

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

STATE OF OHIO EX. REL. RURAL BUILDING OF CINCINNATI, LLC,	:	APPEAL NO. C-170004 TRIAL NO. A-1400889
Plaintiff-Appellant,	:	
vs.	:	<i>JUDGMENT ENTRY.</i>
VILLAGE OF EVENDALE,	:	
Defendant-Appellee,	:	
and	:	
DONALD MERCER,	:	
and	:	
JACK CAMERON,	:	
Defendants.	:	

We consider this appeal on the accelerated calendar, and this judgment entry is not an opinion of the court. *See* Rep.Op.R. 3.1; App.R. 11.1(E); 1st Dist. Loc.R. 11.1.1.

Following a bench trial, plaintiff-appellant Rural Building of Cincinnati, LLC, (“RBOC”) appeals from the trial court’s judgment dismissing its complaint for a writ of mandamus to compel defendant-appellee, the Village of Evendale, to begin an appropriation proceeding for an alleged regulatory taking of RBOC’s private property.

RBOC purchased and developed property in Evendale, Ohio, to provide facilities for Rural Metro Ambulance Company (“Rural Metro”). The property was located in an

area zoned “General Industrial District” (“GI District”). In 2000, it entered a ten-year lease with Rural Metro. When Rural Metro chose not to renew the lease in 2009, RBOC listed the property for sale at a price of \$1.62 million. In late 2010, RBOC successfully bid on a lease of its entire facility to the United States Immigration and Customs Enforcement agency to house its Cincinnati office (the “ICE lease”). Forty-five ICE employees would use the facility as offices. But also within the building would be holding areas for staff to question or interview detainees.

Following the award of the bid, RBOC applied to the Evendale Building Department for a certificate of zoning approval. RBOC claimed that “governmental administrative office space” is a permitted use in that district. Evendale denied the certificate on grounds that the building included a detention facility, which was not a permitted use in the GI District zoning scheme.

RBOC appealed the denial of the zoning certificate to Evendale’s Board of Zoning Appeals. Following a public hearing at which neighboring property owners questioned whether the facility would threaten the safety and character of the area, the board upheld the building commissioner’s denial of the zoning certificate. In its March 2011 decision, the board affirmed the village’s decision on the same grounds. RBOC did not appeal the board’s decision. Although Rural Metro remained a tenant under an amended lease, RBOC sold the property four months later for \$1.15 million.

In February 2014, RBOC filed this complaint for a writ of mandamus seeking to compel Evendale to begin appropriation proceedings under R.C. Chapter 163 for a partial regulatory taking of its property.¹ RBOC claimed that the taking had occurred when Evendale wrongfully denied RBOC’s application for a zoning certificate, causing RBOC to

¹ RBOC’s petition for a writ of mandamus was consolidated in the trial court with the case numbered A-1400901, in which RBOC claimed that Evendale’s building commissioner and its mayoral assistant had maliciously interfered with its property rights.

lose the ICE lease and any attendant profits. We summarized the procedural background of this dispute in our 2015 decision concluding that RBOC did not have an adequate remedy at law and remanding the matter to the trial court for resolution of the writ on its merits. *Rural Bldg. of Cincinnati, L.L.C., v. Evendale*, 2015-Ohio-1614, 32 N.E.3d 983, ¶ 3-8 (1st Dist.).

The trial court conducted a five-day trial on the matter. It ultimately rejected RBOC's complaint and dismissed its action for mandamus, expressly providing that there was no just cause for delay of an appeal. The trial court prepared a detailed, 15-page decision with findings of fact and conclusions of law, and incorporated it into its judgment entry.

On appeal, RBOC does not contest the trial court's findings of fact. Rather, in its single assignment of error, it asserts that the trial court erred "in applying the law to those undisputed facts" by finding that RBOC had failed to prove that Evendale had engaged in a partial regulatory taking of its property through the denial of a zoning certificate and that it was entitled to compensation for Evendale's actions.

Mandamus is the appropriate action to compel public authorities to institute appropriation proceedings where an involuntary taking of private property is alleged. *State ex rel. Gilbert v. Cincinnati*, 125 Ohio St.3d 385, 2010-Ohio-1473, 928 N.E.2d 706, ¶ 14. To be entitled to the writ, RBOC had to establish a clear legal right to compel Evendale to commence an appropriation action, a clear legal duty on the part of Evendale to start the action, and the lack of an adequate remedy in the ordinary course of law. *Id.* at ¶ 15.

But a writ of mandamus is not granted by right. Its issuance rests in the sound discretion of the court. *State ex rel. Mettler v. Stratton*, 139 Ohio St. 86, 38 N.E.2d 393 (1941), paragraph one of the syllabus. Thus we review the denial of a writ of mandamus

only for an abuse of that discretion. *See State ex rel. Paluch v. Zita*, 141 Ohio St.3d 123, 2014-Ohio-4529, 22 N.E.3d 1050, ¶ 9.

In applying this standard, a reviewing court is not free to substitute its judgment for that of the trial court. *See Hustler Cincinnati, Inc. v. Elm 411, L.L.C.*, 1st Dist. Hamilton No. C-130754, 2014-Ohio-5648, ¶ 29. Instead an abuse of discretion is shown when the trial court's decision is unreasonable, arbitrary, or unconscionable; that is, when the trial court issues a ruling that is not supported by a "sound reasoning process." *AAAA Ents., Inc. v. River Place Community Urban Redev. Corp.*, 50 Ohio St.3d 157, 161, 553 N.E.2d 597 (1990).

There is no set formula for determining when economic injuries caused by public action must be compensated by the government. *See State ex rel. R.T.G., Inc. v. State*, 98 Ohio St.3d 1, 2002-Ohio-6716, 780 N.E.2d 998, ¶ 1. But when, as here, a petitioner has claimed a regulatory taking by government action in which there was no physical invasion and the regulation deprived the property of less than 100 percent of its economically viable use, its claim is governed by the standards set forth in *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978). *See State ex rel. Shelly Materials, Inc.*, 115 Ohio St.3d 337, 2007-Ohio-5022, 875 N.E.2d 59, ¶ 18. The trial court expressly employed this standard, and engaged in the required "ad hoc, factual inquiry" of the following factors to determine whether a regulatory taking had occurred: (1) the economic impact of the regulation on the claimant; (2) the extent to which the regulation has interfered with distinct investment-backed expectations; and (3) the character of the governmental action. *Penn Cent.* at 124.

The trial court did not abuse its discretion in determining that RBOC had failed to demonstrate an economic impact on RBOC sufficient to constitute a regulatory taking. Economic impact is demonstrated by a reduction in the value of the property. Typically,

that devaluation must be extreme to reflect a taking. *E.g., Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 122 S.Ct. 1465, 1477, 152 L.Ed.2d 517 (2002), fn. 15 (listing losses in value of over 90 percent that did not constitute a taking); *see also Tennessee Scrap Recyclers Assn. v. Bredesen*, 556 F.3d 442, 456 (6th Cir.2009); *Sullivan v. Hamilton Cty. Bd. of Health*, 155 Ohio App.3d 609, 2003-Ohio-6916, 802 N.E.2d 698 (1st Dist.), fn. 29; *Moore v. Middletown*, 12th Dist. Butler No. CA2009-08-205, 2010-Ohio-2962, ¶ 23.

It is undisputed that RBOC suffered a loss when denied the ability to perform under the ICE lease. But the trial court's conclusion that the loss was not severe enough to constitute a taking is well supported in the record. RBOC had originally listed the property for sale at \$1.62 million. The asking price was reduced due to the dismal real estate market. Before RBOC prepared its bid on the ICE lease, and before the board's ruling, RBOC had dropped its asking price to \$1.47 million. RBOC ultimately sold the property for \$1.15 million. Even excluding the additional \$725,000 that RBOC had recouped, in a related lawsuit, from the valuation, the \$320,000 difference between the asking and sale prices reflected at most a 25 percent reduction in value. Moreover, assuming that RBOC would have realized an additional \$2 million over ten years if it had obtained the ICE lease, any diminution in value would have been less than 40 percent.

Thus the trial court's conclusion that the board's action did not have an economic impact of sufficient magnitude as to constitute a regulatory taking is supported by a sound reasoning process and will not be disturbed. *See AAAA Ents.*, 50 Ohio St.3d at 161, 553 N.E.2d 597; *see also Penn Cent.*, 438 U.S. at 124, 98 S.Ct. 2646, 57 L.Ed.2d 631.

Under the second, closely related, prong of the *Penn Central* analysis, RBOC contends that the refusal to grant the certificate of compliance interfered with its reasonable investment-backed expectations in the property. A landowner is not entitled to

the highest and best use of its property. *Goldblatt v. Hempstead*, 369 U.S. 590, 82 S.Ct. 987, 8 L.Ed.2d 130 (1962). Its investment-backed expectation must be more than a unilateral expectation or an abstract need. *See Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1005-06, 104 S.Ct. 2862, 81 L.Ed.2d 815 (1984). The purchase price and the regulatory regime in place at the time of purchase can reflect the reasonableness of the property owner's expectations. *See Murr v. Wisconsin*, ___ U.S. ___, 137 S.Ct. 1933, 1945, 198 L.Ed.2d 497 (2017); *see also Wymsylo v. Bartec, Inc.*, 132 Ohio St.3d 167, 2012-Ohio-2187, 970 N.E.2d 898, ¶ 57; *Loreto Dev. Co. v. Village of Chardon, Ohio*, 149 F.3d 1183 (6th Cir.1998) (rejecting a challenge to the denial of a zoning variance that did not prohibit the plaintiff from using the property in a manner it should have reasonably expected, although plaintiff lost the opportunity for greater profit from its proposed development).

Here, the board's decision did not prohibit RBOC from using the property in the manner in which it reasonably expected to when it purchased the property and leased it as a facility for Rural Metro. RBOC realized over \$610,000 in profit leasing the property. It continued to collect rent after the zoning decision and until it sold the property. Moreover, the zoning scheme applied in the case, which placed significant restrictions on the use of property as a detention facility, was in place before RBOC participated in the ICE leasing process. Therefore, the trial court's conclusion that the board's decision did not interfere with RBOC's reasonable investment-backed expectation was supported by a sound reasoning process. *See AAAA Ents.*, 50 Ohio St.3d at 161, 553 N.E.2d 597; *see also Penn Cent.*, 438 U.S. at 124, 98 S.Ct. 2646, 57 L.Ed.2d 631.

In addition to these two "primary" factors, the "'character of the governmental action'—for instance, whether it amounts to a physical invasion or instead merely affects property interests through 'some public program adjusting the benefits and burdens of economic life to promote the common good'—may be relevant in discerning whether a

taking has occurred.” *See Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 539, 125 S.Ct. 2074, 2082, 161 L.Ed.2d 876 (2005), quoting *Penn Cent.* at 124.

Here, the trial court found that ICE intended to place holding cells in part of RBOC’s leased property. In light of RBOC’s inability to confirm that no more than five detainees would be held at any one time, the court concluded that the holding cells constituted a detention facility. Relying, in part, on the testimony of three expert witnesses, including RBOC’s expert, the court determined that a detention facility, as defined in the Ohio Building Code, was not a permitted or a conditional use in a GI District under the Evendale Zoning Code. When, as here, the character of the government action in denying a zoning certificate does not impose a physical invasion of the property but does further the important public interest in maintaining the character of the zoned area, the trial court’s decision that a regulatory taking had not taken place was supported by a sound reasoning process. *See AAAA Ents.*, 50 Ohio St.3d at 161, 553 N.E.2d 597; *see also Penn Cent.* at 124; *Murr*, ___ U.S. ___, 137 S.Ct. at 1949-50, 198 L.Ed.2d 497.

Having found that the trial court did not abuse its discretion in applying the *Penn Central* factors, the assignment of error is overruled.

Therefore, we affirm the trial court’s judgment.

Further, a certified copy of this judgment entry shall be sent to the trial court under App.R. 27. Costs shall be taxed under App.R. 24.

MOCK, P.J., CUNNINGHAM and DETERS, JJ.

To the clerk:

Enter upon the journal of the court on February 28, 2018
per order of the court _____.
Presiding Judge