

IN THE SUPREME COURT OF OHIO

The Moundbuilders Country Club Company,	:	Case No. 2020-0191
	:	
Appellant,	:	Slip Opinion No. 2022-Ohio-4345
	:	
State ex rel. Ohio History Connection,	:	
	:	
Appellee.	:	

MOTION FOR RECONSIDERATION OF DEFENDANT-APPELLANT,
THE MOUNDBUILDERS COUNTRY CLUB COMPANY

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THE MOUNDBUILDERS COUNTRY CLUB COMPANY

Now comes Appellant The Moundbuilders Country Club Company (“Appellant MCC”), by and through the undersigned counsel, and respectfully moves this Honorable Court, pursuant to Supreme Court Practice Rule 18.02, for reconsideration of the decision dated December 7, 2022 that denied Appellant MCC’s appeal and remanded the case to the trial court for further proceedings. In summary, as explained more fully below, the grounds for the reconsideration are that the trial court in reaching its decision on necessity relied on evidence which time has proven to be inaccurate. At the necessity hearing and in Appellee’s resolution on which its rebuttable presumption of necessity was based, Appellee stated that it was necessary to take Appellant MCC’s leasehold interest by eminent domain because Appellee could not, and would not, apply for World Heritage status if a golf course existed on the site. Both of these contentions have turned out to be without substance. Contrary to its testimony presented at the necessity hearing, Appellee submitted in December of 2021 its World Heritage application dossier to the U.S. Department of Interior. Then in March of 2022, the U.S. Department of Interior submitted to UNESCO the nomination of the site for World Heritage status. This was done even though a representative of the U.S.

Department of Interior testified at the necessity hearing that the nomination would never be submitted as long as the golf course remained on the site. These significant changes of circumstances require a reconsideration by this Court.

Reconsideration before this Court is appropriate if it is confined to the grounds urged for reconsideration, is not a re-argument of the case, and is filed with respect to one of the criteria listed in Supreme Court Practice Rule 18.02(B). Inasmuch as this motion is filed with respect to the decision on the merits in this case, the motion falls within the confines of Supreme Court Practice Rule 18.02(B)(4). The Court may invoke its reconsideration procedures in order to “correct decisions which, upon reflection, are deemed to have been made in error.” *Buckeye Community Hope Found v. Cuyahoga Falls*, 82 Ohio St3d 539, 541 (1998), quoting *State ex rel. Huebner v. Jefferson Village Council*, 75 Ohio St.3d 381, 383 (1995). *See also*, *State ex rel. Mirlisena v. Hamilton Cty. Bd. of Elections*, 67 Ohio St.3d 597 (1993) (reasoning contained in a previous dissenting opinion adopted by a majority of this court pursuant to a motion for reconsideration); *State ex rel. Eaton Corp. v. Lancaster*, 44 Ohio St.3d 106 (1989) (views contained in a previous concurring opinion adopted by a majority of this court pursuant to a motion for “rehearing”). Reconsideration is particularly appropriate where an issue was not fully considered or when this Court fails to cite authority for abandoning prior precedent. *Oberline Manor, Ltd. v. Lorain Cty. Board of Revisions*, 69 Ohio St. 3d 1, 203 (1994), citing *Matthews v. Matthews*, 5 Ohio App. 3d 140 (1981).

Reconsideration is proper in this case for two reasons. First, the Appellee’s pursuit and attainment of the World Heritage nomination application wholly undercuts its contention that acquiring Appellee’s leasehold interest was necessary to obtain its stated goal of achieving that

status for the site. Second, even though the nomination has been made, as recognized by the dissent in this case, the attainment of World Heritage status is still entirely speculative at this point.

With regard to the first reason, the record in this case is replete with evidence submitted by Appellee that it was necessary to take Appellant MCC's leasehold interest because Appellee could not, or would not, submit its application for World Heritage status if a golf course remained on the property. The Appellee's executive director and CEO Burt Logan testified that if the golf course remained on the property and Appellee did not acquire Appellant MCC's leasehold rights to the property, that he would not even authorize that a request be sent to the Department of the Interior requesting the Department nominate the site for World Heritage status. (Necessity Hearing Trans. ("TR."), p. 477-78) He stressed to the trial court that Appellee would not be authorized to do so under the Code of Federal Regulations and that is why the taking was necessary (*Id.*)

Appellee tried to further bolster its necessity argument through the testimony of Steven Morris, the Chief of the Office of Internal Affairs for the National Park Service. Mr. Morris testified that an application would not be submitted to UNESCO without Appellee first acquiring rights to the property with a plan to remove the golf course. (TR., pgs. 364-65, 381, Pl. Ex. 28). In fact, Appellee has strenuously maintained that position throughout this lawsuit, as it stated in its brief filed in this Court that "[a]s long as the golf course remains on the site, nomination of the Octagon Earthworks—and the other earth-works that make up the Hopewell Ceremonial Earthworks complex—is simply not possible. Tr.364–64; U.S. Dept. of the Interior Letter, Hearing Ex.28." (Appellee Br., p. 37).

There is no question that this argument was heavily relied upon by the trial court in reaching its decision on the necessity of the taking, and accepted as true by this Court in affirming on appeal. The trial court stated in its decision that "the Department indicated that it

would only forward the nomination of the Hopewell Ceremonial Earthworks if the golf course operated by the MBCC were removed from the site.” Trial Court Decision, Appendix A-22. In reviewing the facts of this case, this Court found that “[i]n order to qualify for the nomination and assistance by the United States National Park Service and Department of the Interior, the History Connection was informed that it would need to terminate the country club’s lease and physically remove the golf course.” *State ex rel. Ohio History Connection v. Moundbuilders Country Club Co.*, Slip Opinion No. 2022-Ohio-4345, ¶8.

Time has proven that neither of the Appellee’s stated bases for necessity - (1) that it would not submit the application to the Department of Interior if the golf course remained on the property, and (2) that if the golf course was not removed the Department of Interior would not move forward on the World Heritage nomination – were true. Appellee submitted on December 31, 2021, its final World Heritage nomination dossier of materials to the National Park Service Office of International Affairs requesting that the Hopewell Ceremonial Earthworks (which includes Appellant MCC’s site) be nominated for World Heritage status. See Jennifer Aultman¹, *Aultman: A World Heritage fledgling at the Newark Earthworks*, Newark Advocate (April 24, 2022), <https://perma.cc/9QGL-A7CA>. Apparently, it was not necessary that the golf course be removed from Appellant MCC’s site for this to happen as previously asserted by Appellee.

Neither did the presence of the golf course on the property pose an obstacle to the U.S. Department of the Interior’s nomination of the Hopewell Ceremonial Earthworks for World heritage status, despite Mr. Morris’s testimony to the contrary. On March 24, 2022, the U.S. Department of the Interior announced it had submitted the Hopewell Ceremonial Earthworks

¹ Jennifer Aultman is Appellee’s Director of Historic Sites and Museums, and testified at the necessity hearing. (TR. pp. 270-325)

nomination to the United Nations Educational, Scientific and Cultural Organization's World Heritage Committee. See Kent Mallett, *US submits Ohio's Hopewell Earthworks nomination to UNESCO for World Heritage List*, Newark Advocate (March 24, 2022), <https://perma.cc/8D7Z-S2FM>. Mr. Logan said in an interview that the eminent domain case and the World Heritage nomination are **not** connected and that the U.S. Department of the Interior was aware of the lease issue. (*Id.*) Mr. Logan said that even a ruling against Appellee in this pending appeal would not hurt the nominations chances. (*Id.*) Mr. Logan said “the more we were involved in the process, the more we learned,” going on to indicate that the nomination is judged on the significance of the site itself, not the current use of the site. (*Id.*) This position supports the premature nature of Appellee’s eminent domain action and wholly undermines the factual basis for the necessity of the taking.

More importantly, the filing of this nomination for World Heritage status emasculates the rebuttable presumption of necessity the Appellee enjoyed by virtue of its passing of a resolution of necessity for the taking. Prior to filing the eminent domain action, Appellee passed a resolution indicating that the property was to be acquired in order to open the property to the public with the intention of seeking World Heritage designation. Complaint, Ex. L. Resolution Article 7(d)(v) specifically states that that Appellee sought to nominate the Hopewell Ceremonial Earthworks to the World Heritage List, but that the Department of the Interior **will not** forward the Hopewell Ceremonial Earthworks to be considered unless the lease is terminated. (*Id.*) (emphasis added). The trial court relied upon this basis by writing that it “was **necessary** to acquire the County Club’s lease to nominate the Hopewell Ceremonial Earthworks to the World Heritage List.” (emphasis added) Trial Court Decision, Appendix A-23. We now know that this is untrue.

By passing this resolution, the trial court found that there was a rebuttable presumption that the taking was necessary, and that Appellant MCC had to rebut that presumption under R.C.

Section 163.09(B). Trial Court Decision, Appendix A-24. Given that the underlying basis for passing the resolution was false, the question must be examined as to whether Appellee's should have been given a rebuttable presumption of necessity in the first place. Further, this is an issue this Court has yet to examine and one that the trial court must determine prior to finding that the taking was necessary. This change in facts and circumstances is paramount to this appeal because the trial court wrote "in evaluating the necessity question, it is **critical** to note that OHC is entitled to a rebuttable presumption that the taking is necessary because the OHC's Board of Trustees passed a resolution." Trial Court Decision, Appendix A-27 (emphasis added). This is the last opportunity for the Ohio legal system to correct a decision that is now based on factual misrepresentations.

Should the decision be upheld, the trial court will proceed with a jury trial to determine just compensation for the taking without ever examining whether the change of circumstances and facts affect the necessity of the taking to begin with. As indicated, it is evident that the resolution was passed based on false pretenses, thus calling into question the validity of the resolution from its original adoption. This Court supported the rebuttable presumption finding and found that the appellate court "gave appropriate deference to the trial court's factual finding that the country club had not rebutted the presumption that the appropriating the golf course was necessary." *State ex rel. Ohio History Connection v. Moundbuilders Country Club Co.*, Slip Opinion No. 2022-Ohio-4345, ¶45.

Given that the facts, which the trial court relied on and subsequently upheld by the Fifth District, are undeniably untrue based on Appellee's own admissions, the decision is in error and must be revisited. Hindsight is 20/20. It is now known that World Heritage status is compatible with Appellant MCC's current use of the site, thus negating the argued necessity of the taking.

This Court has the ability to review new and indisputable facts that materially would have affected the trial court's decision. Appellant urges this Court to reconsider its decision in this case to rectify a significant error based on a change in circumstances.

Concerning the second reason, even with the Appellee's nomination for World Heritage being presented by the Department of Interior, as recognized by the dissent in this case, it is still speculative whether World Heritage status will be granted. Necessity is not supported by speculative uses of the property. *Norwood v. Horney*, 110 Ohio St.3d 353, 2006-Ohio-3799, 853 N.E.2d 1115, at ¶ 99. The combination of the speculative nature of the World Heritage designation, and the change of facts and circumstances as they relate to the evidence concerning granting the Appellee a rebuttable presumption under R.C. Section 163.09(B), support a remand to trial court with instructions to retry the issue of whether a rebuttable presumption is warranted, and to consider the correct factors in determining the necessity of the appropriation.

For each of the reasons stated above, and particularly due to the Decision's implications for Ohio eminent domain law, Appellant respectfully asks that this Court reconsider its Decision in this case.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing has been forwarded by Electronic and/or

Regular U.S. Mail this 19th day of December, 2022, to the following individual(s):

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