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*President of Council*

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*Clerk of Council*

# City of Willoughby Hills

*Council*  
CHRISTOPHER L. BIRO  
NANCY E. FELLOWS  
DAVID M. FIEBIG  
FRANK A. GERMANO  
RAYMOND C. SOMICH

## **ORDINANCE NO. 2010-16**

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### **AN ORDINANCE ASSERTING THE CITY OF WILLOUGHBY HILLS' LEGAL RIGHT TO KEEP BISHOP ROAD AS IT NOW EXISTS, FREE FROM APPROPRIATION ON A BASIS OF A RIGHT WHICH IS EXPRESSED SPECIFICALLY WITHIN THE FRAME OF SECTION III, ARTICLE 18 OF THE OHIO CONSTITUTION.**

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**WHEREAS**, a general grant of power given by constitutional authority to a municipal corporation to condemn land within or without its corporate limits for the establishment of public utilities such as airports, landing fields or other air navigation facilities does not extend to the appropriation of a public street in another municipal corporation which is maintained by such municipal corporation in the performance of a governmental function; and

**WHEREAS**, Section 3, Article XVIII, of the Constitution of Ohio, reads as follows: "Municipalities shall have authority [\*\*\*11] to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws."; and

**WHEREAS**, additional language in the Ohio Constitution classifies cities and villages as municipal corporations (Section 1, Article XVIII), and the constitution provides further that "general laws shall be passed to provide for the incorporation and government of cities and villages (Section 2, Article XVIII); and

**WHEREAS**, one of the general laws passed under authority of the Constitution is Section 723.01, Revised Code, which reads: "Municipal corporations shall have special power to regulate the use of the streets. The legislative authority of such municipal corporation shall have the care, supervision, and control of public highways, streets, avenues, alleys, sidewalks\*\*\*and shall cause them to be kept open, in repair, and free from nuisance"; and

**WHEREAS**, the streets and highways as to which the Constitution and statutes have given municipalities the power to "regulate" and control" are not public utilities," as that term is used under Ohio laws; they are "public and governmental institutions, maintained for the [\*\*\*12] free use of all citizens of the state," the maintenance of which engages the municipality in the performance of a governmental function as distinguished from a proprietary function; and

**WHEREAS**, it is a general rule, and one of long standing, that when a condemnor, to which the power of eminent domain is given by law, seeks to exercise its power with respect to property already devoted to public use, its action may be enjoined if the proposed use will either destroy the existing use or interfere with it to such an extent as is tantamount to destruction, unless the law as authorized the acquisition either expressly or by necessary [\*\*\*13] implication; and

**WHEREAS**, no express language gives one municipality, acting in its proprietary capacity, a right to appropriate and use land of another municipality which is already devoted to public use and which is in law a public and governmental instrumentality maintained for the free use of all citizens of the state, much less a right to appropriate and use such land for purposes inconsistent with its established use as a governmental instrumentality.

**WHEREAS**, it requires no argument to prove that the use of the property for airport runway purposes is inconsistent with the use of the property for street purposes. Indeed, its use for airport purposes would entirely destroy its use for street [\*\*\*14] purposes; and

**WHEREAS**, Section 4, Article XIII of the Constitution, was not intended to be repugnant to the power of home rule given to another municipal corporation under Section 3, Article XVIII of the Constitution; and

**WHEREAS**, Bishop Road as it now exists, free from appropriation must be controlled by legal principals, as stated herein and not by considering the practical effect of an airport for another city at the expense of a public street located in the City of Willoughby Hills for if each are municipal corporations, and if property of one, devoted to governmental uses, can be taken by the other for an airport, while acting in its proprietary capacity, it would make possible the destruction the City of Willoughby Hills, or at least a part thereof by another municipal corporation for its convenience and economy.

**NOW, THEREFORE, BE IT ORDAINED BY THE COUNCIL OF THE CITY OF WILLOUGHBY HILLS, COUNTY OF LAKE, STATE OF OHIO THAT:**

**SECTION 1.** The Administration and the Council of the City of Willoughby Hills hereby asserts its legal right to keep and maintain Bishop Road as it now exists, free from appropriation based on the legal principles established by the Ohio Constitution and the Ohio Revised Code.

**SECTION 2.** The actions of this Council concerning and relating to the passage of this legislation were conducted in lawful meetings of this Council and that all deliberations of this Council and of any of its committees that resulted in such formal action were in compliance with all legal requirements including Chapter 107 of the Codified Ordinances of the City of Willoughby Hills.

**SECTION 3.** This Ordinance shall be in full force and take effect at the earliest time permitted by law.

PASSED: May 13, 2010

Submitted to the Mayor for his approval  
on this 13 day of May, 2010

ATTEST:

Victoria Ann Savage, CMC  
Clerk of Council

Kevin D. Malecek  
President of Council

Approved by the Mayor

May 13, 2010

Robert M. Weger  
Mayor