COURT OF COMMON PLEAS
CLERMONT COUNTY, OHIO

HINDU SOCIETY OF GREATER CINCINNATI, INC.	:	
	:	**CASE NO. 2016 CVF 01548**
Appellant	:	**Judge McBride**
vs.	:	**DECISION/ENTRY**
UNION TOWNSHIP BOARD OF ZONING APPEALS	:	
Appellee	:	

Aronoff, Rosen & Hunt, Richard A. Paolo, Stephen R. Hunt, and Edward P. Akin, counsel for the appellant Hindu Society of Greater Cincinnati, Inc., 425 Walnut Street, Suite 2200, Cincinnati, Ohio 45202.

Schroeder, Maundrell, Barbiere & Powers, Lawrence E. Barbiere, counsel for the appellee Union Township Board of Zoning Appeals, 5300 Socialville-Foster Road, Suite 200, Mason, Ohio 45040

This cause is before the court for consideration of the appeal filed by the appellant, Hindu Society of Greater Cincinnati, Inc., from the decision issued by the appellee Union Township Board of Zoning Appeals in Case No. 8-16-A. The court held a hearing on the appeal on April 20, 2018.

Upon consideration of the record of the underlying proceeding, the written and oral arguments of counsel, and the applicable law, the court renders this written decision.

FACTS OF THE CASE AND PROCEDURAL BACKGROUND

The appellant Hindu Society of Greater Cincinnati, Inc. appeals the decision of the appellee Union Township Board of Zoning Appeals in Case 8-16-A. The decision granted the appellant a conditional use approval to expand the existing Hindu temple on its property, but added additional conditions, only one of which is at issue in this appeal.

The condition at issue in this case is the requirement that the appellant establish its primary and principal access point for its temple off of Barg Salt Run Road and that the gate providing access to the temple property located along Klatte Road be permanently closed, secured through electronic gate mechanisms/codes and Knox Box lock, to be utilized only by fire and police emergency responders and designated on the plans as "Emergency Access Only."

The appellant owns property at 720 Barg Salt Run Road in Union Township.[1] The property abuts Barg Salt Run Road and Klatte Road and consists of 105 acres of land.[2] The appellee considered the appellant's request for the conditional use at an October 6, 2016 meeting, and approved the plan for the conditional use with several additional conditions/requirements.[3]

The appellant submitted a conditional use request to expand its existing Hindu temple by adding a 41 ft. by 54 ft. addition that would house additional deities, allow for kitchen upgrades, and have a storage space for the temple's chariot.[4] Previously, the appellant had received approval from the appellee to make improvements along Barg Salt

[1] October 6, 2016 Tr., pg. 2.
[2] Tr., pgs. 2-3.
[3] Tr., pgs. 2, 29.
[4] Tr., pg. 2.

Run Road, whereby the appellant added a new access drive, lighting, and other improvements, and therefore now has two points of access to the temple, one along Barg Salt Run Road and one along Klatte Road.[5]

At the outset of the meeting, an unidentified board member of the appellee stated that the closure of the Klatte Road gate would enhance the overall safety of the site and enhance the safety of the motoring public and the temple's patrons.[6]

The first sworn witness who testified on the appellant's behalf was William Fiedler, the temple's architect.[7] He explained that the addition was designed with the Hindu religion in mind.[8] It would mainly be used to house several deities, including two new deities, one of which would be much larger than the two smaller deities the temple currently houses.[9] Fiedler averred that the new space for the deities is desired by the existing temple worshippers, not some group of prospective members.[10] Fiedler also explained the religious significance in Hindu of entering the property so that, as one enters the property, that person is facing east.[11]

The second sworn witness who spoke in favor of the conditional use request was Steven Hunt, the appellant's counsel, who spoke specifically about the access to Klatte Road.[12] Hunt averred that the temple previously spent $1,300,000 to purchase additional property and build an access point on Barg Salt Run Road to lessen use of Klatte Road,

---

[5] Tr., pg. 3.
[6] Tr., pg. 5.
[7] Tr., pg. 6.
[8] Tr., pg. 7.
[9] Tr., pgs. 7-8.
[10] Tr., pg. 11.
[11] Tr., pg. 9.
[12] Tr., pgs. 12-13.

but it never agreed to close access to its Klatte Road gate.[13] The temple has signs that direct worshippers to use the Barg Salt Run entrance, the appellant modified its website to direct worshippers to use Barg Salt Run Road, and the temple closes the Klatte Road access gate for major events like festivals.[14] The requested addition to house deities would not generate any additional traffic.[15]

Additionally, Hunt testified that the appellant needs continued use of the Klatte Road gate for safety and religious purposes. The Klatte Road entrance is used during inclement weather in the winter.[16] Klatte Road is flat and straight, whereas Barg Salt Run Road is windy and steep, making it dangerous to drive in heavy snowfall if the roads have not already been cleared.[17] The winter prior to the hearing, a worshipper slid off of Barg Salt Run Road due to the winter conditions.[18]

As to religious considerations, Hunt explained that entering the temple so that worshippers are facing east is significant in the Hindu religion.[19] When the temple was constructed, with Klatte Road as the only access point, it allowed people entering the property to be facing east.[20]

Presently, 95 percent of the worshippers enter the temple from the Barg Salt Run Road Access.[21] However, a small portion, including the priest, still enter from Klatte

---

[13] Tr., pg. 13.
[14] Tr., pg. 14.
[15] Tr., pg. 14.
[16] Tr., pg. 15.
[17] Tr., pg. 15.
[18] Tr., pg. 15.
[19] Tr., pg. 16.
[20] Tr., pg. 16.
[21] Tr., pg. 17.

Road.[22] Only approximately 10 to 14 vehicles per day enter the temple from Klatte Road.[23]

Three citizens were sworn in and testified against allowing the new conditional use absent the closure of Klatte Road. The first was Jerry Honerlaw, and it is unclear from the transcript where he lives in relation to the temple or Klatte Road.[24] Honerlaw testified that he had no problem with the new addition for the deities, but he had a problem with Klatte Road.[25] He stated that three years ago he had to "walk down the street in front of a Union Township ambulance so people would move over * * *."[26]

Clark Moore, a Klatte Road resident, testified as well.[27] He had been under the impression that once the appellant had an entrance on Barg Salt Run Road, the Klatte Run Road access point would be closed.[28] He described that Klatte Road as being only 14 feet wide, so that only one vehicle can drive down it at a time, and the other must pull off to the side.[29] Moore averred that several times, when his grandchildren are picked-up by the school bus, the bus has had to wait to let another vehicle pass.[30] He also stated that there have been many occasions where people were in ditches and "tore up drives" along Klatte Road.[31]

---

[22] Tr., pg. 17.
[23] Tr., pg. 19.
[24] Tr., pg. 20.
[25] Tr., pg. 21.
[26] Tr., pg. 21.
[27] Tr., pg. 21.
[28] Tr., pg. 22. Of note, there is no evidence in the record of such an agreement.
[29] Tr., pg. 23.
[30] Tr., pg. 23.
[31] Tr., pg. 24.

Lastly, Kathy Campbell testified about Klatte Road.[32] She was also under the impression that the appellant would not use Klatte Road once Barg Salt Run Road had a new entrance.[33] She stated that "they fly down our street, they go off your roads, they pull in your drive, which I don't care if they pulled in my driveway to turn around but, you know, they never know where they're going. Is this where the temple's at? * * * They're not very good drivers."[34]

Following testimony, unidentified board members stated that Klatte Road was not safe.[35] Then the board members voted in favor of allowing the conditional use for the new room for the deities with four additional conditions.[36] The condition at issue in this appeal is the requirement that "the primary and principal access point to the Hindu temple shall be determined to be from Barg Salt Road – Road Run, with the gate located along Klatte Road permanently closed, secured through electronic gate mechanisms and codes and not [Knox] lock box lock to be utilized only by the fire and police emergency responsers – responders as designated on the plans as emergency access only."[37]

Following the appellee's decision, and pursuant to R.C. Chapter 2506, the appellant filed an administrative appeal on November 13, 2016. The appellant filed its brief on February 28, 2018. The appellee filed its brief on March 30, 2018. The appellant filed its reply brief on April 13, 2018. The court held oral argument on the appeal on April 20, 2018.[38]

---

[32] Tr., pg. 25.
[33] Tr., pg. 25.
[34] Tr., pgs. 25-26.
[35] Tr., pgs. 27-28.
[36] Tr., pgs. 28-31.
[37] Tr. pgs. 28-29.
[38] At the time of the hearing, the parties believed they were close to settling the matter and requested the court provide them additional time to do so, which the court has done.

On appeal the appellant offers several arguments as to why the court should "overrule" the appellee's decision to the extent it is conditioned upon cutting off access to the temple from Klatte Road.[39] It posits that (1) the closure of access from Klatte Road amounts to an unconstitutional taking, (2) conditioning the addition upon the closure of Klatte Road access was arbitrary, capricious, and unreasonable, (3) the appellee was swayed by opinions, not evidence, from members of the public, (4) the condition unfairly burdens the appellant's exercise of religious freedom, and (5) the appellee approved another application for a conditional use permit that night and treated that applicant differently from the appellant.

LEGAL STANDARD

Administrative orders are initially appealed to the common pleas court.[40] In such cases, R.C. Chapter 2506 governs the standards applied to administrative decisions.[41] Although the administrative appeal to the court of common pleas is not a de novo proceeding, it often resembles one.[42] When reviewing an R.C. Chapter 2506 administrative appeal, the common pleas court "considers the 'whole record,' including any new or additional evidence admitted under R.C. 2506.03, and determines whether

---

[39] Appellant's Brief, pg. 1.
[40] *Smith v. Granville Twp. Bd. of Trustees*, 81 Ohio St.3d 608, 612, 693 N.E.2d 219 (1998).
[41] *Queen v. Union Twp. Bd. of Zoning Appeals*, 12th Dist. Fayette No. CA2015-05-011, 2016-Ohio-161, ¶ 12, citing *Hutchinson v. Wayne Twp. Bd. of Zoning Appeals*, 12th Dist. Butler No. CA2012-02-032, 2012-Ohio-4103, ¶ 14.
[42] *Dudukovich v. Lorain Metropolitan Housing Authority*, 58 Ohio St.2d 202, 206-207, 389 N.E.2d 1113 (1979). *See Cincinnati Bell, Inc. v. Village of Glendale*, 42 Ohio St.2d 368, 370, 328 N.E.2d 808 (1975) ("Although a hearing before the Court of Common Pleas pursuant to R.C. 2506.01 is not de novo, it often in fact resembles a de novo proceeding.").

the administrative order is unconstitutional, illegal, arbitrary, capricious, unreasonable, or unsupported by a preponderance of substantial, reliable, and probative evidence."[43]

R.C. 2506.04 provides:

> "If an appeal is taken in relation to a final order, adjudication, or decision covered by division (A) of section 2506.01 of the Revised Code, the court may find that the order, adjudication, or decision is unconstitutional, illegal, arbitrary, capricious, unreasonable, or unsupported by the preponderance of substantial, reliable, and probative evidence on the whole record. Consistent with its findings, the court may affirm, reverse, vacate, or modify the order, adjudication, or decision, or remand the cause to the officer or body appealed from with instructions to enter an order, adjudication, or decision consistent with the findings or opinion of the court. * * *"[44]

Because R.C. 2506.04 is written in the disjunctive, "the trial court need not find that an administrative decision is unconstitutional, illegal, arbitrary, capricious, unreasonable *and* unsupported by the preponderance of the evidence before it may reverse it."[45] Instead, the court "need only find one of the foregoing elements before it may reverse an administrative decision."[46]

The term "arbitrary" has been defined to mean "without adequate determining principle; * * * not governed by any fixed rules or standard."[47] The term "unreasonable" has been defined to mean "irrational."[48] It has also been defined as an act or decision

---

[43] *Henley v. Youngstown Bd. of Zoning Appeals*, 90 Ohio St.3d 142, 147, 735 N.E.2d 433 (2000), citing *Smith*, 81 Ohio St.3d at 612. *See Queen*, 2016-Ohio-161 at ¶ 12, citing *Hutchinson*, 2012-Ohio-4103 at ¶ 14 (holding same); *Mills v. Union Twp. Bd. of Zoning Appeals*, 12th Dist. Clermont No. CA2005-02-013, 2005-Ohio-6273 at ¶ 6, citing *Henley*, 90 Ohio St.3d at 147 (holding same).

[44] R.C. 2506.04.

[45] (Emphasis original.) *Solid Rock Ministries Internatl. v. Monroe Bd. of Zoning Appeals*, 138 Ohio App.3d 46, 51, 740 N.E.2d 320 (12th Dist. 2000).

[46] *Solid Rock Ministries Internatl.*, 138 Ohio App.3d at 51.

[47] *Cedar Bay Const., Inc. v. City of Fremont*, 50 Ohio St.3d 19, 22, 552 N.E.2d 202 (1990), quoting Black's Law Dictionary (5 Ed.).

[48] *Cedar Bay Const., Inc.*, 50 Ohio St.3d at 22, quoting Black's Law Dictionary (5 Ed.).

that "is not governed by reason."[49] The term "reason" has been defined as "a rational ground or motive."

Under, R.C. 2506.03, the court is "confined to the transcript filed under Section 2506.02 of the Revised Code" unless certain circumstances are present, such as that the transcript failing to contain all proffered evidence by the appellant, the testimony was not given under oath, the officer failed to file the transcript with conclusions of fact supporting the final order, etc.[50]

Of note, applications for conditional use permits, which is what is involved in this case, "require adjudication hearings, not legislative hearings."[51] At public hearings, the general public "may speak and express their views on the question of governmental, political and policy considerations as to whether legislation should be adopted. Adjudication hearings, however, are not subject to such public comment but, instead, involve the determination of the rights of specific persons and whether such rights should be granted based upon evidence (not public opinion) presented at the hearing."[52]

---

[49] *Reed v. Vermillion Local School Dist.*, 83 Ohio App.3d 323, 326, 614 N.E.2d 1101 (6th Dist. 1992).

[50] Of note, when there was no objection to unsworn testimony at an administrative hearing, any error allowing such evidence is waived and the court must consider the unsworn testimony as though it were given under oath. *In re Application of Keller*, 12th Dist. Butler No. CA2003-04-100, 2003-Ohio-6549, ¶ 10, citing *Zurow v. Cleveland*, 61 Ohio App.2d 14, 399 N.E.2d 92 (8th Dist. 1978), syllabus. When an objection is not made, then the waiver carries over to the appellate level. *In re Application of Keller*, 2003-Ohio-6549 at ¶ 10, citing *Zurow*, 61 Ohio App.2d at the syllabus. Likewise, a failure at the administrative hearing to cross-examine witnesses also acts as a waiver that carries over to the appellate proceedings. *In re Application of Keller*, 2003-Ohio-6549 at ¶ 10, citing *Kandell v. City Council of Kent*, 11th Dist. Portage App. No. 90-P-2255 (Aug. 2, 1991).

[51] *In re Rocky Plaza Corp.*, 86 Ohio App.3d 486, 491, 621 N.E.2d 566 (10th Dist. 1993).

[52] Id. at 491-492.

The trial court presumes the board's decision is valid, and the burden of showing its invalidity rests on the party contesting the board's determination.[53] Unlike the appellate court's review of an administrative decision, which is more limited in scope, "* * * it is incumbent upon the common pleas court in an R.C. Chapter 2506 appeal to examine and weigh evidence * * *."[54] In doing so, the court must "[a]ppraise all such evidence as to the credibility of [the] witnesses, the probative character of the evidence and the [w]eight to be given it * * *."[55]

As such, the Ohio Supreme Court has observed that "[c]learly, the function of the Court of Common Pleas in a R.C. Chapter 2506 appeal differs substantially from that of appellate courts in other contexts."[56] Even so, "[a] common pleas court should not substitute its judgment for that of an administrative board, such as the board of zoning appeals, unless the court finds that the board's decision is not supported by a preponderance of reliable, probative, and substantial evidence."[57]

LEGAL ANALYSIS

I. WHETHER THE APPELLEE'S DECISION WAS ARBITRARY, CAPRCIOUS, OR UNREASONABLE

---

[53] *C. Miller Chevrolet, Inc. v. City of Willoughby Hills*, 38 Ohio St.2d 298, 313 N.E.2d 400 (1974), paragraph two of the syllabus.
[54] *Kreinest v. Planning Comm. of Mainville*, 12th Dist. Warren No. CA2014-06-087, 2015-Ohio-1178, ¶ 18, citing *Henley*, 90 Ohio St.3d at 147.
[55] *Dudukovich*, 58 Ohio St.2d at 207, quoting *Andrews v. Bd. of Liquor Control*, 164 Ohio St. 275, 131 N.E.2d 390 (1955), paragraph one of the syllabus.
[56] *Cincinnati Bell, Inc.*, 42 Oho St.2d at 370.
[57] *Nassef v. Union Twp. Bd. of Zoning Appeals*, 12th Dist. Clermont No. CA2013-05-038, 2013-Ohio-4130, ¶ 8, citing *Kisil v. City of Sandusky*, 12 Ohio St.3d 30, 34, 465 N.E.2d 848 (1984).

Section 440 of the Union Township Zoning Resolution provides that "* * * conditional use permits shall conform to the procedures and requirements of Sections 441 to 445 of this Resolution." In turn, Section 442.1 states:

> "In considering an application for a conditional use the Board of Zoning Appeals shall give due regard to the nature and condition of all adjacent uses and structures; and in authorizing a conditional use the Board may impose such requirements and conditions with respect to location, construction, maintenance and operation in addition to those expressly stipulated in this Resolution for the particular conditional use as the Board may deem necessary for the protection of adjacent properties and the public interest."[58]

"* * * [B]ecause zoning laws are in derogation of common law and deprive a property owner of uses of his land to which he would otherwise be entitled, such laws are construed in favor of the property owner, especially where an interpretation of the law is necessary."[59] Furthermore, "[s]tatutes or ordinances which impose restrictions upon the use of private property will be strictly construed and their scope cannot be extended to include limitations not clearly prescribed."[60]

Similarly, when construing zoning ordinances "* * * in which terms and language therein are not otherwise defined, common and ordinary meaning of such terms must be considered and the terms and language should be liberally construed in favor of the permitted use proposed by the property owner so as not to extend the restrictions to any

---

[58] (Emphasis added.).
[59] *Boothby v. Williamsburg Twp. Bd. Of Zoning Appeals*, 12th Dist. Clermont No. CA2002-02-009, 2002-Ohio-5883, ¶ 29, citing *Cash v. Brookshire United Methodist Church*, 61 Ohio App.3d 576, 579, 573 N.E.2d 692 (10th Dist. 1988). *See Solid Rock Ministries Internatl.*, 138 Ohio App.3d at 51, quoting *Cash*, 61 Ohio App.3d at 579 ("Zoning ordinances 'deprive a property owner of uses of his land to which he would otherwise be entitled and, therefore, when interpretation is necessary, such enactments are normally construed in favor of the property owner.'").
[60] *Solid Rock Ministries Internatl.*, 138 Ohio App.3d at 51, quoting *Cash*, 61 Ohio App.3d at 579.

limitation of use not clearly prescribed therein."[61] "Courts are to read words and phrases in context."[62] Finally, "[a]mbiguities in zoning provisions which restrict the use of one's land must be construed against the zoning resolution because the enforcement of such provisions is an exercise of police power that constricts property rights."[63]

The appellant argues that the appellee's decision was arbitrary, capricious, and unreasonable because it conditioned a modest building project, which would not increase traffic, upon the closure of Klatte Road. Moreover, the appellant posits that the evidence upon which the appellee made this decision was deficient, as it was only anecdotal opinion evidence from three residents. The appellee does not address this argument in its brief.

As quoted above, Section 441.1 of the Zoning Resolution states that "in authorizing a conditional use the Board may impose such requirements and conditions with respect to * * * operation in addition to those expressly stipulated in this Resolution for the particular conditional use as the Board may deem necessary for the protection of adjacent properties and the public interest." The "particular conditional use" is the addition of the deity room. The "imposed" additional "requirement and condition" is the closure of the temple's access to Klatte Road. Thus, the question becomes whether blocking the temple's access to Klatte Road is "necessary" for the particular conditional use, adding a deity room, for the protection of adjacent properties and the public interest.

---

[61] *Nassef*, 2013-Ohio-4130 at ¶ 14, citing *W. Chester Twp. Bd. of Trustees v. Speedway Superamerica, L.L.C.*, 12th Dist. Butler No. CA2006-05-104, 2007-Ohio-2844, ¶ 24.
[62] *Henley*, 90 Ohio St.3d 142, 151, 735 N.E.2d 433 (2000).
[63] *BP Oil Co. v. Dayton Bd. of Zoning Appeals*, 109 Ohio App.3d 423, 432, 672 N.E.2d 256 (2d Dist. 1996), citing *Freedom Twp. Bd. of Zoning Appeals v. Portage Cty. Bd. of Mental Retardation & Developmental Disabilities*, 16 Ohio App.3d 387, 390, 476 N.E.2d 360 (11th Dist. 1984).

The uncontroverted evidence presented on behalf of appellant at the hearing indicated that traffic will not increase due to the addition of the deity room and that 95 percent of worshippers already use the Barg Salt Run Road entrance. None of the three citizens who spoke in opposition to the conditional use suggested that traffic will increase due to the deity room. In fact, none of them actually discussed any potential problems that the deity room would pose to adjacent properties. Instead, their testimony was focused on an ongoing traffic problem that preexists the appellant's requested conditional use. The appellee has not supplemented the record with any additional evidence, such as a traffic study, that might indicate that the new deity room would exacerbate driving conditions on Klatte Road.

Although the Zoning Resolution does not define "necessary," it is commonly defined to mean absolutely needed or required.[64] There appears to be no connection between the addition of the deity room and exacerbation of traffic problems on Klatte Road. As such, it cannot be necessary that appellant close access to its temple from Klatte Road for the protection of adjacent properties and the public interest. One of the opponents to the conditional use request, Jerry Honerlaw, alluded to this disconnect when he testified that he had "no problem" with the new deity room, but he had problems with the way Klatte Road was used by current worshippers.

Because the court cannot draw a connection between the deity room and Klatte Road traffic, the court cannot find that the closure of the Klatte Road access point is necessary for the protection of adjacent properties and the public interest. The court finds that the appellee's decision to require the appellant to close its Klatte Road access was

---

[64] Merriam-Webster Dictionary, *necessary*, https://www.merriam-webster.com/dictionary/necessary (accessed October 16, 2018).

not governed by reason and was without an adequate determining principle. Moreover, the appellee's decision is not supported by a preponderance of substantial, reliable, and probative evidence, as there was none indicating that the proposed conditional use would increase Klatte Road traffic.[65] Accordingly, the court finds under R.C. 2506.04 that the appellee's decision was arbitrary, unreasonable, and unsupported by the preponderance of substantial, reliable, and probative evidence on the whole record.

II. WHETHER THE APPELLEE'S DECISION WAS UNCONSTITUTIONAL OR OTHERWISE ILEGAL

The United States and Ohio Constitutions guarantee that private property shall not be taken for public use without just compensation.[66] "In cases of * * * destruction of a fundamental attribute of ownership like the right of access, the landowner need not establish the deprivation of *all* economically viable uses of the land."[67] "Instead, the landowner must demonstrate 'a substantial or unreasonable interference with a property right.'"[68]

---

[65] *See Cincinnati Bell, Inc.*, 42 Oho St.2d at 371 (affirming the appellate court's affirmance of trial court's decision to reverse the Board of Zoning Appeals, which had denied Cincinnati Bell's request for a variance in order to permit it to double the size of its Glendale facility; the trial court found that Cincinnati Bell's proposed construction "would 'have an almost miniscule effect on the immediate neighbors and on the Glendalians generally,' but that denial of the permit 'would have a serious effect on those presently served by the Glendale exchange and those wishing new or additional service both in and out of Glendale, and a wholly unreasonable effect on all the people served by Cincinnati Bell, Inc.").

[66] Fifth and Fourteenth Amendments to the United States Constitution; Section 19, Article I, Ohio Constitution.

[67] (Internal quotations omitted.) (Emphasis original.) *State ex rel. Preschool Dev., Ltd. v. Springboro*, 99 Ohio St.3d 347, 2003-Ohio-3999, 792 N.E.2d 721, ¶ 13 (2003), quoting *State ex rel. Sekermestrovich v. Akron*, 90 Ohio St.3d 536, 537–538, 740 N.E.2d 252 (2001).

[68] *State ex rel. Preschool Dev., Ltd.*, 2003-Ohio-3999 at ¶ 13, quoting *State ex rel. OTR v. Columbus*, 76 Ohio St.3d 203, 206, 667 N.E.2d 8 (1996). *See State ex rel. Habash v. Middletown*,

The Ohio Supreme Court has observed that there the "two primary purposes for the existence of a street or highway are (1) to provide a means of passage for the public and (2) to provide a means of access to and egress from abutting lands * * *."[69] As such, a "property owner's right of access to his property from a street or highway upon which it abuts cannot be lawfully destroyed or unreasonably affected * * *."[70]

"One of the elemental rights growing out of the ownership of a parcel of real property is the right to access abutting public roadways."[71] Ohio courts have long held that:

> "An owner of property abutting on a public highway possesses, as a matter of law, not only the right to the use of the highway in common with other members of the public, but also a private right or easement for the purpose of ingress and egress to and from his property, which latter right may not be taken away or destroyed or substantially impaired without compensation therefor."[72]

The state may, however, "in the lawful exercise of police power, regulate a property owner's access without compensation so long as there is no denial of ingress or egress."[73] As with other issues of taking, "[t]he critical issue in cases involving the easement right of access is whether the action taken by the state amounts to a mere regulation to promote the public safety, comfort, health, and welfare or whether such action amounts to a

---

12th Dist. Butler No. CA2005-04-094, 2005-Ohio-6688, ¶ 13, citing *State ex rel. Taylor v. Whitehead*, 70 Ohio St.2d 37, 39, 434 N.E.2d 732 (1982) (holding same).

[69] *State ex rel. Schiederer v. Preston*, 170 Ohio St. 542, 166 N.E.2d 748 (1960), paragraph one of the syllabus.

[70] *State ex rel. Preschool Dev., Ltd.*, 2003-Ohio-3999 at ¶ 14, quoting *State ex rel. McKay v. Kauer*, 156 Ohio St. 347, 102 N.E.2d 703 (1951), paragraph one of the syllabus.

[71] *State ex rel. OTR*, 76 Ohio St.3d at 207.

[72] *State ex rel. OTR*, 76 Ohio St.3d at 207, quoting *State ex rel. Merritt v. Linzell*, 163 Ohio St. 97, 126 N.E.2d 53 (1955), paragraph one of the syllabus. *See State ex rel. Habash*, 2005-Ohio-6688 at ¶ 14, citing *State ex rel. Merritt*, 163 Ohio St. 97 (holding same).

[73] *State ex rel. Habash*, 2005-Ohio-6688 at ¶ 15, citing *Windsor v. Lane Development Co.*, 109 Ohio App. 131, 136, 158 N.E.2d 391 (5th Dist. 1958).

substantial material, or unreasonable interference with the physical access to or from the property."[74]

Courts have held that circuity of travel to and from real property is not compensable.[75] The Ohio Supreme Court has explained: "Mere circuity 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 to and from such property, where any resulting interference is but an inconvenience shared in common with the general public and is necessary in the public interest to make travel safer and more efficient."[76]

Notwithstanding, "circuity of travel created within the property owner's property is compensable where the burden is placed solely on the owner's property and not on the general public."[77] The state creates circuity of travel within a property owner's property "when one entrance or exit way is removed and another is not added."[78] Hence, a taking can occur even when the "state's interference does not amount to a total obstruction of access."[79] "Thus, for example, when a property owner has two entrances from an

---

[74] *State ex rel. Habash*, 2005-Ohio-6688 at ¶ 15, citing *Castrataro v. City of Lyndhurst*, 8th Dist. Cuyahoga No. 60901, 1992 WL 20957 (Aug. 27, 1992). *See Smith v. Dept. of Transp.*, 10th Dist. Franklin No. 15AP-521, 2015-Ohio-5240, 8, quoting *State ex rel. BDFM Co. v. Ohio Dept. of Transp.*, 10th Dist. No. 11AP–1094, 2013–Ohio–107, ¶ 15 ("When a landowner's property abuts a public highway, that owner 'possesses, as a matter of law, not only the right to the use of the highway in common with other members of the public, but also a private right or easement for the purpose of ingress and egress to and from his property, which latter right may not be taken away or destroyed or substantially impaired without compensation therefor.'").

[75] *State ex rel. Habash*, 2005-Ohio-6688 at ¶ 16, citing *Merritt*, 163 Ohio St. at 102.

[76] *State ex rel. Merritt*, 163 Ohio St. at 102.

[77] *State ex rel. Habash*, 2005-Ohio-6688 at ¶ 16, citing *City of Hilliard v. First Industrial, L.P. et al.*, 158 Ohio App.3d 792, 2004-Ohio-5836, 822 N.E.2d 441 ¶ 8 (10th Dist.).

[78] *State ex rel. Habash*, 2005-Ohio-6688 at ¶ 16, citing *City of Hilliard*, 2004-Ohio-5836 at ¶ 8.

[79] *State ex rel. Tieken v. Proctor*, 180 Ohio App.3d 154, 2008-Ohio-6960, 904 N.E.2d 619, ¶ 15 (10th Dist.), citing *City of Hilliard*, 2004-Ohio-5836 at ¶ 8.

abutting roadway, and the state blocks one of the entrances without supplying an additional entrance, circuity of travel within a property results."[80]

In *State ex rel. OTR v. City of Columbus*, 76 Ohio St.3d 203, 667 N.E.2d 8 (1996), the Ohio Supreme Court examined a governmental taking involving problems of ingress and egress. In *OTR*, a landowner owned two parcels with office buildings on them facing each other across a boulevard on which both parcels had frontage.[81] Access to both parcels was available by means of driveways not connected directly to the boulevard.[82] The city proceeded to build a railroad overpass entirely upon the city's right of way on the boulevard.[83] The overpass design incorporated concrete retaining walls to establish an incline at a five-percent grade.[84] The existing driveways that were not on the boulevard remained usable.[85]

The Court found a substantial interference with the property owner's right to access the boulevard even though existing access to the landowner's parcels was undisturbed.[86] The Court observed:

> "Although no access routes existed on Campus View Boulevard along the frontage of either parcel at the time the overpass was constructed, this does not diminish or negate the fact that the city interfered with an existing property right—the right to access Campus View Boulevard from appellants' abutting properties. Additionally, this court has further established that a taking can occur even where, following the governmental action, the landowner has not been denied all access to the property in question."[87]

---

[80] *State ex rel. Tieken*, 2008-Ohio-6960 at ¶ 15, citing *Castrataro*, 1992 WL 209578.
[81] *State ex rel. OTR*, 76 Ohio St.3d at 203-204.
[82] Id.
[83] Id. at 204-205.
[84] Id. at 205.
[85] Id. at 203-205.
[86] Id. at 209.
[87] Id. at 209, quoting *State ex rel. McKay v. Kauer*, 156 Ohio St. 347. *Cf. Smith*, 2015-Ohio-5240 at ¶¶ 10, 16 (finding that there was no taking where a newly built overpass did not physically

The case of *Castrataro v. City of Lyndhurst*, 8th Dist. Cuyahoga No. 60901, 1992 WL 209578 (Aug. 27, 1992), involved a situation analogous to the present case. The landowners' property fronted Mayfield Road in Lyndhurst and had entrances on the west and east sides of the block.[88] The city of Lyndhurst installed barriers in front of the west entrance, which completely blocked access to the property, but the other side remained open.[89] The city argued that the elimination of only one of two means of direct access did not constitute a taking.[90] The appellate court disagreed, instead noting that "[a]dditional authority supports the proposition that the elimination of one of two means of direct access to and from a public road constitutes a taking where the abutting property owner's means of access is substantially impaired."[91] The appellate court concluded that the installation of the barriers permanently blocking one entrance onto the property was a compensable taking of property because it substantially interfered with the landowners' pre-existing property rights by creating circuity of travel within their property and the blockage was a burden placed solely upon their property.[92]

---

interfere with the property owner's right of ingress or egress and the burden created by the new overpass was shared by all surrounding residents).

[88] *Castrataro*, 1992 WL 209578 at *2.

[89] Id.

[90] Id. at *4.

[91] Id. at *5.

[92] Id. at *6. *Cf. State ex rel. Preschool Dev., Ltd.*, 2003-Ohio-3999 at ¶¶ 15-18 (finding city's elimination of daycare facility's curb cut onto highway did not substantially or unreasonably interfere with facility's access to property from highway, and thus no taking of property occurred; although facility no longer had access to and from highway directly from property, it had access to and from highway via a route that ran parallel to highway from its property to center line of curb cut of adjacent shopping center, and the fact that drivers had to negotiate one additional turn and travel along secondary access route rather than on highway to reach facility's parking lot did not warrant finding of compensable taking); *State ex rel. Merritt*, 163 Ohio St. at 101-102 (finding that, although an abutting lot owner has an interest on the portion of the street on which he abuts, such that closing it or impairing its use is a taking of private property, there was no taking because the property owners did not show impairment of their use of an old abutting highway, but only the

In turning to the present case, the appellant argues that the ordered closure of the appellant's Klatte Road entrance is an unconstitutional taking because it creates circuitous travel within the appellant's property and it singles out appellant, as opposed to Klatte Road residents generally. The appellee counters that closing the Klatte Road entrance is not such a substantial interference with the appellant's property rights as to amount to a taking.

As discussed, courts have consistently found that creating circuity of travel within a landowner's property is a compensable taking as it does create a substantial interference with the landowner's fundamental right to enter and exit abutting roadways. Here, the appellee's condition would create circuity of travel within appellee's property because one ingress and egress point is being eliminated and another is not being added.[93] Moreover, courts have found this unconstitutional even when there are multiple access points to a property from the abutting roadways, such as here. [94]

Furthermore, although the gate is a barrier that can be opened, it will only be able to be opened by emergency responders, and thus none of the temple's patrons or priests would be able to access the temple through that access point. And the appellee is not offering to create a new ingress and egress point for the appellant along Klatte Road. Indeed, it is the express opinion of the appellee that the appellant's patrons should not be using Klatte Road at all. Finally, the denial of appellant's access to Klatte Road is not a burden shared by other Klatte Road residents. The appellant has been singled out by the

---

opening of a new highway, which they did not abut, which diverted public travel from the old highway).

[93] *See State ex rel. Habash*, 2005-Ohio-6688 at ¶ 16, citing *City of Hilliard*, 2004-Ohio-5836 at ¶ 8.

[94] *State ex rel. Tieken*, 2008-Ohio-6960 at ¶ 15, citing *Castrataro*, 1992 WL 209578.

appellee's decision, while none of the other Klatte Road residents have their access to the roadway blocked. As such, the condition appellee has imposed, that appellant permanently close its gate to Klatte Road except to emergency responders, constitutes an unconstitutional and uncompensated taking under R.C. 2506.04.[95]

CONCLUSION

For the foregoing reasons, the court reverses the appellee's decision insofar as it conditions the approval of the appellant's conditional use permit upon the requirement that the appellant close access to Klatte Road except for emergency responders.

IT IS SO ORDERED.

DATED: 10-26-18

Judge Jerry R. McBride

[95] Because the court has found that there are already multiple bases for deeming the appellee's decision reversible under R.C. 2506.04, the court will not address the additional arguments the appellant set forth in its brief.

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing order were sent on this 26th day of October 2018 by e-mail to Richard A. Paolo, attorney for the appellant, at rapaolo@arh-law.com, and to Lawrence Barbiere, attorney for the appellee, at lbarbiere@smbplaw.com.

Judicial Assistant to Judge McBride