

FILED

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IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

STATE ex rel.
DOUGLAS P. WHIPPLE
1518 S. Taylor Road
Cleveland Hts., OH 44118

and

SUSAN M. TUCK-WHIPPLE
1518 S. Taylor Road
Cleveland Hts., OH 44118

Relators,

vs.

CITY OF CLEVELAND HEIGHTS
40 Severance Circle
Cleveland Hts., OH 44118

and

OHIO DEPARTMENT OF TRANS-
PORTATION, DISTRICT 12
5500 Transportation Blvd.
Garfield Hts., OH 44125

Respondents.

Judge: PETER J CORRIGAN

CV 11 768270

JUDGE:

COMPLAINT FOR MANDAMUS,
DECLARATORY JUDGMENT,
INJUNCTION, STATUTORY DAMAGES
AND OTHER RELIEF

(Jury demand endorsed hereon)

Relators, for their Complaint, allege as follows:

PARTIES

1. At all times relevant hereto, Relators were and are residents of the City of Cleveland Heights, County of Cuyahoga, State of Ohio, specifically at 1518 South Taylor Road.

2. At all times relevant hereto, Relator Susan M. Tuck-Whipple was and is the owner of the home and land located at 1518 South Taylor Road, City of Cleveland Heights, County of Cuyahoga, State of Ohio, more particularly, PPN 684-37-001.

3. At all times relevant hereto, Respondent City of Cleveland Heights, Ohio (hereafter the "City") was and is an Ohio municipal corporation located in Cuyahoga County, Ohio.

4. At all times relevant hereto, Respondent Ohio Department of Transportation, District 12 (hereafter "ODOT") was and is a department or agency of the State of Ohio, located in Cuyahoga County, Ohio.

ALLEGATIONS

5. Since 2002, the City has engaged in activities for the purpose of rehabilitating Taylor Road, including the seven-lane portion of South Taylor Road between Euclid Heights Blvd. and Mayfield Road (hereafter "Rehabilitation Project").

6. The west side of the portion of South Taylor Road between Euclid Heights Blvd. and Mayfield Road, on which Relators reside, is completely residential.

7. There is has a comparatively narrow strip of sidewalk and tree lawn on the west side of the portion of South Taylor Road between Euclid Heights Blvd. and Mayfield Road that buffers the residential homes and their residents from the heavy road traffic, including fast-moving emergency vehicles proceeding from the Taylor/Mayfield fire department and the Severance Road police department.

8. Due to the wideness of the road and the narrowness of the tree lawn, the sidewalk on the west side of the portion of South Taylor Road between Euclid Heights Blvd. and Mayfield Road becomes impassable, particularly to residents and pedestrians who are handicapped, elderly

or minor children, whenever there is a significant accumulation of snow and ice on South Taylor Road that the City plows onto the sidewalk.

9. The City used to plow the sidewalk on the west side of the portion of South Taylor Road between Euclid Heights Blvd. and Mayfield Road, but discontinued the service after the citizens rejected a tax levy that City Council had proposed.

10. The east side of the portion of South Taylor Road between Euclid Heights Blvd. and Mayfield Road is comprised of commercial properties, high-rise apartment complexes and undeveloped lands.

11. The commercial properties, high-rise apartment complexes and undeveloped lands on the east side of the portion of South Taylor Road between Euclid Heights Blvd. and Mayfield Road enjoy a strip of sidewalk, tree lawn and green space that is substantially wider than is available to the residents and pedestrians on the west side of the road.

12. On or about January 22, 2002, City Council approved Resolution No. 14-2002(MS), which among other things directed the City Manager to enter into an agreement with Wade Trim Ohio, Inc. (hereafter "Wade Trim") for engineering services relating to the Rehabilitation Project, the scope of which was defined in a proposal on file with the Clerk of Council.

13. City Council indiscriminately and inappropriately declared Resolution No. 14-2002(MS) to be an emergency measure.

14. On or about January 23, 2002, the City conducted a "kick-off meeting" for the Rehabilitation Project. The minutes of this non-public meeting identified certain "Preconceived Ideas" from City staff members.

15. On or before March 14, 2002, the City recognized the propriety and necessity of conducting one or more public meetings on the Rehabilitation Project, including the plans for utilizing the green space created by the narrowing of South Taylor Road by two lanes. The City acknowledged that the cost estimates would not be available for public comment.

16. In a timetable dated March 13, 2002, the City and/or its agent, Wade Trim, set a projected public meeting for July 17, 2002, following the completion of the final conceptual design and the final cost estimates.

17. The City failed to conduct a public meeting following the completion of the final conceptual design and the final cost estimates, on July 17, 2002 as planned or on any other date.

18. The City's failure to conduct a public meeting following the completion of the final conceptual design and the final cost estimates was an intentional act on the part of the City Manager, one or more of the members of City Council, and one or more of the City's legal advisors in the course and scope of their agency.

19. The City conducted a public meeting on the Rehabilitation Project on or about March 21, 2002, more than nine years ago.

20. At the March 21, 2002 public meeting, the City introduced four concepts for the Rehabilitation Project, identified as Concepts A through D.

21. According to Concept C that the City presented the Rehabilitation Project would remove two lanes from the seven-lane stretch of South Taylor Road between Euclid Heights Blvd. and Mayfield Road, and Wade-Trim distributed graphic design drawings showing that some of the newly created green space would be allocated to the residential west side of South Taylor Road.

22. The City conducted a second public meeting on the Rehabilitation Project on or about April 3, 2002, which also was more than nine years ago.

23. At the April 3, 2002 public meeting, the City submitted Concepts C and D for further consideration, indicating that Concept C was the City's first choice. The public meeting addressed traffic analysis, schematic design, lighting elements and landscaping considerations.

24. At no time from April 3, 2002 to the date of the bid opening in 2011 did the City notify its property owners and residents that it had abandoned Concept C, including the plan to allocate a portion of the newly created green space to the residential west side of South Taylor Road.

25. According to the plan that the City publicized to its property owners, residents and taxpayers, the Rehabilitation Project would remove two lanes from the seven-lane stretch of South Taylor Road between Euclid Heights Blvd. and Mayfield Road, resulting in the creation of forty-one feet of new green space; and seven feet of the newly created green space would be allocated to the residential west side of South Taylor Road, thereby widening the tree lawn and sidewalk to fifteen feet from its present eight feet. The remaining thirty-four feet of newly created green space would be allocated to the commercial and undeveloped east side of South Taylor Road, generating enough land for the inclusion of a new ten-foot multipurpose path.

26. On or about January 7, 2003, Wade-Trim created a preliminary drawing that continued to show that a portion of the newly created green space was to be allocated to the residential west side of South Taylor Road.

27. On or about January 3, 2005, City Council approved Resolution No. 3-2005(MS), which among other things directed the City Manager to enter into an agreement with Wade Trim

for engineering services for a construction feasibility and cost study for the Rehabilitation Project, the scope of which was defined in the proposal of December 17, 2004.

28. City Council indiscriminately and inappropriately declared Resolution No. 3-2005(MS) to be an emergency measure.

29. On or about October 25, 2006, Wade Trim presented to the City a draft submittal to the Northeast Ohio Areawide Coordination Agency (hereafter "NOACA") for preliminary project discussions. Attachments to the draft submittal indicated that a portion of the newly created green space was to be allocated to the residential west side of South Taylor Road, and demonstrated that no public meetings had been conducted on the Rehabilitation Project since 2002.

30. On or about November 20, 2006, City Council approved Resolution No. 134-2006, which among other things directed the City Manager to apply to NOACA for federal funding for the Rehabilitation Project.

31. City Council indiscriminately and inappropriately declared Resolution No. 134-2006(MS) to be an emergency measure.

32. On or about December 1, 2006, City Capital Projects Manager Carl Czaga transmitted a letter and application for federal funding to NOACA, which confirmed that the City had not conducted a public meeting regarding the Rehabilitation Project since the year 2002.

33. Upon information and belief, Relators assert that the contents of this application package continued to indicate that a portion of the newly created green space was to be allocated to the residential west side of South Taylor Road.

34. The contents of this application package included "a modified version of Concept C," which the City declared to be more fiscally sound "due to economic considerations." The City included in its explanation that additional green space would be added to the east side of South Taylor Road.

35. The City's aforementioned explanation to NOACA failed to point out expressly that additional green space would no longer be added to the west side and, in the context of the entire application package, was therefore misleading.

36. On or before March 13, 2007, the City informed NOACA's Regional Transportation Investment Subcommittee that the City "is thinking of leaving the pavement" on the residential west side of South Taylor Road as it is, and allocating all the of additional green space created by the removal of two traffic lanes to the commercial and undeveloped east side.

37. The City failed to inform its property owners and residents, including Relators, that it had abandoned its plan to allocate any portion of the newly created green space to the residential west side.

38. The City's failure to inform its property owners and residents that it had abandoned its plan to allocate any portion of the newly created green space to the residential west side was an intentional act on the part of the City Manager, one or more of the members of City Council, and one or more of the City's legal advisors in the course and scope of their agency.

39. On or about January 31, 2008, the City's Capital Projects Manager presented to ODOT its NOACA funding application and a Draft Project Scope for the Rehabilitation Project.

40. Attached to the aforementioned January 31, 2008 communication was a fourteen-page "LPA Scope of Services Form."

41. In the context of the aforementioned Form, the term "LPA" refers to "local public agency," i.e., the City.

42. On page 9 of the Form the City acknowledged that in its role as LPA it was required to conduct a public meeting or hearing on the environmental impact of the Rehabilitation Project.

43. The City and ODOT never conducted any such public environmental impact meeting or hearing.

44. According to the City and/or its agents, ODOT waived the City's obligation to conduct a public meeting or hearing on the environmental impact of the Rehabilitation Project.

45. According to the City and/or its agents, the reason that the City never conducted a public meeting or hearing on the environmental impact of the Rehabilitation Project was because the number of property owners and residents who might be affected by the environmental impact of the Rehabilitation Project was insignificant.

46. Respondents never notified the property owners and residents of South Taylor Road, including Relators, that the public meeting or hearing on the environmental impact of the Rehabilitation Project would not take place.

47. Respondents never notified the property owners and residents of South Taylor Road, including Relators, that they were deemed by Respondents to be too insignificant to be afforded a public meeting or hearing on the environmental impact of the Rehabilitation Project.

48. On or about September 2, 2008, City Council approved Resolution No. 134-2008(MS), which among other things directed the City Manager to enter into an agreement with Wade Trim for engineering services for the survey and traffic data phase of the Rehabilitation Project, the scope of which was defined in the proposal of August 21, 2008.

49. City Council indiscriminately and inappropriately declared Resolution No. 134-2008(MS) to be an emergency measure.

50. On or about February 17, 2009, City Council approved Resolution No. 17-2009(MS), which among other things directed the City Manager to enter into an agreement with Wade Trim for the preliminary engineering study and design plan phase (Phase I) of the Rehabilitation Project, the scope of which was defined in the proposal of November 7, 2008.

51. City Council indiscriminately and inappropriately declared Resolution No. 17-2009(MS) to be an emergency measure.

52. On or about May 13, 2010, the City and ODOT adopted a preliminary project schedule whereby certain plans would be prepared and reviewed in anticipation that the Rehabilitation Project contract would be awarded in April 2011.

53. On or about June 1, 2010, the City indicated that the federal funds would not be available by April 2011 and, accordingly, notified NOACA that it sought to obtain a SIB loan through ODOT to finance the Rehabilitation Project in the interim with a commitment from NOACA to remit the Federal share toward repayment of the SIB loan.

54. On or about June 17, 2010, the City represented to ODOT with respect to the Rehabilitation Project that "There has been extensive public involvement during the planning process of this project."

55. The City made this representation in June 2010 with full knowledge that it had not conducted any public meetings or hearings since 2002.

56. On or about October 4, 2010, City Council enacted Resolution No. 126-2010(MS), which among other things pledged cooperation with ODOT for the Rehabilitation Project.

57. City Council indiscriminately and inappropriately declared Resolution No. 126-2010(MS) to be an emergency measure.

58. City Council contemplated that the scope of the Rehabilitation Project would include among other things pavement narrowing, base replacement, curbs, drainage improvements and resurfacing.

59. City Council contemplated that the cost of the Rehabilitation Project would be paid for by funds obtained from City taxpayers and the Federal Highway Administration through NOACA.

60. ODOT approved Resolution No. 126-2010(MS) and caused plans and specifications to be made for the Rehabilitation Project.

61. On or about March 4, 2011, Relators submitted to the City a Public Records Request seeking certain documents pertaining to the Rehabilitation Project and/or Resolution No. 78-2011 (MS), as to which the City was generally responsive.

62. On or about June 20, 2011, City Council enacted Resolution No. 78-2011(MS), which among other things directed the City Manager to execute a contract with ODOT to proceed with the aforesaid highway improvement.

63. Resolution No. 78-2011(MS) was offered by City Council member Bonita W. Caplan.

64. Resolution No. 78-2011(MS) was omitted from the agenda that was made public to the residents of the City, including Relators.

65. The omission of Resolution No. 78-2011(MS) from the June 20, 2011 public agenda was unlawful.

66. The omission of Resolution No. 78-2011(MS) from the June 20, 2011 public agenda was an intentional act on the part of the City Manager, one or more of the members of City Council, and one or more of the City's legal advisors in the course and scope of their agency, with knowledge that the omission was unlawful.

67. City Council indiscriminately and inappropriately declared Resolution No. 78-2011 (MS) to be an emergency measure.

68. As a consequence of Resolution No. 78-2011 (MS), the City and ODOT entered into a Contract on or about June 28, 2011

69. On or about July 8, 2011, Relators submitted to the City a Public Records Request seeking five separate categories of documents pertaining to the Rehabilitation Project and/or Resolution No. 78-2011 (MS), requesting an inspection date of July 13 or 14, 2011.

70. On or about July 18, 2011, Relator Whipple attended the City Council meeting and asked the members of Council to formally address, among other things, a) the City's failure to notify the public that it had modified the Taylor Road green space allocation; b) the omission of Resolution No. 78-2011(MS) from the June 20, 2011 public agenda; c) the City's failure since 2002 to conduct a public meeting or hearing on the Rehabilitation Project; and d) the City's indiscriminate and inappropriate use of the emergency legislation provision.

71. None of the members of City Council have taken any initiative, to Relators' knowledge, to address the concerns raised at the July 18 City Council meeting.

72. The bid opening for the Rehabilitation Project was July 21, 2011.

73. On or about July 21, 2011, Relators asked the City Manager for a response to their Public Records Requests because neither he nor any other City representative had responded to them.

74. Shortly thereafter, Relator Whipple was informed that he was permitted to communicate only through the City's Law Director and that neither the City Manager nor the members of City Council would communicate with him directly.

75. On or about August 5, 2011, Relators submitted to the City a Public Records Request seeking documents pertaining to the public meeting or hearing on the environmental impact of the Rehabilitation Project, referred to in the January 2008 LPA Scope of Services Form, that apparently never was conducted.

76. On or about August 5, 2011, Relators submitted to ODOT a Public Records Request seeking documents pertaining to the public meeting or hearing on the environmental impact of the Rehabilitation Project, referred to in the January 2008 LPA Scope of Services Form, that apparently never was conducted.

77. On or about August 11, 2011, ODOT responded to Relators' August 5 Public Records Request by producing documents that were categorically unresponsive.

78. On or about August 18, 2011, Relators renewed in writing their August 5, 2011 Public Records Request.

79. On or about August 22, 2011, ODOT presented a response to Relators' August 18, 2011 letter that was unresponsive if not evasive.

80. The failure to present to Relators complete responses to their Public Records Request of August 5 was and continues to be an intentional act on the part of ODOT.

81. On or about August 19, 2011, Relator Whipple notified the City's Law Director that he still had not received complete responses to Relators' Public Records Requests to the City of July 8 and August 5.

82. On or about September 2, 2011, Relator Whipple notified the City's Law Director that he still had not received complete responses to Relators' Public Records Requests to the City of July 8 and August 5.

83. To date, Relators still have not received complete responses to Relators' Public Records Requests to the City of July 8 and August 5, 2011.

84. The failure to present to Relators complete responses to their Public Records Requests of July 8 and August 5 was and continues to be an intentional act on the part of the City Manager, one or more of the members of City Council, and one or more of the City's legal advisors in the course and scope of their agency.

85. The commencement of the Rehabilitation Project is imminent.

COUNT ONE
(Mandamus)

86. Relators incorporate by reference and reallege the above assertions as if set forth herein at length.

87. The aforementioned acts and omissions of Respondents constitute a violation of the Public Records Act, R.C. § 149.43.

88. The records requested are public records pursuant to R.C. § 149.43(A)(1), to which Relators are entitled and as to which Respondents can show no applicable exception.

89. Respondents have failed to set forth why they have not provided complete responses to Relators' Public Records Requests, including citations to legal authorities, in violation of R.C. § 149.43(B)(3).

90. Accordingly, Respondents are entitled to a writ of mandamus as to the Public Records that they have requested.

COUNT TWO
(Attorney Fees and Costs)

91. Relators incorporate by reference and reallege the above assertions as if set forth herein at length.

92. The aforementioned acts and omissions of Respondents entitle Relators to a remedial award of reasonable attorney fees, pursuant to R.C. § 149.43(C)(2)(b) and (c).

93. The aforementioned acts and omissions of Respondents that were knowingly unlawful and/or wrongful entitle Relators to a punitive award of reasonable attorney fees.

COUNT THREE
(Injunction)

94. Relators incorporate by reference and reallege the above assertions as if set forth herein at length.

95. The aforementioned acts and omissions of Respondents have deprived Relators and other property owners and residents of South Taylor Road of public hearings about the Rehabilitation Project to which they were lawfully entitled.

96. The aforementioned acts and omissions of the City by its indiscriminate and inappropriate exercise of the emergency measure clause, particularly with respect to Resolution No. 78-2011(MS), deprived Relators and other property owners and residents of South Taylor Road of public notice of the proceedings of City Council to which they were lawfully entitled.

97. The aforementioned acts and omissions of the City by passing Resolution No. 78-2011(MS) despite its omission from the June 20, 2011 public agenda deprived Relators and other property owners and residents of South Taylor Road of public notice of the proceedings of City Council to which they were lawfully entitled.

98. An injunction against Respondents from proceeding with the Rehabilitation Project is necessary so as to prevent irreparable harm to Relators and other property owners and residents of South Taylor Road.

99. No adequate remedy at law exists in favor of Relators and against Respondents.

PRAYER FOR RELIEF

WHEREFORE, Relators respectfully pray for the following relief:

a) An order in mandamus compelling Respondents to immediately submit complete responses to Relators' pending Public Records Requests.

b) An award of statutory damages to Relators and against the City in the amount of Five Thousand and no/100 Dollars (\$5,000.00) with respect to Relators' Public Records Requests dated July 8, 2011.

c) An award of statutory damages to Relators and against the City in the amount of One Thousand and no/100 Dollars (\$1,000.00) with respect to Relators' Public Records Request dated August 5, 2011.

d) An award of statutory damages to Relators and against ODOT in the amount of One Thousand and no/100 Dollars (\$1,000.00) with respect to Relators' Public Records Request dated August 5, 2011.

e) A declaration that the City's use of the emergency legislation provision has been indiscriminate and inappropriate, and an order providing preliminary and/or permanent injunctive relief prohibiting the City from continuing such practice.

f) A declaration that Resolution No. 78-2011(MS) and the contract between Respondents executed as a result thereof are void due to its omission from the June 20, 2011

public agenda and/or because the City's declaration of the Resolution as an emergency measure was indiscriminate and inappropriate, and an order providing preliminary and/or permanent injunctive relief prohibiting Respondents from proceeding with the Rehabilitation Project.

g) A declaration by the Court providing preliminary and/or permanent injunctive relief prohibiting Respondents from proceeding with the Rehabilitation Project until one or more meetings or hearings open to the general public are conducted that address the final conceptual design and the final cost estimates, to which all the property owners and residents of South Taylor Road are to be specifically invited.

h) A declaration by the Court providing preliminary and/or permanent injunctive relief prohibiting Respondents from proceeding with the Rehabilitation Project until one or more meetings or hearings open to the general public are conducted that address the environmental impact of the Rehabilitation Project, to which all the property owners and residents of South Taylor Road are specifically to be invited.

i) A declaration by the Court providing preliminary and/or permanent injunctive relief prohibiting the City from restricting Relators' right to communicate directly with their elected representatives and public servants.

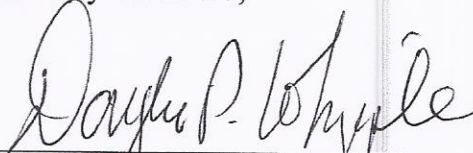
j) An order that Relators are not required to post security pursuant to Civil Rule 65(C).

k) An award to Relators of reasonable attorney fees incurred in the prosecution of this action and in pursuing their Public Records Requests.

l) An award of costs pursuant to R.C. § 149.43(C)(2).

m) Such other relief as this Honorable Court may deem just and equitable.

Respectfully submitted,



Douglas P. Whipple (# 0025754)

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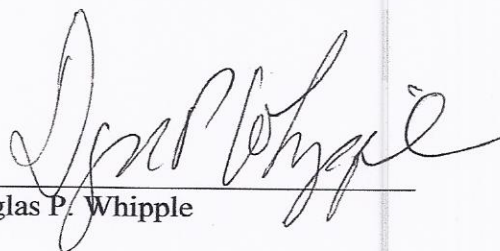
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JURY DEMAND

A trial by the greatest number of jurors allowable by law is hereby demanded as to all issues so triable.



Douglas P. Whipple