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Court of Appeals

RESPONSE IN OPPOSITION TO
May 9, 2018 10:48

By: CHRISTOPHER M. DEVITO 0047118

Confirmation Nbr. 1379511

EDWARD GRAHAM, ET AL.

CA 17 106094

vs.

CITY OF LAKEWOOD, ET AL.

Judge:

Pages Filed: 12

IN THE COURT OF APPEALS
EIGHTH APPELLATE DISTRICT
CUYAHOGA COUNTY, OHIO

EDWARD GRAHAM, et al.)	CASE NO. CA-17-106094
)	
Relators-Plaintiffs-Appellants)	On Appeal from Cuyahoga County
)	Court of Common Pleas
v.)	Case No. CV-15-846212
)	
CITY OF LAKEWOOD, et al.)	Regular Calendar
)	
Respondents-Defendants-Appellees)	

**RELATORS' RESPONSE IN OPPOSITION WITH AFFIDAVIT TO
MOTION TO DISSOLVE THE TEMPORARY RESTRAINING ORDER
AND TO SCHEDULE A HEARING ON APPELLANTS'
MOTION FOR A PRELIMINARY INJUNCTION FORTHWITH**

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INTRODUCTION

Relators-Plaintiffs-Appellants Edward Graham, Marguerite Harkness, William Grulich, Deborah Meckes, and Amy Dilzell (“Relators”), by and through their counsel, respond in opposition to Respondents-Defendants-Appellees the City of Lakewood (“City”) and Mayor Michael Summers’ (“Mayor”) (collectively “Respondents”) Motion to Dissolve the Temporary Restraining Order and to Schedule a Hearing on Appellants’ Motion for a Preliminary Injunction Forthwith.

The Respondents conduct exemplifies the need to maintain the *status quo* through the Courts April 30, 2018, TRO Journal Entry. If there does not exist any immediacy of action by the City and the Mayor as they posit, then maintaining the TRO and granting an injunction prohibiting the irreparable harm of razing Lakewood Hospital should not be an issue. However, the proposed Ordinance No. 27-18 (“Ordinance”) pending before the Lakewood City Council regarding demolition of Lakewood Hospital (City-owned property at the southeast corner of Detroit Avenue and Belle Avenue) with the developer Carnegie Management and Development Company (“Carnegie”) grants the Mayor complete authority to act without any further action by Council.

Maintaining the TRO and/or granting the preliminary injunction is further supported by recent events taken by the Lakewood City Council (“Council”). On Monday May 7, 2018, the Council voted 5 to 2 to pass the Ordinance, which grants the Mayor unbridled authority to to enter into not only the Term Sheet, but “related and ancillary documents, including a development agreement, instruments of conveyance and those documents related to closing, and to take such other actions as are necessary and appropriate to give effect tot he Term Sheet, the development agreement and any other related and ancillary documents.” The, the threat to Lakewood Hospital is imminent, unless the TRO is maintained to preserve the *status quo*.

ARGUMENT

Respondents allege in their Motion to Dissolve that “The TRO should be dissolved because Appellants misled the Court about the demolition of Lakewood Hospital being imminent.” Relators did NOT mislead this court and the personal attack by the Respondents is unwarranted. The Relators and Court properly relied upon the plain language in the Ordinance.

The language of Ordinance No. 27-18 (“Ordinance”) is “AN ORDINANCE **to take effect immediately** provided it receives the affirmative vote of at least two thirds of the members of Council, or otherwise to take effect and be in force after the earliest period allowed by law, **authorizing the execution and delivery of an agreement** by and between the City of Lakewood, Ohio, a municipal corporation and political subdivision in and of the State of Ohio (the "City" and Carnegie Management and Development Corporation, an Ohio corporation (“Carnegie”), related to the development of City-owned property at the southeast corner of Detroit Avenue and Belle Avenue, and authorizing and approving related matters” (Emphasis added). (See Graham Affidavit).

The *emphasized* words in the Ordinance “**to take effect immediately**” and “**authorizing the execution and delivery of an agreement**” clearly indicates an imminent authorization to act. (See Graham Affidavit). The language of the Ordinance at “Section 5 provides that “this ordinance is hereby declared to be *an emergency measure* necessary for the *immediate* preservation of the public peace, property, health, safety and welfare in the City and for the usual daily operation of the City for the reasons set forth and defined in the preamble to this ordinance, and provided it receives the affirmative vote of at least two thirds of its members of Council this ordinance **shall take effect and be in force immediately**, or otherwise shall take effect and be in force after the earliest period allowed by law” certainly connotes immanency and authorization to act immediately by the Mayor. (*Id.*).

The failure of the City to adequately explain in its brief the rationale for the inclusion in Ordinance No. 27-18 of Section 2, which authorizes and directs the Mayor (A) to enter into the Term Sheet with Carnegie **AND** (B) “authorized and directed to to execute such other and related and ancillary documents, including a development agreement, instruments of conveyance and those documents related to closing, and to take such other actions as are necessary and appropriate to give effect to the Term Sheet, the development agreement and any other related and ancillary documents” is a material omission. Section 2 grants the Mayor’s exclusive authority to move forward immediately with additional contracts, **including** the development agreement and demolition of the hospital buildings without any further oversight by Council.

Similarly, The City’s failure to explain the inclusion in Ordinance NO. 27-18 of Section 3 that would have Council deemed to be in compliance with “Purchasing and Contracting” ordinances and “Real Property Transactions” before they have even seen the agreement; or superseding those ordinances, is to mislead the Council. (See Graham Affidavit).

It appears that Mayor seeks to acquire more than authority to proceed with the term sheet, as described in Section 1 of the Ordinance. A careful review of the Ordinance provides for complete and immediate authority to enter into contracts for the destruction of the Lakewood Hospital, without further action of Council. Such an authorization appears to be directed towards destroying the Relators position in this litigation as the Mayor would have full authority to quickly move forward with demolition activities and the destruction of the property.

In the event that the Mayor is successful in his quest to demolish the hospital buildings prior to this honorable court’s ruling on the appeal, the citizens will be deprived of an important and practical remedy. Specifically, should the court make a determination that the restrictive covenant is illegal and that the Master Agreement was procured through fraud, bid rigging, contract steering and ethics violations it would be too late to save this valuable city owned assets.

Any opportunity for the Cleveland Clinic Foundation competitors to finally have a chance through an open and competitive bid process to submit proposals for the reuse of portions of the hospital property for inpatient or outpatient health care will have been lost. A viable emergency department and a renovated building would be demolished along with the older buildings of Lakewood Hospital. To clear the entire hospital property prior to the court's ruling would deprive the city of a viable option to bring competitive health care to the hospital campus.

The Relators and this Court properly relied upon the language in Ordinance No. 27-18 and the proposed term sheet to request and grant the temporary restraining order. Had there not been a court order the Mayor would have moved forward within the next several weeks with the demolition.

Finally, pursuant to Appellate Rule 7, on April 30, 2018, this Court properly granted the TRO and held it "shall remain in full force and effect until this court resolves the merits of this appeal, rules on appellants' motion for preliminary injunction, or issues further order." Pursuant to App.R. 7, no hearing or further action is required. Respondents fail to cite to any case law interpreting App.R. 7 and only cite to Civ.R. 65. The facts in the record properly established the TRO and this Court has properly held in abeyance any determination on the request for a preliminary injunction, which is within its authority. Further, App.R. 7's plain reading appears to allow this Court to grant a preliminary injunction without a hearing, based upon the facts in the records and evidence supporting the motion for equitable relief being requested. App.R. 7 is written differently than Civ.R. 65 and effect must be given to their differences in the words used, procedure established, and substantive application.

CONCLUSION

For the foregoing reasons, Relators submit that this Court should maintain the April 30, 2018, Temporary Restraining Order and continue to hold in abeyance, or grant the preliminary injunction, without a hearing, pursuant to Appellate Rule 7.

Respectfully submitted,

s/ Christopher M. DeVito

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CERTIFICATE OF SERVICE

A copy of the foregoing **RELATORS' RESPONSE IN OPPOSITION WITH AFFIDAVIT TO MOTION TO DISSOLVE THE TEMPORARY RESTRAINING ORDER AND TO SCHEDULE A HEARING ON APPELLANTS' MOTION FOR A PRELIMINARY INJUNCTION FORTHWITH** has been filed through the Court's electronic case management system ("ECM"), is available for review on-line by counsel and parties, will be provided notice of filing by the Court's ECM system, and a courtesy pdf copy is also being sent via email only on this 9th day of May, 2018, to the following:

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AFFIDAVIT

The undersigned Edward M. Graham, being first duly sworn, deposes and says that:

1. Affiant has had the honor of serving three terms (12 years) on the City of Lakewood Council ("Council"), including two years as President of Council.
2. Affiant is familiar with the procedures of passing legislation, including amendments of docket items.
3. Council has regular meetings on the first and third Mondays of the month as shown on the City website and Exhibit A attached hereto.
4. The Council Docket Agenda for 4-16-18 included "ORDINANCE NO. 27-18 —AN ORDINANCE to take effect immediately provided it receives the affirmative vote of at least two thirds of the members of Council, or otherwise to take effect and be in force after the earliest period allowed by law, authorizing the execution and delivery of an agreement by and between the City of Lakewood, Ohio, a municipal corporation and political subdivision in and of the State of Ohio (the "City") and Carnegie Management and Development Corporation, an Ohio corporation ("Carnegie"), related to the development of City-owned property at the southeast corner of Detroit Avenue and Belle Avenue, and authorizing and approving related matters."
5. The agendas for Special Council Meetings on April 23, 2018, and April 30, 2018, had only one item each, to wit, ORDINANCE NO. 27-18. Section 2. of that ordinance provided that "The Mayor is hereby authorized and directed to execute the Term Sheet, and any and all among the Mayor, President of Council, Director of Finance, Director of Law and Director of Planning and Development are hereby authorized and directed to execute such other

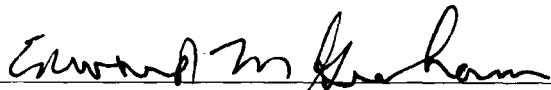
related and ancillary document, including a development agreement, instruments of conveyance and those documents related to closing, and to take such other actions as are necessary and appropriate to give effect to the Term Sheet, the development and any other related and ancillary documents.”

6. While no minutes have been published at this time, those two special meetings would constitute the second and third readings of ORDINANCE NO. 27 -18 enabling the ordinance to be adopted at the April 30, 2018 meeting.
7. In an April 30th article in *Cleveland.com* the Mayor in discussing the term sheet said that “**simultaneously** we're developing the actual development.” (See, http://www.cleveland.com/lakewood/index.ssf/2018/04/lakewood_city_council_consider_10.html#incart_river_index) (Emphasis added).
8. While Section 2 of ORDINANCE NO. 27 -18 provides that “The Mayor is hereby authorized and directed to execute the Term Sheet,” it also provides that “**the Mayor ...[is] hereby authorized and directed to execute ...a development agreement, instruments of conveyance and those documents related to closing ...**”. (Emphasis added).
9. Section 3 of ORDINANCE NO. 27 -18: “All provisions of Chapters 111 and 155 of the Codified Ordinances, including but not limited to Sections 111. 04 and 155. 07, with respect to contracts for the purchase, sale or lease of City-owned property are deemed to have been met or superseded by this ordinance inasmuch as that chapter may apply to the real property transactions contemplated under the terms of the Term Sheet and subsequent development agreement” is totally unnecessary language if the true purpose of ORDINANCE NO. 27 -18 is to authorize execution of only the term sheet.

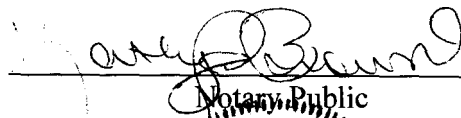

10. Chapters 111 and 155 of the Codified Ordinances are code sections regulating “Purchasing and Contracting” and “Real Property Transactions.”

11. Section 3 of ORDINANCE NO. 27 -18, if adopted, would have Council, a priori, deeming that “contracts for the purchase, sale or lease of City-owned property” are in accordance with Chapters 111 and 155, or superseded.

IN WITNESS WHEREOF, I have set my hand in the presence of a notary public at Lakewood, Ohio the 4th day of May, 2018.


Edward M. Graham

Sworn in my presence at Lakewood, Ohio by Edward M. Graham this 4th day of May, 2018.


Notary Public


KATHY J. BROWN
Notary Public, State of Ohio
My Commission Expires
June 19, 2022

EXHIBIT A

From Lakewood, Ohio Website

City Council Docket Agenda Special Meeting 4-30-18

City Council Docket Agenda Special Meeting 4-23-18

City Council Docket Agenda 4-16-18

City Council Docket Agenda 4-2-18

City Council Docket Agenda 3-19-18

City Council Docket Agenda 3-5-18

City Council Docket Agenda 2-20-18

City Council Docket Agenda 2-5-18

City Council Docket Agenda 1-16-18

City Council Docket Agenda 1-2-18