

**EXPLANATION OF WHY THIS CASE DOES NOT
INVOLVE A SUBSTANTIAL CONSTITUTIONAL QUESTION AND IS
NOT A CASE OF PUBLIC OR GREAT GENERAL INTEREST**

The Court should decline jurisdiction over this claimed appeal as of right because it does not involve substantial constitutional questions and is not a case of public or great general interest. The Fifth Appellate District appropriately affirmed the trial court's judgments by holding that the Appellant had invited the error of which it appeals, that Appellant had waived all but plain error, and that the claimed error did not constitute plain error.

First, the Appellant claims that the Fifth District's decision conflicts with the Eminent Domain Clause of the Ohio Constitution and the Takings Clause of the U.S. Constitution by permitting the introduction of evidence of a separate, but related, public improvement project, allegedly depriving the property owner of just compensation. In this case, the project requiring the appropriation of property was what the Appellant has termed the "Overpass Project." The "Realignment Project" was a separate, but related, road improvement project that was designed in conjunction with and scheduled to coincide with the "Overpass Project." Appellant correctly states the pertinent Ohio law that valuation is to be determined as of the date of take. Appellant also argues that Ohio law limits the jury's determination to conditions that exist as of the date of the take. On this point, the Appellant is misconstruing Ohio law by attempting to define this rule in terms of physical existence and, thus, create a constitutional quandary that simply does not exist.

Ohio law requires a jury to "consider every element that can fairly enter into the question of value and that an ordinarily prudent businessperson would consider before purchasing the property." *Proctor v. Hankinson*, 2009-Ohio-4248, ¶39; see *Masheter v. Hoffman* (1973), 34 Ohio St.2d 213, 221; see also *Hilliard v. First Indus., L.P.*, 2005-Ohio-6469, 165 Ohio App.3d

335, ¶10; *Hurst v. Starr* (1992), 79 Ohio App.3d 757, 763. At trial in this very case, the Appellant introduced evidence regarding multiple conditions that were not in actual existence as of the date of take: (1) the probability of future rezoning; (2) the probability of future sanitary sewer availability; and (3) the probability of development in improved real estate market conditions. These are all elements that can fairly enter into the question of value and that an ordinarily prudent businessperson would consider before purchasing the property, yet none of the conditions actually exist as of the date of the take, other than as factors for determining market value. According to testimony at trial, the Realignment Project had been designed, all necessary property had been acquired, and the early phases of construction preparation had commenced. Based on this evidence, the Realignment Project constitutes a condition that existed on the date of take, inasmuch as it has a direct impact on the access to and the value of the subject property. For this reason, the admission of evidence of the Realignment Project fails to raise a substantial constitutional question or a matter of public or great general interest.

Second, the Appellant argues that its due process rights had been violated by the Appellee's failure to make plans for the Realignment Project available to the Appellant or to put the Appellant on notice of Appellee's intention to rely on such evidence. Appellant's argument in this respect is curious, at best, because the Fifth District's holding of invited error is based on a clear record that Appellant did have access to the plans for the Realignment Project and obviously intended the Realignment Project to be an issue at trial. Appellant's trial counsel asked the first question about the Realignment Project and offered an exhibit depicting the Realignment Project that had been prepared for trial and brought to the courtroom on the day of trial. Another of Appellant's witnesses, a landscape architect and land planner, testified that she had utilized the plans in preparing her exhibits, which included the exhibit depicting the Realignment Project.

Furthermore, the Appellant's trial counsel did not take any depositions in advance of trial and performed no other discovery whatsoever. The introduction of evidence of the Realignment Project was not an "ambush." Rather, the record shows that it was an aspect of the trial that Appellant had clearly prepared for, despite little or no discovery. As the Fifth District correctly held, any error with regard to the introduction of this evidence was invited error, certainly not a violation of due process rights that would raise a substantial constitutional question for this Court's consideration.

Third, the Appellant argues that the Fifth District's decision was erroneous in stating that the Appellant's claimed "three-to-five-mile trip" constitutes mere circuitry of travel for which damages cannot be awarded. In support of this argument, Appellant cites this Court's opinion in *State ex rel. OTR v. Columbus* (1996), 76 Ohio St.3d 203, and argues that the Fifth District has somehow broken new ground in the area of a property owner's right to access and the effects of circuitous access. In the *OTR* opinion, this Court already provided a clear test for distinguishing between a substantial and unreasonable interference with access and mere circuitry of access. Disruption or destruction of access that causes circuitry of travel within one's own property is compensable; circuitry of travel to and from abutting properties is not compensable. *Id.* at 210. In this case, the circuitry of travel is to and from the subject property and abutting properties and roadways and an inconvenience shared in common with the general public. For this reason, the Fifth District correctly applied the law in accordance with this Court's opinions. No further clarification is necessary. Accordingly, this case again fails to involve a substantial constitutional question or constitute a case of public or great general interest.

For the foregoing reasons, this Court should decline jurisdiction over this case.

ARGUMENT

- I. **First Proposition of Law: An appropriating authority may introduce evidence at trial regarding a separate, but related, public improvement project if it constitutes an element that can fairly enter into the question of value and that an ordinarily prudent businessperson would consider before purchasing the property.**

As Appellant appropriately states in its memorandum, “[i]t 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.” *Director of Highways v. Olich* (1966), 5 Ohio St.2d 70, 72. Using this “date of take,” a jury is in the unenviable position of considering a number of elements that may or may not effect the value of the subject property, some of which may not yet exist in any form other than two-dimensional construction plans. Ohio courts have consistently reinforced the proper considerations for a jury sitting in an appropriation action: “In determining both pre- and post-appropriation values, a jury must consider every element that can fairly enter into the question of value and that an ordinarily prudent businessperson would consider before purchasing the property.” *Hankinson*, 2009-Ohio-4248, ¶39; *see Hoffman*, 34 Ohio St.2d at 221; *see also Hilliard v. First Indus., L.P.*, 2005-Ohio-6469 at ¶10; *Hurst*, 79 Ohio App.3d at 763. Contrary to Appellant’s arguments, in certain appropriation actions, this necessarily includes conditions that do not physically exist on the date of the take.

It is undisputed that the subject property was not accessible via the realigned Liberty Road on April 2, 2009. Appellant fails to state, however, that the subject property was not damaged at all on April 2, 2009, because the Overpass Project had not even commenced. Essentially, Appellant would have the jury consider one future project—the Overpass Project—and be barred from hearing any evidence whatsoever regarding an intimately related simultaneous project—the Realignment Project. An appropriation for the purpose of a future

improvement requires the parties to present evidence regarding what the after situation will be, not just what physically exists on the date of the take. Although the Realignment Project may not be completed on the date of take, the project nonetheless is a present condition that may have an impact on the value of the subject property. A jury must consider all elements bearing on market value, whether the determination is for the pre- or post-appropriation value. See *Hankinson*, 2009-Ohio-4248, ¶39. Evidence regarding the Realignment Project is indistinguishable from evidence regarding other future projects, such as rezoning, sanitary sewer construction, or future development plans. Therefore, such evidence is necessary for the jury's proper determination of value. The nature of appropriation cases requires that the jury consider evidence regarding market value on an artificial and hypothetical basis. It is within the sound discretion of the jury as finder of fact to weigh the evidence presented.

Appellant will certainly agree that changes in access to the subject property are a very important element affecting the value of the subject property. "One of the elemental rights growing out of the ownership of a parcel of real property is the right to access abutting public roadways." *OTR*, 76 Ohio St.3d at 207. This right of access "may not be taken away or destroyed or substantially impaired without compensation therefor." *Id.* Accordingly, the jury must consider the change in access to the subject property in order to determine proper compensation and damages. Appellant opposes evidence of the Realignment Project because, without it, the jury is left only with evidence of the three-to-five-mile trip to access the subject property. Testimony at trial established the following: (1) the Realignment Project and Overpass Project were designed in conjunction to work in conjunction; (2) the Realignment Project is not speculative; (3) absent the Realignment Project, the Overpass Project would require redesign to maintain existing access to Liberty Road North; and (4) the subject property is not damaged as a

result of the changes in access. Only through evidence of the Realignment Project could the jury get an accurate depiction of access to the subject property in the after condition and, as a result, an accurate value of the subject property in the after condition. Appellant cites to no case that specifically prohibits evidence of companion projects. The Realignment Project has a bearing on the value of the subject property post-appropriation, and an ordinarily prudent businessperson would take the Realignment Project into account in purchasing the property. Accordingly, the County asserts that the Realignment Project is a necessary element for the jury's consideration.

Despite Appellant's arguments to the contrary, this Court's holding in *Smith v. Erie R. Co.* (1938), 134 Ohio St. 135, and *Bekos v. Masheter* (1968), 15 Ohio St.2d 15, are not applicable to this case. The Appellee is not attempting to benefit from the indirect impact of the Realignment Project. Evidence of the Realignment Project is a necessary element for demonstrating the direct impact on access to and, therefore, the value of the subject property, such evidence being further necessary to rebut the Appellant's theory of a "three-to-five-mile trip" to access the subject property. Notably, the Appellee's expert never mentioned the Realignment Project in his appraisal report or direct examination at trial, yet the expert testified that the Overpass Project *alone* resulted in no damage to the residual property.

In its First Proposition of Law, the Appellant also fails to address the central elements of the Fifth District's opinion: invited error and plain error. As stated above, the Appellant's trial counsel asked the first question regarding the Realignment Project and freely offered an exhibit—prepared by one of Appellant's experts and brought into the courtroom on the day of trial by the Appellant—depicting the Realignment Project. The record clearly supports the Fifth District's holding of invited error. The Appellant also failed to object, at any time before or during trial, to introduction of evidence of the Realignment Project, waiving all but plain error.

Admission of the evidence does not constitute plain error. As this Court stated in *Goldfuss v. Davisson* (1997), 79 Ohio St.3d 116, 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.” *Id.* at 121. The errors of which Appellant claims do not rise to the level of plain error and do not involve substantial constitutional questions. Rather, the errors were trial practice and discovery errors or omissions, for which the Appellant has an adequate remedy via its malpractice complaint against trial counsel.

Based on the foregoing, this case does not involve a substantial constitutional question and is not a case of public or great general interest. Accordingly, this Court should decline jurisdiction.

II. Second Proposition of Law: Admission of evidence of the Realignment Project did not violate Appellant’s constitutional due process rights.

Appellee concurs with Appellant’s Second Proposition of Law as a correct statement of applicable law, but the facts of this case do not comport with the proposition. Appellant was not deprived of substantive and procedural due process of law by the trial court’s admission of evidence of the Realignment Project. With respect to procedural due process, the County complied with all statutory and constitutional requirements in the exercise of its appropriation authority. With respect to Appellant’s claim of a violation of substantive due process, the actions of the County during the proceedings and the trial court’s admission of evidence of the Realignment Project were not arbitrary, unreasonable, or wrongful. Both parties were aware of the Realignment Project and its status as a separate but related companion project to the Overpass Project. As the record indicates, the County did not treat the two projects as one

project, but the County did elicit testimony to explain the access to and value of the subject property in the after condition.

Section 163.05 sets forth the requirement for providing plans and specifications in partial takings appropriation actions. Contrary to the Appellant's argument, the County complied with this requirement with respect to both the Overpass Project *and* the Realignment Project. Plans and specifications of both projects were filed in the office of the Delaware County Engineer. Furthermore, the plans for both projects were made available to Appellant. As evidence of this fact, Appellant's own witness testified at trial that she created her exhibits by utilizing the plans for the improvements. One of these exhibits depicted the Realignment Project as portrayed in the plans. Appellant's owner—the owner of a firm that performs, among other projects, highway construction—displayed knowledge of the Realignment Project in describing it during cross-examination. The County asserts, however, that R.C. 163.05 in no way requires provision of the plans for the Realignment Project because it does not “require[] the appropriation.” The fact that the County *did* comply with the statute with regard to the Realignment Project only serves as additional evidence to refute Appellant's argument.

Section 163.05 also sets forth the requirements for a “petition for appropriation” (i.e., the “Complaint”). The County's Complaint in this case meets the requirements of R.C. 163.05(A)–(G). There is no dispute that the Realignment Project does not require the appropriation of any of Appellant's property. A plain reading of the statute indicates that the Complaint does not even require a description of the project that *does require* appropriation of the subject property. Therefore, the description in the Complaint of the Overpass Project goes beyond the minimum requirements for a valid petition for appropriation. Moreover, since the Complaint is intended to place the property owner on notice of the extent of the appropriation, a description of the

Realignment Project would have been inappropriate for the Complaint. The aforementioned requirement for making plans and specifications available is intended to inform and educate the property owner regarding the improvement's scope and effect on the subject property. As stated above, the County complied with that requirement for the Overpass Project *and*—even though it was not required—the Realignment Project. Therefore, Appellant's argument is without merit.

Regardless of whether the County provided any specific notice of the Realignment Project, it is obvious from the record that Appellant had actual notice of the Realignment Project. From the date the Complaint was filed in March 2008, Appellant conducted no discovery in this case. Still, Appellant produced one witness who testified that he was aware of the Realignment Project and could easily describe it. Then, Appellant produced an exhibit for trial that depicted the Realignment Project. Most importantly, Appellant did not object to admission of the evidence and actually facilitated its introduction. Because the County complied with its statutory requirements, the trial court did not commit error in admitting evidence of the Realignment Project.

In its brief, Appellant also argues that admission of evidence of the Realignment Project was a violation of its substantive due process rights because admission was arbitrary, unreasonable, and wrongful. Appellant's claim is without merit. Partial takings cases necessarily require competing testimony on the issue of damages to the residue of the subject property. As stated previously, the jury must consider any element that can fairly enter into the question of value and that an ordinarily prudent businessperson would consider in purchasing the property. This is the logical backstop that the Appellant argues is lacking. The trial court's jury instructions specify certain elements that are compensable and certain elements that are not compensable. Change of access, if substantially impaired, is compensable. In this case, the

Realignment Project elucidates the issue of access by providing the jury with an accurate description of how the subject property will have access to Home Road after the Overpass Project is completed. Testimony at trial established that the Realignment Project would be completed before or at the same time as the Overpass Project. The jury was free to accept or reject the testimony in this regard, but to deny their ability to even hear it is the only way that a “non-existent condition” would have been presented to the jury.

Appellant’s claim of prejudice is also without merit. By asking the first questions related to the Realignment Project, it is clear that Appellant chose to attack the County’s case by attempting to prove the Realignment Project was speculative, rather than by attempting to exclude the evidence. If Appellant and its trial counsel were truly “ambushed” by the Realignment Project, there is no reason for the Appellant to even have the exhibit depicting it. The proper tactic would have been to object to the introduction of the evidence and, if overruled, appeal on that basis. As the record indicates, however, Appellant was a willing participant in the discussion, as Appellant’s case was based around proving that it would suffer a three-to-five-mile trip to access its property from Home Road. Evidence of the Realignment Project was necessary to refute Appellant’s case, which would have been misleading to the jury. Any error in the introduction of evidence of the Realignment Project was invited error.

Based on the foregoing, Appellant was not deprived of its substantive and procedural due process rights. The County complied with all statutory and constitutional requirements in exercise of its appropriation authority. Neither the County nor the trial court acted arbitrarily, unreasonably, or wrongfully in its treatment of evidence of the Realignment Project. Therefore, the Fifth District was correct to affirm the trial court’s judgments. Accordingly, this Court should decline jurisdiction over this case.

III. Third Proposition of Law: The Fifth District's opinion, with respect to circuitry of travel, is consistent with this Court's decision in *State ex rel. OTR v. Columbus*.

Appellant argues that the Fifth District erroneously applied *State ex rel. Merritt v. Linzell* (1955), 163 Ohio St. 97, to hold that the supposed "three-to-five-mile trip" Appellant alleges would be necessary to reach the subject property is not compensable because it constitutes mere circuitry of travel shared in common with the general public. Appellant further argues that the Fifth District's decision failed to follow this Court's holding in *State ex rel. OTR v. Columbus* (1996), 76 Ohio St.3d 203. Appellant's argument is without merit because the Fifth District's decision is consistent with *OTR* and the case *OTR* distinguished in arriving at its rule regarding circuitry of travel.

As Appellant states, the *OTR* case involved the construction of a highway overpass that resulted in the erection of a concrete retaining wall, reaching a height of thirty feet, between the subject properties and the newly elevated roadway. At that point, however, the similarities cease, and this case is clearly distinguishable, having more facts in common with the case that *OTR* distinguished: *State ex rel. Noga v. Masheter* (1975), 42 Ohio St.2d 471.

In *Noga*, the property at issue abutted U.S. Route 422 in Trumbull County. The property owners had direct access from their property to the westbound lanes of Route 422, but did not have direct access to the eastbound lanes because a divider separated the lanes of travel. In 1968, the state improved Route 422. As part of the improvement, the state widened the highway, constructed a curb barricade along the edge of the roadway fronting the property, and also constructed a service road providing the property owners with access to Route 422 at a distance of approximately five hundred feet from the property.

OTR, 76 Ohio St.3d at 210. In *Noga*, this Court held that "mere circuitry of travel, necessarily and newly created, to and from real property, does not of itself result in legal impairment of the right of ingress and egress." *Noga*, 42 Ohio St.2d at 473. In distinguishing *Noga*, this Court in *OTR* noted the unique features of the improvement in *Noga*: access to the property along the same

frontage that had abutted Route 422 via the newly constructed service road. *OTR*, 76 Ohio St.3d at 210. In *OTR*, “the improvement did not include any new access routes, forever denying access along the frontage of the property and resulting in continued circuitry of travel within appellants’ properties, and not circuitry of travel *to and from* the abutting properties.” *Id.*

This case more closely resembles *Noga* than *OTR*, and the Fifth District’s opinion reflects that fact. In this case, the County is constructing an access road along the subject property’s frontage, allowing for the maintenance of the existing access drives to the subject property. The resultant circuitry of travel is only to and from the abutting properties, not within the Appellant’s property. Contrary to Appellant’s assertion, this circuitous route is shared in common with at least two other property owners and the general public accessing the properties along this stretch of Home Road. The access is circuitous and less convenient, compared with the before condition, but the jury, which was instructed regarding the rule in *OTR*, determined that there was no substantial or unreasonable interference with Appellant’s right to access. The Fifth District’s opinion is, therefore, consistent with this Court’s opinions regarding circuitry of travel and not, as Appellant suggests, the result of the Fifth District’s “confusion regarding the proper standard.”

Based on the foregoing, this case does not involve a substantial constitutional question and is not a case of public or great general interest. Accordingly, this Court should decline jurisdiction over this case.

CONCLUSION

Contrary to Appellant’s arguments, the Fifth District has not radically expanded the scope of evidence a jury may consider on the issue of damages in a partial taking eminent domain case. Evidence of the Realignment Project was an element that could fairly enter into the question of value and which an ordinarily prudent businessperson would consider before

purchasing the property, well within the scope of permissible evidence in eminent domain cases. This evidence was directly and intimately linked to the Overpass Project and the subject property, not evidence of the general type Appellant cautions the Court against (e.g., a master thoroughfare plan). The record also clearly demonstrates that Appellant had actual notice of the Realignment Project and facilitated, rather than opposed, its introduction at trial. Therefore, Appellant's arguments regarding its due process rights simply do not ring true. Appellant's request for clarification regarding this Court's opinion in *OTR* is also without merit. The Fifth District's opinion was consistent with this Court's opinions in *OTR* and *Noga*, and nothing in the Fifth District's opinion requires any correction or clarification with respect to circuitry of travel. This Court should take into consideration its general rule in appropriation cases that "each case must be considered in the light of its own facts." *Hoffman*, 34 Ohio St. 2d at 221. This case is consistent with existing law, does not break new ground, and is not the beginning of a "slippery slope" eroding the right of just compensation.

This Court should not lose sight of the Fifth District's specific holdings: (1) Appellant had invited the error of which it appeals; (2) Appellant had waived all but plain error; and (3) the claimed error did not constitute plain error. This case is more about the Appellant's failed trial tactics and failure to perform discovery than about any constitutional concerns. Appellant's trial counsel asked the first questions regarding the Realignment Project, Appellant's witness displayed an intimate knowledge of the project, Appellant's expert witness prepared an exhibit depicting the Realignment Project, and Appellant facilitated discussion of the Realignment Project, never objecting during trial. Any error in the proceedings is the result of invited error. With respect to plain error, the admission of evidence of the Realignment Project does not constitute plain error. The Appellant chooses its own counsel and is the master of its own trial

strategy. The admission of the disputed evidence was constitutional, within the accepted bounds of applicable law, and consistent with due process safeguards. The County is not responsible for any perceived failure on the part of Appellant's trial counsel to prepare for or prosecute its case, and Appellant has an adequate remedy via its malpractice complaint against trial counsel.

Based on the foregoing, this case would be inappropriate for this Court's review, since it does not involve a substantial constitutional question and it is not a case of public or great general interest. Accordingly, this Court should decline jurisdiction over this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true and accurate copy of the foregoing document was served this 12th day of January, 2011, via regular U.S. Mail, postage prepaid, upon the following:

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