

**THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
TRUMBULL COUNTY, OHIO**

M&M EXCAVATING & DEMOLITION, INC.,	:	O P I N I O N
	:	CASE NO. 2009-T-0097
Plaintiff-Appellant,	:	
-VS-	:	
	:	
CHRISTOPHER A. TANEYHILL, CHIEF BUILDING OFFICIAL FOR THE CITY OF WARREN, OHIO, et al.,	:	
	:	
Defendants-Appellees.		

Civil Appeal from the Court of Common Pleas, Case No. 2008 CV 02852.

Judgment: Affirmed.

Robert L. York, 138 East Market Street, Warren, OH 44481 (For Plaintiff-Appellant).

Gregory V. Hicks, Warren City Law Director, and *David D. Daugherty*, Assistant Warren City Law Director, 391 Mahoning Avenue, N.W., Warren, OH 44483 (For Defendants-Appellees).

COLLEEN MARY O'TOOLE, J.

{¶1} M&M Excavating & Demolition, Inc., appeals from the judgment of the Trumbull County Court of Common Pleas, granting judgment in favor of Christopher A. Taneyhill and the City of Warren, Ohio, in M&M's action for deprivation of its constitutional rights under Section 1983, Title 42, U.S.Code. We affirm.

{¶2} M&M is a contractor, which held a valid contractor registration pursuant to the Codified Ordinances of the City of Warren, allowing it to do business in the city. On or about August 11, 2008, M&M entered a contract with Warren City School District Board to demolish two school buildings. Mr. Taneyhill, as Chief Building Official for the city, issued M&M permits to carry out the demolitions.

{¶3} As Chief Building Official, Mr. Taneyhill is also the city's Flood Damage Prevention Administrator, empowered to grant or deny development permits in special flood hazard zones. An organization named WLOM owns the Up-a-Creek Tavern, and wished to expand its parking lot into a flood hazard zone. Mr. Taneyhill issued a stop work order September 17, 2007, regarding the expansion. WLOM thereafter submitted appropriate plans for the expansion; and, September 15, 2008, Mr. Taneyhill issued a permit for the expansion, conditioned on WLOM obtaining a drainage easement from Howland Township, Ohio.

{¶4} September 26, 2008, Mr. Taneyhill revoked WLOM's permit, upon determining that no drainage easement had yet been obtained from Howland Township. After September 29, 2008, no permit was posted on the Up-a-Creek property permitting development in the flood zone. Nevertheless, October 7, 2008, M&M (which, evidently, had a contract with WLOM), placed clean, hard fill, removed from the schools it was demolishing, into the flood zone. Consequently, October 8, 2008, Mr. Taneyhill revoked M&M's contractor registration, pursuant to his powers under city ordinance 1305.06, as well as M&M's permits for demolishing the two schools, pursuant to his powers under ordinance 1307.05. Neither ordinance provides for any notice or hearing prior to the revocation of a contractor registration or a permit; each provides for post revocation

appeals to the city's Residential Board of Appeals. Pursuant to ordinance 1311.04, once an aggrieved party has appealed to the board, hearing must be held within fifteen days, and the board must render a decision within ten days following the hearing.

{¶5} October 10, 2008, M&M moved the trial court for a restraining order regarding the revocations of its registration and demolition permits. It further filed a complaint for an injunction, declaratory judgment, and compensatory and punitive damages. The complaint stated a claim for deprivation of rights under the federal constitution in violation of Section 1983, Title 42, U.S.Code. The trial court granted the temporary restraining order that same day. October 15, 2008, M&M filed an amended complaint. In relevant part, the amended complaint further requested the trial court to find ordinances 1307.05 and 1307.06 unconstitutional. October 17, Mr. Taneyhill rescinded the revocations of the contractor registration and the permits.

{¶6} January 20, 2009, Mr. Taneyhill and the city answered. April 23, 2009, M&M moved for leave to file a first amended complaint, deleting all its claims except for those relating to the unconstitutionality of the ordinances, and the appurtenant Section 1983 claims. The trial court granted the motion that same day. The parties further entered an agreement to stipulate to the facts, and submit the dispute to the trial court on briefs on all issues, except the amount of M&M's claims for attorney fees. The joint stipulation of facts was filed May 20, 2009, along with M&M's brief; Mr. Taneyhill and the city filed their brief June 12, 2009. M&M replied June 17, 2009.

{¶7} August 28, 2009, the trial court filed its judgment entry. Noting that M&M had stipulated that it suffered no actual damages, the trial court further found the ordinances in question to be constitutional, since they provided for appeal and hearing

following the suspension or revocation of a contractor registration or a permit. Consequently, it further denied M&M's Section 1983 claims for nominal damages and attorney fees.

{¶8} September 25, 2009, M&M timely noticed this appeal, assigning a single error:

{¶9} "The court below erred in entering judgment that neither Warren City Ordinance 1305.06 nor Warren City Ordinance 1307.05 violates the right to procedural due process under Amendments V and XIV of the United States Constitution and in denying Appellant's claims for damages and attorney fees under 42 U.S.C. §1983."

{¶10} We review constitutional challenges de novo. *Hanners v. Ho Wah Genting Wire & Cable SDN BHD*, 10th Dist. No. 09AP-361, 2009-Ohio-6481, at ¶14.

{¶11} In order to establish a claim for violation of procedural due process, a plaintiff must show that he or she possessed a protected property interest. *Chandler v. The Village of Chagrin Falls* (C.A.6, 2008), 296 Fed.Appx. 463, 469. A benefit is a protected property interest if there are substantial limitations upon state discretion in granting or denying the benefit. *Id.* at 469-470. For purposes of this appeal, we find that M&M's permits and contractor registration were protected property interests. The federal courts have recognized construction permits, once issued, to be protected property interests. *Id.* at 469. The power of either Warren or its Building Official, Mr. Taneyhill, to suspend or revoke permits or contractor registrations, is limited in ordinances 1305.06 and 1307.05 to situations generally involving breaches of laws and regulations, crimes involving moral turpitude, and the making of false statements (in

relation to obtaining a permit). Consequently, M&M had a right to due process if either the permits or the contractor registration were revoked.

{¶12} “(O)nce it is determined that the Due Process Clause applies, the question remains what process is due. The answer to that question is not to be found in the [ordinances].’ [*Cleveland Bd. of Edn. v. Loudermill* [(1985),] 470 U.S. [532,] ***541. Rather, the Constitution defines what procedures are sufficient to satisfy due process. *Morrissey v. Brewer*, 408 U.S. 471, 489, ***(1972) (noting that to determine whether a constitutional violation occurred, this Court’s ‘task is limited to deciding the minimum requirements of due process’). In interpreting the constitutional requirements of due process, the Supreme Court has held that the hallmark of due process is that a deprivation of a property interest must be ‘preceded by notice and opportunity for hearing appropriate to the nature of the case.’ *Loudermill*, 470 U.S. at 542 (quoting *Mullane [v. Cent. Hanover Bank & Trust Co. (1950)]*, 339 U.S. 306, 313 ***; *Matthews [v. Eldridge (1976)]*, 424 U.S. 319, 333, *** (noting that the Supreme Court ‘consistently has held that some form of hearing is required before an individual is *finally* deprived of a property interest’). In evaluating whether a particular process comports with the requirements of due process, this Court must weigh a number of factors:

{¶13} “First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail.

{¶14} “Id. at 335. ‘Applying this test, the Court has usually held that the Constitution requires some kind of a hearing before the State deprives a person of liberty or property.’ *Zinerman v. Burch*, 494 U.S. 113, 127, ***(1990). ‘In some circumstances, however, the Court has held that a statutory provision for a post-deprivation hearing, or a common-law tort remedy for erroneous deprivation, satisfies due process.’ Id. at 128.” *Chandler* at 470-471. (Parallel citations omitted.) (Emphasis added.)

{¶15} Application of the foregoing test leads us to the conclusion M&M has not been deprived of the process due it, and that the ordinances challenged pass constitutional muster. M&M’s interest in its permits and contractor registration is considerable: without them the business fails. However, the challenged ordinances do provide for an expeditious hearing following the revocation or suspension of a permit or contractor registration. Consequently, the actions of the Building Official in revoking or suspending such a permit or registration does not constitute a *final* deprivation of a protected property interest. And, the city obviously has an interest in being able to quickly stop work on a construction project, if only due to the dangers inherent to construction.

{¶16} The ordinances are constitutional, and the assignment of error is without merit.

{¶17} The judgment of the Trumbull County Court of Common Pleas is affirmed.

{¶18} It is the further order of this court that appellant is assessed costs herein

taxed.

{¶19} The court finds there were reasonable grounds for this appeal.

MARY JANE TRAPP, P.J.,

CYNTHIA WESTCOTT RICE, J.,

concur.