IN THE SUPREME COURT OF OHIO

STATE EX REL. JUNE L. BLANK 192 S. High Street Cortland, Ohio 44410-1702 and **STATE EX REL. ESTATE OF RICHARD L. BLANK** **By: June L. Blank, Executrix** 8895 Cain Drive NE Warren, Ohio 44484 Relators vs. **JAMES G. BEASLEY, DIRECTOR OHIO DEPARTMENT OF TRANSPORTATION** 1980 West Broad Street, PO Box 899 Columbus, Ohio 43216-0899 Respondent	)	**CASE NO. 2007-2217** **ORIGINAL ACTION IN MANDAMUS**

AMENDED COMPLAINT FOR A WRIT OF MANDAMUS WITH ATTACHED MEMORANDUM AND AFFIDAVITS

FILED
JAN 14 2008
CLERK OF COURT
SUPREME COURT OF OHIO

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Counsel for Respondent

AMENDED COMPLAINT FOR A WRIT OF MANDAMUS

1. Relators June L. Blank, individually and as Executrix of the Estate of Richard L. Blank [collectively referred to as "Relators"], state that Respondents Gordon Proctor, former Director and the Ohio Department of Transportation [collectively referred to as "Respondents"], filed on December 3, 2001 in Trumbull County Common Pleas Court Case No. 2001-CV-2422 a Petition to Appropriate their property and to fix compensation for a perpetual easement, Parcel 34-S, to construct and maintain a sewer in this case.

In addition Respondents included in its Petition for appropriation of a temporary easement, Parcel 34-T for the purpose of performing work necessary to construct a drive and grade in front of Relators' commercial establishments located on State Route 5, at 192 and 194 South High Street, Cortland, Ohio in Bazetta Township. The temporary easement was taken for eighteen (18) months.

2. Respondents took physical possession of the land parcels 34-S and 34-T on April 29, 2002. During Respondents' occupation of landowner real estate, Respondents, acting through its agents and employees, broadened its occupation of Relators' property outside and beyond the limits of the easements taken, as described in its appropriation petition and its plans and specifications for the project, by using and confiscating, through its employees and agents, additional property rights in the real estate during construction that were not described in the Respondents' Petition for appropriation or included in the original plans and specifications. These additional property rights taken by Respondents are as follows:

a. Occupied, operated, stored and parked heavy construction equipment upon the parking lots and drives of Blanks' real estate; impairing access to their building;

b. Dragged mud, gouged and roughed up Blanks' parking lots and put rocks, cracks, gouges and depressions in the blacktop portions of their parking lot;

c. Cracked and broke out a portion of a concrete pad and damaged a pillar in the front of their commercial building located at 192 S. High Street;

d. Used heavy mechanical shovels to pound out shale rock in close proximity to Blanks' restaurant building creating extreme vibration and lack of lateral support causing a permanent vertical crack in the south wall of the concrete block masonry of the restaurant building;

e. Broke through a sewer line to the restaurant building on Blanks' real estate causing sewage to back up into the restaurant and made improper repairs thereto;

f. Broke through gas lines servicing the premises;

g. Broke a storm sewer line and failed to repair the pipes properly;

h. Blocked access to the only rear door of Blanks' restaurant building where deliveries are received.

i. Used landowners' real estate outside the boundaries of the parcels taken by ODOT to park heavy machinery and equipment.

3. During a pretrial or status conference of the case Respondents' attorney maintained to the trial court that the activity that occurred outside the right-of-way on Relators' property was not a part of the original appropriation action[1].

4. Relator June L. Blank states that her husband, Richard L. Blank, a co-defendant and co-owner named in the appropriation case, died on November 24, 2005 and that his cause of action survives pursuant to O.R.C. §2305.19. Relator June L. Blank commences this action as the decedent's personal representative and beneficiary of the real estate in issue by reason of Richard L. Blank's last will and testament.

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[1] See attached Affidavit of Frank R. Bodor

encroachment upon the land that subjects it to a public use that excludes or restricts the landowner's dominion and control over his land and such owner has a right to compensation for the property taken under Ohio Constitution Article I §19.

In Lucas v. Carney (1958) 167 Ohio St. 416 this Court determined that where a County as a result of the creation of a public improvement physically encroaches upon the land and property of an owner and deprives that owner of any of the use or enjoyment of his property such encroachment is a taking "pro tanto" of the property so encroached upon for which the County is liable. In such case the owner is entitled to institute an action and have a jury impaneled to determine the compensation due him.

These long established principles were confirmed in this Court's holding in State ex rel. OTR v. Columbus (1996) 76 Ohio St.3d 203 where the Court determined that any physical interference with the property is a "taking" for which compensation may be required under the United State and Ohio Constitution. In that case there was an interference with the owners access to his land even though the owner had not been denied all access to the land in question.

These established principles were followed by lower Appellate Courts. In State ex rel. Livingston Court Apts. v. Columbus (1998) 130 Ohio App.3d 730 the Court ruled that a writ of mandamus, rather than a negligence action, compelling the City to commence appropriation proceedings to compensate the owner for the taking of its property was the appropriate remedy for the taking, which resulted from the City's failure to maintain and repair the City's sewer system. In that case the owner's basements were flooded by sewage during time of heavy rainfall.

In Ohio Edison v. Desecker (1993) 89 Ohio App.3d 164 it was held that there need not even be a physical taking of property or dispossession of the owner to constitute a "taking." Any

substantial interference with elemental rights growing out of ownership of property is a taking. Even a special assessment materially in excess of the benefits conferred has been deemed to invade the inviability of private property thus contravening Ohio Constitution Article I §19. Laskey v. Hiltz (1951) 91 Ohio App. 136.

In Crane v. Brintnall (1992) 29 Ohio Misc. 75; 58 O.O. 2d 175 a Common Pleas Court ruled that the term "taking" as used in Ohio Constitution Article I §19 includes such items or expense as may be necessarily incurred by the land owner in connection with construction of an improvement of his premises.

In this case the intrusions, encroachments and interferences by Respondent outside the limits of its taking in the pending appropriation proceedings, as outlined in Relators' Amended Complaint for Mandamus, require that a writ be ordered for Respondent's taking of such rights so that the owners can be justly compensated by a jury under Article I §19 of the Ohio Constitution.

Respondent has evaded its responsibilities required by law to compensate the owners for an unlawful taking of property rights outside the limits of the right-of-way described in its pending appropriation proceedings. It has exhausted its procedural technicalities to deprive the owners of its right to be compensated.

It is now time that justice be served by order of the Court mandating Respondent to perform its responsibilities and obligations under the Constitution and laws of Ohio. A writ of mandamus or alternative writ should be issued ordering Respondent to file the necessary eminent domain proceedings for the taking and ordering a jury trial. The appropriation proceedings should be consolidated with the pending Trumbull County Common Pleas appropriation Case

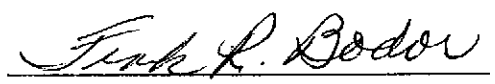
No. 2001-CV-2422 to avoid separate jury trials and serve judicial economy and litigation expenses for all parties.

Respectfully Submitted,

FRANK R. BODOR (0005387)
157 Porter Street NE
Warren, Ohio 44483
Telephone: (330) 399-2233
Facsimile: (330) 399-5165
Attorney for Relators Blank

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *Amended Complaint For Writ Of Mandamus With Attached Memorandum & Affidavits* was served upon L. Martin Cordero, Assistant Attorney General, Transportation Section, 150 East Gay Street—17th Floor, Columbus, Ohio 43215-3130; Warren Redevelopment and Planning Corp., c/o Michael D. Keys-Registered Agent, 418 S. Main Avenue Suite 201, Warren, Ohio 44481; and Jason C. Earnhart, Assistant Prosecuting Attorney, Tr. Co. Prosecutor's Office, 4th Floor Administration Bldg., 160 High Street NW, Warren, Ohio 44481-1092 via U.S. mail this 10th day of January 2008.



FRANK R. BODOR (0005387)
Attorney for Relators Blank

AFFIDAVIT
OF
JUNE L. BLANK, INDIVIDUALLY AND AS EXECUTRIX
OF THE ESTATE OF RICHARD L. BLANK

1. Relators June L. Blank, individually and as Executrix of the Estate of Richard L. Blank [collectively referred to as "Relators"] state that Respondents Gordon Proctor, former Director and the Ohio Department of Transportation [collectively referred to as "Respondents"] filed on December 3, 2001 a Petition to Appropriate their property and to fix compensation for a perpetual easement, Parcel 34-S, to construct and maintain a sewer in this case.

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2. Respondents took physical possession of the land parcels 34-S and 34-T on April 29, 2002. During Respondents' occupation of landowner real estate, Respondents, acting through its agents and employees, broadened its occupation of Relators' property outside and beyond the limits of the easements taken, as described in its appropriation petition and its plans and specifications for the project, by using and confiscating, through its employees and agents, additional property rights in the real estate during construction that were not described in the Respondents' Petition for appropriation or included in the original plans and specifications. These additional property rights taken by Respondents are as follows:

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3. Relator June L. Blank states that her husband, Richard L. Blank, a co-defendant and co-owner named in the appropriation case, died on November 24, 2005 and that his cause of action survives pursuant to O.R.C. §2305.19. Relator June L. Blank commences this action as the decedent's personal representative and beneficiary of the real estate in issue by reason of Richard L. Blank's last will and testament.

4. Relators filed a counterclaim for mandamus in the pending appropriation case Trumbull County Common Pleas Court Case No. 2001-CV-2422, which counterclaim was dismissed by the trial court on motion of Respondents claiming that the trial court lacked jurisdiction because Respondent Director is not suable in any court outside Franklin County.

The trial court's ruling was sustained by the Eleventh District Court of Appeals and also by this Supreme Court in Proctor vs. Blank, 115 Ohio St. 3d 71, 2007-Ohio-4838.

5. Relators state that their case, being dismissed, failed otherwise than upon the merits and as such Relators may, pursuant to O.R.C. §2305.19 and O.R.C.P. Rule 41(B)(4)(a), commence action within one (1) year from this Court's final judgment for dismissal rendered October 3, 2007.

6. Relators state that the facts stated in this affidavit are made on and by the personal knowledge of the Affiant Relators and that they are of sound mind and are adults competent to testify to all matters stated in the affidavit.

June L. Blank

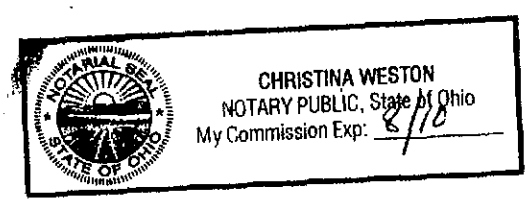
JUNE L. BLANK, Individually
Affiant/Relator

June L. Blank

JUNE L. BLANK, Executrix of the
Estate of Richard L. Blank
Affiant/Relator

STATE OF OHIO)
) SS.
TRUMBULL COUNTY)

Before me a notary public for Trumbull County, State of Ohio personally appeared the above Affiant, June L. Blank individually and as Executrix of the Estate of Richard L. Blank, who on January 8, 2008 swore that the facts stated in the above affidavit are based on her personal knowledge; that the facts are admissible in evidence; and that she is competent to testify as to all matters stated herein.



Christina Weston

NOTARY PUBLIC

AFFIDAVIT
OF
ATTORNEY FRANK R. BODOR

Affiant, FRANK R. BODOR, states that during a pretrial or status conference of the Trumbull County Common Pleas Court Case No. 2001-CV-2422 Respondent's attorney maintained and admitted to the trial court that the activity that occurred outside the right-of-way on Relators' property was not a part of the original appropriation action.

Frank R. Bodor
FRANK R. BODOR, Affiant
Counsel for Relators Blank

STATE OF OHIO)
) SS.
TRUMBULL COUNTY)

Before me a notary public, in and for said county and state, personally appeared Frank R. Bodor Affiant and Attorney for Relators and on January 8, 2008 swore that the facts stated in the above affidavit are based on his personal knowledge; that the admission is admissible in evidence; and that he is competent to testify as to the matters stated therein.

Christina Weston
NOTARY PUBLIC