**[Cite as *State ex rel. Nicholson v. Toledo*, 2012-Ohio-4325.]**

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

State of Ohio, ex rel. Anthony Nicholson — Court of Appeals No. L-11-1072

Relator

v.

City of Toledo, et al. — **DECISION AND JUDGMENT**

Respondents — Decided: September 17, 2012

* * * * *

Megan K. Mattimoe, for relator.

Adam W. Loukx, Director of Law, and Jeffrey B. Charles, for respondents.

* * * * *

**PIETRYKOWSKI, J.**

**{¶ 1}** This matter is before the court as an original action in mandamus. Relator, Anthony Nicholson, seeks an order from this court directing respondent the city of Toledo to initiate appropriation proceedings and to empanel a jury to determine just compensation for relator's real property, situated at 3019 Warsaw, Toledo, Ohio 43608,

which relator asserts respondent has taken without just compensation in violation of Ohio law. In the alternative, relator requests that we order respondent, the Nuisance Abatement Housing Appeals Board ("NAHAB"), to issue a final appealable order for demolition and journalize the order in accordance with Ohio law so that relator might take additional appropriate legal action. Respondents have filed a motion to dismiss.

**{¶ 2}** Respondents in this action are listed on the petition as follows: the city of Toledo; the Nuisance Abatement Housing Appeals Board; Mayor Michael Bell, in his official capacity and individually; former Mayor Carlton S. Finkbeiner, in his official capacity and individually; Lori Rutkowski, supervisor for the city of Toledo Department of Neighborhoods, Building Inspection and Code Enforcement, in her official capacity and individually; Thomas B. Kroma, acting commissioner of the city of Toledo Department of Neighborhoods, Building Inspection and Code Enforcement, in his official capacity and individually; Paula Kozlowski, a building inspector with the city of Toledo Department of Neighborhoods, Building Inspection and Code Enforcement, in her official capacity and individually; David L. Grossman, M.D., city of Toledo Health Commissioner, in his official capacity and individually; John Doe, city of Toledo Director of Public Safety, in his official capacity and individually; and John Madigan, the former law director of the city of Toledo, in his official capacity and individually. Following the filing of the petition, however, relator filed a motion for voluntary dismissal, seeking to dismiss the action against the various respondents in their individual capacities. That motion for voluntary dismissal is hereby granted.

**{¶ 3}** The facts of this case are not in dispute. Relator is the owner of real property situated at 3019 Warsaw Street, Toledo, Ohio. Relator purchased the house on January 7, 2005. On May 26, 2005, the city of Toledo issued a notice of liability to relator regarding the nuisance condition of the property. The nuisance conditions listed in the notice were: tall grass and weeds, junk, debris, trash and litter, tires and an unsecured building. In addition, photographs attached to the citation show the exterior of the home in great disrepair. Pursuant to the notice, relator was fined $75, instructed to immediately abate the nuisance and was notified of his right to appeal the notice to NAHAB. On June 1, 2005, the city issued a determination of public nuisance regarding the same parcel. That determination ordered relator to repair or replace the windows and siding on the house, repair or replace the fence, and repair or replace the doors and windows on the garage, all within 30 days after service of the notice. The notice further stated that if relator failed to abate the public nuisance within 30 days after service of the notice, criminal charges and/or a civil complaint may be filed against him and that "the public nuisance may be abated or demolished by the City of Toledo at [relator's] expense."

**{¶ 4}** On July 18, 2005, and August 10, 2005, the city again issued notices of liability to relator regarding the nuisance condition of his Warsaw Street property, following re-inspections of that property. The photographs attached to those notices show no change in the condition of the property. They also include notices to relator of his right to appeal the citations and the question of whether a public nuisance exists to

NAHAB. Relator did not appeal those notices or comply with the order to abate the nuisance, and on August 11, 2005, the city filed a request to place the property on the demolition list. The city then sent relator a notice of condemnation and demolition, dated August 22, 2005, which included a notice of relator's right to appeal the decision to NAHAB. The city posted the notice on the Warsaw Street property on September 20, 2005.

**{¶ 5}** Relator responded by a letter in which he set forth a schedule for making the repairs and asked that the demolition be delayed so that he could prove he had begun the necessary repairs to the property. Relator, however, did not immediately begin those repairs, and on October 3, 2005, the city filed a complaint in the Toledo Municipal Court which charged relator with failure to abate a public nuisance in violation of Toledo Municipal Code 1726.03.

**{¶ 6}** Photographs in the record that appear to have been taken in December 2005 and January 2006, show very few changes to the exterior of the property, except for the boarding up of windows and doors and possible repairs to the siding. On April 6, 2006, the city once again issued a notice of liability to relator regarding the nuisance condition of his Warsaw Street property. The notice indicated that it was the fourth violation in two years, fined him $300 and demanded that he immediately abate the nuisance to avoid further penalties and criminal prosecution. On May 26, 2006, the city issued a final notice of condemnation and demolition for the Warsaw Street property. Relator, however, had begun to make improvements to the property, and following his appeal of

the final notice of condemnation and demolition, NAHAB approved his appeal on the condition that he continue to make progress. Relator further submitted an updated plan for his rehabilitation of the property, which included painting the trim and siding, plumbing and electrical updates, new doors on the garage, drywall work, and a new bath and kitchen. Relator planned to move into the home in February or March 2007. NAHAB's conditional approval of relator's appeal, however, noted that the property was to remain on the demolition list pending relator's compliance with the conditions.

**{¶ 7}** On August 21, 2006, the city returned relator's property to demolition status. In the letter to relator informing him of the decision, the city stated that relator had failed to follow through with the conditions established by NAHAB in its approval of his earlier appeal. An inspector's report of October 26, 2006, however, notes that some work had been started, and relator was evidently given further time to comply with the abatement orders. Nevertheless, on February 28, 2007, the city sent relator a final notice of condemnation and demolition, for his failure to repair, rehabilitate or demolish the Warsaw Street property. Relator appealed that notice to NAHAB which, in a decision dated April 5, 2007, denied the appeal. That decision did not cite a reason for the denial and was signed by the Commissioner of Health, or his designated representative, and the Director of Public Safety, or his designated representative. There is a space on the decision for the signature of the Director of Law or his designated representative, but that line is blank. Relator states in his affidavit attached to his petition that the city demolished his Warsaw Street house on April 30, 2007.

**{¶ 8}** Relator responded by letter directed to the city's Department of Neighborhoods, Division of Building Inspection and Code Enforcement, demanding payment for the destruction of his property. In a letter dated June 18, 2007, respondent John T. Madigan, then the director of law for the city of Toledo, notified relator that he had reviewed the Department of Neighborhood's file regarding the Warsaw Street property, including the history of notices and orders regarding the nuisance condition of the house. Madigan then stated

> From this record it appears that you were given numerous opportunities to rehabilitate your property but failed to do so. While you did apply siding to the front of the structure, you failed to complete all the repairs required when your demolition appeal was granted. For these reasons, I believe you were given sufficient opportunities to correct violations and present your case to the appropriate City of Toledo Boards.

**{¶ 9}** Relator did not further appeal the NAHAB determination but, rather, on April 5, 2011, filed the present petition for a writ of mandamus. As noted above, relator seeks an order from this court directing respondent the city of Toledo to initiate appropriation proceedings and to empanel a jury to determine just compensation for relator's real property which he asserts has been taken without just compensation in violation of Ohio law. In the alternative, relator contends that the NAHAB order denying his appeal was not a final appealable order and so, he requests that we order respondent

NAHAB to issue a final appealable order for demolition and journalize the order in accordance with Ohio law so that relator might take additional appropriate legal action.

**{¶ 10}** For a writ of mandamus to be granted, the relator must demonstrate that he has a clear legal right to the relief requested, that respondent is under a clear legal duty to perform the requested act, and that relator has no plain and adequate remedy at law. *State ex rel. Donaldson v. Alfred*, 66 Ohio St.3d 327, 329, 612 N.E.2d 717 (1993). Respondents have filed a motion to dismiss pursuant to Civ.R. 12(B)(6) in which they assert that because relator failed to exhaust his administrative remedies he is not entitled to the extraordinary writ of mandamus. For the following reasons, we agree.

**{¶ 11}** "The United States and Ohio Constitutions guarantee that private property shall not be taken for public use without just compensation. Fifth and Fourteenth Amendments to the United States Constitution; Section 19, Article I, Ohio Constitution." *State ex rel. Elsass v. Shelby Cty. Bd. of Commrs.*, 92 Ohio St.3d 529, 533, 751 N.E.2d 1032 (2001). It is well-established that "[m]andamus is the appropriate action to compel public authorities to institute appropriation proceedings where an involuntary taking of private property is alleged." *State ex rel. Shemo v. Mayfield Hts.*, 95 Ohio St.3d 59, 63, 765 N.E.2d 345 (2002). Not all government intrusions onto private land, however, constitute compensable takings. As the United States Supreme Court recognized in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992), a government must pay just compensation for takings "except to the extent that 'background principles of nuisance and property law' independently restrict the

owner's intended use of the property." *State ex rel. Shelly Materials, Inc. v. Clark Cty. Bd. of Commrs.*, 115 Ohio St.3d 337, 2007-Ohio-5022, 875 N.E.2d 59, ¶ 18, quoting *Lucas* at 1030. That is, "a State need not provide compensation when it diminishes or destroys the value of property by stopping illegal activity or abating a public nuisance." *Keystone Bituminous Coal Assn. v. DeBenedictis*, 480 U.S. 470, 492, 107 S.Ct. 1232, 94 L.Ed.2d 472, fn. 22; *Hardale Investment Co. v. Ohio*, 7th Dist. No. 98-BA-40, 2000 WL 459704, *10 (Apr. 14, 2000).

**{¶ 12}** R.C. 715.26(B) authorizes municipal corporations to "[p]rovide for the inspection of buildings or other structures and for the removal and repair of insecure, unsafe, or structurally defective buildings or other structures under this section or section 715.261 of the Revised Code." To that end, Chapter 1726 of the Toledo Municipal Code sets forth procedures for the abatement of nuisances within the city of Toledo. First, Toledo Municipal Code 1726.01(a) defines a "public nuisance" in pertinent part as follows:

> * * * [A]ny fence, wall, shed, deck, house, garage, building, structure or any part of any of the aforesaid; * * * or any lot, land, yard, premises or location which in its entirety, or in any part thereof, by reason of the condition in which the same is found or permitted to be or remain, shall or may endanger the health, safety, life, limb or property, or cause any hurt, harm, inconvenience, discomfort, damage or injury to any one or more

individuals in the City, in any one or more of the following particulars by reason of:

* * *

(4) lack of sufficient or adequate maintenance of the structure, location and/or premises, and/or being vacant, any of which depreciates the enjoyment and use of property in the immediate vicinity to such an extent that it is harmful to the community in which such structure, location or premises is situated or such condition exists.

**{¶ 13}** In a regular (i.e. non-emergency) abatement situation, Toledo Municipal Code 1726.03(b) provides that the property owner shall be given written notice of the public nuisance and an order to abate the nuisance within 30 days of the date of the notice. Thereafter, if the property owner fails to abate the nuisance within the time period allotted, the director of the Department of Inspection is authorized to enter on the property, inspect for a public nuisance, and abate the nuisance. Toledo Municipal Code 1726.03(c). In addition, Toledo Municipal Code 1726.08(d) provides that the director may "issue a Notice of Liability to the owner of the premises upon which any public nuisance exists * * * or to anyone found in violation of Chapter 1726 or Chapter 963, or any Rule of the Director of Inspection."

**{¶ 14}** The code also sets forth an appeal procedure which provides that an owner of a property, location or structure that has been declared a public nuisance and issued a notice of liability, "may appeal the notice or order in writing, and request a hearing with

the Nuisance Abatement Housing Appeals Board (Appeal Board) within three business days from the date on the notice-order or no later than twenty-four (24) hours from the date of receipt (excluding weekends and/or holidays)." Toledo Municipal Code 1726.04(a). Similarly, when an owner of a property, location or structure that has been declared a public nuisance is ordered to abate the nuisance within 30 days, the owner "may appeal the notice-order by requesting in-person a hearing with either the Nuisance Abatement Housing Appeals Board within ten calendar days from the date on the notice-order or no later than twenty-four (24) hours from the date of receipt (excluding weekends and/or holidays)." Toledo Municipal Code 1726.04(b). The failure to file an appeal from a notice of liability, however, "shall constitute a waiver of the right to contest and an admission of the Notice of Liability." Toledo Municipal Code 1726.08(d)(3).

**{¶ 15}** When a property owner does appeal a declaration of public nuisance or a notice of liability to NAHAB, the filing of the appeal does not stay the order to abate the nuisance. Toledo Municipal Code 1726.04(b). Upon the filing of an appeal, NAHAB, which is comprised of the Director of Law, the Commissioner of Health and the Director of Public Safety, shall hold a hearing at its next regularly scheduled meeting. Following the hearing, the NAHAB "may amend, modify, revoke or uphold the notice or order, and may extend the time for compliance with the order by the owner[,]" Toledo Municipal Code 1726.04(c)(1), and "shall render a written decision on the matter within seven business days after the hearing." Toledo Municipal Code 1726.04(c)(2). Toledo

Municipal Code 1726.04(c)(4) then states "[t]he ruling or decision of the Appeal Board is a final appealable order; but appeal to a court of competent jurisdiction will not act as a stay of the abatement order." Finally, "[a]ny public nuisance not abated within the time specified in the notice-order provided by the Director, * * * or within any additional time provided by the Nuisance Abatement Housing Appeals Board, may be abated by the City pursuant to the order issued by the Director * * *." Toledo Municipal Code 1726.05(a).

**{¶ 16}** As is clear, the Toledo Municipal Code provides an owner of property that has been declared a public nuisance or to whom a notice of liability has been issued, a clear and adequate remedy at law for challenging the declaration of a nuisance and/or the order of abatement. It is noteworthy that relator never appealed the notices of liability issued in May 2005, July 2005, August 2005 and April 2006, or the determination of a public nuisance that was issued in June 2005. He only instituted the appeal process when his property was put on the list for demolition. Ultimately, NAHAB granted him additional time to make the necessary repairs to the property, but relator failed to comply. Finally, when NAHAB issued its final order on April 5, 2007, denying relator's appeal, relator failed to appeal that order to the Lucas County Common Pleas Court.

**{¶ 17}** Throughout his petition, relator asserts that the demolition of his home was improper and was not supported by evidence that his home was unsound. R.C. 2506.01(A) provides for an appeal of "[e]very final order, adjudication, or decision of any * * * board, * * * department, or other division of any political subdivision of the

state * * * [to the] court of common pleas of the county in which the principal office of the political subdivision is located * * *." R.C. 2506.04 then states in relevant part:

> * * * [T]he court may find that the order, adjudication, or decision is unconstitutional, illegal, arbitrary, capricious, unreasonable, or unsupported by the preponderance of substantial, reliable, and probative evidence on the whole record. Consistent with its findings, the court may affirm, reverse, vacate, or modify the order, adjudication, or decision, or remand the cause to the officer or body appealed from with instructions to enter an order, adjudication, or decision consistent with the findings or opinion of the court.

**{¶ 18}** Accordingly, relator had a right to directly appeal the decision of NAHAB to the Lucas County Common Pleas Court. That appeal would have been the proper way to challenge the validity of NAHAB's order and the validity of the determination that his property was in a nuisance condition. "The fact that [relator] failed to timely pursue his right of appeal does not make that remedy inadequate." *State ex rel. Cartmell v. Dorrian*, 11 Ohio St.3d 177, 178, 464 N.E.2d 556 (1984). Because relator failed to appeal the NAHAB order to the common pleas court, that order stands as valid and the nuisance determination and demolition stand as valid. Accordingly, relator's property has not been "taken for public use" and respondents have no clear legal duty to initiate an appropriation proceeding.

**{¶ 19}** Relator further contends that an appeal of the NAHAB order to the common pleas court would have been inadequate because the city proceeded to demolish his property before the time ran for him to file an appeal. On this claim, we find the following statement from the court in *Crosby v. Pickaway Cty. Gen. Health District*, 4th Dist. No. 06CA27, 2007-Ohio-6769, ¶ 24, directly on point: "Appellants' claim that the administrative appeal procedures would not be adequate to compensate them for the involuntary taking of their property * * * presupposes that an involuntary taking occurred, something that the administrative appeal process would ultimately resolve." That is, through an administrative appeal, the common pleas court would have determined the validity of the nuisance determination and demolition order. Because relator failed to appeal the NAHAB decision, he has waived his right to challenge its validity.

**{¶ 20}** Finally, relator contends that NAHAB's decision was not a final appealable order because it was not signed by all three parties to the board and failed to cite a reason for the decision. Accordingly, relator requests that we order respondent NAHAB to issue a final appealable order for demolition and journalize the order in accordance with Ohio law so that relator might take additional appropriate legal action.

**{¶ 21}** R.C. 2505.07 provides, "[a]fter the entry of a final order of an administrative * * * board, * * * the period of time within which the appeal shall be perfected, unless otherwise provided by law, is thirty days." What constitutes a "final order" of an administrative body varies depending on the nature of the administrative

body. Journalization of a final order of an administrative body, however, has no longer been a requirement since the Ohio General Assembly amended R.C. 2505.07 in 1987. *American Aggregates v. Clay*, 2d Dist. No. 16311, 1997 WL 282334, *3 (May 30, 1997). Rather, as we stated in *Popson v. Danbury Local Schools Bd. of Ed.*, 152 Ohio App.3d 304, 2003-Ohio-1625, 787 N.E.2d 686, ¶ 7 (6th Dist.),

> * * * [T]he time period for the perfection of an administrative appeal commences when the "matter for review" is reduced to record form and approved. *Swafford v. Norwood Bd. of Edn.* (1984), 14 Ohio App.3d 346, 348, 14 OBR 414, 471 N.E.2d 509; *LaPlant Enterprises v. Toledo* (June 30, 1988), Lucas App. No. L-87-369, 1988 WL 69147. Because a public board speaks only through its minutes, written record of resolutions, directives, or actions, action by a public board is not final until such a written record is made and approved.

**{¶ 22}** Moreover, following the 1987 amendments to R.C. 2505.07, agencies are "now allowed to adopt their own rules and procedures to determine the finality of their orders so long as those rules and procedures conform to the fundamental requirements of due process." *American Aggregates, supra,* citing *Centerville Bd. of Tax Appeals v. Wright*, 72 Ohio App.3d 313, 318-319, 594 N.E.2d 670 (2d Dist.1991).

**{¶ 23}** The Toledo Municipal Code provides under both section 1743.05(b)(4) and 1726.04(c)(4) that "[t]he ruling or decision of the [Nuisance Abatement Housing] Appeal[s] Board is a final appealable order * * *." In the present case, NAHAB issued

its decision denying relator's appeal on April 5, 2007. Although the decision does not state specific reasons for the denial, the only issue before the board was relator's compliance with the prior order "to repair, rehab or demolish the property." Following relator's continued failure to comply, NAHAB denied his appeal of the demolition order. The fact that the denial was cursory does not make it a non-final appealable order.

**{¶ 24}** Regarding the signatures on the decision, Toledo Municipal Code 1726.04(c)(1) and 1743.05(b)(1), both provide that in appeals to NAHAB, the board "may amend, modify, revoke or uphold the notice or order, and may extend the time for compliance with the order * * * as the majority of the board may determine." Accordingly, because a majority of the board members signed the decision, it was a final order and relator has not established a right to the extraordinary writ of mandamus.

**{¶ 25}** Respondents' motion to dismiss is therefore well-taken and granted. This cause is dismissed at relator's cost.

**{¶ 26}** The clerk is ordered to serve all parties within three days a copy of this judgment and its date of entry upon the journal. Service shall be in a manner prescribed by Civ.R. 5.

Writ denied.

Peter M. Handwork, J.

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JUDGE

Mark L. Pietrykowski, J.

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JUDGE

Arlene Singer, P.J.
CONCUR.

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JUDGE