

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 & ORDER REGARDING
DEFENDANTS' SECOND REPLACEMENT MOTION RECONSIDERATION**

At a session of said Court, held in the
County of Oakland, State of Michigan
May 9, 2013.

PRESENT: HON. MICHAEL WARREN

OPINION

Before the Court is the Defendants' Second Replacement Motion for Reconsideration regarding this Court's Opinion & Order granting Plaintiffs' Motion for Preliminary Injunction and Expediting Proceedings. The Motion requests the Court to reconsider its ruling "to the extent necessary to conclude that Defendants are not enjoined from prohibiting Plaintiffs, their employees, agents and tenants from parking in the Phoenix Center Parking deck." Having ordered and received exhaustive briefing on the Motion with supplemental briefing extending into April 2013, and the Court being otherwise conversant with MCR 2.119(F)(2), oral argument is dispensed.

I

A motion for reconsideration must demonstrate “palpable error” by which the Court and the parties have been misled and show that a different disposition of the motion must result from correction of the error. MCR 2.119(F)(3). Accordingly, a motion that merely presents the same issues as ruled upon by the Court, either expressly or by reasonable implication, will not be granted. *Id.* The grant or denial of a motion for reconsideration is a matter within the sound discretion of the trial court. *Cason v Auto Owners*, 181 Mich App 600, 605 (1989). There is no abuse of discretion in denying a motion resting on a legal theory and facts which could have been pled or argued prior to the trial court’s original order. *Charbeneau v Wayne County Gen’l Hosp*, 158 Mich App 730, 733 (1987).

II

In the instant case, the Defendants have (1) failed to demonstrate palpable error by which this Court was misled, and (2) failed to show that a different disposition of the motion must result from correction of any error. That the underlying opinion and order does not address the parking issue with particularity, at most, constitutes harmless error (not palpable error). Consequently, the breadth of the injunction granted requires no narrowing in relation to parking.

Documents and/or portions of documents apparently in the Defendants’ possession at the time of the Plaintiffs’ underlying motion for preliminary injunction were not provided to the Court (or apparently to the Plaintiffs). Such documents and/or portions of documents were disclosed to the Court for the first time by the Plaintiff in a motion to compel filed in March 2013 and in their instant Amended Response. These newly disclosed documents/portions of documents confirm that the issue of parking, like the issue of demolition, is in

material dispute and, further, that the Plaintiffs may be third party beneficiaries of the Lease and/or Sublease in light of a newly disclosed Section in both documents titled "Appurtenant Facilities." (The Section, substantively identical in both contracts, states "The site on which this Project is to be located, includes, or will include, ... parking areas.") The newly disclosed documents further confirm that the balance of considerations, at this juncture, favor the Plaintiffs on the parking issue and, thus, that there is no error in preserving the breadth and scope of the injunction previously issued. By way of illustration, there is a public interest in enforcing agreements and legal rights - the Defendants' core argument that the Plaintiffs have no contractual right to park in the parking deck and are trespassers has been materially weakened because the Defendants failed to address the "Appurtenant Facilities" provisions in the agreements they signed or the Plaintiffs' related third party beneficiary argument which implicates language in the agreements requiring the Phoenix Center to be available and in good condition and repair to the "users and occupants" of the Phoenix Center. Ingress/egress rights also are in material dispute. Additionally, the harm to Plaintiffs, on balance, outweighs the harm to Defendants in preserving the status quo in relation to parking because it appears, among other things, that adequate alternative parking is in material dispute and losing parking in which the Plaintiffs may have a legal right outweighs any harm to the Defendants in requiring parking be preserved pending dispositive resolution. As to the merits, the Plaintiffs have made a stronger showing on this prong based on the newly disclosed draft report the Defendants declined to acknowledge at the time of the underlying motion describing the Phoenix Center in "fair to good" condition, a subsequent draft report the Defendants also declined to acknowledge at the time of the underlying motion reflecting a written instruction to omit the "fair to good" condition conclusion from the final May 21, 2012 report submitted to the Court, and the newly provided Appurtenant Facilities provision and related third party beneficiary argument to which the Defendants declined to respond. This is not to say that the Plaintiffs *will* ultimately prevail on any particular issue;

however, at this juncture, the foregoing documents are sufficient to tip the merits prong of the preliminary injunction analysis in the Plaintiffs' favor. Finally, as to irreparable harm, 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 (see pp 19-20 of Plaintiffs' Amended Response minus footnote 7 and the ulterior motive they ascribe to the Defendants).

Accordingly, for all of the foregoing reasons, the Motion for Reconsideration is denied, and to the extent any clarification is warranted, this Opinion and Order will clarify 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, including but not limited to parking, by the Plaintiffs and their tenants, agents, representatives, contractors, members, successors, and assigns.

ORDER

Based on the foregoing Opinion, Defendants' Motion is DENIED, and to the extent any clarification of the original opinion & order is warranted, this Order clarifies 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, including but not limited to parking, by the Plaintiffs and their tenants, agents, representatives, contractors, members, successors, and assigns.

/s/Michael Warren

**HON. MICHAEL WARREN,
CIRCUIT COURT JUDGE**