrium Two a variance in the city's parking regulations.

{¶44} David Warner was the developer and initial owner of Atrium Two. Warner testified that he had dealt principally with Nell Surber during Atrium Two's development. Warner stated that the city had precluded him from building above-ground parking for aesthetic reasons, and, consequently, that Atrium Two had been built with limited parking and had been designed to connect to the walkway system.

{¶45} Surber and Warner's testimony was not improper. As this court determined in *OTR v. Cincinnati*, OTR had a right of access at the 530-foot elevation. Surber and Warner's testimony explained the process and events that had created OTR's right of access. The testimony did not indicate that OTR had a right to riverfront parking. Because this testimony explained the development of OTR's right of access, as well as explained why Atrium Two had been constructed with substandard parking, we conclude that the trial court did not abuse its discretion in admitting it.

{¶46} The second assignment of error is overruled.

Jury Instructions

{¶47} In their third assignment of error, the city and county argue that the trial court erred in failing to give the following requested jury instruction: “Damage to the property resulting from the exercise of eminent domain may be recovered only for damages not common to the public. Consequential damages such as circuitry of travel [or] loss of traffic volume suffered by the owner in common with the public are not to be considered.”

{¶48} Because we have already determined that OTR did not suffer a loss shared in common with the public, this instruction would not have been appropriate. As we have stated, not only had Atrium Two been built in reliance on access at the 530-foot elevation and been granted a variance in the city’s parking requirements, but it had also been required to grant the city an easement through its lobby, allowing for constant pedestrian access. Following the closure of the walkway, Atrium Two suffered a loss of traffic flow through its lobby.

{¶49} Although the requested instruction contains a correct statement of the law,¹⁴ it is inapplicable to the facts of this case. Consequently, the trial court did not err in excluding this jury instruction, and the third assignment of error is overruled.¹⁵

Damages Awarded

{¶50} In their fourth assignment of error, the city and county argue that the jury’s award for damages to the building was not supported by the sufficiency or the weight of the evidence.

{¶51} The jury verdict form contained three blank lines. The first line provided for “[c]ompensation for the property right that was taken.” The second line

¹⁴ See *Richley v. Jones* (1974), 38 Ohio St. 2d 64, 68-69, 310 N.E. 2d 236. See, also, Ohio Jury Instr. 301.09(4).

¹⁵ See *Murphy v. Carrollton Mfg. Co.* (1990), 61 Ohio St.3d 585, 591, 575 N.E.2d 828.

provided for “[d]amages to the building.” And the third line simply provided for the sum of the first two lines.

{¶52} An explanation of “damages to the building” was provided in the jury instructions: “In addition to compensation for the property right taken, the owner is entitled to any decrease in fair-market value of the building that is a direct result of the appropriation. If the building is less valuable because of the severance of the access to the elevated walkway, then you must consider such injury and determine the amount of such decrease in the fair market caused by the severance of the access to the elevated walkway. This will be the amount awarded for damages to the building.”

{¶53} The jury awarded \$2.5 million for compensation for the property right taken and \$1 million for damages to the building. The verdict form does not specify how the jury arrived at these numbers or what evidence the award was based upon.

{¶54} Much testimony was presented concerning the damage to the building and the decrease in fair-market value. OTR presented the testimony of Raymond Jackson, owner of the Jackson Advisory Group, Inc., a real estate consulting firm. Jackson testified that he had employed three traditional methods in appraising the loss in value to Atrium Two: the cost approach, the sales-comparison approach, and the income approach. The cost approach is somewhat difficult to conceptualize, but, as Jackson explained, “[it] incorporates a land value. Then you come up with what the cost to rebuild or replicate that facility is. You deduct an appreciation, come up with indicated value.” The sales-comparison approach, as its title indicates, compares sales of similar properties in the area. The income approach compares income brought in by Atrium Two before and after the appropriation.

{¶55} Before explaining the results of his approaches, Jackson testified about specific damage to the residue of Atrium Two following elimination of the walkway. Jackson determined that it would cost approximately \$1 million to restore access on

the south side of Atrium Two at the 530-foot elevation. But Atrium Two did not own the land that this access would attach to, and the \$1 million figure did not account for the necessary land acquisition. Jackson further testified that Atrium Two was affected by the loss of foot traffic through its lobby. As a result, the building's first two floors would no longer be ideal for retail and restaurant space. This space would have to be renovated, which Jackson opined would cost approximately \$600,000.

{¶56} Considering these figures, Jackson determined that under the cost approach, Atrium Two had suffered a \$5.525 million loss in value. Under the sales-comparison approach, Jackson determined that, before the appropriation, Atrium Two had been worth \$110 per square foot, and that, following the appropriation, it was worth \$104.53 per square foot, for a loss in value of approximately \$3.6 million. Lastly, Jackson discussed the income approach. He had calculated the loss in value under this approach in two ways, and he had settled on the average of his two results, for a loss in value of \$4.7 million. Jackson ultimately reconciled all three approaches and determined that Atrium Two had experienced a loss in value of \$4.2 million.

{¶57} OTR additionally presented valuation testimony from real-estate appraiser Jerry Fletcher. Fletcher testified that he had calculated the loss in value to Atrium Two under the cost, sales-comparison, and income approaches. Fletcher first derived the value of Atrium Two before the closure of the walkway under each approach. He reconciled the different valuations, placing the most weight on the income approach, and settled on the overall value of Atrium Two to be \$79,600,000. Fletcher next determined the value of Atrium Two after the appropriation under all three approaches. He again reconciled the various approaches and determined that Atrium Two was worth \$73,600,000 after the appropriation. Thus, as a result of the appropriation, Fletcher opined that Atrium Two had suffered a loss in value of \$6 million.

{¶58} The third witness presented by OTR to provide valuation testimony was Todd Honeycutt. Honeycutt was employed by OTR and was its senior asset manager for the Midwest region. Honeycutt was responsible for managing various properties owned by OTR, including Atrium Two. Honeycutt testified that, following the appropriation, Atrium Two would suffer a loss of \$6.5 million based on a decrease in rent charged and/or increased vacancy. Honeycutt further opined that restoring a southern access point to Atrium Two would cost an additional \$3.5 million. But Honeycutt clarified that access could not be restored without acquiring property not currently owned by OTR. In summary, Honeycutt determined that Atrium Two had suffered a loss in value of \$10 million following the appropriation.

{¶59} The city and county presented valuation testimony from two witnesses. Shaun Wilkins, a commercial-real-estate appraiser, used the income approach to determine loss in value. Wilkins utilized Atrium Two's rent rolls, which contained a list of tenants, the amount of space a particular tenant occupied, the rent paid, and the expiration date of the tenant's lease. He additionally reviewed internal appraisals conducted by OTR. Wilkins concluded that Atrium Two's net income had increased each year since the appropriation. But Wilkins determined that the closure of the walkway had affected the retail traffic's access to Atrium Two. Accordingly, the retail space would need to be converted into office space to maintain the highest and best use of the building. Based on the rent rolls, Wilkins concluded that the rent charged for retail and office space was similar, and that the only cost to be incurred was that associated with the physical conversion of retail space into office space. Wilkins opined that such a conversion would cost \$160,000.

{¶60} Commercial real estate appraiser Neil Notestine was the last witness to provide valuation testimony. Notestine employed the income approach using a discounted-cash-flow method. He concluded that the value of Atrium Two before the appropriation was \$79,750,000. Notestine determined that after the appropriation,

Atrium Two's rental rate had not changed and its occupancy had gone up. But Notestine further determined that portions of the first and second floors needed to be converted into office space, and that the plaza needed repairs where the walkway had been connected. Following these conversions and renovations, Notestine found the value of Atrium Two to be \$79,570,000, for a loss in value of \$180,000.

{¶61} The jury's award of \$1 million for damages to the building was well within the range of damages testified to at trial and was supported by competent, credible evidence.

{¶62} The city and county argue that the only time the specific amount of \$1 million had been presented during trial was Jackson's estimate of the cost to cure the loss of southern access. As a result, they allege that the jury must have become confused and inserted the amount of the cost to cure the problem in the space provided for damages to the building. We disagree. As we have stated, \$1 million was well within the range of damages testified to. And we do not know what factors or testimony the jury relied upon in determining damages. We note that both the award of \$1 million for damage to the building and the overall award of \$3.5 million were less than amounts provided by each of OTR's witnesses.

{¶63} Because the jury's award of damages was supported by competent, credible evidence, we overrule the fourth assignment of error.¹⁶

"Cost of Cure"

{¶64} In their fifth assignment of error, the city and county argue that the trial court erred in not reducing the jury's award of damages to the "cost of cure," which is the cost to restore the building's fair-market value.¹⁷ They argue that when a

¹⁶ See *Hilliard v. First Indus., L.P.*, supra, at ¶30.

¹⁷ The "cost of cure" to restore the building's fair-market value is distinguishable from the "cost to cure" discussed in the second assignment of error, which concerned the cost to secure additional parking for Atrium Two.

“cost of cure” has been established, the award of damages must be limited to such an amount.

{¶65} The jury was given the following instruction regarding the “cost of cure”: “If, by the expenditure of money in an amount less than the difference between the fair market value of the building before the taking and the fair market value of the building after the taking, the property owner can make improvements to the building to restore its fair market value, such cost of cure, if proved, limits the amount of damages to be assessed. However, such cost of cure may not be used to reduce the damages where the cure must be accomplished by going outside or beyond the Atrium [Two’s] property.”

{¶66} In the case sub judice, the “cost of cure” was the cost to restore access from the 530-foot elevation of Atrium Two to the public right of way. Limited testimony was given regarding the “cost of cure.” Raymond Jackson testified that it would cost \$1 million to secure such access. And Todd Honeycutt testified that a southern access would cost \$3.5 million. But both Jackson and Honeycutt stated that the restoration of access could not be accomplished without the purchase of additional property.

{¶67} Accordingly, because the “cost of cure” could not be established without going outside of Atrium Two’s property, it could not be used to reduce the award of damages.

{¶68} The fifth assignment of error is overruled.

OTR’s Cross-Appeal

{¶69} OTR has filed a cross-appeal raising two assignments of error. But the cross-appeal was solely filed to preserve OTR’s claims of error should this court sustain the city and county’s arguments and remand for a new trial. OTR has

requested that we refrain from addressing its assignments of error if we find no merit in any assignments raised in the city and county's appeal.

{¶70} Because we have, in fact, found no merit in the arguments raised by the city and county, we will not address the arguments raised in OTR's cross-appeal.

{¶71} Consequently, we affirm the jury's award of damages in the amount of \$3.5 million.

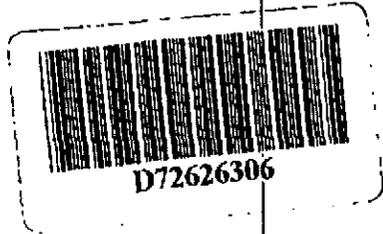
Judgment affirmed.

PAINTER, P.J., and HILDEBRANDT, J., concur.

Please Note:

The court has recorded its own entry on the date of the release of this decision.

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



HAMILTON COUNTY BOARD OF
COUNTY COMMISSIONERS,

and

CITY OF CINCINNATI,

Plaintiffs-Appellants/Cross-
Appellees,

vs.

OTR, an Ohio General Partnership,
Nominee for the State Teachers'
Retirement Board of Ohio,

Defendant-Appellee/Cross-
Appellant,

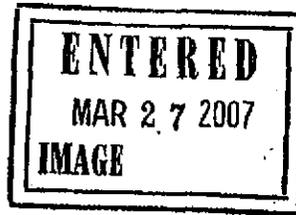
and

ROBERT A. GOERING, TREASURER,
HAMILTON COUNTY, OHIO, et al.,

Defendants.

APPEAL NO. C-060074
C-060104
TRIAL NO. A-0400434

ENTRY TRANSMITTING ERRATA.



It appearing to the Court that on page 9, ¶24, of the Decision filed on March 23, 2007, the Court through inadvertence incorrectly stated "... The case law relied upon by OTR ..." The correct text is "... The case law relied upon by the city and county ..."

Wherefore, it is the order of this Court that the second sentence of ¶24 is corrected to read as follows:

"The case law relied upon by the city and county regarding loss of traffic flow concerns loss of traffic flow *past* a premise, generally due to the relocation or elimination of a roadway."

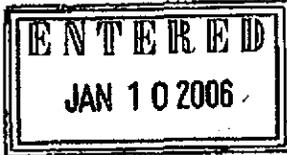
To The Clerk:

Enter upon the Journal of the Court on March 27, 2007 per order of the Court.

By: 
Presiding Judge

(Copies sent to all counsel)





COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO



**HAMILTON COUNTY BOARD OF
COUNTY COMMISSIONERS**

and

CITY OF CINCINNATI,

Plaintiffs,

vs.

**OTR, an Ohio General Partnership,
Nominee for the State Teachers'
Retirement Board of Ohio**

and

**ROBERT A. GOERING, Treasurer,
Hamilton County, Ohio**

and

**DUSTY RHODES, Auditor,
Hamilton County, Ohio**

Defendants.

Case No. A0400434

(Judge Steven E. Martin)

**FINAL JUDGMENT ENTRY
ON JURY VERDICT**

This matter came before the Court on the "Petition (Complaint) for Appropriation" brought by Plaintiffs against Defendant, OTR, an Ohio General Partnership, Nominee for the State Teachers' Retirement Board of Ohio, seeking to appropriate certain property rights of Defendant OTR and to have a jury empaneled to determine the amount of compensation and damages to be paid to Defendant OTR for its property rights taken by Plaintiffs. Plaintiffs brought this action pursuant to the Judgment of the Court of Appeals for Hamilton County on

ENTERED
JAN 10 2006

March 28, 2003 in Appeal No. C-010658. The date of taking is October 2, 2000. Since Plaintiffs took possession of Defendant OTR's property rights before the jury was empaneled to determine the value of those property rights, this Court issued an Order requiring the deposit of funds. Pursuant to said Order, Plaintiffs paid to Defendant OTR the principal amount of One Hundred Eighty Thousand Dollars (\$180,000.00) on April 29, 2005. \$90,000 of this amount was paid by Plaintiff Hamilton County Board of County Board of County Commissioners, and \$90,000 of this amount was paid by Plaintiff City of Cincinnati. Plaintiffs also paid interest thereon from October 2, 2000 through April 30, 2005 for a total sum of Two Hundred Fifty Seven Thousand Three Hundred Six Dollars and 24/100 (\$257,306.24). The within appropriation action proceeded to trial by a jury which had been duly empaneled and sworn. At the conclusion of the trial on November 23, 2005, the jury rendered a verdict that the total award to Defendant OTR is in the amount of Three Million Five Hundred Thousand Dollars (\$3,500,000.00). Plaintiffs having previously paid Defendant OTR the principal amount of \$180,000.00 on April 29, 2005 as described above, the principal balance owed by Plaintiffs to Defendant OTR is in the amount of Three Million Three Hundred Twenty Thousand Dollars (\$3,320,000.00).

It is, therefore, ORDERED, ADJUDGED, and DECREED that judgment is rendered in favor of Defendant, OTR, an Ohio General Partnership, Nominee for the State Teachers' Retirement Board of Ohio, and against Plaintiff, Hamilton County Board of County Commissioners, and Plaintiff, City of Cincinnati, pursuant to the jury verdict rendered November 23, 2005 in the total amount of Three Million Five Hundred Thousand Dollars (\$3,500,000.00), less the principal amount of One Hundred Eighty Thousand Dollars (\$180,000.00) previously paid by Plaintiffs to Defendant OTR, for a net principal amount of Three Million Three Hundred

RENTERED
JAN 10 2006

Twenty Thousand Dollars (\$3,320,000.00) owing to Defendant OTR by Plaintiffs.

It is further ORDERED that interest on said judgment in the amount of \$3,320,000 shall be paid by Plaintiffs to Defendant OTR pursuant to R.C. 163.17 from the date of taking to the date of the actual payment of the award to include pre-judgment interest and post-judgment interest, to wit: pre-judgment interest thereon shall be paid by Plaintiffs to Defendant OTR from the date of taking, October 2, 2000, to the date of this Judgment, January 10, 2006, in the amount of \$1,466620.37, in accordance with the Schedule attached hereto as Exhibit "A" and incorporated herein, and post-judgment interest shall be paid by Plaintiffs to Defendant OTR as such interest shall accrue on the principal amount of \$3,320,000.00 from January 11, 2006 until paid, at the per diem rate of \$545.75 per day beginning January 11, 2006 for the calendar year 2006, in accordance with the Schedule attached hereto as Exhibit "A" and incorporated herein, and that interest for any period beyond 2006 shall be paid in accordance with R.C. 1343.03 and R.C. 5703.47; or as such sections of the Ohio Revised Code may be amended.

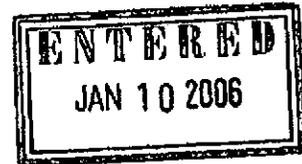
It is further ORDERED that Plaintiffs pay the costs of this action.

SO ORDERED.

COURT OF COMMON PLEAS
ENTERED
HON. STEVEN E. MARTIN
THE CLERK SHALL SERVE NOTICE
Steven E. Martin, Judge
Court of Common Pleas
AS COSTS HEREIN. 10-06

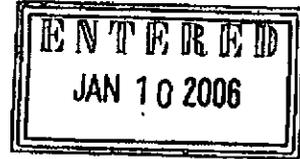
To all of which Plaintiff Hamilton County Board of
County Commissioners objects.
Have Seen: Mark C. Vollman, asst Pros Atty

Mark C. Vollman (0007040)
Christian J. Schaefer (0015494)
Assistant Prosecuting Attorneys and
Trial Attorneys for Plaintiff, Hamilton
County Board of County Commissioners
Hamilton County Prosecutor's Office
230 E. Ninth Street, Suite 4000
Cincinnati, Ohio 45202
(513) 946-3041
(513) 946-3018 - facsimile



To all of which City of Cincinnati objects.
Have Seen: Geri H. Geiler 1/10/06
Geri H. Geiler (0043081)
Senior Assistant City Solicitor and
Trial Attorney for Plaintiff
City of Cincinnati
City Solicitor's Office
801 Plum Street, Room 214
Cincinnati, Ohio 45202
(513) 352-3338
(513) 352-1515 - facsimile

C. Francis Barrett
M. Michele Fleming
C. Francis Barrett (0022371)
M. Michele Fleming (0022391)
Trial Attorneys for Defendant OTR,
an Ohio General Partnership and
Nominee for State Teachers'
Retirement System of Ohio
BARRETT & WEBER
105 E. Fourth Street, Suite 500
Cincinnati, Ohio 45202
(513) 721-2120
(513) 721-2139 - facsimile



CALCULATION OF INTEREST ON JURY VERDICT

Verdict (11/23/05)	3,500,000.00
Less deposit rec'd 4/29/05	180,000.00
Balance	3,320,000.00
Interest year 2000 (10/2/00 to 12/31/00 = 91 days) @ 10%	82,546.45
Interest year 2001 (365 days) @ 10%	332,000.00
Interest year 2002 (365 days) @ 10%	332,000.00
Interest year 2003 (365 days) @ 10%	332,000.00
Interest 2004 (01/01/04 to 06/02/04= 154 days) @ 10%	139,693.99
Interest 2004 (06/03/04 - 12/31/04 = 212 days) @ 4%	76,922.40
Interest 2005 (01/01/05 - 12/31/05 = 365 days) @ 5%	166,000.00
Interest 2006 (01/01/06 - 01/10/06 = 10 days) @ 6%	5,457.53
Subtotal interest to 01/10/06	1,466,620.37
Total verdict balance plus interest to 01/10/06	4,786,620.37
Per diem interest for year 2006 @ 6%	545.75

EXHIBIT A

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

OTR, an Ohio General Partnership, as
NOMINEE FOR THE STATE
TEACHERS' RETIREMENT BOARD
OF OHIO,

and

STATE OF OHIO ON RELATION OF
OTR, an Ohio General Partnership, as
NOMINEE FOR THE STATE
TEACHERS' RETIREMENT BOARD
OF OHIO,

Relator-Appellant,

vs.

CITY OF CINCINNATI,

and

WILLIAM V. LANGEVIN, Director,
Department of Buildings & Inspections,
City of Cincinnati,

and

JOHN F. DEATRICK, P.E., Director,
Department of Engineering, City of
Cincinnati,

and

JOHN F. SHIREY, City Manager, City
of Cincinnati,

and

APPEAL NO. C-010658
TRIAL NO. A-0006027

OPINION.

**PRESENTED TO THE CLERK
OF COURTS FOR FILING**

MAR 28 2003

COURT OF APPEALS



OHIO FIRST DISTRICT COURT OF APPEALS

BOARD OF COUNTY :
COMMISSIONERS OF HAMILTON :
COUNTY, OHIO, :

Respondents-Appellees. :

Civil Appeal From: Hamilton County Court of Common Pleas

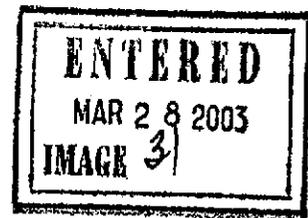
Judgment Appealed From Is: Reversed and Cause Remanded

Date of Judgment Entry on Appeal: March 28, 2003

Barrett & Weber, LPA, C. Francis Barrett and M. Michele Fleming, for Relator-Appellant,

Julia McNeil, Cincinnati City Solicitor, Mark C. Vollman and Geri H. Geiler, Assistant City Solicitors, for Respondents-Appellees City of Cincinnati, William Langevin, P.E., John F. Deatruck, and John F. Shirey,

Michael K. Allen, Hamilton County Prosecuting Attorney, and Christian J. Schaefer, Assistant Prosecuting Attorney, for Respondent-Appellee Board of County Commissioners of Hamilton County, Ohio.



SUNDERMANN, Judge.

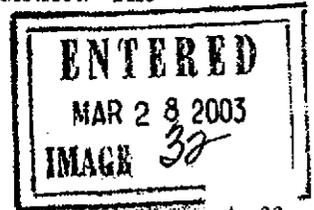
{¶1} Relator-appellant OTR, an Ohio general partnership, appeals from the judgment of the Hamilton County Court of Common Pleas refusing to issue a writ of mandamus to compel respondents-appellees, the city of Cincinnati, various city officials, and the Hamilton County Commissioners, to commence an appropriation action to compensate OTR for the taking of its property rights as a result of the demolition of an elevated walkway directly connecting the Atrium Two office building in Cincinnati to the riverfront parking areas at or around a public stadium. OTR raises four assignments of error for our review. For the reasons that follow, we reverse.

I. FACTS

{¶2} OTR is the statutory nominee for the State Teachers' Retirement Board of Ohio ("the Board"). The Board finances the retirement program for Ohio's public-school teachers through investments, including real estate such as the Atrium Two office building. Atrium Two is located at the southwest corner of Fourth and Sycamore Streets in downtown Cincinnati. It contains approximately 650,000 square feet of net rentable office and retail space, common areas, and a 154-space parking garage.

{¶3} Atrium Two was designed and built by the Atrium Two Development Company ("ATDC"). OTR provided post-construction financing for Atrium Two. In 1987, OTR acquired a seventy-percent co-tenancy interest in Atrium Two. In April 1997, OTR purchased the remaining thirty-percent interest from ATDC.

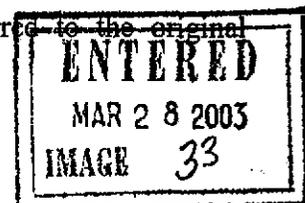
{¶4} In the early 1970s, the city of Cincinnati developed a plan for the redevelopment and growth of the central riverfront and the central business district. The



centerpiece was Riverfront Stadium (later renamed Cinergy Field), which was built to accommodate both the Cincinnati Reds and the Cincinnati Bengals. The stadium had a public plaza at an elevation of 530 feet, which was above the limits of periodic floods, above Fort Washington Way, and close to the elevation of Fourth Street. The city's Central Riverfront Project, Amended Urban Renewal Plan of May 1971, set forth the plan to have a stadium on the central riverfront that would provide parking for its events and would "supplement parking for the entire Downtown Business District." The plan also provided for "pedestrian bridges across Fort Washington Way connecting directly to the [stadium] Plaza" at the 530-foot elevation.

{¶5} Around 1970, the city built the first vehicular and pedestrian bridge from Hammond Street. This bridge, which included both a bus/taxi ramp and a pedestrian walkway, spanned Third Street and Fort Washington Way and terminated on the north side of the large public plaza of the stadium. Steps were constructed descending from the north end of the stadium plaza to the north side of Pete Rose Way (formerly known as Second Street). A second "pedestrian only" bridge was built from the north side of the stadium plaza. It spanned Fort Washington Way and Third Street and terminated on the public sidewalk on the north side of Third Street between Walnut and Main Streets.

{¶6} In August 1979, the city sold Central Riverfront Business District Core Urban Renewal Project Parcel N-1 to a private developer, Atrium One, Limited. The bus/taxi ramp and pedestrian bridge was thereafter extended from Hammond Street to the south side of the Atrium One building. The extension included a pedestrian bridge over Hammond Street and Third Street and a platform tower on the south side of Third Street. It was inclined from the elevation of Fourth Street to the 530-foot elevation of the stadium plaza. For clarity of discussion, the parties have referred to the original



pedestrian bridge and the extension as the elevated walkway. We adhere to that designation.

{¶7} In March 1982, the city amended its Urban Renewal Plan to specify how the block N properties, which later would become the Atrium Two building, were to be developed for office use, directly connected to the elevated walkway from the stadium plaza, and made a part of the city's skywalk system. In September 1982, the city sold Central Riverfront Business District Core Urban Renewal Project Parcel N-2 to ATDC. The "Contract for Sale of Land for Private Redevelopment for Parcel N-2" provided that the developer of Atrium Two would design its building to accommodate a future connection between the property and north of Fourth Street via a skywalk, and that the developer would grant the city an easement through its building that would connect the city's skywalk system to the "general pedestrian public easement which now exists or as it may hereafter be located from the Riverfront Stadium to the South Side of Fourth Street. Said easement shall be for pedestrian traffic (including wheelchair or similar ambulatory devices) and shall be open 24 hours per day." The contract further provided that the developer of Atrium Two was obligated to grant the city " * * * a public easement for the Winter Garden [a ground-floor lobby area between the Atrium One and Atrium Two buildings] which easement shall permit the public to enter and traverse through it during normal business hours."

{¶8} The contract additionally provided that "no change shall be made in the Urban Renewal Plan that physically affects the use of the Property, except with the consent of the Redeveloper * * *." Throughout the contract, there were references to the 1982 amended Urban Development Plan. The contract stated that the covenants for use



OHIO FIRST DISTRICT COURT OF APPEALS

by ATDC would end January 1, 2000. The 1982 amended Urban Development Plan expired on January 1, 1987.

{¶9} In November 1983, the city and ATDC entered into a "Supplemental Agreement No. 1 to Contracts for Sale of Land for Private Development by and between the City of Cincinnati and Atrium Two Development Company." In section four of that agreement, ATDC, in order to assure adequate parking for Atrium Two, agreed to construct upon the city's request an additional parking garage with a minimum of 300 spaces in the core of the central business district or central riverfront urban-renewal areas. ATDC also agreed to deliver a letter of credit to the city as security for its performance of this obligation. The city, however, never required ATDC to build this garage.

{¶10} In December 1983, ATDC acquired an additional piece of property from the city. The deed provided that ATDC was to "grant a permanent skywalk easement by metes and bounds description for use by the pedestrian public on a twenty-four hours a day, seven days a week basis connecting Fourth Street skywalk to the Stadium Bus-Taxi Ramp south of Third Street upon completion of redevelopment of real property" and that this was to "be a covenant running with the land* * *."

{¶11} During the construction of Atrium Two in 1983-1984, the elevated walkway was modified and relocated from the south side of the Atrium One building to the south side of Atrium Two. It was attached above Hammond Street to an outdoor plaza on the Atrium Two property that served both Atrium One and Atrium Two. Thereafter, the elevated walkway provided direct, covered pedestrian access from the south side of the Atrium Two plaza to riverfront parking.

{¶12} In July 1993, the city filed a lawsuit against OTR, ATDC, its then co-tenant, and Connecticut General Life Insurance Company, their mortgagee, to enforce the



provision of its sales contract with ATDC that required ATDC or its successor to “grant the city an easement through the office building so as to connect the skywalk to the public easement from the riverfront stadium to Fourth Street.” The lawsuit was settled in October 1995, when the parties entered into a “Fourth Street Walkway Agreement.” Shortly thereafter, ATDC modified Atrium Two to accept the Fourth Street skywalk by building an escalator from the second level to the lobby and by modifying the public-access easements to provide continuous access from the Fourth Street skywalk through Atrium Two.

{¶13} In 1996, voters approved a sales-tax increase to fund construction of new stadiums for the Cincinnati Reds and the Cincinnati Bengals. Sometime thereafter, the city amended its urban renewal plan to reflect a new development plan, which included the creation of the two new public stadiums, as well as parks, museums, and other amenities in the central riverfront area. This revised plan did not include the pedestrian bridge south of Atrium Two because of changes in grading. Under the revised plan, pedestrians could directly obtain access to the riverfront from street level through the addition of streets and sidewalks, and the creation of formal intersections with traffic lights.

{¶14} To effectuate the new riverfront development, the city and Hamilton County entered into a recorded agreement in September 1996 whereby the city assigned to the county in subsection four “all of the City’s ownership rights and obligations, including, but not limited to, performance and maintenance obligations, liabilities, debts and claims for the following parts of the pedestrian and vehicular skywalks directly serving the Riverfront complex: * * *



{¶15} “(c) The bus/taxi and pedestrian bridge over Fort Washington Way and Third Street, the tower and the access steps on the North Side of the stadium: The bridge extends from the north side of the Stadium to the south side of Hammond Alley approximately 620 feet in length;

{¶16} “(d) The pedestrian bridge over Hammond Alley and Third Street and the tower on the south side of Third Street: The bridge extends from the south side of Third Street to the north side of Hammond Alley approximately 340 feet in length;

{¶17} “(e) All other skywalks or elevated vehicular or pedestrian bridges which attach to or connect other portions of the City skywalk or street system directly to the Stadium complex.”

{¶18} The assignment further provided that “the above described parts of the skywalk system [were] subject to the rights of the public for use as public rights-of-way, and [could] not be demolished, closed, reconstructed or modified without the prior written approval of the City Manager.”

{¶19} In March 1999, OTR and the city entered into an “Entry Agreement” whereby OTR agreed to allow the city to remove certain concrete supports for the elevated walkway and to relocate them in conjunction with the reconstruction of Fort Washington Way. The agreement provided that “[t]he city’s work when complete, shall relocate and reattach the pedestrian bridge to another section of the plaza, in accordance with plans supplied by Owner, and the pedestrian access from the Fourth Street Skywalk to the Stadium and surrounding areas shall thereafter be maintained for regular pedestrian traffic.”

{¶20} On September 25, 2000, a week before the county was scheduled to close the bus/taxi ramp and elevated walkway over Fort Washington Way, OTR



complaint for injunctive relief and a writ of mandamus. The trial court denied OTR's motion for a temporary restraining order on September 28, 2000. The county closed the elevated walkway on October 2, 2000, when construction for the new baseball stadium, the Great American Ballpark, necessitated the removal of a portion of the old stadium plaza to which the elevated walkway had been connected. The parties, however, entered into a stipulation prohibiting the further demolition of the bridge until OTR's motion for a preliminary injunction was heard. Sometime thereafter, the city built temporary wooden steps, north of Third Street and south of the rear of Atrium Two's plaza, to provide pedestrians access from the remaining portion of the skywalk to the bus-taxi ramp extending from Hammond Street.

{¶21} On December 18, 2000, the trial court held a hearing on OTR's motion for a preliminary injunction. The parties had agreed to an extensive stipulation of facts. In addition to these stipulated facts, the parties presented testimony from several witnesses. Numerous exhibits were also admitted into evidence. After two days of testimony from David Warner, the private developer of the Atrium One and Atrium Two buildings, Arnold I. Rosenberger, the project manager for the Great American Ballpark, and Steven Richter, the building manager for Atrium Two, the trial court denied OTR's motion for a preliminary injunction on January 26, 2001.

{¶22} Although only a portion of the bus/taxi ramp and the elevated walkway had been demolished it remained closed. Therefore, OTR proceeded on its claim for a writ of mandamus. The parties presented two more days of testimony to the trial court. Steven Richter, the building manager for Atrium Two, testified on cross-examination about the operation of Atrium Two before and after the county's closure of the elevated walkway. Robert L. Richardson, the city's architect, testified regarding the new riverfront plans.



Thomas Rehme, a former assistant city solicitor, and Nell Day Surber, the former development director for the city, each testified regarding the negotiations concerning the development of Atrium Two.

{¶23} On September 4, 2001, the trial court refused to issue a writ of mandamus. On appeal, OTR now raises four assignments of error.

III. ANALYSIS

{¶24} In the first assignment of error, OTR argues that trial court erred in refusing to issue a writ of mandamus to compel the city and/or the county to compensate it for the loss of its property rights in the elevated walkway. In the second, third, and fourth assignments of error, OTR argues that the trial court erred by failing to recognize that OTR had property rights, both as a result of its status as an abutting property owner and as a result of the contractual agreements between its predecessor, ATDC, and the city, which, OTR contends, gave it an express and/or implied right of access over the elevated walkway to riverfront parking. For simplicity of discussion, we address these assignments together.

{¶25} Both the United States and Ohio Constitutions guarantee that if the government takes private property for public use, it must provide the owner of that property with just compensation.¹ Where a property owner claims that his property has been taken by the government and that he has been damaged, and appropriation proceedings have not been instituted, the property owner may proceed to seek a writ of mandamus to compel the initiation of such appropriation proceedings.² A property

¹ See Fifth and Fourteenth Amendments to the United States Constitution; Section 19, Article I, Ohio Constitution.

² See *State ex rel. BSW Dev. Group v. Dayton*, 83 Ohio St.3d 338, 341, 1998-Ohio-287, 699 N.E.2d 271.



owner, though, is only entitled to a writ of mandamus if he can demonstrate the following: (1) a clear legal right to the relief requested; (2) a clear legal duty to perform the act requested; and (3) the absence of a plain and adequate remedy in the ordinary course of the law.³

{¶26} In this case, OTR would have had a right to the requested relief and the city and/or county would have been under a clear legal duty to commence appropriation proceedings only if OTR could demonstrate that the closure and demolition of the elevated walkway amounted to a taking of OTR's property. In order to establish a taking, OTR had to demonstrate "a substantial or unreasonable interference with a property right."⁴ Such interference may involve the actual physical taking of real property, or it may include the deprivation of an intangible interest in the premises.⁵

{¶27} OTR first argues that the trial court erred as a matter of law when it held that the closure and demolition of the elevated walkway did not amount to a taking of its implied right of access to an abutting right-of-way.

{¶28} Under Ohio law, "an owner of a parcel of real property has a right to access public streets or highways on which [its] land abuts[,] and * * *any governmental action that substantially or unreasonably interferes with this right constitutes a taking of private property* * *."⁶ However, governmental action that merely renders a property owner's right of access to an abutting street less convenient or more circuitous does not by itself constitute a taking.⁷

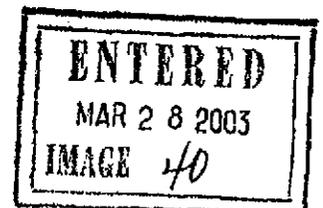
³ *State ex rel. Westchester Estates, Inc. v. Bacon* (1980), 61 Ohio St.2d 42, 399 N.E.2d 81, paragraph one of the syllabus.

⁴ *State ex rel. OTR v. Columbus*, 76 Ohio St.3d 203, 207, 1996-Ohio-411, 667 N.E.2d 8.

⁵ *Id.*

⁶ See *OTR v. Columbus*, 76 Ohio St.3d 203, syllabus; *State ex rel. Pitz v. Columbus* (1988), 56 Ohio App.3d 37, 41, 564 N.E.2d 1081.

⁷ See *State ex rel. Noga v. Masheter* (1975), 42 Ohio St.2d 471, 330 N.E.2d 439.



{¶29} The trial court held that the elevated walkway was not a right-of-way under Cincinnati Municipal Code 721-1-S, which defines an elevated walkway as a sidewalk. The court reasoned that the walkway could only have become a public right-of-way if it had been properly dedicated under Section 8, Article VII of the Charter of the City of Cincinnati. Because the city had never formally dedicated the elevated walkway as a right-of-way, the trial court concluded that the walkway was not a right-of-way.

{¶30} OTR contends that the trial court erred as a matter of law when it held that the elevated walkway was not a public right-of-way without a dedication. OTR argues that it was not required to prove the elevated walkway had been dedicated to public use, because the city had built the elevated walkway within the rights-of-way of several public streets, and it was, therefore, automatically a public right-of-way. The city and county argue, however, that, absent a dedication, the elevated walkway was merely a structure within the rights-of-way of several streets. We agree with the city and county.

{¶31} In Ohio, property may be dedicated to public use for streets and roads pursuant to either statutory requirements⁸ or the rules of the common law.⁹ While dedication procedures are typically employed by private property owners, municipal corporations may also utilize them to make a valid dedication of a way through municipal land.¹⁰ Thus, when a property owner claims that a municipal corporation has dedicated its own property to public use as a street or road, the owner must demonstrate either that the municipal corporation has statutorily dedicated the property to such public use or that the property has become dedicated to public use through the common law.¹¹ Proof of a municipal corporation's intent to dedicate its land to public use for streets and roads is

⁸ See, e.g., R.C. 711.06 and 723.03.

⁹ See *Vermillion v. Dickason* (1976), 53 Ohio App.2d 138, 372 N.E.2d 608.

¹⁰ See *Hicksville v. Lantz* (1950), 153 Ohio St. 421, 92 N.E.2d 270.

¹¹ *Id.*, paragraph three of the syllabus.



necessary because dedication not only deprives the municipal corporation of its proprietary interests in the property, but also subjects it to statutory burdens regarding the upkeep of streets and roads.¹² Thus, in order to establish that the elevated walkway in this case was a public right-of-way, OTR had to prove that the walkway had been dedicated to public use.

{¶32} OTR next contends that even if proof of a dedication was required, it presented competent, credible evidence that the elevated walkway had been dedicated to public use under common-law principles. OTR argues that the trial court erred as a matter of law when it failed to consider any evidence of a common-law dedication.

{¶33} The city and county contend, however, that because Section 8, Article VII of the city's charter only provides for statutory dedication of streets, alleys, or rights-of-way, and OTR presented no evidence of a statutory dedication, the trial court correctly concluded that the elevated walkway had not been dedicated to public use.¹³ We disagree.

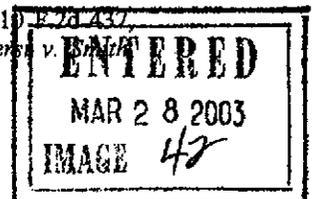
{¶34} The mere fact that OTR failed to present evidence of a statutory dedication of the walkway did not preclude proof of a common-law dedication.¹⁴ Ohio courts have

¹² *Id.* at 426-427.

¹³ {¶a} Section 8, Article VII, of the City's Charter, provides the following: "All plans of the subdivision of lands within the corporate limits of the city or within three miles thereof, and all instruments of dedication of lands for public use, shall be submitted to the commission and approved thereon in writing by it before they may be offered for record or accepted by the city. The approval of the commission shall not be deemed the city's acceptance of the dedication of any street, alley, way or other public ground shown on the plat or set forth in the instrument.

{¶b} "No street, alley, way, or other public ground shall be accepted by the city as a public street, way or ground, unless the plat and location thereof shall have been submitted to and approved by the commission; provided however, that council may submit to the commission any ordinance proposing to accept the dedication of any such unapproved street, alley, way, or ground, and if approved by the commission, council shall have the power to accept the dedication thereof by a majority vote, or, if disapproved, by a vote of not less than two-thirds of its members."

¹⁴ See *Hicksville*, 153 Ohio St. at 426-427; *Pennsylvania R. Co. v. Girard* (C.A.6, 1954), 218 F.2d 437, 442; *Zetzer v. Lundgard* (1953), 95 Ohio App. 51, 52, 117 N.E.2d 445; *State ex rel. Litters v. Litters* (1950), 87 Ohio App. 513, 517-518, 94 N.E.2d 802.



recognized that a statutory provision for the dedication of property for a particular public purpose does not generally preclude a common-law dedication.¹⁵ Thus, notwithstanding that specific statutory proceedings are provided for the dedication of land for streets and roads, there may be a valid common-law dedication for such purposes.¹⁶ Consequently, we reject the city and county's argument that Section 8, Article VII of the city's charter provides the exclusive means by which public rights-of-way may be created by the city.

{¶35} In order to show that the elevated walkway was dedicated under the common law, OTR had to prove the following: (1) the existence of an intention on the part of the city to make such a dedication; (2) an actual offer on the part of the city, evidenced by some unequivocal act, to make such dedication; and (3) the acceptance of such offer by or on behalf of the public.¹⁷ A city's intent to dedicate can be either express or implied from its actions.¹⁸ Public acceptance can also be express or implied. To imply acceptance by the public of a street or road dedication, public use alone is insufficient.¹⁹ Thus, OTR had to demonstrate that the city had taken control or direction over the elevated walkway.²⁰

{¶36} Our review of the record reveals that the city had committed in its urban renewal plan to build a pedestrian bridge that would connect directly to the stadium plaza. In 1970, the city built the bridge, which included both the bus/taxi ramp and the

¹⁵ *Steubenville v. King* (1873), 23 Ohio St. 610.

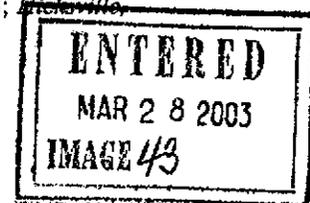
¹⁶ *Silverthorne v. Parsons*, (1899), 60 Ohio St. 331; see, also, *Eggert v. Puleo* (1993), 67 Ohio St.3d 78, 84-85, 616 N.E.2d 195, wherein the Ohio Supreme Court recognized that dedication of property for public use as a street can be accomplished by means other than a municipal ordinance. In that case, the court recognized that the creation of a street through the platting process was a separate type of dedication from that provided in R.C. 723.03.

¹⁷ See *Dickason*, 53 Ohio App.2d at 141.

¹⁸ See *State ex rel. Mentor Lagoons, Inc. v. Wyant* (1957), 166 Ohio St. 169, 140 N.E.2d 788; *Starkville*, 153 Ohio St. at 426-427.

¹⁹ See *State ex rel. Fitzhum v. Turinsky* (1961), 172 Ohio St. 148, 153, 174 N.E.2d 240.

²⁰ *Fitzhum*, supra, at paragraph one of the syllabus



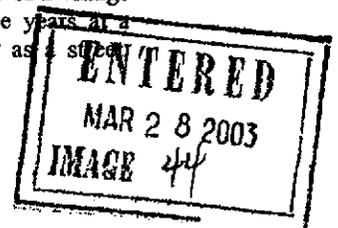
pedestrian walkway, and then contracted with Atrium Two to connect the pedestrian portion of the bridge to its building. The city additionally provided a cover for that portion of the elevated walkway directly linking Atrium Two to the riverfront parking and maintained all but fifty feet of the entire walkway. Thus, the city's construction of the elevated walkway was consistent with a use for street purposes.²¹

{¶37} Furthermore, neither the city nor the county dispute that the walkway was open twenty-four hours per day for use by the general public, and that tenants of Atrium Two, as well as the public at large, had extensively used the walkway until its closure on October 2, 2000. As evidence of this public use, OTR presented a July 1999 headcount and survey of walkway users, which found some 5,500 persons per day crossing the walkway and entering or leaving Atrium Two.

{¶38} Moreover, the assignment of rights between the city and county provided that "the above described parts of the skywalk system are subject to the rights of the public for use as **public rights-of-way**, and shall not be demolished, closed, reconstructed or modified without the prior written approval of the City Manager." (Emphasis added) Such reservations were consistent with the city's treatment of the walkway and bus/taxi ramp as a street.²² Under these circumstances, the manifest weight of the evidence demonstrated that the city intended to dedicate the elevated walkway for street purposes. Additionally, the public's continuous use of the elevated walkway for three decades, combined with the city's maintenance of the walkway, was sufficient to

²¹ See *State ex rel. Cincinnati Garage Co. v. Bird*, (1970), 25 Ohio Misc. 69, 72-73, 263 N.E.2d 330.

²² Cf. *Hicksville*, 153 Ohio St. at 427-428 (where the Ohio Supreme Court held that public use of a village driveway to and from a privately owned parking lot, which the village had leased for five years at a nominal rental, did not evidence any intent on the village's part to dedicate the driveway as a street, particularly when the lease was terminable at any time on 30 days' notice).



imply an acceptance of a public dedication. Consequently, we conclude that the elevated walkway became dedicated to public use as a street through common-law principles.²³

{¶39} Having determined that the elevated walkway was a street, we must next address whether the elevated walkway abutted Atrium Two. The city contends that OTR could not have been an abutting owner because the elevated walkway did not border Atrium Two, but only touched it at a point. We disagree.

{¶40} In *Eastland Woods v. Tallmadge*,²⁴ the Ohio Supreme Court addressed the meaning of the phrase “abutting landowner.” It held that “property must share a common border with a street to actually abut it.”²⁵ Thus, property that touches a public street at one point, but does not share a common border with the street, does not abut the public street.²⁶ In a subsequent case, the court stated that this definition was “in accord with that set forth under the word ‘abut’ in Black’s Law Dictionary (5 Ed.1979), which provides [that] the term ‘abutting’ implies a closer proximity than the term ‘adjacent.’ No intervening land.”²⁷

{¶41} Given that the parties stipulated that the elevated walkway was attached directly to the south plaza of Atrium Two, we fail to see how the city can assert that there was not a common border between the plaza and the elevated walkway.²⁸ Consequently, we find the city’s argument to be without merit.

²³ We are not saying that other portions of the city’s skywalk system are automatically public rights-of-way. See, e.g., *Nusekabel v. Cincinnati Public School Employees Credit Union* (1997), 125 Ohio App.3d 427, 431, 708 N.E.2d 1015, wherein we recognized that whether a street has been dedicated to public use is a factual determination.

²⁴ (1983), 2 Ohio St.3d 185, 187, 443 N.E.2d 972.

²⁵ Id.

²⁶ Id.

²⁷ *In the Matter of the Vacation (of a Public Road)* (1985), 18 Ohio St.3d 397, 399, 482 N.E.2d 570.

²⁸ See *Messinger v. Cincinnati* (1930), 36 Ohio App. 337, 342, 173 N.E. 260.



{¶42} OTR next contends that the trial court's decision that the walkway's removal did not substantially or unreasonably interfere with Atrium Two's rights of ingress and egress was clearly erroneous. We agree.

{¶43} The trial court held that the county's demolition of the walkway did not substantially affect Atrium Two's access to riverfront parking because Atrium Two still had access to other abutting streets, including Hammond Street, that abutted the south side of the building and because pedestrians would still be able to leave the south plaza and obtain access to riverfront parking once permanent steps had been constructed from the plaza to street level. The trial court concluded that the change in grade of the street system had not destroyed Atrium Two's access to riverfront parking; it had only changed it. In doing so, the trial court distinguished this court's decision in *Cincinnati Entertainment Assoc. Ltd. v. Board of Commissioners of Hamilton Co.* ("CEA").²⁹

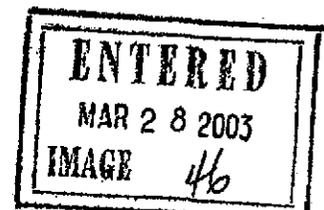
{¶44} In *CEA*, we held that the county's demolition of the stadium plaza at the 530-foot elevation, along with a bridge that connected the stadium to the Firststar Center, had amounted to a taking of CEA's implied right of access to abutting public streets at the existing plaza level.³⁰ In that case, we relied upon the fact that the Firststar Center's plaza had been built above street level in reliance on the availability of pedestrian and vehicular access from a surrounding plaza at a 530-foot elevation.³¹ We also relied upon the fact that the bridge and corresponding parallel plaza were the primary means for pedestrian as well as vehicular access to the Firststar Center.³² In *CEA*, the county had admitted that a new plaza would eventually be built to connect the Firststar Center to the new stadium, but that it would be built at a lower grade that would leave the connection

²⁹ (2001), 141 Ohio App.3d 803, 753 N.E.2d 884.

³⁰ Id. at 819.

³¹ Id. at 820.

³² Id. at 821.



between the Firststar Center and the new stadium disjointed.³³ Given these circumstances, we held that the lack of vehicular access, combined with the temporary pedestrian access, amounted to a taking of CEA's implied right of ingress and egress to the plaza of its facility from the public streets.³⁴

{¶45} OTR contends that the trial court erred in characterizing the loss of its access as insubstantial and distinguishing its case from our decision in *CEA*. OTR maintains that, like *CEA*, the city required that the south entrance of Atrium Two be built at the 530-foot elevation so that it could connect directly with the elevated walkway. OTR argues that the loss of the walkway substantially interfered with its use of Atrium Two because it deprived the office building of all pedestrian access from its southern side at the 530-foot elevation.

{¶46} The city and county, on the other hand, contend that because Atrium Two still has access to riverfront parking and because pedestrian access under the new street system is much improved at grade level, OTR failed to demonstrate that the removal of the walkway substantially interfered with its right of ingress and egress. We disagree.

{¶47} The parties stipulated that the walkway, which was an abutting right-of-way, would be completely demolished, and that the county and city had no plans to provide access from the plaza. Under these circumstances, the trial court's conclusion that OTR's access rights had merely changed was clearly erroneous and contrary to the evidence. The eventual demolition of the walkway will completely extinguish OTR's access rights at the 530-foot elevation.

³³ Id.

³⁴ Id.



{¶48} The trial court's conclusion that OTR would still have access from its southern plaza once steps were built to connect the plaza to street level does not allay the city and county's interference with OTR's right of access. Under Ohio law, an abutting property owner is entitled to damages for any change in the grade of a street abutting his property that substantially interferes with the owner's rights of ingress and egress.³⁵ The Ohio Supreme Court has stated that a substantial interference occurs when a change in the grade of a street abutting the private owner's property renders the buildings thereon less convenient to access, and the property owner, in order to make its access as convenient as it formerly was, must incur additional expenses to alter its buildings.³⁶

{¶49} Moreover, the trial court's conclusion that OTR's access had not been substantially changed because it had access to other public rights of ways is not supported by the law. OTR's access to other abutting streets does not "diminish or negate" the fact that the city" and/or county interfered with OTR's right of access to the elevated walkway at the 530-foot level.³⁷ The Ohio Supreme Court has stated that "the denial of access to one abutting street can still constitute a taking of private property regardless of the fact that there remained alternate means of access to the property in question."³⁸

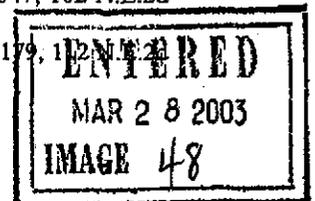
{¶50} Given that Atrium Two was built in reliance upon access at the 530-foot elevation, access at the 530-foot level no longer exists, and that the city and/or county have made no plans to restore this access, the evidence unambiguously demonstrates that the city and/or county's demolition of the walkway substantially interfered with OTR's right to access at the 530-foot elevation. Consequently, the trial court erred when it

³⁵ See *OTR*, supra, at 207-209, citing *State ex rel. McKay v. Kauer* (1951), 156 Ohio St. 347, 102 N.E.2d 703; *Lotze v. Cincinnati* (1899), 61 Ohio St. 272, 55 N.E.828.

³⁶ See, also, *In re Appropriation of Easement for Highway Purposes* (1952), 93 Ohio App. 179, 112 N.E.2d 411.

³⁷ See *OTR*, supra, at 209.

³⁸ *Id.*



refused to issue a writ of mandamus to compel appropriation proceedings for the taking of OTR's right of access to the elevated walkway.

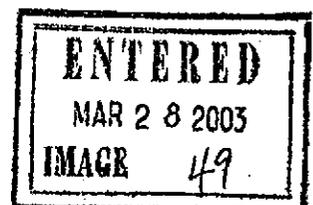
{¶51} OTR next argues that the trial court erred in refusing to issue a writ of mandamus to compensate OTR for the loss of its property rights arising from the city's agreements with ATDC and OTR. OTR alleges that these property rights stemmed from the amended urban renewal plan and three agreements, each of which contemplated that Atrium Two's parking needs would be largely satisfied by the public parking to which it would be directly linked by the walkway. OTR contends that these agreements established a contractual duty that was breached when the elevated walkway was demolished. OTR relies primarily on our decision in *CEA* to support this argument.

{¶52} In *CEA*, we held that three separate agreements between the city of Cincinnati and the Firststar Center's developer concerning parking created a property interest best characterized as an easement, and that the property interest was taken by the county's demolition at the 530-foot elevation.³⁹ The first agreement, which the parties had termed a "parking lease," permitted the center's patrons to park in the city's stadium parking facilities on certain event days and apportioned any resulting parking proceeds among the Firststar Center and the city.⁴⁰ This "parking lease" was assignable and was to have lasted through April 30, 2007. A second agreement between the city and the Firststar Center's developer, which was subject to the lease agreement, granted *CEA* the use of an additional parking area adjacent to the stadium for temporary storage and parking, presumably to facilitate the staging of events.⁴¹ The city and the developer had also signed a third agreement—a reciprocal grant of easements—that delineated access rights

³⁹ 141 Ohio App.3d at 809.

⁴⁰ *Id.* at 812.

⁴¹ *Id.*



and maintenance responsibilities of the parties with respect to the interdependent walkways and support structures constructed for access to Riverfront Stadium and the Firststar Center.⁴² This reciprocal grant of easements, the covenants of which were to remain in effect until the Firststar Center ceased to exist, expressly granted the center the right to use the city's property for the limited purpose of patron access through a linked walkway.⁴³

{¶53} Unlike the property owner in *CEA*, OTR presented no documents in the trial court providing it with any specific right to parking. The 1982 Amended Urban Renewal Plan, the provisions of which expired in January 1987, merely specified how the Block N properties, which later would become the Atrium Two building, were to be developed for office use, directly connected to the elevated walkway from the stadium plaza, and made a part of the city's skywalk system. Moreover, we cannot say that the language contained in the Contract for Sale of Land for Private Redevelopment for Parcel N-2 relating to the public use of the elevated walkway provided OTR with any express right to parking or obligated the city to maintain the walkway in perpetuity. OTR additionally relies on language in the 1995 agreement with the city relating to the Fourth Street Skywalk, as well as the 1999 entry agreement with the city. The 1995 walkway agreement is irrelevant because it concerns only the skywalk over Fourth Street. Additionally, the 1999 entry agreement merely provided that the city would relocate and reattach the pedestrian bridge upon completion of the necessary work on the Fort Washington Way project. The city completed this work and reattached the bridge. Because none of these documents provided OTR with any express property rights, we

⁴² Id. at 816-817.

⁴³ Id.



cannot say the trial court erred in holding that OTR did not have any express contractual right of access to riverfront parking.

III. CONCLUSION

{¶54} Having concluded that OTR's right of access at the 530-foot elevation has been destroyed, we hold that OTR is entitled to a writ of mandamus to compel the initiation of appropriation proceedings. But, based upon the record before us, we cannot determine whether the city alone, the county alone, or both of them have the legal duty to initiate these proceedings. We, therefore, reverse the trial court's decision and remand this case for a hearing, at which the trial court must determine the party or parties to whom the writ should issue,⁴⁴ and for the issuance of an appropriate writ.

Judgment reversed and cause remanded.

PAINTER, P.J., and DOAN J. concur.

Please Note:

The court has recorded its own entry on the date of the release of this Opinion.



⁴⁴ Our uncertainty results from the fact that the county and city entered into an assignment in 1996 regarding the walkway, which the trial court never addressed, and which the parties have not otherwise elaborated upon. We are certain, however, that either the city or the county, or both of them, had a duty to appropriate in this case.