In The

Supreme Court of Virginia

RECORD NO. 092385

JOSEPH C. LEE,

Appellant,

v.

CITY OF NORFOLK,

Appellee.

BRIEF OF APPELLEE

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STATEMENT OF THE CASE

On January 22, 2008, your Appellant, hereinafter "Lee," filed this action against the City of Norfolk seeking damages of $400,000. (App. 1-4.) The complaint named three counts, entitled "Count One – Deprivation of Civil Rights," "Count Two – Inverse Condemnation," and "Count Three – Property Damage." Id. The defendant, hereinafter "City," filed a demurrer and certain pleas in bar. (App. 5-55.) On September 4, 2008, the demurrer was sustained and Counts One and Two of the complaint were dismissed with leave to amend. (App. 56-57.) Rulings on the pleas in bar were deferred in order that the record could be more fully developed. Id.

On September 16, 2008, Lee filed an amended complaint containing the same enumerated counts. (App. 58-69.) Thereafter, the City filed a demurrer and pleas in bar responsive to the new allegations. (App. 70-77.) On March 23, 2009, the demurrer was sustained with regard to certain claims made in Count One. (App. 78-79, 99-100.) Those claims relating to a violation of due process were dismissed without leave to amend while Lee was granted leave to amend those claims relating to a violation of equal protection. Id.

On May 27, 2009, the parties argued the pleas in bar previously filed by the City. (App. 131.) The pleas asserted that Lee had failed to exhaust

the administrative remedies available to him, which served to bar the claims made in Count Two, and that the doctrine of sovereign immunity barred Lee from any recovery based on the claims made in Count Three. (App. 70-74.) On July 9, 2009, the trial court granted both pleas and dismissed the claims listed in both Count Two and Count Three of the complaint. (App. 129-132.)

After resolving the issues raised by the City, the only question that remained to be adjudicated at trial was Lee's claim made in Count One that his right to equal protection had been violated. (App. 99.) On August 24, 2009, a final order was entered in which this remaining claim was nonsuited and the case was removed from the docket. (App. 133-34.) Lee thereafter filed a timely notice of appeal in order to petition for review by this Court.

STATEMENT OF FACTS

This case never proceeded to trial, however the circuit court admitted several items into evidence during its hearing on the City's pleas in bar and certain other facts were established by the plaintiff's admissions. (See, e.g., App. 129 (reciting undisputed facts of the case).) Because Lee's federal due process claim was dismissed when the City's demurrer was sustained, no facts were considered with regard to that count. Because

Lee's state-law due process, inverse condemnation, and tort claims were dismissed when the City's pleas in bar were sustained, the documents and other facts accepted into evidence by the trial court during the hearing are part of the record of this case.

In his brief Lee includes a "statement of facts" that is largely devoid of citations to evidence admitted by the trial court. (Opening Br. 3-9.) The only citations that appear in his recitation refer to allegations made in his amended complaint. Id. While such might be useful in resolving whether the trial court erred in dismissing Lee's due process claim pursuant to the City's demurrer, only those allegations which were admitted in the City's answer are relevant to the issues raised in the City's pleas in bar—pleas which resulted in the dismissal of Lee's state-law due process, inverse condemnation, and tort claims.

With an eye to clarifying what was the evidence before the trial court, the City provides this accurate recapitulation of the facts proven in this case.

In June of 2006, Lee obtained a building permit for repairs to a duplex located at 221 Ethel Avenue, located in the City of Norfolk, Virginia. (App. 58-59 ¶ 4, 92 ¶ 3.) In August of 2006, he obtained a revised building permit authorizing renovations to the building so that it could be elevated

above the applicable flood plain. (App. 59 ¶ 5, 92 ¶ 3.) On September 5th and 6th of that year, Lee's duplex was observed with most of the roof missing, an unsecured roof gable, shattered brickwork (some of which was falling off the building), glass windows pulled loose from their frames, rotten portions along the base of certain walls, some walls raised off the foundation with improperly used jacks, dangling electrical wires at the point where the service was connected to the house, and piles of dangerous debris strewn about both inside and outside the structure. (App. 123-24 ¶¶ 4-7, 137-159.)

On September 12, 2006, the City sent a letter to Lee via certified mail advising him that the building at 221 Ethel Avenue had "been rendered unsafe by attempted repairs" and was now "unsafe and a public nuisance." (App. 60 ¶ 9, 92 ¶ 7, 172.) In its letter the City requested that Lee abate the nuisance by demolishing what remained of the structure. (App. 172.) It informed Lee of his right to appeal the determination that his building was "unsafe and a public nuisance" and identified for him the required process for doing so. (App. 129, 172.) Lee received the letter on September 20, 2006, read it, and understood it. (App. 83 ¶ 15, 104 ¶ 11, 122-23 ¶ 2.) Yet he never exercised his right to appeal this determination. (App. 125-26 ¶¶ 15-16, 129.) He did, however, arrange and attend a meeting with several

City representatives in order to discuss the safety problems posed by the building. (App. 61 ¶ 17, 93 ¶ 14.)

After more than two months the structure still had not been taken down. (App. 124 at ¶ 9, 160-61.) By letter dated December 19, 2006, the City informed Lee that all extensions to the deadline by which abatement must be accomplished had expired and that it would be proceeding to demolish the structure. (App. 63 ¶ 25, 94 ¶ 20, 129, 136.)

At the time the nuisance condition was first discovered, Lee was working on elevating the building above the flood plan in order to prevent future water damage. (App. 59 ¶ 5, ¶ 7, 92-93 ¶ 3, ¶ 5.) However, from September 20, 2006, being the day Lee received the letter informing him that the duplex was "unsafe and a public nuisance," until January 5, 2007, being the day he alleges the City demolished it (App. 63-64 ¶ 28), Lee never obtained any written estimate of how much it would cost to actually do the work necessary to elevate the duplex. (App. 126 ¶ 18.) As late as January 4, 2007, Lee informed the City that he was still undecided about whether or not he would actually go through with his plans to elevate the structure. (App. 173.)

Finally, although Lee alleged in his inverse condemnation claim that the City took his property for a "public purpose or uses," he never alleged

any *facts* to support this allegation. (App. 67 ¶¶ 36-37.) As was proven by Lee's admission, neither he nor any person known to him had any information about any "public purpose" that the City had made of his property at 221 Ethel Avenue. (App. 126-27 ¶ 20, ¶ 22.)

ARGUMENT

Lee's amended complaint contained allegations related to three causes of action which he identified as "Counts." The first alleged that the City violated his rights to due process and equal protection under the Constitution of the United States (designated as "Count One"). (App. 66-67 ¶ 35.) The second alleged that the City had taken his property without due process and for a public use without providing just compensation (designated as "Count Two"). (App. 67 ¶¶ 36-37.) The last asserted that the City has engaged in "intentional, wrongful, vindictive, and grossly negligent" behavior that caused damage to Lee's property (designated as "Count Three"). (App. 67-68 ¶¶ 38-39.)

I. THE TRIAL COURT WAS CORRECT TO RULE THAT LEE'S § 1983 DUE PROCESS CLAIM WAS NOT COGNIZABLE.

To the extent it is distinct from his due process claim found in Count Two of the amended complaint, Lee's due process claim in Count One relies upon the United States Constitution's Fourteenth Amendment

guarantees.[1] (App. 66-67 ¶ 35.) The gravamen of this § 1983 due process claim is that Lee was not provided adequate notice or an opportunity to be heard before the unsafe, nuisance structure located on his property was demolished. (App. 66-67 ¶ 35; Opening Br. 11.) The claim was dismissed when the trial court sustained the City's demurrer. (App. 78-79, 99.) For purposes of considering the merits of a demurrer, the allegations made in the complaint are assumed to be true and, on appeal, the trial court's decision is reviewed *de novo.* Glazebrook v. Bd. of Supervisors, 266 Va. 550, 554, 587 S.E.2d 589, 591 (2003).

(a) A deprivation of private property for public use cannot constitute a violation of the Fourteenth Amendment right to due process given Virginia's current constitution and statutes.

The federal constitutional right claimed by Lee in Count One of his amended complaint protects him against the government depriving him of property without due process of law. U.S Const. amend. XIV, § 1. But where the deprivation of property is accomplished for some *public use*, it amounts to a lawful taking, which requires that just compensation be paid. U.S Const. amend. V. Whenever this particular form of deprivation occurs,

[1] Any due process claim alleged in Count Two of Lee's amended complaint was dismissed when the City's plea in bar was granted. (App. 131). Lee does not assign error with respect to that ruling. (App. 135; Opening Br. 2.)

the property owner's right to due process is satisfied so long as he is justly compensated. Id.

Virginia gives all owners of private property the right to proceed against state or local governments to recover damages caused by a deprivation of private property for public use through an action for inverse condemnation. Va. Const. Art. 1 § 11; Va. Code Ann. § 8.01-187 (1950); Nelson County v. Loving, 126 Va. 283, 298, 101 S.E. 406, 410 (1919). Because this right exists, the private property owner whose land is taken or damaged without compensation being paid beforehand is *necessarily* afforded due process of law. Presley v. City of Charlottesville, 464 F.3d 480, 489 (4th Cir. 2006) (holding that, where the only deprivation alleged in the pleading is a taking, availability of inverse condemnation prevents plaintiff from bringing any claim for due process violation under 42 U.S.C. § 1983); Tri-County Paving, Inc. v. Ashe County, 281 F.3d 430, 438 (4th Cir. 2002). The law does not require that a determination and payment of just compensation occur *before* the taking. Presley v. City of Charlottesville, 464 F.3d 480, 489 (4th Cir. 2006); Yearsley v. Ross, 309 U.S. 18, 21-22 (1940).

In the instant case Lee has expressly alleged an inverse condemnation claim at Count Two of his amended complaint. (App. 67

¶¶ 36-37.) He has alleged that his property was taken for a public use. Id. Not only does Lee have a right to be heard on his claim for just compensation before he is finally and permanently deprived of his property, but his pleading demonstrates that he is well aware of this right. He may pursue both the statutory remedy and a state constitutional remedy. Kitchen v. City of Newport News, 275 Va. 378, 395-96, 657 S.E.2d 132, 141-42 (2008) (holding that plaintiff could simultaneously pursue claims under Va. Code Ann. § 8.01-187 and Va. Const. Art. I § 11).

And so, because Lee can—and indeed has—brought an action to recover just compensation for the alleged taking of his duplex building, it is not possible for any claim to succeed which has as one of its *prima facie* elements proof that a final and permanent deprivation of property has occurred. Merely prevailing on the inverse condemnation claim in Count Two of his amended complaint would net Lee the very compensation he alleges the City permanently deprived him of any opportunity to recover in Count One.[2]

[2] At the time the demurrer was sustained, Lee's inverse condemnation claim was still alive. (App. 99-100). His inverse condemnation was barred nearly four months later, after a subsequent hearing at which the trial court took evidence. (App. 131.)

Lee argues that the trial court misapplied the rule of Tri-County Paving, Inc. v. Ash County, 281 F.3d 430 (4th Cir. 2002), opining that the § 1983 claim dismissed in that case was a *substantive* due process claim, not a procedural one.[3] (Br. of Appellant 16). Here Lee misreads a clearly stated holding of the case. In Tri-County Paving the Fourth Circuit dismissed the *procedural* due process claim brought under § 1983, meaning that its holding is directly on point with the case *sub judice*. Id., 281 F.3d at 436-38.

For all of these reasons Lee's 42 U.S.C. § 1983 claim made in Count One of his complaints relating to a deprivation of property for a public use in violation of the Due Process clause of the Fourteenth Amendment is not cognizable and the trial court was correct to dismiss it.

(b) Lee never alleged facts sufficient to state a claim that his constitutional right to due process was violated.

Procedural due process guarantees that an individual whose property interests are at stake is entitled to notice and an opportunity to be heard. Dusenbery v. United States, 534 U.S. 161, 167, 122 S. Ct. 694, 699 (2002). When the person fails to comply with reasonable procedural requirements

[3] Lee states no claim based on a right to substantive due process. (Opening Br. 16.)

regarding this opportunity, however, the state is no longer required to hear his claim. Logan v. Zimmerman Brush Co., 455 U.S. 422, 434 n.7, 102 S. Ct. 1148, 1157 n.7 (1982). While due process ensures an opportunity to be heard, it does not require that a right of appeal be provided. Thomas v. State Highway Comm'r, 166 Va. 512, 516, 186 S.E. 172, 173 (1936); Ringstaff v. Metro. Life Ins. Co., 164 Va. 196, 199, 179 S.E. 66, 67 (1935) ("the right of appeal is not a part of due process of law….").

Lee's amended complaint contains a variety of allegations, but the ones regarding his due process claim reveal that the City *did* provide due process. He alleges that he received notice on September 20, 2006, informing him that the City had determined his building to be unsafe and a public nuisance. (App. 60 ¶ 9, 61 ¶ 15.) He alleges that seven days after receiving the letter, he and his attorney met with the City to discuss the building. (App. 61 ¶ 17.) He alleges that the City allowed him several months to provide additional information and documentation about the building. (App. 61-62 ¶¶ 19-24.) He alleges that the City sent him a second notice on December 19, 2006, again declaring the structure to be unsafe and a public nuisance. (App. 63 ¶ 25.) He alleges that he had communication with the City regarding the property for another seventeen days after the second notice was issued. (App. 63 ¶ 26.) In short, Lee's

own allegations indicate that he was given two notices and engaged in an ongoing dialogue with the City addressing how to abate the nuisance posed by his building and lasting more than three months. Nowhere does Lee's amended complaint allege the he was *not* given notice or was *not* provided an opportunity to be heard. (App. 58-69.) As such, he fails to state a due process claim under the U.S. Constitution; and this is true whether his claims allege a deprivation of property for either a public use or for *no* public use.

(c) The defects alleged to exist in the notice are unrelated to the question of whether due process was provided.

Because Lee does not—perhaps because he cannot—allege that he failed to get notice before he was deprived of property, he argues on brief that the two notices he got did not qualify as such under a due process analysis because they contained certain errors or deficiencies that render them inadequate. (Opening Br. 21.)

The standard regarding adequacy of due process notice is well established. It must be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314, 70 S. Ct. 652, 657 (1950) (citations omitted). The notice must reasonably convey the required

information and it must afford a reasonable time for those interested to make their appearance. Id.

In the case at bar, Lee alleges certain defects in one of the two notices he received, namely the September 12, 2006 notice. However, upon inspection it is apparent that none of these alleged defects belie the adequacy of that notice under the Mullane standard.

Even if it were proven that the September 12 notice contained an erroneous citation to a Building Code provision, such would not render the notice void for purposes of due process.[4] The notice clearly informed Lee that the City had determined his duplex to be unsafe and a public nuisance. Arguably, it was this notice that allegedly led Lee to contact his attorney and arrange a meeting with City representatives, (App. 61 ¶ 16), a meeting that was held just one week later (App. 61 ¶ 17, 93 ¶ 14.) In any event, it is apparent from Lee's own allegations that the City's two notices apprised him of the pendency of the nuisance abatement action and informed him that he had an opportunity to dispute the matter. The Due Process Clause of the Fourteenth Amendment does not requiring that a notice do anything

[4] Later in the adjudication of this case the evidence admitted by the trial court revealed that the citation to the Building Code appeal rule, namely Uniform Statewide Building Code § 106.5 (2003), appearing in the September 12 notice was accurate. (App. 129, 172.)

more. Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314, 70 S. Ct. 652, 657 (1950).

Additionally, there is absolutely no allegation that the notice sent to Lee dated December 19, 2006, contained any defects of any kind. Lee's best effort to cast doubt on the adequacy of that second notice is to claim that the building was demolished before the appeal period had expired. (Opening Br. 14.) That argument does not challenge the adequacy of the notice but rather the reasonableness of his opportunity to be heard. While interesting in the abstract, the argument has no application to the allegations made—or, more precisely,—*not* made in the amended complaint, since Lee never claims that he attempted to exercise his right to be heard. As mentioned previously, when the property owner makes no effort to exercise his right to a hearing, a failure to hold such a hearing does not violate due process. Logan v. Zimmerman Brush Co., 455 U.S. 422, 434 n.7, 102 S. Ct. 1148, 1157 n.7 (1982).

(d) The amended complaint contains no allegation that the City failed to give adequate notice to Lee regarding its determination that his property constituted a public nuisance.

Norfolk's City Charter expressly empowers the City to compel the abatement of nuisances. Norfolk City Charter § 2(16) (1958). No other source of authority is required and none other was relied upon in this case.

That authority is exercised in the Norfolk City Code at § 27-1 *et seq*. (1979).

The two notices given to Lee on September 12th and December 19th, 2006, both informed him that his property had been determined by City officials as a "public nuisance." (App. 136, 172.) As such, the City complied with the statutory notice requirements. Norfolk City Code §§ 27-6, -8 (1979).

Lee makes much of the City's failure to comply with the requirements of Code of Virginia § 15.2-906. (App. 60 ¶¶ 11-12; Opening Br. 13, 21.) In doing so, he must assume that § 15.2-906 is the exclusive source of authority for the City to demolish an unsafe, nuisance structure. Because it is not, and because the City derives its nuisance abatement authority from its Charter power, noncompliance with Code of Virginia § 15.2-906 is irrelevant to this case. See Va. Code Ann. § 15.2-100 (providing that § 15.2-906 does not impair or alter Norfolk's nuisance abatement power found in the Charter).

Nowhere does Lee allege that the two notices did not satisfy the requirements of due process with regard to the City's nuisance abatement power expressed in City Code § 27-1 *et seq*. For this reason—in addition

to the reasons cited above—the trial court was correct to conclude that his allegations regarding § 1983 did not state a cognizable claim.

II. THE TRIAL COURT WAS CORRECT TO RULE THAT THE CLAIMS IN COUNT TWO WERE BARRED BY LEE'S FAILURE TO EXHAUST ADMINISTRATIVE REMEDIES.

Lee's inverse condemnation claim and state-law due process claims were dismissed when the City's plea in bar was granted. (App. 131.) A plea in bar is a defensive pleading that reduces litigation to a single issue which, if proven, creates a bar to the plaintiff's right of recovery. Cooper Indus. v. Melendez, 260 Va. 578, 594, 537 S.E.2d 580, 595 (2000). The trial court's decision to grant a plea in bar should not be disturbed unless the appellant can show that the trial court misapplied the law to the evidence. See, e.g., Helton v. Phillip A. Glick Plumbing, Inc., 277 Va. 352, 358, 672 S.E.2d 842, 844 (2009) (holding that trial court erred by denying plea in bar when evidence indicated accord and satisfaction occurred); Miller v. Highland County, 274 Va. 355, 368, 650 S.E.2d 532, 537 (2007) (holding that trial court erred by denying plea in bar when evidence indicated that plaintiff named impermissible defendant).

It should here be noted that the standard of review proffered by Lee in his brief is inapt. (Opening Br. 10.) He asserts that no evidence was taken in support of the City's pleas, a position that is readily disproven by

the record in this case. (See, e.g., App. 129 (reciting undisputed facts of the case).) The trial court admitted the December 19th written notice sent to Lee (App. 136), certain photographs of Lee's dilapidated duplex (App. 137-171), the September 12th written notice addressed to Lee (App. 172), a letter written by Lee dated January 4, 2007 (App. 173), and had before it all of the plaintiff's admissions. (App. 122-128.) Because all of this evidence was admitted, the rule applied in Tomlin v. McKenzie, 251 Va. 478, 468 S.E.2d 882 (1996), and cited by Lee does not apply. Rather the applicable rule is that utilized in Helton and Miller (cited above), requiring the appellant to demonstrate that the trial court incorrectly applied the law to the evidence.

(a) That Lee's duplex was an unsafe building and a danger to the public was "a thing decided" and no longer subject to review.

Under Norfolk's regulations, an unsafe or nuisance building can be ordered removed. Uniform Statewide Building Code, part III § 105.1 (2003)[5] (hereinafter "USBC"); Norfolk City Code § 27-6 (1979). Any appeal

[5] The USBC was revised in 2006, but that revision was not effective until May 1, 2008. Thus, the 2003 version of the USBC was the version in effect at all relevant times.

from a decision of the code official finding that a certain property is unsafe must be appealed within 21 days. USBC, part III § 106.5 (2003). The appeal must be taken to the local board of Building Code appeals. Id.; Va. Code Ann. § 36-105 (1950). If no appeal is taken, then the property owner is deemed to have agreed with the determination that the building is unsafe. USBC, part III § 106.5 (2003). A structure that is "unsafe" includes any building "determined by the code official to be *dangerous to the health, safety and welfare of the occupants of the structure or the public*." USBC, part III § 202 (2003) (emphasis added).

A would-be plaintiff who seeks judicial relief from a determination that the use of his property is unlawful may only appeal that decision to the designated appellate body. Cf. Phillips v. Telum, Inc., 223 Va. 585, 589, 292 S.E.2d 311, 313-14 (1982) (holding that an appeal to the board of zoning appeals is the exclusive remedy for a property owner who disagrees with a zoning administrator's official determination). A complaint which bypasses this administrative process and is filed directly in the Circuit Court must be dismissed. Id., 223 Va. at 591, 292 S.E.2d at 314. When the property owner is warned that an official determination shall become final and unappealable unless an appeal is timely made to the proper reviewing body, his failure to appeal means that the determination becomes "a thing

decided." Lilly v. Caroline County, 259 Va. 291, 296, 526 S.E.2d 743, 745 (2000); Dick Kelly Enters. v. City of Norfolk, 243 Va. 373, 378-79, 416 S.E.2d 680, 683-84 (1992).

In the instant case the evidence admitted by the trial court established that Lee personally received a letter on September 20, 2006, informing him that the City had determined that his property was unsafe and a nuisance. (App. 122-23 ¶ 2, 129, 172.) He was advised of his right to appeal, pursuant to USBC, part III § 106.5, and of the deadline for doing so. Id. Yet Lee never filed any appeal. (App. 125-26 ¶¶ 15-16, 129.) His property remained unsafe and a nuisance, as proven by Lee's admissions and photographic evidence admitted by the trial court (App. 123-24 ¶¶ 4-7, ¶ 9, 137-159, 160-61.) The evidence also showed that the City confirmed and continued its previous determination that his property was a nuisance as part of a second notice sent on December 19, 2006. (App. 136.) Notably, Lee never alleged that his property was *not* a nuisance. (App. 58-69, 80-91.)

Had Lee appealed, the local board of Building Code appeals would have heard his grievances and could have reversed the code official's determination. USBC, part III § 106.7 (2003). No other entity—including the local circuit court—is appropriately equipped to review decisions made

under the building code. See, Va. Code Ann. § 36-105 (1950) (mandating that appeals concerning applications of the building code "shall first lie to the local board of Building Code appeals"); USBC, part III § 106.3 (2003) (requiring that the local board of Building Code appeals include members from specific, property-related professions). But because no appeal was taken, the decision became final, as mandated by law. USBC, part III § 106.5 (2003). Consequentially every aspect of Lee's suit must be resolved in accordance with the irrebutable conclusion that his building at 221 Ethel Avenue was "dangerous to the health, safety and welfare of the occupants of the structure or the public" because it was "unsafe." USBC, part III § 202 (2003).

To allow Lee's inverse condemnation claim to go forward would eviscerate the appellate procedure set up by state law requiring that a building official's decision be first reviewed by a local board of Building Code appeals and then by the State Building Code Technical Review Board. Va. Code Ann. § 36-105(A) (1950). It would also deny to the City the finality it relies upon whenever unsafe building determinations are made and the statutory appeal period runs out.

For all of these reasons, the trial court was correct to conclude that the City's determination that Lee's duplex was "unsafe" and presented a danger to occupants or the public was "a thing decided" and no longer litigable. (App. 130-31.)

(b) The demolition of a nuisance property pursuant to a locality's police power is not actionable as a taking.

When a government compels a nuisance to be abated such that private property is destroyed, it is exercising the police power of the state. Mumpower v. Housing Auth. of City of Bristol, 176 Va. 426, 441, 11 S.E.2d 732, 737 (1940); Jeremy Improvement, Co. v. Commonwealth, 106 Va. 482, 490, 56 S.E. 224, 226 (1907). Such action does not amount to a taking. Jeremy Improvement, Co. v. Commonwealth, 106 Va. 482, 490, 56 S.E. 224, 226 (1907); see also, Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 492 (1987); Miller v. Schoene, 276 U.S. 272, 279-80 (1928). No person has a right to use his land so as to create a public nuisance. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 417 (1922).

In Norfolk, a nuisance is defined as:

> "any condition, substance, material or thing which may be annoying, obnoxious, offensive, irritating or detrimental or potentially hazardous or detrimental to the health, safety, comfort and general welfare of the public or the environment…."

Norfolk City Code § 27-2(a) (1979). Norfolk is specifically empowered to compel the abatement and removal of all nuisances.[6] Norfolk City Charter § 2(16) (1958).

In light of this jurisprudence and the irrebutable determination that Lee's unsafe building was a nuisance, the City's abatement effort cannot result in a compensable taking. But because Lee must prove that a compensable taking *has* occurred in order to sustain his inverse

[6] This is significant because Lee labors under a misconception that the City's authority to compel the removal of his nuisance structure is derived from Code of Virginia § 15.2-906. (App. 60 ¶¶ 11-12; Opening Br. 13.) The City never relied on the authority found in § 15.2-906, but rather always relied on its Charter power.

condemnation claim, he faced an impossibility.[7] Va. Code Ann. § 8.01-187 (1950); Va. Const., Art. I § 11 (1971).

Having recognized this, and in consideration of all of the evidence provided by the City and the fact that Lee failed to exhaust administrative remedies, the trial court was correct to grant the City's plea in bar and thereby dismiss the claims enumerated in Count Two of the amended complaint. (App. 131.)

III. THE TRIAL COURT WAS CORRECT TO RULE THAT LEE'S PROPERTY DAMAGE CLAIM WAS BARRED BY THE DOCTRINE OF SOVEREIGN IMMUNITY.

A municipality is not liable for negligent acts resulting from the execution of a governmental function. Bialk v. City of Hampton, 242 Va.

[7] Before he can even proceed to trial, the plaintiff in an inverse condemnation suit must allege "sufficient facts to constitute a foundation in law for the judgment sought, and not merely conclusions of law." Kitchen v. City of Newport News, 275 Va. 378, 387-88, 657 S.E.2d 132, 137 (2008) (quoting Hubbard v. Dresser, Inc., 271 Va. 117, 122, 624 S.E.2d 1, 4 (2006)). Not only did Lee fail to allege such facts, (App. 58-69, 80-91), but the evidence admitted by the trial court during its hearing of the City's pleas in bar revealed that Lee could not produce any information about any public purpose the City had made of his property. (App. 126-27 ¶ 20, ¶ 22.) Where there is no public use, there can be no condemnation. State Hwy. & Transp. Comm'r of Va. v. Lanier Farm, Inc., 233 Va. 506, 511, 357 S.E.2d 531, 534 (1987) (condemnation provisions of the Virginia Constitution have no application to conduct by governmental entities which is tortious or unlawful); White v. State Hwy. Comm'r, 201 Va. 885, 888, 114 S.E.2d 614, 616 (1960) (taking of land without any legal authority to do so is not a condemnation).

56, 58, 405 S.E.2d 619, 620 (1991). On the other hand, a municipality may be liable for negligent acts resulting from the execution of a proprietary function. City of Richmond v. Branch, 205 Va. 424, 428, 137 S.E.2d 882, 885 (1964). The underlying test for determining whether a municipal act is governmental or proprietary in nature "is whether the act is for the common good of all without the element of special corporate benefit, or pecuniary profit." Fenon v. City of Norfolk, 203 Va. 551, 556, 125 S.E.2d 808, 812 (1962) (citing Ashbury v. City of Norfolk, 152 Va. 278, 288, 147 S.E. 223, 226 (1929)). A function is governmental if it is "directly tied to the health, safety, and welfare of the citizens." Edwards v. City of Portsmouth, 237 Va. 167, 171, 375 S.E.2d 747, 750 (1989).

The power of the City to cause the demolition of an unsafe building is codified in USBC, part III § 105.1 (2003) and in Norfolk City Code § 27-1 *et seq.* (1979). The decision to demolish an unsafe building under either (or both) of those codes is a decision made in the enforcement of those laws. Thus, applying the Ashbury and Edwards tests, the enforcement of the local building code and the city code are governmental functions. Cf. Gray-Hopkins v. Prince George's County, 309 F.3d 224, 234 (4th Cir. 2002) (holding that law enforcement is a governmental function). Razing an

unsafe, nuisance structure falls within the ambit of enforcing local codes.[8] At least one Virginia circuit court has concluded that the decision to compel the removal of such a building is a governmental function entitled to sovereign immunity. See, Combs v. City of Winchester, 25 Va. Cir. 207, 210 (1991).

In Count Three of his amended complaint, Lee alleges that the City's demolition of his property was negligent. (App. 64-65 ¶ 30, 67-68 ¶¶ 38-39.) He alleges a variety of torts committed by the City, but all of them are directly related to the manner in which the City enforces its laws. Id.

On brief, Lee claims that these allegations amount to a common law inverse condemnation claim, along the lines of a claim made by the plaintiff in Kitchen v. City of Newport News, 275 Va. 378, 657 S.E.2d 132 (2008). (Opening Br. 20.) This argument misreads his own pleadings. Nothing alleged in Count Three of the amended complaint states an inverse condemnation claim. (App. 67-68 ¶ 38-39.) Assuming, *arguendo*, that it

[8] Once the governmental function of code enforcement is completed, the *manner* in which the dismantling of an unsafe or nuisance structure is carried out is a proprietary function, not protected by sovereign immunity. Burson v. Bristol, 176 Va. 53, 65, 10 S.E.2d 541, 545 (1940). This rule has no bearing on the fact that the *determination* of whether or not a building needs to be razed in order to protect the public is a law enforcement function cloaked with sovereign immunity.

did state such a claim, it would be barred for all the same reasons that the inverse condemnation claim made out in Count Two is barred.

In the end, the evidence admitted by the trial court established that the property was demolished in order to remove a building that was found to be "unsafe" under the building code and a nuisance under Norfolk's City Code. (App. 129-30, 136-172.) Since the City is cloaked with sovereign immunity against liability for any torts committed incident to enforcing its codes, Lee's property damage claims were barred, and the trial court was correct to grant the City's plea.

SUMMARY

Overarching the legal issues in this case are some rather significant public policy concerns regarding the treatment of unsafe, nuisance buildings. An unsafe building, by definition, presents a danger to "the health, safety and welfare of the occupants of the structure or the public." USBC, part III § 202 (2003). Because of the public safety concern, this Court has noted that "[t]he abatement of a nuisance often requires prompt and summary proceedings…." Stickley v. Givens, 176 Va. 548, 562, 11 S.E.2d 631, 638 (1940). Such proceedings do not tolerate additional complications beyond providing notice, an opportunity to be heard, and compliance with the statute manifesting the abatement power. Id. But Lee

seeks to complicate the nuisance abatement process by directing a broad-ranging attack against the nuisance enforcement process undertaken at his property at 221 Ethel Avenue. In so doing, he attempts to force the City to litigate matters that are, in various ways, beyond the ken of the trial court.

For example, he levels a variety of torts claims, even though none can overcome the doctrine of sovereign immunity.[9] He asserts an inverse condemnation claim, even though he had no evidence that his property was ever used for any public purpose. (App. 126-27 ¶ 20, ¶ 22.) It is undisputed that he received notice that the City found his property to constitute a nuisance (in fact, he received two notices). (App. 60 ¶ 9, 63 ¶ 25, 92 ¶ 7, 94 ¶ 20, 129, 136, 172.) And because his due process opportunity to be heard need not take the form of a right of appeal, Lee's pleadings allege that he *did* have his concerns heard, including attending a meeting with City representatives during which the building's safety problems were discussed. (App. 61 ¶ 17, 93 ¶ 14, 129.) In addition to this

[9] Allowing a plaintiff to proceed with a claim from which the sovereign is immune can do meaningful damage to the defendant, since even the threat of litigation burdens the public purse, strikes doubt in law enforcement officials who have a responsibility and duty to act, and invites vexatious litigation. Ligon v. County of Goochland, 279 Va. 312, 316, 689 S.E.2d 666, 668 (2010).

opportunity to be heard, Lee also enjoyed a right of appeal; but he never exercised it, not within the 21 days required by law and not during the three months the City maintained communications about how he might remedy the nuisance on his property. (App. 129.)

Once all these meritless claims are set aside, the essential thrust of Lee's complaint is laid bare. It attempts, in a roundabout fashion, to challenge whether the City *came to the correct conclusion* when it found his property to be unsafe and a nuisance. Yet his opportunity to argue that particular question had come and gone long before this suit was filed.

If Lee believed that the City applied incorrect Building Code provisions (or, perhaps, *mis*applied *correct* Building Code provisions), he could have taken his case before to the local board of Building Code appeals. But since he never did so, that opportunity was forever lost. If he believed that his property was *not* a nuisance, he could have disputed the City's finding anytime during the three months after he received written notice. Nor did he do that. Instead, the evidence revealed that as late as January 4, 2007, Lee was still undecided about what exactly he intended to do with his building. (App. 173.)

Most importantly, had the trial court allowed Lee to proceed with his due process or inverse condemnation claims, established notions of finality would have been shattered. The City applies its regulations every day, including the Building Code. When a property owner is put on notice that a determination has been made that he is in violation of the law, an opportunity to be heard commences to run. Once that period expires, however, the City relies upon the finality of that expiration. Due process having already been provided, it must be able to proceed with enforcement. To allow a plaintiff to challenge the correctness of a decision after the hearing period has closed would undermine the effectiveness of the "prompt and summary proceedings" that nuisance abatement requires. See, Stickley v. Givens, 176 Va. 548, 562, 11 S.E.2d 631, 638 (1940).

Upon review of the evidence submitted and upon analysis of the applicable principles of law, it is clear that the trial court's rulings were not reached in error.

STATEMENT OF RELIEF

The City of Norfolk prays that this Court find that the trial court was correct and that its decisions to sustain the demurrer and grant the two pleas in bar be affirmed.

Dated: June 21, 2010

CITY OF NORFOLK

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CERTIFICATION OF COMPLIANCE WITH RULE 5:26(d)

I hereby certify that fifteen paper copies and one electronic copy on CD of the foregoing Brief of Appellee have been hand-filed with the Clerk of the Supreme Court of Virginia and that three paper copies of the same have been mailed, postage prepaid, to Thomas S. Carnes, Esq. and Sarah Davis Harrison, Esq. at Roy, Larson, Carnes & Romm, P.C., 109-A Wimbledon Square, Chesapeake, Virginia 23320, on this the 21st day of June, 2010.

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