

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

OTTAWA TOWER II, LLC, et al.,

Plaintiffs,

v.

Case No. 12-130331-CH
Hon. Michael Warren

CITY OF PONTIAC, et al.,

Defendants.

OPINION AND ORDER GRANTING PLAINTIFFS' MOTION FOR
PRELIMINARY INJUNCTION AND EXPEDITING THE PROCEEDINGS

At a session of said Court, held in the
County of Oakland, State of Michigan
November 30, 2012.

PRESENT: HON. MICHAEL WARREN

OPINION

I

Introduction

Before the Court is the Plaintiffs' Motion for Preliminary Injunction. In particular, the Plaintiffs seek to enjoin the imminent demolition of the Phoenix Center Plaza & Parking Structure (the "Phoenix Center") in the City of Pontiac. This Court entertained extensive oral argument on the record on November 28, 2012, reviewed the filings of the parties, taken into consideration the various offers of proof presented by the parties, and issues this Opinion and Order accordingly.

At stake in this matter is whether this Court should enjoin the demolition pending a trial on the merits when (1) harm to the public interest in protecting constitutional rights may occur if an injunction is denied, (2) the permanent harm of violating constitutional and property rights of not issuing the injunction outweighs the temporary financial and public safety harm of granting it, (3) the Plaintiffs have made a substantial showing of ultimately prevailing on the merits in connection with violation of easements, inverse condemnation, takings, and due process claims, (4) assuming they ultimately prevail on the merits, the Plaintiffs will suffer an irreparable injury to the constitutional and property rights if the injunction is denied, and (5) an injunction would merely maintain the status quo pending a final disposition of the case? Because the answer is "yes," the Motion is granted. Furthermore, because the public interest warrants a speedy resolution of this matter, the Court will place this case on an expedited calendar.

II

Background

The parties disagree on a number of material facts, but they do agree on (or at least do not contest) many key facts that frame this Court's decision:

- 1) Over the course of several years of urban planning, several governmental authorities cooperated to create a multi-building complex in downtown Pontiac, Michigan, the center of which is the Phoenix Center. The Phoenix Center was developed pursuant to a Modified Urban Renewal Plan approved in 1970. Consistent with this plan, the City of Pontiac, the Pontiac Downtown Development Authority, and the Downtown Pontiac Development Company entered into a Comprehensive Development

Agreement dated October 30, 1979, which led to the building of the Phoenix Center, a senior center, and eventually the Ottawa Towers (hereinafter defined). Other expected construction, such as a hotel, was never implemented. The owner of the Phoenix Center is the great County of Oakland, and it subleases the center to the City of Pontiac.¹

- 2) The rights of the Plaintiffs with regard to access and use of the Phoenix Center are set forth in a Declaration of Easements, executed by the City of Pontiac on May 8, 1980 and recorded on May 19, 1980 at LIBER 7788, page 1 (the "Declaration of Easements").
- 3) Despite the grand plan, the Phoenix Center is an underutilized facility, imposes significant financial losses on the City of Pontiac, and has lost most of its power (the copper in its generator having been stripped); the street running underneath the Phoenix Center has been closed; one man died of an apparent drug overdose on the premises; and it has become a magnet for prostitution.
- 4) Because of great financial distress, the immediate past Governor appointed for the City of Pontiac an Emergency Financial Manager, originally under the Local Government Fiscal Responsibility Act, MCL 141.1201 *et seq.* ("1990 PA 72"). With the urging the current Governor, 1990 PA 72 was repealed and replaced with the Local Government and School District Fiscal Accountability Act, MCL 141.1501 *et seq.* (commonly referred to as "Public Act 4"). The current Governor re-appointed the Emergency Financial Manager under Public Act 4. However, the voters of the State of Michigan repealed Public Act 4 pursuant to a statewide referendum on November 6, 2012, and 1990 PA 72 was revived. The

¹ There was some discussion on the record, also reflected in the exhibits, that the technical owner and subleasing governmental authorities may be building or taxing authorities related to the respective governments; however, for purposes of this Motion, no one disputes that the pertinent governmental authorities have authorized the relevant decisions. All references to "City of Pontiac" and "County of Oakland" include all appropriate related entities.

Emergency Financial Manager is now acting under his authority under 1990 PA 72.

- 5) On July 5, 2012, the Emergency Financial Manager, while then vested with authority under Public Act 4, issued Order S-221 Regarding the Approval to Request the County of Oakland to Approve the Demolition of the Phoenix Center Parking Structure (the "Phoenix Center") ("Order S-221").
- 6) Order S-221 found (a) that demolition of the Phoenix Center was necessary to reduce capital and operating expenses and eliminate trespassers, (b) vacant land would support the parking needs of the Ottawa Towers tenants, (c) the demolition was supported by the Downtown Business Association, and (d) the demolition provides downtown Pontiac with several future options.
- 7) Oakland County, through its Board of Commissioners, has agreed to demolish the Phoenix Center for the reasons articulated by Order S-221.
- 8) Each of the Plaintiffs is an owner of an office tower which adjoins the Phoenix Center (as detailed below) - one office tower is owned by Plaintiff Ottawa Tower II, LLC, and is located on 31 E. Judson Street ("Judson Tower"), the other tower is owned by North Bay Drywall, Inc. Profit Sharing Plan & Trust and is located at 51111 Woodward Avenue ("Woodward Tower") (the Judson Tower and Woodward Tower together, the "Ottawa Towers").
- 9) The Woodward Tower stands approximately 1 foot away from the Phoenix Center, and the Judson Tower stands approximately 40-50 feet away.
- 10) Each of the Ottawa Towers is joined to the Phoenix Center through pedestrian walkways and an atrium.
- 11) The pedestrian walkways are used by employees of the tenants of the Ottawa Towers to access parking at the Phoenix Center.

12) If the Phoenix Center is demolished, the Ottawa Towers will have large, gaping holes and the employees of the Ottawa Towers will obviously not be able to park at the Phoenix Center.

The Plaintiffs have filed a five count Complaint. Count I seeks a declaratory judgment that the Emergency Financial Manager has no authority to demolish the Phoenix Center in light of the repeal of the Public Act 4 and the limited statutory authority he possesses under 1990 PA 72. Count II claims the demolition would violate the Declaration of Easements and asks for specific performance of the same. Count III claims that the demolition improperly inversely condemns their easement rights and damages their property. Count IV alleges a violation of due process rights, and Count V claims a violation of 42 USC §§ 1984 and 1988.

The heart of the Plaintiffs' Motion is that this Court should enjoin the demolition of the Phoenix Center because the demolition procedurally runs roughshod over the constitutionally protected property rights in the easements and the Ottawa Towers, and that only injunctive relief can prevent this otherwise irreparable harm. The heart of the Defendants' counter argument is that the Plaintiffs' substantive claims are meritless, and that injunctive relief is unwarranted because any injuries can be compensated by monetary damages.

III Analysis

Under MCR 3.310(A), this Court has the authority to grant a preliminary injunction. "Whether a preliminary injunction should issue is determined by a four-factor analysis" *MSEA v Dep't of Mental Health*, 421 Mich 152, 157 (1984). This analysis must address the following factors:

- 1) Harm to the public interest if an injunction issues;
- 2) Whether harm to the moving party in the absence of injunctive relief outweighs the harm to the opposing party if a stay is granted;
- 3) The strength of the moving party's demonstration that the moving party is likely to prevail on the merits; and
- 4) Demonstration that the applicant will suffer irreparable injury if injunctive relief is not granted.
[MSEA, *supra* at 157-158.²]

In addition, this inquiry "often includes the consideration of whether an adequate legal remedy is available to the applicant." *Id.* at 158. Other considerations to be addressed when considering injunctive relief "are whether it will preserve the status quo so that a final hearing can be held without either party having been injured and whether it will grant one of the parties final relief prior to a hearing on the merits." *Campau v McMath*, 185 Mich App 724, 729 (1990). See also *Thermatool Corp v Borzým*, 227 Mich App 366, 376 (1998).

² See also *Campau v McMath*, 185 Mich App 724, 728-729 (1990) (noting that there is "a four-factor analysis to determine whether a preliminary injunction should be issued: (1) the likelihood that the party seeking the injunction will prevail on the merits; (2) the danger that the party seeking the injunction will suffer irreparable injury if the injunction is not issued; (3) the risk that the party seeking the injunction would be harmed more by the absence of an injunction than the opposing party; and (4) the harm to the public interest if the injunction is issued"); *Ins Comm'r v Arcilio*, 221 Mich App 54, 77-78 (1997) ("In determining whether to issue a preliminary injunction, the court must consider four factors: (1) harm to the public interest if an injunction issues, (2) whether harm to the applicant in the absence of temporary relief outweighs the harm to the opposing party if relief is granted, (3) the strength of the applicant's demonstration that the applicant is likely to prevail on the merits, and (4) demonstration that the applicant will suffer irreparable injury if the relief is not granted"); *Thermatool Corp v Borzým*, 227 Mich App 366, 376 (1998) ("In determining whether to issue a preliminary injunction, a court must consider four factors: (1) harm to the public interest if the injunction issues; (2) whether harm to the applicant in the absence of temporary relief is outweighs the harm to the opposing party if relief is granted; (3) the likelihood that the applicant will prevail on the merits; and (4) demonstration that the applicant will suffer irreparable injury if the relief is not granted. The Plaintiff may indeed terminate the purchase orders pursuant to clear and unambiguous terms and conditions of those orders, at which time the Plaintiff would be responsible granted").

Moreover, “[t]he general rule is that whenever courts have found a mandatory injunction essential to the preservation of the *status quo* and a serious inconvenience and loss would result to plaintiff and there would be no great loss to defendant, they will grant it.” *Steggles v National Discount Corp*, 326 Mich 44, 50 (1949). See also *Gates v Detroit & Mackinac Railway Co*, 151 Mich 548, 552 (1908); *L & L Concession Co v Goldhar-Zimmer Theatre Enterprises, Inc*, 332 Mich 382, 388 (1952), quoting *Steggles, supra* at 50.³

Furthermore, this Court’s ruling “must not be arbitrary and must be based on the facts of the particular case.” *Thermatool, supra* at 376. See also *Steggles, supra* at 50 (holding that granting injunctive relief “is largely a mater of discretion of the trial court”); *Bratton v DAIIE*, 120 Mich App 73, 79 (1982); *Campau, supra* at 729 (the Court of Appeals “will not overturn a trial court’s grant or denial of a preliminary injunction save for an abuse of discretion”).

1. Harm to the Public Interest.

Under this factor of the analysis, this Court must address whether the public policy of Michigan is furthered or undermined by the granting of the injunctive relief.

As noted by the Defendants, the demolition of the Phoenix Center has been approved by the appropriate governmental authorities, and generally the courts should not stand in the way of lawful decisions of the

³ A mandatory preliminary injunction is one that requires the non-moving party to take an affirmative act. See, e.g., *Gates, supra* at 551. The standard is identical for granting mandatory and prohibitive injunctive relief. See, e.g., *Paccar Inc v TeleScan Technologies LLC*, 319 F3d 243 (CA 6, 2003).

other branches of government. Moreover, the City of Pontiac is in grave financial distress, and the Phoenix Center has become a financial drain as well as a public safety concern. There is a clearly a broad public interest in addressing these issues effectively and speedily.

On the other hand, the actions of all public officials must abide by the rule of law. The Constitution provides certain protections and procedures in place to protect the unalienable rights of property owners. The protection of due process and property rights is a vital function of the Constitution and a key role for this Court. Public safety is an insufficient cause to ignore constitutional rights - otherwise all of the constitutional rights afforded the general public and criminal defendants in Michigan's Declaration of Rights and the federal Constitution's Bill of Rights would be for naught. Likewise, financial considerations of a public entity do not allow it to violate the rights of property owners. Efficiency and speed must bow to the rigors of the law. Although the rights of the broader public are important, they cannot override the specific constitutional protects afforded to the Plaintiffs. If the Court were to accept the Defendants' arguments that the Defendants' concerns outweigh the rights of the Plaintiffs, the law and the Constitution would be rendered meaningless. The key issue before the Court today is whether the Constitution matters. It does. This factor favors the Plaintiffs.

2. Balance of Harm.

Under this prong of the analysis, this Court must evaluate whether the harm incurred by the nonmoving parties caused by granting the proposed injunctive relief will outweigh the harm to be incurred by the moving parties if the injunctive relief is denied.

The harm to the nonmoving parties includes an additional drain on the resources of the City of Pontiac, public security, and obstacles to urban renewal. However, these harms are limited in duration and temporally fixed. In addition, they have been longstanding issues. In part, these problems have been self-inflicted.

The harm to the moving parties would be the utter destruction of their due process and property rights. That a violation of due process as alleged in the Complaint can be remedied is a dubious proposition. In other words, the harm to the Plaintiffs if an injunction is denied is permanent - at least for a portion of their claims. Moreover, the harm imposed on the Plaintiffs is not of their own doing (other than by purchasing the Ottawa Towers). This factor favors the Plaintiffs.

3. The Merits.

Under this prong of the analysis, the moving parties must demonstrate that they are likely to prevail on the merits of a fully litigated action. In the instant case, the Plaintiffs have made a strong showing that their easement rights would be infringed, that they are being subjected to inverse condemnation through the destruction of their easements and physical damage to their structures, and that a taking outside of the constitutionally prescribed procedures and protections would occur through the demolition of the Phoenix Center. As such, they have also made a strong showing of due process violations.

This is not to conclude that the Plaintiffs *will* prevail, that is for another day. The Defendants have mounted a vigorous defense, and could very well win the case. However, for purposes of this Motion, the Plaintiffs have made the stronger showing.

4. Irreparable Harm.

Irreparable harm means harm that cannot be remedied by damages. *Thermatool, supra* at 377. In other words, “to establish irreparable injury, the moving party must demonstrate a noncompensable injury for which there is no legal measurement of damages or for which damages cannot be determined with a sufficient degree of certainty.” *Id.* Moreover, the “[t]he injury must be both certain and great, and it must be actual rather than theoretical.” *Id.*

Under the circumstances presented to the Court, the Plaintiffs have shown that the harm to them would be irreparable if injunctive relief is not granted. In particular, the Plaintiffs have made a strong showing that the demolition would be an unconstitutional inverse condemnation and taking that warrants injunctive relief before the harm occurs. See, e.g., *Bales v State Highway Comm’n*, 72 Mich App 50 (1976). This factor favors the Plaintiffs.

In light of the foregoing analysis, injunctive relief to preserve the status quo so that a final hearing can be held is appropriate. As revealed by the colloquy on the record, if the Plaintiffs are correct and prevail on their claims, and the Court had denied injunctive relief, would the Defendants really want to face the prospect of rebuilding the Phoenix Center (or whatever lesser specific performance might be more reasonable) rather than simply wait for a decision on

the merits? This consideration clearly favors granting a preliminary injunction. However, the proposed order extends to "public use," which is not at issue and not briefed by the Plaintiffs. Accordingly, the injunctive relief shall be limited to the Plaintiffs. In addition, in light of the public interest in this case, the case shall proceed on an expedited schedule.

ORDER

In light of the foregoing Opinion, the COURT HEREBY ORDERS that the Defendants, and their agents, representatives, contractors, members, successors and assigns, are, at this juncture, enjoined and restrained from taking any actions to close or demolish the Phoenix Center Plaza & Parking Garage or diminish its availability or condition for use by the Plaintiffs and their tenants, agents, representatives, contractors, members, successors, and assigns. In addition, the Court shall schedule an expedited status conference to develop an expedited scheduling order in this matter.

/s/Michael Warren

HON. MICHAEL WARREN,
CIRCUIT COURT JUDGE