IN THE SUPREME COURT OF OHIO

STATE OF OHIO EX REL. DYNAMIC INDUSTRIES, INC.	:	**CASE NO. 2016-0231**
Appellant,	:	**On Appeal from the Hamilton County Court of Appeals, First Appellate District**
v.	:	
CITY OF CINCINNATI, *et al.*	:	**Court of Appeals Case No. C-150563**
Appellees.	:	

REPLY IN SUPPORT OF MERIT BRIEF OF APPELLANT DYNAMIC INDUSTRIES, INC.

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I. INTRODUCTION

In their Merit Brief, the Appellees, City of Cincinnati, Art Dahlberg, Chief Building Official, and Beth Johnson, Urban Conservator (collectively, the "City"), mischaracterize many of the relevant facts. The City takes factual liberties in order to justify its wrongful actions. The allegations in Appellant, Dynamic Industries, Inc.'s ("Dynamic"), Complaint, along with the exhibits attached thereto, nevertheless demonstrate the City's actions were unconstitutional, Dynamic is entitled to relief and the Court of Appeal erred in dismissing this action.

The primary issue for consideration is whether the City is permitted to subvert its own rules and procedures – unconstitutional in and of themselves – to retroactively designate a building as historic, after the owner of the building completed a Demolition Application and had a vested interest in the application, thus unlawfully preventing the demolition. The City's arguments rely entirely on the false assertion that Dynamic filed its Demolition Application after a complete Designation Application had been filed. Viewing the facts and evidence in the proper light, however, demonstrates the City's argument is without merit.

II. STATEMENT OF FACTS

The facts are straightforward, and the Court must accept all factual allegations of the complaint as true and all reasonable inferences must be drawn in favor of Dynamic. *State ex rel. Boggs v. Springfield Local Sch. Dist. Bd. of Educ*., 72 Ohio St. 3d 94, 95 (1995). On June 25, 2015, Dynamic filed a complete application with the City's Department of Planning & Buildings for a permit to demolish the dilapidated structure located on its 1532 Brewster Avenue Property. (Ver. Comp., ¶ 13-15).[1] At that time, no other person or organization had submitted any other application of any kind related to the 1532 Brewster Avenue Property that impacted in any way

[1] As set forth in its Merit Brief, Dynamic owns real property located at 1532, 1534 and 1536 Brewster Avenue in the City of Cincinnati (collectively, the "1532 Brewster Avenue Property"). *Id*. at ¶ 3.

the demolition permit request. *Id*. at ¶ 37. Sometime in May, the Bootsy Collins Foundation and Cincinnati USA Music Heritage Foundation (collectively, "CMHF") submitted an incomplete application to have *1540 Brewster Avenue* designated as a Historic Landmark (*id*. at ¶ 38), but this application could not have affected Dynamic's Demolition Application for two reasons: (1) CMHF's application was not complete when Dynamic filed its Demolition Application on June 25, and (2) CMHF's application did not pertain to the 1532 Brewster Avenue Property.[2]

Nevertheless, the City, without first providing notice to Dynamic, unilaterally included Dynamic's 1532 Brewster Avenue Property into CMHF's application, including Dynamic's property in what the City coined the "King Records Building." (City Motion to Dismiss, p. 5). By that time, Dynamic had satisfied all requirements necessary for its permit, and yet, the City refused to issue the permit and did not communicate in any way with Dynamic regarding its application. (Ver. Comp. at ¶¶ 19-22). Rather, the City circumvented Dynamic's application in favor of CMHF's subsequently-filed application, and placed the Demolition Application "on hold" while it performed a "Historic Conservation Review" to determine whether the property subject to CMHF's Application – the property located at 1540 Brewster Avenue – and the newly-added 1532 Brewster Avenue Property should be legislatively designated as historic. *Id*. at ¶¶ 25-26. On October 7, 2015, more than 3 months after Dynamic applied for its Demolition Permit, the City, *ex post facto*, adopted City Ordinance No. 319-2015, designating the 1540 Brewster Avenue Property and the 1532 Brewster Avenue Property as a Historic Landmark, and retroactively applied the Ordinance to deny Dynamic's application. (Motion to Dismiss at 5).

[2] 1540 Brewster Avenue is adjacent to Dynamic's property, is owned by 1543 Brewster Avenue, LLC (a separate entity), encompasses 1540-1543 Brewster Avenue, Hamilton County Auditor's parcels 059-0002-88, 89, 90, 91, and 92, and includes a building constructed in 1921, which is a different building entirely from the building located on Dynamic's property, which was constructed in 1948 and is the subject of the demolition permit. *Id.*

The City now insists Dynamic's only recourse is to engage in the onerous, likely futile process of applying for a Certificate of Appropriateness – a process that would require Dynamic to satisfy as many as eleven *subjective* criteria – rather than the typical process for obtaining a demolition permit under the City's Building Code – the process Dynamic was entitled to use – which required consideration of minimal *objective* criteria before approval. Appellee Brief, p. 4; *See* City Zoning Code §§1435-09-1-A, B, C, D, E, 1435-09-2, and 1435-09-3.

III. DYNAMIC'S CLAIMS ARE NOT MOOT AND ARE RIPE FOR CONSIDERATION

In its Merit Brief, the City argues, "Dynamic's claims are moot" because "Dynamic's Complaint depends upon a factual scenario that has substantially changed since its filing." (Appellee Brief at 5). The City's argument fails to two reasons: (1) Dynamic's claims are not moot, as there are actual controversies here and the Court can grant relief on Dynamic's claims; and (2) the scenario underlying Dynamic's Complaint has "substantially changed" only because of the City's illegal actions. Had the City recognized Dynamic's vested right in its properly-filed Demolition Application and processed the application in accordance with its duty to do so, the City could not have wrongfully designated the property as a Historic Landmark.

As recognized by the City, "if Dynamic is correct and there was not a complete designation application, then the City acknowledges that Dynamic is entitled to a demolition permit so long as other safety requirements are fulfilled." (City Reply in Support of Motion to Dismiss, p. 1). Thus, there is a dispositive issue – an actual controversy – that must be resolved. If Dynamic's demolition permit application preceded the filing of CMHF's "complete historic designation application", then Dynamic had vested rights in the permit. If Dynamic's rights vested, the City violated those rights by refusing to issue the permit.

The City further asserts, "The King Records Building is a historic landmark by virtue of the City Council's action on October 7, 2015, and its demolition requires a certificate of appropriateness." (Appellee Brief at 6). When a structure has been properly designated as a historic landmark, the typical path to make changes (including demolition) to the structure is to seek a Certificate of Appropriateness. But, the property in this case is only a "historic landmark" because the City illegally designated it as such. Dynamic followed the proper procedure to demolish its building – it submitted a completed Demolition Application at a time when no complete designation application was pending – and the City was required to approve Dynamic's application. The City acknowledges it has "a duty to act on the Demolition Application consistent with the City Council's action and the City's historic preservation code" (*id*.), yet it utterly failed to do so here.

Dynamic followed the City's procedure and submitted a complete Demolition Application on June 25, 2015. That procedure was an administrative process requiring consideration of minimal *objective* criteria before approval. The City wrongfully circumvented Dynamic's application, approved instead CMHF's subsequently-filed application, and improperly designated Dynamic's property as historic. Through this illegal conduct, the City now seeks to push Dynamic away from the relatively easy administrative process it was entitled to use to an onerous, likely futile legislative process of obtaining a certificate of appropriateness, which would require Dynamic to satisfy as many as eleven *subjective* criteria. *See* City Zoning Code §§1435-09-1-A, B, C, D, E, 1435-09-2, and 1435-09-3.

In sum, the City cannot absolve itself of its illegal conduct by adopting legislation depriving Dynamic of its vested rights. There remain significant constitutional and other issues

to be resolved, and none of Dynamic's claims has in any way been rendered moot by the City's *ex post facto* legislative action.

In support of its mootness argument, the City cites *Karches v. Cincinnati*, 38 Ohio St. 3d 12, 17 (1988) and argues, now that Dynamic has been deprived through the retroactive legislation of its right to the demolition permit, its only remedy is to apply for a Certificate of Appropriateness and only after obtaining a final determination can Dynamic then challenge the City's conduct. (Appellee Brief at 6). The *Karches* case has no application here. Specifically, the issue before the *Karches* Court was whether a property owner was required to exhaust administrative remedies before challenging, in a declaratory judgment action, the constitutionality of an existing zoning ordinance as applied to a specific parcel of property. The *Karches* Court was not concerned with the vested rights doctrine or the retroactive application of legislation to deprive a property owner of a vested right in a building permit.

Assuming, however, Dynamic is expected to exhaust some administrative process before seeking relief, *Karches* recognized two exceptions to this requirement. The first is where there is no administrative remedy available that can provide the relief sought. *Karches*, 38 Ohio St. 3d at 17. Here, Dynamic has been denied any administrative remedy whatsoever related to the decision of the City to place its demolition permit "on hold." When a property owner is denied a demolition permit, he generally has the opportunity to appeal the denial to the Board of Building Appeals. Cincinnati Building Code §1101-81**.** Here, the City never made a decision on Dynamic's pending application and never gave Dynamic required written findings relating to its application. CBC § 1101.17.2. (Ver. Comp., ¶ 19). So there is nothing for Dynamic to appeal. Furthermore, according to the City, now the structure has been legislatively designated as historic, Dynamic has no right to appeal the decision (or lack thereof) on its demolition permit

application to the Board of Building Appeals, and instead must now begin a new and onerous process of seeking a Certificate of Appropriateness set forth in the City's Zoning Code. CZC §1435-09, *et seq*. Thus, there is no administrative remedy available to Dynamic to challenge the decision by the City to place on hold (and effectively deny) its demolition permit application.

The second exception recognized by *Karches* is when the available remedy is onerous or unusually expensive. *Karches*, 38 Ohio St. 3d at 17. Assuming the process related to the application for a Certificate of Appropriateness for the demolition of a Historic Landmark under the Zoning Code somehow now supplants the process related to the consideration of an application for a demolition permit under the Building Code, the former process is onerous. In this regard, the process for seeking a Certificate of Appropriateness is set out in §§1435-09-1-A, B, C, D, E, 1435-09-2, and 1435-09-3 of the City's Zoning Code and requires the property owner to satisfy as many as eleven *subjective* criteria. *See* CZC §1435.09-2. In contrast, the typical process for obtaining a demolition permit under the City's Building Code – the process Dynamic was entitled to use – requires consideration of minimal *objective* criteria before approval.

IV. DYNAMIC HAS ALLEGED SUFFICIENT FACTS TO AVOID DISMISSAL

In its Brief, the City argues, "Dynamic's Complaint does not allege sufficient facts to support the issuance of an extraordinary writ." (Appellee Brief at 7). This argument fails, as Dynamic has demonstrated all of the elements necessary to support its claim for a writ of mandamus: "the existence of a legal duty by the respondent and the lack of an adequate remedy at law for the relator." *Boggs*, 72 Ohio St. 3d at 95.

A. Dynamic Has a Clear Legal Right to the Relief Prayed For

Dynamic has a clear legal right to a writ of mandamus, ordering the City to approve Dynamic's Demolition Application. The City acknowledges "a property owner is vested in a permit once it has complied with all legislative requirements for the permit," and "once a

property owner's rights have vested…the City must apply the zoning regulations in effect when those rights vested and…cannot, through subsequent legislation, deprive the property owner of those rights." (Appellee Brief at 7-8). Because Dynamic had a vested right in its demolition application permit as of June 25, 2015 – when it complied with all legislative requirements for that permit – the City cannot deprive Dynamic of that right through its subsequent October 7 Ordinance designating the property as historic.

Contrary to the City's misinterpretations of the facts, the exhibits attached to Dynamic's Complaint demonstrate Dynamic's demolition permit application was completed and filed before any complete designation application was filed. *See* Ver. Comp. Exhibits 9-14. The following timeline illustrates what is evident in those exhibits:

- **May 15, 2015**: CMHF submits incomplete, 1-page Local Historic Landmark Designation Application, pertaining to "All parcels of '1540 Brewster Ave'" of which Dynamic's 1532 Brewster Avenue Property is not a part. *Id*. at 9.

- **May 18, 2015**: In an email to CMHF's representative, Larry Harris, City Urban Conservator, requests "the form to go with the application," indicating CMHF's application was not complete at that time. *Id*. at 10.

- **June 24, 2015**: CMHF submits an "updated Designation Report", indicating its application was still not complete. *Id*. at 11. Per the language on the 1-page Designation Application, the "Designation Report" is necessary "supporting documentation" for the application. *Id*. at 9.

- **June 25, 2015**: Dynamic submitted a completed Demolition Application. *Id*. at 5.

- **June 30, 2015**: CMHF e-mail stating "just received a bunch of feedback…and will incorporate with new copy" indicating the application and Designation Report was still not complete. *Id*. at 13.

- **July 2, 2015**: CMHF submits "more for the application." It is unclear whether this was sufficient to finalize the application, but certainly demonstrates CMHF was still trying to complete its application a week after Dynamic's completed application had been submitted. *Id*. at 14.

- **October 7, 2015**: The City, *ex post facto*, enacts City Ordinance No. 319-2015, designating as historic both the 1540 Brewster Avenue Property – per CMHF's

> Designation Application – and the 1532 Brewster Avenue Property (a completely separate property) subject to Dynamic's Demolition Application.

The City never indicated, as it was required to do so, the dates on which CMHF's Designation Application was "received by staff" or determined to be "complete", though it is clear from the timeline the application was not complete as of July 2, 2015. *Id*. at 9. Further, at no time during the pendency of CMHF's application was Dynamic given notice its property was subject to historic designation. Indeed, on July 1, 2015, the City told CMHF that Dynamic's "permit for demo…will not be approved, but I recommend you contact the owner [Dynamic] to advise them of the designation application, if you feel comfortable doing that." *Id*. at 14. The City sought to impermissibly punt the responsibility of notifying Dynamic its property was subject to historic designation. But neither the City nor CMHF provided notice to Dynamic.

Dynamic's rights to the demolition permit vested at the time the Designation Application was filed (June 25), and the City's *ex post facto* legislation adopted months later cannot, as a matter of constitutional jurisprudence, affect those rights.

B. The City Has a Clear Duty to Perform the Requested Act

The City had a clear duty to approve Dynamic's complete Demolition Application. As the City acknowledged, "its Chief Building Official and Urban Conservator have a duty to act on the Demolition Application consistent with the City Council's action and the City's historic preservation code." (Appellee Brief at 6). The City failed to fulfill this duty. Dynamic submitted its completed application before any complete designation application was filed. Nonetheless, the City failed to act on Dynamic's application – informing CMHF just one week later it was denying the application – and instead circumvented the application, assisted CMHF through the completion of its application, and then enacted retroactive legislation, effectively

denying Dynamic's application without ever actually acting on it. Although the City admits it had a duty to act, the facts and evidence demonstrate it violated that duty as to Dynamic.

C. Dynamic Has No Plain and Adequate Remedy at Law

Dynamic has no plain and adequate remedy at law. Without a demolition permit, Dynamic cannot demolish the dilapidated structure on the 1532 Brewster Avenue Property. Aside from expending unreasonable resources to renovate the building, Dynamic can do nothing with the dilapidated structure. Dynamic acquired the property in 1995 for the purpose of demolishing the building and including the property in a much larger assemblage. (Ver. Comp. at ¶¶ 10-12). The City argues, "it has not alleged any attempt to do so in the several years it owned the property" (Appellee Brief at 16), but that is irrelevant. Dynamic owns the property, had a vested right in the demolition permit, and intended to demolish the building. As a result of the City's wrongful actions, Dynamic can no longer do that, and has no adequate remedy at law.

Further, the application of CZC §1435-07-2-1 deprives a property owner the right to appeal a decision by the City to place an application for a demolition permit filed under the Building Code "on hold" while the City considers an application for historic designation filed under the Zoning Code. "It is axiomatic…that constitutional due process requires that one adversely affected by the decisions of an administrative agency be given sufficient notice of such action to make his objections thereto heard." *Hinton v. Hine*, 9th Dist. Summit No. 10455, 1982 Ohio App. LEXIS 11517 (Apr. 21, 1982). (citations omitted). In circumstances such as here where the City ultimately adopts the historic designation, the property owner is forever deprived of the right to object and appeal the decision to place the demolition permit application on hold in deference to a later-filed application for designation or the decision to then effectively deny the permit when legislation is adopted. Thus, Dynamic has no adequate remedy and the City's

efforts to force Dynamic to now seek a Certificate of Appropriateness is not an adequate remedy. The City does not get to change the rules to meet is political preferences.

V. THE COURT OF APPEALS HAD JURISDICTION OVER DYNAMIC'S CLAIMS

The Court of Appeals had original jurisdiction over all claims in Dynamic's Verified Complaint. The City argues, "the Complaint raises many claims that are outside the scope of the appellate court's jurisdiction." (Appellee Brief at 11). The City's argument is incorrect, and the First District erred in dismissing this action.

"The standard of review for a dismissal, pursuant to Civ.R. 12(B)(1), is whether any cause of action cognizable by the forum has been raised in the complaint." *State ex rel. Ullmann v. Husted*, 10th Dist. Franklin No. 14AP-863, 2015-Ohio-3120, ¶ 7 (citing *State ex rel. Bush v. Spurlock*, 42 Ohio St.3d 77, 80, 537 N.E.2d 641 (1989)) (emphasis added). As set forth in its Merit Brief, although Dynamic requested declaratory and injunctive relief, these claims are ancillary to the essence of the action, which is a request for a Writ of Mandamus. Because Dynamic's mandamus action seeks a specific order directing state actors to perform certain legal duties – and because there was at least one cognizable cause of action raised in the complaint – the appellate court had subject-matter jurisdiction over all of Dynamic's claims.

The City relies upon *State ex rel. Neer v. Indus. Comm.*, 53 Ohio St. 2d 22 (1978) and *State ex rel. Crabtree v. Franklin Cty. Bd. of Health*, 77 Ohio St. 3d 247 (1977) in support of its argument that the First District court's "original jurisdiction does not extend to actions seeking injunctive relief or declaratory relief." (Appellee Brief at 12). However, neither *Neer* nor *Crabtree* applies. The *Neer* Court found the appellant was only seeking a declaratory judgment in the original action filed with the Court of Appeals. *State ex rel. Neer*, 53 Ohio St. 2d at 23. On this basis, the court concluded the Court of Appeals did not have jurisdiction over "what is basically a declaratory judgment." *Id*. at 24.

Crabtree considered whether the court had jurisdiction over a writ of mandamus seeking an injunction "restrain[ing] the Franklin County Health Board from withholding fully drafted regulations that would benefit the entire Columbus area." *State ex rel. Crabtree*, 77 Ohio St. 3d at 248. That Court concluded, among other things, a writ of mandamus cannot be used to control administrative or legislative discretion, and because the appellant's complaint sought an order compelling the health board to adopt certain legislation, the Court of Appeals did not have jurisdiction over a mandamus action seeking such relief. *Id*. at 249.

The City further relies upon *State ex rel. United Auto., Aerospace & Agric. Implement Workers of Am. v. Ohio Bur. of Workers' Comp.*, 108 Ohio St.3d 432, 2006-Ohio-1327, 844 N.E.2d 335 ("UAW"), *State ex rel. Satow v. Gausse-Milliken*, 98 Ohio St.3d 479, 2003-Ohio-2074, 786 N.E.2d 1289, and *Rammage v. Saros*, 97 Ohio St.3d 430, 2002-Ohio-6669, 780 N.E.2d 278 to support its argument "that declaratory judgment and prohibitory injunction actions disguised as mandamus actions cannot invoke an appellate court's original jurisdiction." (Appellee Brief at 12). Again, none of these cases apply here.

In *UAW*, this Court affirmed the dismissal of a mandamus action because the relator's true objectives were a declaratory judgment and prohibitory injunction and because the relator had an adequate remedy at law via a declaratory judgment action. 108 Ohio St.3d at 438. Further, the relator never alleged that it or any of its members had been harmed by the allegedly unconstitutional action. This Court further held the general rule – appellate courts do not have original jurisdiction to hear declaratory and injunction actions – "would apply where the mandamus case presents only a general and abstract question concerning the constitutionality of a legislative act instead of a claim that a 'specific public entity had failed to perform its clear legal duty to consider specific petitions.'" *Id*. at 441.

In *Satow*, this Court held "where…an action in mandamus does not provide effective relief unless accompanied by an ancillary [preventive] injunction, it would appear that injunction rather than mandamus is the appropriate remedy" and thus, in those cases, mandamus would not be proper. 98 Ohio St.3d at 482. Again, because the essence of the relator's claims involved declaratory judgment and prohibitory injunction, the appellate court lacked jurisdiction.

Rammage is not a mandamus case at all, but rather was an action seeking relief in *habeas corpus*. 97 Ohio St.3d at 431. Nevertheless, this Court held Rammage "has or had adequate legal remedies in the ordinary course of law to raise her claims," and "[h]abeas corpus, like other extraordinary writ actions, is not available when there is an adequate remedy at law." *Id*.

Here, the gravamen of Dynamic's Verified Complaint is its request for mandamus relief; Dynamic claimed a specific entity (the City) failed to perform its clear legal duty to consider specific petitions (the Demolition Application), and Dynamic alleged harm. (Ver. Comp. at ¶¶ 44-49). Further, Dynamic has no adequate remedy at law. This Court has long held the remedy of mandatory injunction or the availability of an action for declaratory judgment "does not bar the issuance of a writ of mandamus if the relator demonstrates a clear legal right thereto." *State ex rel. Fenske v. McGovern*, 11 Ohio St. 3d 129, 131 (1984). And requests for declaratory judgment and/or injunctive relief routinely accompany mandamus actions. *See e.g. Ullmann*, 2015-Ohio-3120 at ¶ 11.

VI. DYNAMIC'S DECLARATORY JUDGMENT, INJUNCTION, AND DAMAGES CLAIMS ARE NOT CONTRARY TO LAW

A. The City's Historic Preservation Code is Unconstitutional

The City claims its historic preservation code is a constitutional exercise of its police power and comports with due process. (Appellee Brief at 15, 19). The issue here is not whether

the historic preservation code is an illegal exercise of police power. Instead, Dynamic contends the code, as written and applied to Dynamic, is substantively and procedurally unconstitutional.

i. The City's Historic Preservation Code is Void for Vagueness

The City argues, "there should be no question whether a person of common intelligence is able to understand what form is required to seek the designation of a historic building," and "there is no serious argument that a person of common intelligence cannot discern the proper method for completing a designation form." *Id*. at 19. The City's argument misses the mark. The vagueness associated with the code has nothing to do with which form a person should file or how they should fill it out; it is void for vagueness because "complete designation application" in CZC §1435-07-2-1 is not defined, and there is nothing in the City's code to provide "fair notice" to anyone engaged in the designation process. *City of Toledo v. Ross*, 6th Dist. Lucas No. L-00-1337, 2001 Ohio App. LEXIS 3891, *6 (Aug. 31 2001).

The ordinance at issue states no historic structure "may be demolished or excavated during the pendency of a designation application, which commences upon the filing of a **complete designation application**." CZC 1435-07-2-1. Nowhere is "complete designation application" defined, so Dynamic and every other citizen subjected to the ordinance are left to guess as to what the ordinance requires.

The issues before this Court highlight the exact reason the City's code is void for vagueness. The City narrowly interprets "complete" to mean filling out the one-page form titled Local Historic Landmark Designation Application, while ignoring the fact the application also requires additional information, including a "Designation Report", pictures, and other forms before it can even be considered. *See* Ver. Comp. Ex. 9-14. Indeed, in this case, the evidence shows the City assisted CMHF at least through July 2, 2015 in completing its application so it could be "ready for the Historic Conservation Board". *Id*. at 11, 14. On the other hand,

Dynamic submitted its Demolition Application on June 25, and it was complete as of that date (*i.e.*, no other documents or information were required to be submitted).

The City is certainly capable of adopting legislation that defines when a particular application is "complete." It has adopted a set of specific rules for the Historic Conservation Board to determine whether and when an application for a Certificate of Appropriateness is complete. *See* CZC §1435-09-01-A. There is no similar set of rules for determining whether and when a "designation application" is "complete" and the City does not get to define "complete" as it sees fit to meet its needs.

ii. The City's Historic Preservation Code Violates Procedural Due Process Requirements

The City's code violates procedural due process requirements, and in fact, the City violated Dynamic's due process rights by accepting, reviewing, and approving CMHF's Designation Application without providing any notice to Dynamic that it was doing so. In its Brief, the City claims, "the historic preservation code, in conjunction with other City laws and regulations, does in fact provide a comprehensive process that ensures the owner of a proposed historic landmark receives ample notice and the opportunity to be heard." (Appellee Brief at 19).

A review of Section 1435 (the historic preservation code) demonstrates there is no requirement or mechanism for providing a property owner notice once a structure or land owned by a property owner has become the subject of an involuntary designation application. That is, there simply is no procedural safeguard to ensure a property owner is given notice. The City certainly knows how to adopt provisions within the historic preservation code requiring notice, but those provisions apply only after a parcel or structure has been designated historic. *See* CZC §1435-09-1-D & E (adopting detailed notice requirements for when a landowner files an application for a Certificate of Appropriateness or for when an application for a Certificate of

Appropriateness is to be considered). There is no corollary for providing notice to a property owner before his property is subjected to an application for designation.

Because Dynamic filed its Demolition Application before any complete designation application was submitted, Dynamic had a vested right in its application. The City violated that right when it circumvented Dynamic's application and approved CMHF's Designation Application instead. In its Brief, the City contends its "historic preservation code provides a robust and efficient process for designating historic landmarks that accounts for and respects the interests of all property owners," and then lists several purported avenues by which it follows this process (*e.g.*, public staff conference, public hearings, timeline for decision, etc.). (Appellee Brief at 21). This argument misses the point because this "process" does not require any notice be given to a property owner whose property is subjected to an involuntary designation application, nor does it require notice be given to the owner as the application is considered.

As for CZC §1435-07-2-B – the legislation the City claims requires notice to a property owner – the ordinance merely sets forth the legislative procedure for the consideration of an application for historic designation. This is another red-herring because this ordinance does not require or provide for any notice to the property owner or any other person or entity for that matter. This is further illustrated by the City's e-mail to CMHF on July 1, 2015, when Mr. Harris stated, "I recommend you contact the owner [Dynamic] to advise them of the designation application, if you feel comfortable doing that." (Ver. Comp. Ex. 14). The City suggested CMHF give Dynamic notice of its application because the City had no intention to do so.

The City's historic preservation code is devoid of any requirement that notice be given to a property owner when an involuntary application for designation is filed. Notice is fundamental to due process and the absence of notice is constitutionally fatal.

B. The City's Historic Preservation Code as Applied Effects a Taking

The City argues, "First, Dynamic has set out the patently incorrect test for determining a regulatory taking. Second, it has not alleged facts that would support a regulatory taking under any applicable theory." (Appellee Brief at 23). Both of these arguments fail.

i. The Test for Determining a Regulatory Taking Set Forth in Dynamic's Merit Brief is Good Law

The test set forth in Dynamic's Merit Brief for determining a regulatory taking is still good law. *State ex rel. Shemo v. City of Mayfield Heights*, 95 Ohio St.3d 59, 63-64, 2002-Ohio-1627, 765 N.E.2d 345 (emphasis original). The City argues, "the test cited by Dynamic has since been superseded by subsequent decisions of the United States Supreme Court and this Court." (Appellee Brief at 23). This is false. While Dynamic acknowledges the Courts' rulings in *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528 (2005) and *State ex. rel. Gilmour Realty, Inc. v. City of Mayfield Heights*, 119 Ohio St.3d 11, 2008-Ohio-3181, 891 N.E.2d 320, neither of these cases superseded or overruled *Shemo*.[3]

In 2005, this Court relied upon *Shemo* for the proposition that "a compensable regulatory taking could 'occur *either* if the application of the zoning ordinance to the particular property is constitutionally invalid, *i.e.*, it does not substantially advance legitimate state interests, *or* denies the landowner all economically viable use of the land.'" *State ex rel. Duncan v. City of Mentor City Council*, 105 Ohio St.3d 372, 2005-Ohio-2163, 826 N.E.2d 832, ¶ 18 (still good law).

In 2012, the Third District Court of Appeals held, "The United States Supreme Court has consistently held that the application of land-use regulations to a particular piece of property is a taking only if either the regulation is constitutionally invalid in that it does not substantially

[3] A review of the Shepard's report for *Shemo* reveals that *Shemo* has been distinguished by three cases – none of which are *Lingle* or *Gilmour* – and superseded or overruled by none. In fact, *Shemo* has been followed (positive) by 15 cases – by this Court as recently as 2011 in *State ex rel. Doner v. Zody*, 130 Ohio St.3d 446, 2011-Ohio-6117, 958 N.E.2d 1235 – and cited by 91 cases, as recently as 2014 by this Court in *State ex rel. Wasserman v. City of Fremont*, 140 Ohio St.3d 471, 2014-Ohio-2962, 20 N.E.3d 664, ¶ 22.

advance legitimate state interests or if it denies an owner economically viable use of his land." *Bd. of Health v. McCalla*, 3d Dist. Defiance No. 4-12-07, 2012-Ohio-4107, ¶ 47 (citing *Shemo,* 95 Ohio St.3d at 63). And as recently as 2015, the Eighth District relied on *Shemo* when it held "Mandamus is the appropriate action for compelling public authorities to commence appropriation proceedings when an involuntary taking of private property is alleged," and "[t]emporary takings are also compensable." *State ex rel. Cuyahoga Lakefront Land, LLC v. City of Cleveland*, 8th Dist. Cuyahoga No. 101438, 2015-Ohio-1637, ¶ 6.

ii. Dynamic Industries Has Alleged Facts to Support Its Claim that the City's Actions Constitute a Regulatory Taking

Dynamic has adequately pled the elements of an unconstitutional taking (Ver. Comp. at ¶¶ 66-76), and the City has failed to demonstrate how those facts, which must be taken as true, would not entitle Dynamic to relief. "The United States and Ohio Constitutions guarantee that private property shall not be taken for public use without just compensation." *State ex rel. Gilbert v. Cincinnati*, 125 Ohio St. 3d 385, 388 (2010). "Mandamus is the appropriate action to compel public authorities to institute appropriation proceedings where an involuntary taking of private property is alleged." *Id*., quoting *Shemo*, 95 Ohio St. 3d at 63.

Here, Dynamic has alleged the City began taking all or part of its property beginning on June 25, 2015, and the taking has continued uninterrupted and will continue until a Writ of Mandamus is issued requiring the City to issue a demolition permit. (Ver. Comp. at ¶ 69). In response, the City does not take issue with the facts plead, but instead argues, apropos of nothing, that no taking occurred because "Dynamic apparently took no steps to demolish the building until the Designation Application was filed." (Appellee Brief at 26). This argument is irrelevant to whether a taking occurred.

Viewed in the proper light, the record shows the City accepted back-dated documents from CMHF in an attempt to make it appear as though the designation application was filed before the demolition permit application. The City never indicated, as it was required to do so, on the application submitted by CMHF the dates on which the application was "received by staff" or determined to be "complete." (Ver. Comp. Ex. 9). The public record proves the designation application was received after Dynamic's June 25 demolition permit application and the designation application was not "complete", if ever, until well after June 25. *Id*. at 9-14.

As demonstrated above, there was never a "complete designation application" pending when Dynamic filed its permit application on June 25. Thus, a taking began on June 25 when the City placed the permit application "on hold" and has continued uninterrupted. At the very least, the question of whether a "complete designation application" was pending and, therefore, whether Dynamic had vested rights in the permit application is a question of fact that cannot be resolved by a motion to dismiss and should only be resolved after Dynamic has an opportunity to place representatives of the City under oath. Accordingly, the appellate court erred.

The City further argues a taking has not occurred because the "the allegations in [Dynamic's] Complaint do not support the conclusion that the hold's relatively short duration constitutes a taking." (Appellee Brief at 26). This argument misses the mark for several reasons. Most notably, the taking alleged by Dynamic began on June 25 and continues. It is clear the City will not voluntarily issue the demolition permit, so until a Writ of Mandamus is ordered, Dynamic will continue to be deprived of its property. By the time this Court grants the requested writ, many more months may well pass, thereby increasing the total taking period. Whether the taking period is sufficiently long to constitute a temporary taking is a factual question this Court should resolve once the taking period has concluded.

Ultimately, the determination of whether a taking has occurred cannot be made until the Court resolves the questions around the City's refusal to issue the demolition permit and until the period of taking is defined by the issuance of a writ. Then this Court – or the appellate court on remand – will be able to determine whether a writ requiring the City to compensate Dynamic for the taking of its property, temporary or otherwise, is appropriate.

To support its claim that no taking occurred here, the City relies on *BSW Dev. Grp. v. City of Dayton*, 83 Ohio St.3d 338, 1998-Ohio-287, 699 N.E.2d 1271. (Appellee Brief at 25). Specifically, the City argues that Dynamic, like the property owner in *BSW*, cannot establish it was denied all economically-viable use of the property, because "Dynamic may continue to use its property in the (sic) essentially the same manner in which it was used prior to its application for a demolition permit." *Id*. *BSW*, however, can be distinguished from the facts of this case.

In *BSW*, the property owner applied for a demolition permit, but Dayton refused to issue it because it considered the building historic. The property owner obtained a judgment holding that Dayton should have issued the demolition permit. The property owner then sought compensation for the taking of its property during the time the demolition permit had been improperly denied. This Court upheld the denial of the writ, holding the property owner had failed to show it had been denied all economically-viable use of the property, because it was still able to use the property for parking and storage. *BSW*, 83 Ohio St.3d at 341.

Here, the record reflects the structure on Dynamic's property was in poor structural condition twenty years ago, has continued to deteriorate, is not economically feasible to repair, restore, or maintain, and is not viable. (Ver. Comp. at ¶¶ 10-12). Due to the City's illegal actions, Dynamic cannot demolish the structure, and cannot use it for any other purpose. Thus, unlike the *BSW* building, which could be put to some use, Dynamic's building is uninhabitable

and cannot be put to any economically-viable use. *See also, State ex rel. Greenacres Found. v. City of Cincinnati*, 1st Dist. Hamilton No. C-150038, 2015-Ohio-5479, ¶¶ 39-41.

C. Dynamic's Claim for Damages is Not Barred by R.C. § 2744

Dynamic's claim for damages is not barred by Ohio Rev. Code § 2744. In its Brief, the City argues, "the City is immune from this claim under R.C. Chapter 2744." (Appellee Brief at 27). This is incorrect. As demonstrated in Dynamic's Merit Brief, "R.C. 2744.02(A)(1) extends immunity to political subdivisions against claims for 'damages in a civil action for . . . loss to person or property' but not to those claims seeking equitable relief." *City of Cincinnati v. City of Harrison*, 1st Dist. Hamilton No. C-130195, 2014-Ohio-2844, ¶ 30. It cannot be disputed this is an action for equitable relief (mandamus), not an action based on tort. Thus, the City is not immune from liability for its illegal conduct.

VII. CONCLUSION

For all of the foregoing reasons, Dynamic requests the Court reverse the First District Court of Appeals' Entry Dismissing Petition and remand this case for further proceedings.

Respectfully submitted,

Toby K. Henderson, Counsel of Record

/s/ Toby K. Henderson
Toby K. Henderson
Matthew G. Bruce
Counsel for Appellant, Dynamic Industries, Inc.

CERTIFICATE OF SERVICE

My office filed the foregoing Appellant's Reply in Support of Merit Brief on July 11, 2016, and served a true and accurate copy of the foregoing upon the following via e-mail:

Marion E. Haynes, III, Esq.
Terrance A. Nestor, Esq.
Emily E. Woerner, Esq.
Assistant City Solicitor
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801 Plum Street
Cincinnati, Ohio 45202
(513) 352-4894
(513) 352-1515 (fax)
Marion.haynes@cincinnati-oh.gov

Counsel for Appellees City of Cincinnati, Art Dahlberg, Chief Building Official, and Beth Johnson, Urban Conservator

/s/ Toby K. Henderson
Toby K. Henderson
Counsel for Appellant, Dynamic Industries, Inc.

2354114.6

CINCINNATI

LOCAL HISTORIC LANDMARK DESIGNATION APPLICATION

HCB USE ONLY
DATE RECEIVED BY STAFF:
APP. COMPLETION DATE:

APPLICATION DATE: 5/15/15

PROPOSED DISTRICT NAME: KING RECORDS AT 1540 BREWSTER II (if applicable)

PROPOSED LANDMARK NAME: _____ (if applicable)

PROPERTY ADDRESS: All parcels of "1540 Brewster Ave"

PROPOSED SITE NAME: KING RECORDS AT BREWSTER (if applicable)

PROPERTY ADDRESS: All parcels of "1540 Brewster Ave"

NEIGHBORHOOD: EVANSTON

DESIGNATOR'S NAME: Patti Collins + Marvin Hawkins

DESIGNATOR'S ADDRESS: 811 Race St #2 CINTI OH 45202

PHONE NUMBER: Patti - 513-236-2724 Marvin - 573-448-8980

EMAIL: thezillatron@gmail.com grouphum@gmail

(From Bootsy Collins Foundation + Cincinnati USA Music Heritage foundation

Attach a letter outlining the justification for the approval of the desired designation by the Historic Conservation Board as defined in Chapter 1435-7-1 or 1435-7-2.

IT IS YOUR RESPONSIBILITY TO PROVIDE THE URBAN CONSERVATOR SUPPORTING DOCUMENTATION IN THE FORM OF A "DESIGNATION REPORT" TO FACILITATE THE CREATION OF A STAFF REPORT UNDER CHAPTER 1435-07, "PRESERVING A STRUCTURE".

Applications should be submitted to
The Historic Conservation Office
Department of City Planning and Buildings
805 Central Avenues, Suite 720, Two Centennial Plaza, Cincinnati, Ohio 45202 513/352-4848

Public Notice: Please be advised that Local Historic Landmark Designation applications are reviewed by the Local Historic Conservation Board. The fee for the review is $500.00 and is due at the time the application is submitted.

EXHIBIT 9

APPX. 1

Harris, Larry

From: Elliott Ruther <elliottvruther@yahoo.com>
Sent: Monday, May 18, 2015 7:45 PM
To: Harris, Larry
Subject: Application form

Larry, it was great talking today. I look forward to more. Please send the form to go with the application made Friday. Thanks again. Elliott 513.484.0505

Sent from my IPhone

APPX. 2

EXHIBIT
tabbies
10

Harris, Larry

From:	Elliott V. Ruther <elliottvruther@yahoo.com>
Sent:	Wednesday, June 24, 2015 10:07 PM
To:	Harris, Larry; Martinez, Charles
Cc:	Patricia Collins; Marvin Hawkins; Haynes, Marion; Laing, David
Subject:	Save King On Brewster/ updated application

SaveKingOnBrewsterAdjusted6.20.15.pdf (12 MB) *Saved to Hightail*

Hi Larry, thanks again for convening the recent meeting and your guidance in this process. Attached is an updated Designation Report reflecting the organizational request for you and Charles. Thanks for sharing examples. Please let me, Patti or Marvin know that/if this is ready for the Historic Conservation Board. The attached goes with the previously provided books, 2008 Council motion, and Brewster buildings pictures for interested parties. While it could use some editing I think it's tuned close enough. We also request that music recorded at 1548 Brewster Avenue be played in the foreground and background during public meetings. Finally, please direct all inquiries to Patti and Marvin by email or phone or at Historic Herzog, 811 Race Street #2, 45202 as CMHF and BCF will start sharing with public and media about this application. Thanks again Larry for all your help.

APPX. 3

EXHIBIT
tabbies
11

Harris, Larry

From: Elliott Ruther <elliottvruther@yahoo.com>
Sent: Tuesday, June 30, 2015 4:02 PM
To: Harris, Larry; ldharris@fuse.net
Subject: Fwd: Save King On Brewster/ updated application
Attachments: SaveKingOnBrewsterAdjusted6.20.15.pdf; ATT00001.htm

Trying again

Sent from my iPhone

Begin forwarded message:

From: "Elliott V. Ruther" <elliottvruther@yahoo.com>
Date: June 24, 2015 at 10:07:13 PM EDT
To: Larry Harris <larry.harris@cincinnati-oh.gov>, "charles.martinez@cincinnati-oh.gov" <charles.martinez@cincinnati-oh.gov>
Cc: Patricia Collins <p@bootsycollins.com>, Marvin Hawkins <grouphum@gmail.com>, Marion Haynes <marion.haynes@cincinnati-oh.gov>, David Laing <david.laing@cincinnati-oh.gov>
Subject: Save King On Brewster/ updated application
Reply-To: "Elliott V. Ruther" <elliottvruther@yahoo.com>

HI Larry, thanks again for convening the recent meeting and your guidance in this process. Attached is an updated Designation Report reflecting the organizational request for you and Charles. Thanks for sharing examples. Please let me, Patti or Marvin know that/if this is ready for the Historic Conservation Board. The attached goes with the previously provided books, 2008 Council motion, and Brewster buildings pictures for interested parties. While it could use some editing I think it's tuned close enough. We also request that music recorded at 1548 Brewster Avenue be played in the foreground and background during public meetings. Finally, please direct all inquiries to Patti and Marvin by email or phone or at Historic Herzog, 811 Race Street #2, 45202 as CMHF and BCF will start sharing with public and media about this application. Thanks again Larry for all your help.

APPX. 4

EXHIBIT
tabbies
12

Harris, Larry

From: Elliott V. Ruther <elliottvruther@yahoo.com>
Sent: Tuesday, June 30, 2015 6:31 PM
To: Harris, Larry; ldharris@fuse.net
Subject: Re: Application

Hi again Larry. Let me know if that went thru. And, also, we just received a bunch of feedback from Margo and we will incorporate with new copy. Thanks again.

From: "Harris, Larry" <Larry.Harris@cincinnati-oh.gov>
To: Elliott Ruther <elliottvruther@yahoo.com>
Sent: Tuesday, June 30, 2015 3:59 PM
Subject: RE: Application

I still can't open the file on my office computer ad didn't get it at home. Can you send it again to both email addresses. larry.harris@cincinnaqti-oh.gov and ldharris@fuse.net.

Larry D. Harris
City Urban Conservator
Historic Conservation Office
Department of City Planning and Buildings
Two Centennial Plaza - Suite 720
805 Central Avenue
City of Cincinnati, Ohio 45202

Phone: 513.352.4848
Cell: 513.432.5716
Fax: 513.352.4853
Email: larry.harris@cincinnati-oh.gov

-----Original Message-----
From: Elliott Ruther [mailto:elliottvruther@yahoo.com]
Sent: Tuesday, June 30, 2015 7:22 AM
To: Harris, Larry
Subject: Application

Hey Larry, checking to see if you have had chance to reviewed the revised app with designation report.

Sent from my iPhone

EXHIBIT
tabbies
13

APPX. 5

Harris, Larry

From:	Elliott V. Ruther <elliottvruther@yahoo.com>
Sent:	Thursday, July 02, 2015 7:32 AM
To:	Harris, Larry
Cc:	Haynes, Marion; Martinez, Charles; Patricia Collins; Marvin Hawkins; Edwin Vardiman
Subject:	Re: Application
Attachments:	Historic Designation Request Updated.docx

Larry - attached is more for the application. It;s in word. Would def like to review with you at your convenience.

Let us know and we can re-package with additional pictures and supplemental materials included in the earlier stages of this application. We can also reformat to pdf for ease of emailing etc.

Thanks again for all your assistance.

On Jul 1, 2015, at 10:12 AM, "Harris, Larry" <Larry.Harris@cincinnati-oh.gov> wrote:

> Elliot – See the attached permit for demo. It will not be approved, but I recommend you contact the owner to advise them of the designation application, if you feel comfortable doing that.
>
> **Larry D. Harris**
> **City Urban Conservator**
> **Historic Conservation Office**
> **Department of City Planning and Buildings**
> **Two Centennial Plaza - Suite 720**
> **805 Central Avenue**
> **City of Cincinnati, Ohio 45202**
>
> **Phone: 513.352.4848**
> **Cell: 513.432.5716**
> **Fax: 513.352.4853**
> **Email: larry.harris@cincinnati-oh.gov**
>
> <image002.jpg>
>
> ---
>
> **From:** Elliott V. Ruther [mailto:elliottvruther@yahoo.com]
> **Sent:** Tuesday, June 30, 2015 6:31 PM
> **To:** Harris, Larry; idharris@fuse.net
> **Subject:** Re: Application
>
> Hi again Larry. Let me know if that went thru. And, also, we just received a bunch of feedback from Margo and we will incorporate with new copy. Thanks again.
>
> ---
>
> From: "Harris, Larry" <Larry.Harris@cincinnati-oh.gov>
> To: Elliott Ruther <elliottvruther@yahoo.com>

EXHIBIT tabbies 14

APPX. 6

Sent: Tuesday, June 30, 2015 3:59 PM
Subject: RE: Application

I still can't open the file on my office computer ad didn't get it at home. Can you send it again to both email addresses, larry.harris@cincinnati-oh.gov and ldharris@fuse.net.

Larry D. Harris
City Urban Conservator
Historic Conservation Office
Department of City Planning and Buildings
Two Centennial Plaza - Suite 720
805 Central Avenue
City of Cincinnati, Ohio 45202

Phone: 513.352.4848
Cell: 513.432.5716
Fax: 513.352.4853
Email: larry.harris@cincinnati-oh.gov

-----Original Message-----
From: Elliott Ruther [mailto:elliottvruther@yahoo.com]
Sent: Tuesday, June 30, 2015 7:22 AM
To: Harris, Larry
Subject: Application

Hey Larry, checking to see if you have had chance to reviewed the revised app with designation report.

Sent from my iPhone

<king records demo permit.pdf>