

[Cite as *Palco Invest., Inc. v. Springfield*, 2005-Ohio-6838.]

IN THE COURT OF APPEALS FOR CLARK COUNTY, OHIO

PALCO INVESTMENTS, INC.	:	
Plaintiff-Appellant	:	C.A. CASE NO. 2004 CA 80
v.	:	T.C. NO. 02 CV 0249
CITY OF SPRINGFIELD, OHIO	:	(Civil Appeal from Common Pleas Court)
Defendant-Appellee	:	

OPINION

Rendered on the 23rd day of December, 2005.

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DONOVAN, J.

{¶1} Palco Investments Company, Dixie Distributing Company, and Harry Denune (collectively, “Palco”), is appealing the Clark County Common Pleas Court’s judgment, which affirmed the decision of the Springfield Board of Building Appeals (“Board”).

{¶2} In 2002, Springfield's Department of Planning and Development Director, William Craig, issued a notice and order ("Notice") for Palco to abate a public nuisance. The public nuisance consisted of several structures located at 426 East Street. The Notice required it to be abated within thirty days either through repair or demolition. The Notice clearly stated on page two that it "was given pursuant to Section 1323.03 of the Codified Ordinances of the City of Springfield." The conditions requiring abatement were listed in an attachment. The Notice indicated that several structures contained asbestos fragments and fibers - a detriment to the community's general health. In addition, structures were fire hazards because they were not easily accessible to fire-fighting apparatus or personnel. These structures could not be occupied because they lacked heat, plumbing facilities, lighting and electric services. In addition, sections of the roof had collapsed and window glass fell inside and outside of the structures. Further, the complex was an attractive nuisance to children due to the lack of a fence or other security. Lastly, a lack of maintenance was found to depreciate the surrounding property and some minimal roof maintenance had been performed without the required permits.

{¶3} Palco petitioned for a hearing on the Notice with the Board. The Board conducted a hearing on February 14, 2002, but did not grant the requested relief. The Board determined the petition was not well founded and the Notice of January 25, 2002, was not contrary to the applicable law. Palco sought a stay of the Notice from several courts, winning a temporary one from this court from March 1 to March 7, 2002.

{¶4} Palco sought both Ohio Supreme Court and United States District Court intervention unsuccessfully. Ultimately, since Palco did not abate the nuisance, the

property was demolished by the City of Springfield.

{115} Palco appealed to the Clark County Common Pleas Court, claiming the Board's decision was illegal and unreasonable. Palco argued no public nuisance existed and that the Notice failed both to state the necessary repairs required and did not provide a reasonable time frame to bring the structures into compliance.

{116} Palco has appealed the trial court's judgment, raising the following assignment of error:

{117} " THE TRIAL COURT ERRED IN AFFIRMING THE DEMOLITION ORDER OF THE SPRINGFIELD BOARD OF BUILDING APPEALS."

{118} Palco argues that it was denied due process because the Notice did not specify the required repairs or provide a reasonable time to comply. Palco asserts the conditions were not public nuisances. We disagree.

{119} When reviewing the trial court's judgment, an appellate court is limited to determining whether the trial court abused its discretion in reviewing the administrative order. *Board of Education of the Rossford Exempted Village School Dist. v. State Bd. of Education* (1992), 63 Ohio St.3d 705, 707. Absent an abuse of discretion, the trial court's decision must be affirmed. *Id.* An abuse of discretion amounts to more than a mere error in law or judgment, but indicates the court's attitude was unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217.

{110} R.C. 2506.01 provides, "Every final order * * * of any officer, * * * of any political subdivision of the state may be reviewed by the court of common pleas of the county in which the principal office of the political subdivision is located." R.C. 2506.04 allows the court to find the order "unconstitutional, illegal, arbitrary, capricious,

unreasonable, or unsupported by the preponderance of substantial, reliable and probative evidence on the whole record.” The court has the authority to “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” consistent with the court’s opinion. *Id.*

{¶11} When interpreting a code provision, the various code provisions must be read together to improve the code’s understanding. *Hughes v. Bureau of Motor Vehicles*, 79 Ohio St.3d 305, 308, 1997-Ohio-387. When a conflict exists between a specific provision and a general provision, the specific provision prevails. *Love v. Port Clinton* (1988), 37 Ohio St.3d 98, 99. A code section should not be read to create an unreasonable or absurd result. *State ex rel Webb v. Bliss*, 99 Ohio St.3d 166, 2003-Ohio-3049.

{¶12} Section 1323.01(i) of Springfield’s Codified Ordinances, Abatement of Nuisances and Demolition of Structures, defines a public nuisance as:

{¶13} “[A] building, structure, * * * or any excavation, basement * * * or sidewalk subspace or part thereof, having an accumulation of demolition material, garbage, litter, rubbish or weeds, * * * [which] will cause hurt, harm, discomfort, damage or injury to the public or to any considerable number of persons in the City by reason of any one (1) or more of the following:

{¶14} “(1) Being detrimental to the general health of the community.

{¶15} “(2) Being a fire hazard.

{¶16} “(3) Being unsafe for occupancy, or use.

{¶17} “(4) Being an attractive nuisance to children.

{¶18} “(5) Lack of reasonable or adequate maintenance of structures, and grounds causing deterioration and blighting influence on nearby properties and thereby depreciating the enjoyment and use of the property in the immediate vicinity to such an extent that it is harmful to the community.”

{¶19} Section 1315.08 requires the City’s orders to not only cite applicable law but also “specify what actions are necessary to comply with the applicable code.” But, §1323.03 describes the notice to be sent, stating the “notice shall identify the public nuisance and require the owner * * * to abate the public nuisance * * * within thirty (30) days of such notice either by the removal * * * or the repair of the public nuisance.” Section 1323.06 allows the owner to make an application for a special building permit to make the repairs to abate a public nuisance.

{¶20} Palco claims the court abused its discretion in affirming the Board’s decision by arguing the Notice was defective because the property’s condition did not constitute a public nuisance. Palco suggests the phrase, “having an accumulation of demolition material, garbage, litter, rubbish, or weeds,” in §1323.01(i) modifies the words “buildings” and “structures.” Thus, a building or structure cannot be a public nuisance under §1323.01(i) unless there is such an accumulation. However; this interpretation of §1323.01(i) would create an absurd result that ignores the language of §1323.01(i)(3) and (5). Subsection (3) and (5) include in the definition of a public nuisance any structure which causes harm or depreciates surrounding property because it is unsafe for occupancy or has been inadequately maintained. Obviously, an accumulation of demolition material, garbage, litter, rubbish or weeds cannot be occupied, hence, applying the “accumulation” language to Section 1323.01(i)(3) and (5)

is a far too restrictive reading of the ordinance which defines nuisance. We see no abuse of discretion in the trial court interpreting §1323.01(i) so as to avoid such an absurd result. It must also be noted that the Notice given to Palco should be read to properly include an accumulation of “litter” and “rubbish” as these terms are broadly defined in Section 1323.01(c) and (g). Both the glass and asbestos fragments specifically identified in the Notice would fall into these two broad categories of “litter” and “rubbish.”

{¶21} Palco argues the Notice was inadequate because it did not list the repairs required to remedy the nuisance. Section 1323.06, which addresses the abatement of nuisances, permits the owner of a nuisance property to apply for a special building permit to repair the property; also, Section 1323.06 clearly places a responsibility upon the owner to produce appropriate plans to remedy the violations and abate the nuisance. It would be onerous to place this responsibility upon the City of Springfield in a nuisance case. Section 1315.08 requires a city’s notice to specify the actions necessary to comply with the code. While §1315.08 applies generally to all the city’s orders, §1323.06 specifically refers to orders to abate public nuisances. Since specific provisions prevail over general provisions, §1323.06 is the governing law. Section 1323.06 contemplates the owner assessing and effectuating the repairs he must complete in order to abate the nuisance. Accordingly, the City’s Notice was not inadequate because it did not direct Palco to perform certain actions to abate the nuisance. A careful reading of the City’s Abatement Order of January 25, 2002 at page three identifies with particularity a list of violations that must be corrected and repaired in order to abate.

{¶22} Palco asserts the Notice was improper because it did not give him reasonable time to abate the nuisance. Palco argues the thirty days allotted was not a reasonable time. Section 1323.10 provides that orders based on a violation of a chapter provision shall specify a reasonable time for performance. But, §1323.03 states that if a public nuisance exists the director shall issue a notice giving the owner thirty days to abate the nuisance. As we said above, when a general provision and a specific provision conflict, the specific provision prevails. Section 1323.10 addresses notices for a violation of any provision in the chapter, while §1323.03 specifically addresses notices to abate a public nuisance. Since §1323.03 is a specific provision, it prevails over §1323.10. The Notice complied with §1323.03's requirement of thirty days for the abatement. Further, the Notice clearly states under the caption "Notice" that the owner may appeal to the Board of Building Appeals as Palco did. Not only did the Abatement Order advise Palco of his right to appeal to the Board, but on page two of the Order to Abate, Palco is informed the order is "given pursuant to Section 1323.03 of the Codified Ordinances of the City of Springfield." A person of reasonable intelligence can read the order to abate, read Section 1323.03 and recognize permits and extensions to repair may be applied for pursuant to Section 1323.06. Palco could have developed a repair plan and requested time to implement it. However, it elected not to do so. Thus, we cannot say the trial court abused its discretion in upholding the Board's determination that Palco was not deprived of due process because of the Notice's time restriction dictated by Section 1323.03. Clearly, the abatement of this nuisance was of some urgency.

{¶23} Palco also argues that it was deprived of property without compensation

by its buildings' demolition and that it should be permitted to pursue money damages. The trial court disagreed, which Palco now argues was an abuse of discretion. R.C. 2506 permits an appellate court to review the affirmance of an administrative decision for a rule's constitutionality. *Grossman v. Cleveland Heights* (1997), 120 Ohio App.3d 435. But, R.C. 2506.04 only permits a common pleas court to "affirm, reverse, vacate, or modify" the agency's decision. The statute does not provide jurisdiction for the court to determine money damages. *Id.* In order to obtain compensation for an unlawful taking, a mandamus action must be filed to compel public authorities to conduct appropriation proceedings. *Florian v. Board of Cty. Commrs. of Hamilton Cty.* (Aug. 5, 1981), Hamilton App. No. C-800843; *Huelsman v. State* (1977), 56 Ohio App.2d 100, 108; *State ex rel Levin v. Sheffield Lake*, 70 Ohio St.3d 104, 108, 1994-Ohio-385.

{¶24} Palco has not filed a mandamus action. Rather, Palco asks this Court to reverse the judgment and allow it to pursue money damages for its property's demolition based on R.C. 2506. But this statute does not authorize a common pleas court to consider and award money damages. Thus, the trial court correctly found that it lacked jurisdiction to consider this damages claim.

{¶25} The basis for Palco's damages claim is an assertion that the city destroyed its property without due process of law. But having addressed all of the alleged errors, we cannot find the City of Springfield deprived Palco of due process of law. Palco presented its claims on a stay of the demolition with the Board, the Court of Common Pleas, the Second District Court of Appeals, the Ohio Supreme Court, and the United States District Court for the Southern District of Ohio. Palco was afforded ample due process, notice and opportunity to be heard. Palco did not abate the nuisance,

thus the city lawfully demolished the structure.

{¶26} We do not find that the trial court abused its discretion in affirming the Board’s judgment. Palco’s assignment of error is without merit and is overruled.

{¶27} The judgment of the trial court is affirmed.

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WOLFF, J., concurs.

GRADY, J., dissenting:

{¶28} I agree that, on this record, Palco’s property constitutes a public nuisance as defined by Section 1323.01 of the Codified Ordinances of the City of Springfield. I also agree that pursuant to those ordinances the City’s Director of the Department of Development and Planning was authorized to order Palco to abate the nuisance. However, the particular action which the Director ordered Palco to take within the time allowed was not within the Director’s authority to order. It was also impossible of performance. Therefore, the trial court erred when it held that Palco failed to comply with a valid order.

{¶29} The Notice served on Palco declared its property to constitute a public nuisance and stated: “you are hereby Ordered to Abate this Public Nuisance by Repair or Demolition within thirty (30) days from the receipt of this Order so as to correct the conditions identified . . .” The order was signed by the City’s Director of the Department of Planning and Development, William P. Craig.

{¶30} Section 1323.10 of the Codified Ordinances states that when the City’s Director of Planning and Development determines that a nuisance exists, the Director “may give notice of such violations to the person responsible therefor and order

compliance with this chapter as hereinafter provided. Such notice and order shall . . .

(c) Specify a reasonable time for compliance.”

{¶31} Palco argues, as it did in the trial court, that thirty days the Director’s notice allowed was not a reasonable time to comply with the abatement action specified, which was to repair or demolish the buildings on its property. The property is a former industrial site and the conditions identified as constituting the nuisance were numerous and substantial. The Director opined that “the only way you could comply with the code (with respect to) the structures is to demolish them.” (T. 16). The contractor the City subsequently engaged to perform that work estimated that it would take approximately five months. (T. 26). How, then, could the thirty days the Director’s notice allowed to repair or demolish the structure be a “reasonable time” to comply with the Director’s order, which is the mandate of Section 1323.10?

{¶32} Section 1315.08 of the City’s ordinances states: “Each order of the City shall cite the law or rules upon which it was issued and shall specify what actions are necessary to comply with the applicable code.” The actions the Director’s abatement order specified were repair or demolition, and nothing else. The order further states: “Permits must be obtained from the Inspection Services Division prior to starting any repairs, demolition, building alterations, electrical, plumbing or heating work of such a nature as to require City of Springfield permits.” The final sentences of the Director’s Order states: “This Written Notice is given pursuant to Section 1323.03 of Codified Ordinances of the City of Springfield. If there are any questions regarding this Notice please contact me at (937) 324-7371.”

{¶33} Section 1323.03, to which the Notice refers as the rule upon which the

Notice was issued, authorizes the Director to send a notice to abate a public nuisance, and further provides that “such notice shall identify the public nuisance and require the owner or occupant, or both, to abate the public nuisance . . . within thirty (30) days of such notice either by the removal of the public nuisance or the repair of the public nuisance in accordance with Section 1323.06.” (Emphasis supplied.)

{¶34} Section 1323.06 states:

{¶35} “Upon being served notice, the owner or owners may make application in writing or in person to the Planning and Development Director for a special building permit to undertake the repairs or replacement of items found to constitute a public nuisance. Plans and specifications as required by the Planning and Development Director covering the repairs or replacements shall be furnished by such owner or owners to the Planning and Development Director within fifteen days after receipt of notice or such additional time as the Planning and Development Director may deem necessary to complete plans and specifications, not to exceed ninety (90) days. The Planning and Development Director shall, upon approval of such plans and specifications, issue a special building permit to the owner or owners, such permit to effect and complete such repairs and/or replacements, or the Planning and Development Director may grant a renewal of the special building permit if the owner or owners show reason or cause for the requested extension and which extension will more readily effect such repairs and/or replacements.”

{¶36} The actions to abate a nuisance which Section 1323.03 authorizes the Director to order are, by its express terms, those for which Section 1323.06 provides. Those actions are application for and approval of building permits needed to either

remove or repair the conditions which constitute a nuisance. Instead of the “reasonable time” for more substantial steps that Section 1323.10 requires the Director to allow, the permit application and approval process allows for far shorter time-lines. An owner or occupant is allowed thirty days to submit an application and up to ninety days to obtain a special building permit.

{¶37} The Director’s reliance on Section 1323.03 and, by reference, Section 1323.06 to order Palco to repair or demolish its property within thirty days presents two difficulties. First, the Director is not authorized by those sections to order that action within that time, but only to order persons subject to a notice and order to obtain a building permit within a thirty-day period. Second, as the record shows, the Director’s Notice improperly applied that thirty day requirement to a form of abatement, repair or demolition, for which Section 1323.10 expressly requires the Director to allow a “reasonable time for compliance,” when the record is unequivocal that the thirty days the Director’s order allowed was wholly unreasonable. The Director conceded that only demolition could cure the problem, and the City’s contractor said that job would take five months.

{¶38} The trial court brushed aside those problems in the Director’s Notice, suggesting that because Section 1323.03 was specified as the source of the Director’s authority, Palco should have known that it could comply not by repair or demolition, which the Notice specifies, but instead by applying for a building permit. However, that was not the action the Notice ordered Palco to take. That action was repair or demolition within thirty days, and nothing else. Section 1315.08 requires a correspondence and consistency between the action ordered and the authority cited. In

the Director’s order, the two are inconsistent.

{¶39} The majority approves the trial court’s finding, reasoning that the more specific provisions of Sections 1323.03 and 1323.06 prevail over the conflicting “reasonable time” provision of Section 1323.10. However, there is no conflict between those sections. The conflict is in the Director’s Notice, which orders a form of abatement authorized by Section 1323.10 within the shorter times imposed by the two other sections, which was impossible for Palco to perform.

{¶40} When this appeal was filed, Palco asked us to stay the trial court’s order, which permitted the City to raze Palco’s property to abate the nuisance at Palco’s expense. We declined to issue a stay, believing that if the City proceeded to do that it would take the action at its own risk. The City proceeded to do that. In consequence, because of the defects in the City’s Notice, Palco has been deprived of its property without due process of law. In view of the decrepit condition of its property, the value of that loss may not be substantial. However, it will compound the problem if Palco is required to compensate the City for the demolition work, which on this record is a demand the City likely will make.

{¶41} I would reverse and remand for an order in favor of Palco on its claim for damages in an amount to be determined.

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Copies mailed to:

- Richard E. Mayhall
- Robin B. DeBell
- Hon. Douglas M. Rastatter