ORIGINAL

Case No. _____ 10-2156

In the Supreme Court of Ohio

APPEAL FROM THE COURT OF APPEALS
FIFTH APPELLATE DISTRICT
DELAWARE COUNTY, OHIO
CASE NO. 10CAE010007

DELAWARE COUNTY BOARD OF COMMISSIONERS,

Plaintiff-Appellee,

v.

HOME ROAD HOLDINGS, LLC,

Defendant-Appellant.

MEMORANDUM IN SUPPORT OF JURISDICTION OF DEFENDANT-APPELLANT, HOME ROAD HOLDINGS, LLC

Aric I. Hochstetler
Delaware County Prosecutor's Office
140 North Sandusky Street
Delaware, OH 43015

Attorney for Plaintiff-Appellee, Delaware County Board of Commissioners

Stephen D. Jones (0018066) (COUNSEL OF RECORD)
sjones@ralaw.com
Jeremy S. Young (0082179)
jyoung@ralaw.com
Roetzel & Andress, LPA
National City Plaza
Twelfth Floor
155 East Broad Street
Columbus, OH 43215
Telephone: 614.463.9770

Attorneys for Defendant-Appellant, Home Road Holdings, LLC

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EXPLANATION OF WHY THIS CASE PRESENTS SUBSTANTIAL CONSTITUTIONAL QUESTIONS AND ISSUES OF PUBLIC AND GREAT GENERAL INTEREST

The Court should accept jurisdiction over this claimed appeal as of right because it presents substantial Constitutional questions. Alternatively, the Court should accept jurisdiction because this appeal presents issues of public and great general interest.

First, the Fifth District's decision in *Delaware County Board of Commissioners v. Home Road Holdings, LLC*, Judgment Entry and Opinion No. 10CAE010007 (October 28, 2010) wrongly permits an appropriating authority to introduce evidence at trial in an eminent domain case relating to a future improvement project, which is separate from the improvement requiring the taking of the property owner's land. The decision of the Fifth District thereby conflicts with the Eminent Domain Clause of the Ohio Constitution and the Takings Clause of the U.S. Constitution because it erroneously permits an appropriating authority in a partial taking eminent domain case to deprive a property owner of just compensation for the damage the improvement at issue does to the residue (*i.e.*, the part of the property that is not taken).

As this Court's decisions in *Director of Highways v. Olrich* (1966), 5 Ohio St.2d 70, 213 N.E.2d 82 and *Evans v. Hope* (1984), 12 Ohio St.3d 119, 465 N.E.2d 869-interpreting and applying the Eminent Domain and Takings Clauses—make clear, the relevant time to value real property affected by eminent domain is the date of the take, which is the earlier of the date of trial or the date the appropriator has taken possession of the subject property. This Court's decisions further establish that only conditions in existence as of the date of the take may fairly enter into the jury's determination of damage the improvement project at issue causes to the residue. Moreover, this Court's reasoning in *Smith v. Erie R. Co.* (1938), 134 Ohio St. 135, 16 N.E.2d 310 precludes an appropriating authority from introducing evidence at trial regarding the consequential effects of an improvement that does not require the taking of the subject.

Second, the Fifth District's decision wrongly permits an appropriating authority to introduce evidence at trial in an eminent domain case regarding a separate future improvement project without ever making the plans for that separate improvement available to the property owner, or putting the property owner on timely notice that it intends to rely on such evidence. The decision of the Fifth District thereby conflicts with the Due Process Clauses of the Ohio and U.S. Constitutions, as furthered by statute, because it permits property owners to be deprived of procedural due process of law.

R.C. 163.05 ensures procedural due process in the eminent domain setting by requiring that the appropriating authority make available to the property owner the plans for the improvement project requiring the taking, in sufficient detail to permit the property owner to determine the nature, extent, and effect of the improvement. The Fifth District's decision wrongly permits an appropriating authority to disregard the requirements of R.C. 163.05 by introducing evidence at trial regarding a separate, future improvement, without ever making the plans for that separate improvement available to the property owner, or putting the property owner on notice that it intends to rely on such evidence. If permitted to stand, the Fifth District's decision will deprive property owners in partial taking eminent domain cases of their procedural due process rights by permitting an appropriating authority to ambush the property owner at trial with undisclosed and damaging evidence.

Third, The Fifth District's decision erroneously permits a property owner to be deprived of just compensation for damage to the residue in a partial taking case wherever the taking causes circuity of travel in order to reach the subject property. The Fifth District's decision thereby conflicts with the Eminent Domain Clause of the Ohio Constitution and the Takings Clause of the U.S. Constitution, as interpreted and applied by *State ex rel. OTR v.*

Columbus (1996), 76 Ohio St.3d 203, 667 N.E.2d 8, holding that a substantial and unreasonable interference with a property owner's right to access an abutting highway is compensable.

Clarification of the law with regard to these important Constitutional issues is necessary not only to rectify the error in this case, but also to provide much needed guidance to Ohio's Trial and Appellate Courts. With federal stimulus money accelerating highway projects and increasing partial taking eminent domain case filings, it is critically important that Ohio law in this area be easily understood and uniformly applied.[1] Accordingly, the Court should accept jurisdiction of this case in order to correct the Fifth District's legally flawed decision.

STATEMENT OF THE CASE AND FACTS

Plaintiff-Appellee, the Delaware County Board of Commissioners (the "County"), filed its complaint in appropriation in the Delaware County Court of Common Pleas on March 24, 2008. This case was tried to a jury on April 2 and 3, 2009. The jury rendered a verdict in favor of the property owner, Defendant-Appellant, Home Road Holdings, LLC ("HRH"), as follows: $91,875.00 as compensation for the property taken; $775.00 as compensation for the temporary easement taken; and $0 as damages to the residue. The Trial Court's final judgment entry on the verdict was filed on April 23, 2009. On May 6, 2009, HRH filed a motion for judgment notwithstanding the verdict, or for new trial ("Post-Verdict Motion"), which was thereafter fully briefed. By Judgment Entry dated January 5, 2010, the Trial Court denied HRH's Post-Verdict Motion. On January 19, 2010, HRH's Notice of Appeal was timely filed. After close of briefing, the case was argued before the Fifth District Court of Appeals on September 7, 2010. The Fifth District issued its decision, affirming the judgment below, on October 28, 2010.

This is an eminent domain action brought by the County against HRH, for a partial taking of HRH's land to construct a railroad overpass public improvement project (the "Overpass

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[1] Jack Zemlicka, *Eminent Domain Cases on the Rise*, Daily Reporter, February 3, 2010, http://dailyreporter.com/blog/2010/02/03/eminent-domain-cases-on-the-rise/.

Project") on Home Road in Liberty Township, Delaware County. Home Road is a major east-west traffic artery across southern Delaware County, connecting U.S. Route 23 with the southwestern portion of Delaware County, one of the most dynamic areas of growth and development in the country for several years. The subject property is located on the north side of Home Road, immediately to the east of a CSX railroad line. The subject is bounded on the east by Liberty Road North, but does not have any access points to Liberty Road North. In the before (*i.e.*, the condition of the subject before the construction of the Overpass Project), the subject is at-grade with Home Road, has two Home Road access points, and bears a Home Road address. The Overpass Project results in a partial taking of the subject, removes both Home Road access points, and deprives the subject of its Home Road address.

In the before, Home Road is at-grade with the railroad. The Overpass Project involves the elevation of Home Road, eliminating the railroad crossing, to permit the Home Road traffic to flow uninterrupted over the CSX railroad. In the after (*i.e.*, the condition of the subject property after the construction of the Overpass Project), Home Road is significantly elevated above the subject. Between the subject property and the newly elevated Home Road is a sheer, vertical retaining wall, measuring approximately twenty feet high at the eastern boundary of the subject and rising in height to approximately thirty feet at the western boundary. Thus, in the after, the subject no longer has access or visual exposure to heavily-traveled Home Road. Nor does the subject have direct access to Liberty Road North. Rather, the subject is accessible in the after only by way of a cul-de-sac connector street, which connects to Liberty Road North. Thus, in the after, the subject is isolated from Home Road to such a degree that a three- to five-mile trip is necessary to reach it from the pre-existing Home Road access points and has very limited visible exposure to Home Road.

The central issue at trial was the extent to which the Overpass Project damages the residue. Due to the improper tactics of the County and the error of the Trial Court, however, the jury's assessment of damage to the residue was tainted by consideration of evidence of a separate improvement project that will not require any taking of the subject property, the Liberty Road Re-alignment Project (the "Re-alignment Project"). At the time of trial, the Re-alignment Project was a contemplated improvement that the County intended to complete at some future time.[2] In both the before and after, Liberty Road North runs into the north side of Home Road, immediately to the east of the subject, and "dog-legs" to the east (such that traffic traveling southbound on Liberty Road North must turn left onto Home Road, and then turn right onto Liberty Road South). The Re-alignment Project is intended to re-connect the two sections of Liberty Road, to the north of the subject.

Evidence regarding the re-alignment of Liberty Road (the "Re-alignment Project") was the subject of the County's first motion *in limine*, filed January 16, 2009. In its first motion *in limine*, the County moved to exclude the introduction of evidence of the decrease in traffic flow that will result from the Re-alignment Project. On March 27, 2009, before the Court could rule upon the first motion *in limine*, it was withdrawn by the County. The County then proceeded to make the Re-alignment Project a central theme of its case, in a last-minute attempt to mitigate the obvious damage the Overpass Project caused to the residue. Significantly, the County never made any plans or specifications relating to the Re-alignment Project available to HRH. Nor did it seek to introduce such plans as evidence at trial.

In its brief to the Fifth District, the County argued that admission of evidence regarding the Re-alignment Project was proper because "[a]s part of the Delaware County Thoroughfare Plan, the area immediately surrounding the subject property has been marked for traffic flow

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[2] Although irrelevant to the issues raised by this appeal, the Re-alignment Project is now complete.

improvements since the 1980's...[t]he Overpass Project is only one component of the overall roadway system improvement in this area. A companion project involves the realignment of Liberty Road..."

Due to the admission of evidence of the Re-alignment Project, the jury was improperly instructed by the Court that a motorist coming to the subject property from Home Road in the after would be spared the three- to five-mile trip because one could reach the subject by turning north from Home Road onto the future Liberty Road connector, then left onto Liberty Road North, and then right onto the cul-de-sac connector street. The jury awarded HRH no damages for injury caused to the residue by the Overpass Project, despite the overwhelming evidence that such damage was, in fact, caused. In fact, nearly every witness who testified at trial provided the jury with evidence that the Overpass Project resulted in substantial damage to the residue. Nevertheless, the Trial Court entered judgment on the jury's verdict. Without addressing the important constitutional issues presented by this case, the Fifth District found no reversible error because its erroneously concluded that (1) HRH had invited the Trial Court's error; (2) HRH had waived all but plain error; and (3) that the Trial Court's error did not constitute plain error.[3]

ARGUMENT

I. FIRST PROPOSITION OF LAW: The Eminent Domain Clause Of The Ohio Constitution And The Takings Clause Of The U.S. Constitution, As Interpreted And Applied By This Court's Decisions, Prohibits An Appropriating Authority From Introducing Evidence At Trial Regarding A Future Improvement Project, Which Is Separate From The Improvement Requiring The Taking Of A Property Owner's Land, For The Purpose Of Mitigating Damage To The Residue.

The Fifth District's decision wrongly permits an appropriating authority to introduce evidence at trial relating to a future improvement project, which is separate from the

[3] Should the Court accept jurisdiction of this appeal, as it should, HRH will demonstrate the following: (1) HRH's former trial counsel did not invite the Trial Court's error; (2) HRH's former trial counsel did not waive all but plain error; and (3) the Trial Court's error did rise to the level of plain error.

improvement requiring the taking of the property owner's land. The decision of the Fifth District thereby conflicts with the Eminent Domain Clause of the Ohio Constitution and the Takings Clause of the U.S. Constitution because it erroneously permits an appropriating authority in a partial taking eminent domain case to deprive a property owner of just compensation for the damage the improvement at issue does to the residue.

The Eminent Domain Clause of the Ohio Constitution provides as follows:

> Private property shall ever be held inviolate, but subservient to the public welfare....where private property shall be taken for public use, a compensation therefor shall first be made in money, or first secured by a deposit of money, and such compensation shall be assessed by a jury, without deduction for benefits to any property of the owner.

OH Const. Art. I, § 19.

The Takings Clause of the U.S. Constitution similarly provides that "[n]o person shall be....deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." U.S.C.A. Const. Amend. V.

Under well-settled Ohio law, the time to value property taken by eminent domain is the date of the take. "It is recognized in this state that property taken for public use shall be valued as of the date of trial, that being the date of take, unless the appropriator has taken possession prior thereto, in which event compensation is determined as of the time of the taking." *Director of Highways v. Olrich* (1966), 5 Ohio St.2d 70, 72, 213 N.E.2d 823, 825 (citations omitted). *See also, Evans v. Hope* (1984), 12 Ohio St.3d 119, 120, 465 N.E.2d 869, 871.

Ohio law further contemplates that the property owner will be compensated based upon the impact that the improvement project at issue, not some other improvement, has upon the property being appropriated. In *Smith v. Erie R. Co.* (1938), 134 Ohio St. 135, 16 N.E.2d 310, this Court held that a property owner could not recover consequential damages to her property in connection with the taking of a different piece of property. The Supreme Court held, *inter alia*, the following: "[w]hen there is no taking altogether or *pro tanto*, damages consequential to the

taking of other property in the neighborhood, or to the construction of the improvement, are not recoverable; under such circumstances, loss suffered by the owner is *damnum absque injuria*[4]." *Id.* at Syllabus, ¶2. This Court has consistently applied the foregoing rule to prevent a property owner from requiring an appropriating authority to compensate him/her for damage to his/her property unless there has been an actual taking of his/her land. *See, State ex rel. Fejes v. City of Akron* (1966), 5 Ohio St.2d 47, 49, 213 N.E.2d 353, 355; *State ex rel. Ohio Turnpike Commission v. Allen* (1952), 158 Ohio St. 168, 175, 107 N.E.2d 345, 350.

The reasoning underlying the *Smith* rule is straightforward: a property owner cannot benefit from the indirect impact of an improvement project if the project does not result in a taking of the property owner's land. In this case, admission of evidence of the Re-alignment Project turned the *Smith* rule on its head. Just as the property owners tried to do in *Smith*, *Fejes*, and *Allen*, the County sought to benefit from the indirect impact the Re-alignment Project will have in purportedly mitigating the damage the Overpass Project causes to the residue of the subject property. It is undisputed, however, that HRH's land is not being appropriated in connection with the Re-alignment Project. Thus, if HRH wished to initiate an inverse condemnation action in order to benefit from the indirect impact of the Re-alignment Project upon its property, HRH would be foreclosed from doing so. Fundamental considerations of fairness compel the conclusion that the Trial Court's admission of evidence of the Re-alignment Project was erroneous, and that the verdict which resulted from the introduction of that evidence was contrary to law.

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[4] *Damnum absque injuria* means "[l]oss, hurt, or harm without injury in the legal sense, that is, without such breach of duty as is redressible by an action." *City of Norwood v. Forest Converting Co.* (1984), 16 Ohio App.3d 411, 414, 476 N.E.2d 695, 699, FN2 (citing Black's Law Dictionary (Rev. 4 Ed. 1968) 470).

In *Bekos v. Masheter* (1968), 15 Ohio St.2d 15, 238 N.E.2d 548, this Court held that the rule of *Nichols v. City of Cleveland* (1922), 104 Ohio St. 19, 135 N.E. 291, that a property owner is not entitled to benefit from any appreciation to the value of his or her land that occurs because of the project for which the land is being appropriated, applies with equal force to the appropriating authority, as follows: "[s]ince, under the doctrine of the *Nichols* case, a property owner may not profit from an increase in value resulting from the improvement project, he may not be made to suffer the depreciation of his property occasioned by a public project in which his property is included." Id. at 18, 551 (citing *Giesy v. Cincinnati, Wilmington & Zanesville Rd. Co.* (1854), 4 Ohio St. 308, 330-31). The same considerations of fundamental fairness that led this Court to apply the inverse of the *Nichols* rule in *Bekos* should be applied in this case to hold that the inverse of the *Smith* rule precludes an appropriating authority from introducing evidence of a separate, future improvement that will not require any taking of the subject property.

It is undisputed that the subject property was not accessible via the new Liberty Road on April 2, 2009, the date of the take, because the Re-alignment Project had not been completed at that time. It is further undisputed that, while the Overpass Project requires a taking of HRH's land, the Re-alignment Project does not. In accordance with the foregoing legal authorities, therefore, evidence regarding the Re-alignment Project should not have been permitted to enter into the jury's determination of damage to the residue. Because such evidence was introduced at trial, the jury was prevented from getting an accurate picture of the extent to which the Overpass Project would isolate the subject, and HRH was deprived of its Constitutionally guaranteed fair compensation for the impact the Overpass Project will have upon the residue.

The Court should accept jurisdiction of this case in order to clarify that the Eminent Domain Clause of the Ohio Constitution and the Takings Clause of the U.S. Constitution precludes an appropriating authority in a partial taking eminent domain case from introducing

evidence at trial regarding a future improvement project that is separate from the improvement requiring the taking at issue.

II. SECOND PROPOSITION OF LAW: The Due Process Clauses Of The Ohio And U.S. Constitutions Prohibit An Appropriating Authority From Introducing Evidence At Trial Regarding Future Improvement Projects, Which Are Separate From The Improvement Requiring The Taking, Without Ever Making The Plans For That Separate Improvement Available To The Property Owner, Or Putting The Property Owner On Notice That It Intends To Rely On Such Evidence.

The Fifth District's decision wrongly permits an appropriating authority to introduce evidence at trial regarding a future improvement project, which is separate from the improvement requiring the taking, without ever making the plans for that separate improvement available to the property owner, or putting the property owner on notice that it intends to rely on such evidence. The decision of the Fifth District thereby conflicts with the Due Process Clauses of the Ohio and U.S. Constitutions, as furthered by statute, because it permits property owners to be deprived of procedural due process of law.

Due Process limitations on the exercise of the eminent domain power are contained in Chapter 163 of the Ohio Revised Code. R.C. 163.05 provides, *inter alia*, as follows:

> In the event of the appropriation of less than the fee of any parcel or of a fee in less than the whole of any parcel of property, the agency shall either make available to the owner or shall file in the office of Delaware County engineer, a description of the nature of the improvement or use which requires the appropriation, including any specifications, elevations, and grade changes already determined at the time of the filing of the petition, in sufficient detail to permit a determination of the nature, extent, and effect of the taking and improvement.

"[T]he Due Process Clause contains a substantive component that bars certain arbitrary, wrongful government actions [and] also encompasses...a guarantee of fair procedure." *Shirokey v. Marth* (1992), 63 Ohio St.3d 113, 119, 585 N.E.2d 407, 412 (citing *Zinermon v. Burch* (1990), 494 U.S. 113, 110 S.Ct. 975). The Sixth District Court of Appeals has described procedural due process in the following terms:

> The Fifth and Fourteenth Amendments to the United States Constitution prohibit the states from depriving an individual of property without due process of law. In its most fundamental form, procedural due process demands that prior to state action, an individual must receive adequate and timely notice of the proposed action and a meaningful opportunity to be heard... Encompassed in this is the concept that, in order for the procedure to be meaningful, the governmental activity must be fundamentally fair... That is, the proceedings as a whole must conform to the community's sense of fair play and decency...

Abraham v. Wood Cty. Regional Water & Sewer Dist. (1995), 107 Ohio App.3d 773, 778, 669 N.E.2d 514, 517 (citing *Quill Corp. v. N. Dakota* (1992), 504 U.S. 298, 312, 112 S.Ct. 1904, 1913; *United States v. Lovasco* (1977), 431 U.S. 783, 790, 97 S.Ct. 2044, 2048-2049; *Goldberg v. Kelly* (1970), 397 U.S. 254, 267-268, 90 S.Ct. 1011, 1020-1021; *Baltimore & Ohio RR. Co. v. Pub. Util. Comm.* (1968), 16 Ohio St.2d 60, 63, 242 N.E.2d 577, 579-580; *Gibraltar Mausoleum Corp. v. Cincinnati* (1981), 1 Ohio App.3d 107, 109, 439 N.E.2d 922, 925-926).

In this case, the County's tactic of making the Re-alignment Project central to its case on the eve of trial is contrary to the procedural due process concerns embodied in Ohio's eminent domain statutory scheme. The statutory requirement that the appropriating authority provide the property owner with a copy of the plans and specifications for an improvement project provides the landowner with notice and an opportunity to advocate for itself throughout the appropriation process. Thus, the violation of R.C. 163.05 is a denial of procedural due process because it deprives a property owner of "adequate and timely notice of the proposed action and a meaningful opportunity to be heard." If the County wished to rely on evidence regarding the future impact the Re-alignment Project will purportedly have upon the residue, it had an obligation to give HRH notice of its intent to do so consistently from the beginning to the end of the appropriation. The plans and specifications provided to Defendant, setting forth the nature of the improvement, should have included not only information relating to the Overpass Project, but also the Re-alignment Project. But no detailed plans, specifications, or other information

meeting the statutory requirements relating to the Re-alignment Project were ever made available to HRH or admitted into evidence.

Likewise, the County should have included a description of both projects in its complaint. Notably, however, the complaint put HRH on notice only with regard to the "construction, reconstruction, installation, replacement, repair, maintenance, and improvement of Home Road." *Complaint*, ¶¶ 4,6. The complaint further incorporates, as Exhibit B, Resolution No. 08-254 of the Delaware County Commissioners, which describes the purpose of the appropriation in the following terms: "Construction of a highway overpass over the CSX Railroad tracks on Home Road including construction, reconstruction, installation, repair, maintenance and improvement of Home Road." No mention is made of the Re-alignment Project. By failing to put HRH on notice regarding its intent to rely upon evidence regarding the Re-alignment Project, the County deprived HRH of procedural due process.

The admission of evidence of the Re-alignment Project, which resulted in the verdict and final judgment in this case, was a further violation of HRH's procedural due process rights. Because the County did not provide HRH with any plans and specifications with regard to the Re-alignment Project and did not describe the Re-alignment Project in its complaint, it was a procedural due process violation by the Trial Court to permit the jury to consider evidence of the Re-alignment Project.

The Court should accept jurisdiction of this case in order to clarify that the Due Process Clauses of the Ohio and U.S. Constitutions preclude an appropriating authority from introducing evidence at trial regarding a future improvement project, which is separate from the improvement requiring the taking, without ever making the plans for that separate improvement available to the property owner, or putting the property owner on notice that it intends to rely on such evidence.

III. THIRD PROPOSITION OF LAW: The Eminent Domain Clause Of The Ohio Constitution And The Takings Clause Of The U.S. Constitution, As Interpreted And Applied By This Court's Decision In *State Ex Rel. OTR v. Columbus*, Precludes A Finding That The Impact Of The Overpass Project Upon The Subject—Independent Of The Re-Alignment Project—Results Only In Non-Compensable Circuity Of Travel.

The Fifth District's decision erroneously applied *State ex rel. Merritt v. Linzell* (1955), 163 Ohio St. 97, 126 N.E.2d 53 to hold that the three- to five-mile trip necessary to reach the subject property in the after is not compensable because it constitutes mere circuity of travel shared in common with the general public. The Fifth District thereby failed to follow this Court's holding in *State ex rel. OTR v. Columbus* (1996), 76 Ohio St.3d 203, 667 N.E.2d 8, that:

> An owner of a parcel of real property has a right to access public streets or highways on which the land abuts. Therefore, any governmental action that substantially or unreasonably interferes with this right constitutes a taking of private property within the meaning of Section 19, Article I of the Ohio Constitution and the Fifth Amendment to the United States Constitution.

Id. at Syllabus.

Like the instant case, the *OTR* case involved the construction of a highway overpass which resulted in the erection of a concrete retaining wall, reaching a height of thirty feet, between the subject properties and the newly elevated roadway. As in the *OTR* case, the record of this case demonstrates an unmistakably substantial and unreasonable interference with HRH's right to access Home Road in the form of (1) the removal of the subject's Home Road access; (2) the construction of the concrete retaining wall; and (3) the three- to five-mile trip necessary to reach the subject in the after.

Further, the record demonstrates that the circuity of travel caused by the Overpass Project is not an inconvenience shared in common with the general public. The Fifth District apparently based its conclusion to the contrary on certain testimony that one other property would be similarly affected by the Overpass Project (*i.e.*, reachable in the after only by way of a three- to five-mile trip from the property's Home Road frontage). Significantly neither the County nor the

Fifth District offered any legal authority for the proposition that circuity of travel imposed upon only two properties rises to the level of an inconvenience shared in common with the general public. Clearly, the type of circuity of travel caused by the Overpass Project impacts individuals attempting to reach the two affected properties, not the public at large.

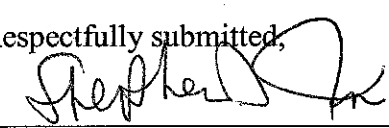
The Court should accept jurisdiction of this case in order to clarify that the Eminent Domain Clause of the Ohio Constitution and the Takings Clause of the U.S. Constitution, as interpreted and applied by this Court in the *OTR* case, precludes a finding that the impact of the Overpass Project—independent of the Re-alignment Project—results only in non-compensable circuity of travel. The need for clarification in this regard is particularly evident in the Fifth District's own apparent confusion regarding the proper standard. Notably, in reaching its holding that the three- to five-mile trip constitutes non-compensable circuity of travel, the Fifth District cited its own decisions in *Proctor v. Hankinson* (Aug. 20, 2009), Licking App. No. 08 CA 0115, slip copy, 2009 -Ohio- 4248 and *Proctor v. Davison* (July 12, 2010), Licking App. No. 09 CA 122, slip copy, 2010 -Ohio- 3273, both of which held, *inter alia*, that loss of direct access to an abutting highway is a compensable factor and does not constitute mere circuity of travel.

CONCLUSION

In radically expanding the scope of evidence a jury may consider on the issue of damage to the residue in a partial taking eminent domain case, the Fifth District's erroneous decision is contrary to the Eminent Domain Clause of the Ohio Constitution and the Takings Clause of the U.S. Constitution. While the improvement projects in this case may have been "separate, but related, companion project[s]," the Fifth District's decision sets a dangerous precedent. *Delaware County Board of Commissioners v. Home Road Holdings, LLC*, Judgment Entry and Opinion No. 10CAE010007 (October 28, 2010), ¶4.

If permitted to stand, the Fifth District's decision will enable appropriating authorities to deprive property owners of just compensation for the partial taking of their land by introducing evidence that, at some point in the future, the damage to the residue may be mitigated by a separate improvement project. For example, the Fifth District's decision opens the door for an appropriating authority to effectively reduce or prevent a determination of damage to the residue by introducing evidence of a master thoroughfare plan setting forth a particular city's or county's intentions for highway development over a period of time which may extend many years or decades into the future. Thus, the Fifth District's decision is fundamentally incompatible with the date of take analysis this Court has repeatedly held is Constitutionally required. Even worse, the Fifth District's decision permits the introduction of evidence regarding a separate, future improvement(s) without even giving the property owner access to that evidence, thereby depriving property owners of procedural Due Process in violation of the Ohio and U.S. Constitutions. This Court's clarification of the law is necessary to prevent Ohio Courts from sliding down the slippery slope presented by the Fifth District's decision and to ensure that property owners whose land suffers damage to the residue as a result of a partial taking receive just compensation. Accordingly, the Court should accept jurisdiction over this case.

Respectfully submitted,



Stephen D. Jones (0018066)
sjones@ralaw.com
Jeremy S. Young (0082179)
jyoung@ralaw.com
Roetzel & Andress, LPA
National City Plaza
Twelfth Floor
155 East Broad Street
Columbus, OH 43215
Telephone: 614.463.9770

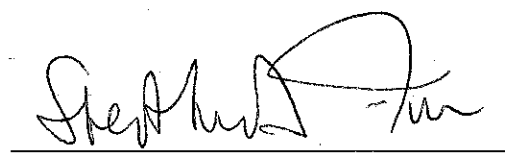
Attorneys for Defendant-Appellant, Home Road Holdings, LLC

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing was served this 13th day of December, 2010 via regular, United States mail, postage prepaid, upon the following:

Aric I. Hochstetler
Delaware County Prosecutor's Office
140 North Sandusky Street
Delaware, OH 43015

Attorney for Plaintiff-Appellee,
Delaware County Board of Commissioners



Stephen D. Jones

IN THE COURT OF APPEALS FOR DELAWARE COUNTY, OHIO
FIFTH APPELLATE DISTRICT

DELAWARE COUNTY BOARD OF COMMISSIONERS	:	30/404
Plaintiff-Appellee	:	
-vs-	:	JUDGMENT ENTRY
HOME ROAD HOLDINGS, LLC, ET AL.	:	
Defendant-Appellant	:	Case No. 10CAE010007

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Delaware County Court of Common Pleas is affirmed. Costs to Appellant.

HON. WILLIAM B. HOFFMAN

HON. W. SCOTT GWIN

HON. JOHN W. WISE

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DELAWARE COUNTY, OHIO
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COURT OF APPEALS
DELAWARE COUNTY, OHIO
FIFTH APPELLATE DISTRICT

DELAWARE COUNTY BOARD OF COMMISSIONERS

Plaintiff-Appellee

-vs-

HOME ROAD HOLDINGS, LLC, ET AL.

Defendant-Appellant

30

392

JUDGES:
Hon. W. Scott Gwin, P.J.
Hon. William B. Hoffman, J.
Hon. John W. Wise, J.

Case No. 10CAE010007

OPINION

CHARACTER OF PROCEEDING: Appeal from the Delaware County Court of Common Pleas, Case No. 08CVH030421

JUDGMENT: Affirmed

DATE OF JUDGMENT ENTRY:

APPEARANCES:

For Plaintiff-Appellee

DAVID YOST
Prosecuting Attorney

ARIC I. HOCHSTETTLER
Assistant Prosecuting Attorney
CHRISTOPHER D. BETTS
Assistant Prosecuting Attorney
140 North Sandusky Street
Third Floor
Delaware, Ohio 43015

For Defendant-Appellant

STEPHEN D. JONES
JEREMY S. YOUNG
Roetzel & Andress, LPA
National City Plaza
Twelfth Floor
155 East Broad Street
Columbus, Ohio 43215

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DELAWARE COUNTY, OHIO
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Hoffman, J.

{¶1} Defendant-appellant Home Road Holdings, LLC appeals the January 5, 2010 Judgment Entry entered by the Delaware County Court of Common Pleas, which denied Appellant's motion for judgment notwithstanding the verdict, or, alternatively, for new trial. Plaintiff-appellee is the Delaware County Board of Commissioners ("the County").

STATEMENT OF THE CASE AND FACTS

{¶2} On March 24, 2008, the County filed a Complaint in Appropriation, seeking a partial taking of land owned by Appellant, in order to construct a railroad overpass public improvement project ("the Overpass Project"). The matter proceeded to jury trial on April 2, 2009.

{¶3} The following evidence was adduced at trial. Appellant owns real property on Home Road in Liberty Township, Delaware County, Ohio. Home Road, which is a major east-west traffic artery across southern Delaware County, connects U.S. Route 23 with the southwestern portion of the county. The subject property is located on the north side of Home Road, immediately east of a CSX railroad line, and is bound on the east by Liberty Road North and a parcel, situated at the northwest corner of the intersection of Home Road and Liberty Road North, owned by another individual. Liberty Road North dead-ends into Home Road, creating a "T" intersection. Liberty Road South commences south of Home Road, less than one mile east of the "T" intersection. The subject property had, at the time of trial, two established access points to Home Road, but no established access points to Liberty Road North.

{¶4} After construction of the Overpass Project, the direct access points to Home Road will be eliminated in order to accommodate the newly constructed Home Road overpass over the CSX railroad. Appellant will still have the same two access points at the front of its property, but the access points will connect to a newly constructed cul-de-sac street, which will run parallel to existing Home Road and connect to Liberty Road North. Appellant argued, after the construction, the change in access will result in a three to five mile trip to access the subject property from Home Road. The County's witnesses testified this distance would be considerably shorter as the result of a separate, but related, companion project to the Overpass Project. The Overpass Project is only one component of the overall roadway system improvement in the area. A companion project will realign Liberty Roads North and South, eliminating the "T" intersection ("the Realignment Project"). Although the Overpass Project and the Realignment Project are separately funded and managed, the two projects are interrelated companion projects. Ryan Mraz, a design engineer for the Delaware County Engineer's Office, discussed the close connection between the two projects, explaining the end result would be a reduction in congestion. The two projects were designed in conjunction by the same consultant.

{¶5} Mark Trucco, the owner of Appellant, testified the Overpass Project would decrease the value of the subject property, explaining in the after the subject property would not have a connection to Home Road. Counsel for Appellant questioned Trucco about the Realignment Project. Trucco stated the subject property would have a more proximate access to Home Road following the completion of the Realignment Project. Trucco acknowledged the circuitry of travel involved in reaching the subject property

after the completion of the Overpass Project would be an inconvenience shared by the general public. Trucco noted Appellant had no development plans for the subject property, and had not made an application to rezone the subject property. Trucco conceded public sanitary sewer service was not available to the subject property and he did not know if it ever would be available.

{¶6} Linda Menery, EMH&T land planner and landscape architect, testified the Overpass Project would isolate the subject property to such a degree a five mile trip would be necessary to access the subject property from Home Road. Menery acknowledged the distance was circuitous and less convenient, but access was, nonetheless, maintained. Menery was unaware of any development plans or approvals in place for the subject property, noting any commercial development would require rezoning. She acknowledged the development plans introduced at trial were prepared only months before the date of trial. Menery was unaware of any actual interest in developing the subject property, and no traffic or access studies had been conducted.

{¶7} Tom Horner, a commercial real estate appraiser, testified the damage to the residue would be $1 million. Horner testified the subject property's highest and best use in the before was a commercial use. After completion of the Overpass Project, the highest and best use would be a destination use, or a secondary industrial use. On cross-examination, Horner admitted his appraisal was conducted in October, 2007, and market conditions had since deteriorated.

{¶8} Richard Vannatta, another real estate appraiser, testified similarly to Horner, stating the Overpass Project would cause substantial damage to the residue. According to Vannatta, the highest and best use of the property before the take was a

mixed use development, commercial/industrial or commercial. In the after, the subject property's best and highest use would be a less intensive residential use. Vannatta's damage figure was three times that of the damage figure provided by Horner. Vannatta recognized the current market was not favorable, but assumed conditions were good for purposes of his appraisal.

{¶9} Ryan Mraz, the Delaware County design engineer responsible for the Overpass Project, testified on behalf of the County. Mraz acknowledged the Overpass Project would have a substantial effect on the subject property, but the effect he described was physical as the Overpass Project would change the appearance and layout of the area. Mraz disclaimed having the expertise to make a determination of value. He did not state or admit to a value of the subject property in either the before or after condition.

{¶10} G. Franklin Hinkle, the County's expert appraiser, testified the change in access to the subject property did not damage the residue. In response to Appellant's hypothetical, Hinkle admitted, if the subject property's best and highest use in the before was commercial, the Overpass Project would, indeed, have an impact. In his report, Hinkle described the general area as commercial, but never described the subject property as commercial, desirable for commercial use, or amenable to commercial development in either the before or after.

{¶11} The County filed its first motion in limine on January 16, 2009, seeking to exclude the introduction of evidence of the Realignment Project due to its speculative status. Prior to trial, after learning the Realignment Project was proceeding, the County withdrew its first motion in limine. The County filed a second motion in limine on March

16, 2009, seeking to exclude evidence of damages on the grounds of changes in access, redirection of traffic, circuity of travel, and change in grade. The trial court overruled the County's motion, finding it was impossible to separate the factors the County sought to exclude, with the exception of the loss of traffic flow or volume, from the jury's consideration of value.

{¶12} After hearing all the evidence and deliberating, the jury rendered a verdict in favor of Appellant. The jury awarded $91,875 as compensation for the property taken; $775 as compensation for the temporary easement taken; and $0 as compensation for damage to the residue. The trail court entered final judgment on the verdict on April 23, 2009. On May 6, 2009, Appellant filed a motion JNOV, or alternatively, for a new trial. Via Judgment Entry filed January 5, 2010, the trial court denied Appellant's motion.

{¶13} It is from this judgment entry, Appellant appeals, raising the following assignments of error:

{¶14} "I. THE FINAL JUDGMENT OF THE TRIAL COURT MUST BE REVERSED BECAUSE THE TRIAL COURT ABUSED ITS DISCRETION AND COMMITTED PLAIN ERROR BY ADMITTING EVIDENCE OF THE UNRELATED PROPOSED LIBERTY ROAD REALIGNMENT PROJECT.

{¶15} "II. THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING DEFENDANT-APPELLANT'S MOTION FOR NEW TRIAL.

{¶16} "III. THE TRIAL COURT ERRED IN DENYING HRH'S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT."

I

{¶17} In its first assignment of error, Appellant submits the trial court erred and abused its discretion in admitting evidence of the unrelated proposed Realignment Project. Appellant asserts: 1) the jury was improperly permitted to consider evidence of the after condition which did not exist at the time of the take; 2) Appellant was deprived of its right to substantive and procedural due process; and 3) the County was improperly permitted to benefit from evidence of the consequential effects of the Realignment Project, which did not constitute a taking.

{¶18} During its case-in-chief, counsel for Appellant asked Mark Trucco the first question about the Realignment Project. Counsel for the County properly asked follow-up questions to Trucco during cross-examination. Under the invited error doctrine, "a party will not be permitted to take advantage of an error which he himself invited or induced." *State v. Bey* (1999), 85 Ohio St.3d 487, 493, 709 N.E.2d 484 (Citation omitted).

{¶19} Assuming, arguendo, such was not invited error, Appellant did not object; therefore, has waived all but plain error in the trial court's admission of such evidence. In civil cases, plain error must be used with utmost caution and applied only "to those extremely rare cases where exceptional circumstances require its application to prevent a manifest miscarriage of justice, and where the error complained of, if left uncorrected, would have a material adverse affect on the character of, and public confidence in, judicial proceedings." *Goldfuss v. Davidson* (1997), 79 Ohio St.3d 116, 121, 679 N.E.2d 1099, 1997-Ohio-401.

{¶20} We find the alleged error in the trial court's admission of evidence of the Realignment Project did not rise to plain error under the circumstances in this case. County submits the realignment project is not an unrelated improvement, and the realignment project has a direct impact on access to and the value of the subject property in the after condition. Upon review of the entire record in this matter, including the transcript of the trial, we find the admission of evidence of the Realignment Project did not seriously affect the basic fairness, integrity, or public reputation of the judicial process. We do not believe a manifest miscarriage of justice resulted from the admission of said evidence.

{¶21} Appellant's first assignment of error is overruled.

II, III

{¶22} Because Appellant's second and third assignments of error require similar analysis, we shall address said assignments together. In the second assignment of error, Appellant maintains the trial court abused its discretion in denying its motion for new trial. In the final assignment of error, Appellant argues the trial court erred in denying its Motion JNOV.

{¶23} Civ. R. 59, which governs motions for new trial, states, in pertinent part:

{¶24} "A new trial may be granted to all or any of the parties and on all or part of the issues upon any of the following grounds:

{¶25} "* * *

{¶26} "(6) The judgment is not sustained by the weight of the evidence; however, only one new trial may be granted on the weight of the evidence in the same case;

{¶27} "(7) The judgment is contrary to law;"

{¶28} In *Helfrich v. Mellon,* Licking App. No. 06CA69, 2007-Ohio-3358, this Court found when a party files a motion for a new trial because the judgment is not sustained by the sufficiency of the evidence, the trial court must review the evidence presented at trial and weigh the sufficiency of the evidence and the credibility of the witnesses. *Helfrich* at paragraph 86, citing *Rohde v. Farmer* (1970), 23 Ohio St.2d 82, 262 N.E.2d 685. In reviewing a trial court's decision regarding a motion for new trial, we apply the abuse of discretion standard. *Sharp v. Norfolk & Western Railway Company,* 72 Ohio St.3d 307, 1995-Ohio-224, 649 N.E .2d 1219. This Court may not disturb a trial court's decision unless we find the decision was unreasonable, unconscionable, or arbitrary. Id. (Citation omitted).

{¶29} Civ. R. 50(B) governs motions for judgment notwithstanding the verdict, and provides:

{¶30} "Whether or not a motion to direct a verdict has been made or overruled and not later than fourteen days after entry of judgment, a party may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion; or if a verdict was not returned such party, within fourteen days after the jury has been discharged, may move for judgment in accordance with his motion. A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative. If a verdict was returned, the court may allow the judgment to stand or may reopen the judgment. If the judgment is reopened, the court shall either order a new trial or direct the entry of judgment, but no judgment shall be rendered by the court on the ground that the verdict is against the weight of the evidence. If no

verdict was returned the court may direct the entry of judgment or may order a new trial."

{¶31} When ruling on a motion for judgment notwithstanding the verdict, a trial court applies the same test as in reviewing a motion for a directed verdict. *Ronske v. Heil Co.*, Stark App. No.2006-CA-00168, 2007-Ohio-5417. See also, *Pariseau v. Wedge Products, Inc.* (1988), 36 Ohio St.3d 124, 127, 522 N.E.2d 511. "A motion for judgment notwithstanding the verdict is used to determine only one issue i.e., whether the evidence is totally insufficient to support the verdict." *Krauss v. Streamo,* Stark App. No.2001 CA00341, 2002-Ohio-4715, paragraph 14. See, also, *McLeod v. Mt. Sinai Medical Center* (2006), 166 Ohio App.3d 647, 853 N.E.2d 1235, reversed on other grounds, 116 Ohio St.3d 139, 876 N.E.2d 1201. Neither the weight of the evidence nor the credibility of the witnesses is a proper consideration for the court. *Posin v. A.B.C. Motor Court Hotel, Inc.* (1976), 45 Ohio St.2d 271, 275, 344 N.E.2d 334. See, also, Civ.R. 50(B); and *Osler v. Lorain* (1986), 28 Ohio St.3d 345, 347, 504 N.E.2d 19. In other words, if there is evidence to support the nonmoving party's side so that reasonable minds could reach different conclusions, the court may not usurp the jury's function and the motion must be denied. *Osler*, supra.

{¶32} Appellate review of a ruling on a motion for judgment notwithstanding the verdict is de novo. *Midwest Energy Consultants, L.L.C. v. Utility Pipeline, Ltd.*, Stark App. No.2006CA00048, 2006-Ohio-6232; *Ronske v. Heil,* supra.

{¶33} Appellant contends the arguments which support its position the trial court's final judgment should be reversed also support its position the trial court erred in denying its motion for new trial and motion for judgment notwithstanding the verdict.

Having found no merit in Appellant's first assignment of error, we likewise find no merit in its final two assignments of error.

{¶34} Appellant places much emphasis on the fact the Overpass Project will result in a three to five mile diversion to access Home Road. This Court has repeatedly found "[a] diversion of traffic resulting from an improvement in the highway, or the construction of an alternate highway, is not an impairment of a property right for which damages may be awarded; mere circuity of travel does not of itself result in impairment of the right of ingress and egress to and from a property, where the interference is an inconvenience shared in common with the general public." *Proctor v. Davison*, Licking App. No. 09CA122, 2010-Ohio-3273; *Proctor v. Hankinson*, Licking App. No. 08CA0115, 2009-Ohio-4248, both citing *State ex rel. Merritt v. Linzell* (1955), 163 Ohio St. 97, 126 N.E.2d 53.

{¶35} Based upon the foregoing, we find the trial court did not abuse its discretion in denying Appellant's motion for new trial. We further find there was sufficient evidence to support the trial court's denial of Appellant's motion JNOV.

{¶36} Appellant's second and third assignments of error are overruled.

By: Hoffman, J.

Gwin, P.J. and

Wise, J. concur

HON. WILLIAM B. HOFFMAN

HON. W. SCOTT GWIN

HON. JOHN W. WISE