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Sixth Circuit: City's Placement of a Park Entrance was not a Taking Under the Fifth Amendment.

The U.S. Supreme Court issued several important decisions altering and clarifying available procedures and arguments for landowners under the Fifth Amendment's Takings Clause in recent years. Most notably, in *Knick v. Township of Scott*, Pennsylvania, 139 S.Ct. 2162 (2019), the Supreme Court overturned a 30-year-old precedent that required landowners to exhaust all state law remedies before bringing a federal Takings Clause claim. This decision requires local governments to be more cognizant of their land use, planning, and zoning decisions because those decisions can be subject to immediate constitutional claims in federal court.

More recently, in *Cedar Point Nursery v. Hassid*, 141 S.Ct. 2063 (2021), the Supreme Court held that an access regulation requiring employers to permit labor organizations a right of access onto the employer's property to solicit support for unionization was a taking under the Fifth Amendment. The Court reasoned that a physical appropriation is a clear taking that can occur by whatever means, including taking the property owner's right to exclude from its property.

In September, in *Golf Village N., LLC v. City of Powell, Ohio*, the Sixth Circuit relied upon both *Knick* and *Cedar Point* in upholding a decision to dismiss a developer's claim that the city of Powell's placement of a municipal park entrance that actually connected to a private street system, and the increased traffic resulting from that placement, was a taking under the Fifth Amendment.

Golf Village alleged that the city appropriated Golf Village's right to exclude the public from its private property but failed to plead any factual content demonstrating such a taking. Per the Court, Golf Village needed to allege that the city authorized and licensed the public's use of the private streets and then deprived Golf Village of its right to exclude to establish a taking.

The city had appropriated one of the private streets in connection with the placement of the park entrance, and the city maintained that this was the intended public entryway to the park. Golf Village was specifically alleging that the remaining private streets could be used as an alternate access route to the park. Golf Village, however, did not allege that it was barred from excluding the public from the remaining private streets - the alleged alternate access route; indeed, the city conceded that Golf Village had the right to block access to the remaining private streets so that traffic could not use them to access the public park. Because the city did not require Golf Village to permit public traffic on its property, the Court found no government-authorized physical invasion of Golf Village's property requiring compensation.

The Court also rebuffed Golf Village's contention that the right to exclude is appropriated even if the property owner can take a specific action, like building a gate, to stop the taking. In short, there is no taking if the private property owner maintains its right to exclude. Because it was undisputed that Golf Village had that ability, there was no taking.

The same reasoning applied to Golf Village's argument that increased traffic along the remaining private roads would result in higher maintenance costs and violate Golf Village's right to use and

enjoy property. The city never appropriated a right of access for members of the public to the remaining private streets and admitted that Golf Village has the right to exclude public traffic through any lawful means. Further, Golf Village retained the same ability to use and enjoy the private streets that it had before the challenged city actions.

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