IN THE SUPREME COURT OF OHIO

CITY OF CINCINNATI,	:	**Case No. 2022-0101**
Appellee,	:	**On Appeal from the Hamilton County Court of Appeals, First Appellate**
v.	:	**District**
TWANG, LLC.,	:	**Court of Appeals Case No.: C200369**
Appellant.	:	

APPELLEE CITY OF CINCINNATI'S MEMORANDUM IN OPPOSITION TO JURISDICTION

William F. Fecher (0039240)
(Counsel of Record)
Statman Harris, LLC
35 East Seventh Street, Suite 315
Cincinnati, Ohio 45202
Tel: (513) 621-2666 | Fax: (513) 621-4896
wbfecher@statmanharris.com
Counsel for Appellant Twang, LLC

ANDREW W. GARTH (0088905)
City Solicitor

Jacklyn Gonzales Martin (0090242)
(COUNSEL OF RECORD)
Assistant City Solicitor
801 Plum Street, Room 214
Cincinnati, Ohio 45202
Phone: (513) 352-3315
Fax: (513) 352-1515
jacklyn.martin@cincinnati-oh.gov
Counsel for Appellee City of Cincinnati

TABLE OF CONTENTS

I. TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

II. THIS CASE DOES NOT PRESENT A MATTER OF PUBLIC OR GREAT GENERAL INTEREST

Twang, LLC ("Twang") mischaracterizes the facts and distorts the holding of the First District Court of Appeals to try to construct novel propositions of law. A review of the record and the decision below reveals Twang's propositions of law for what they really are: last-ditch attempts to circumvent the clear text of R.C. 3767.41 and avoid Twang's obligations as the owner of a historic building.

The major point omitted from its jurisdictional brief is that Twang failed to appeal the administrative decision denying a certificate of appropriateness for demolition of its historic building, 819 Elm Street ("819 Elm"). Twang then attempted to skirt around its misstep and get a court to allow demolition anyway by turning R.C. 3767.41 (the "Ohio Nuisance Statute") on its head. In essence, Twang demanded that the trial court give it permission to do what it *cannot* do under the City of Cincinnati's historic conservation laws: demolish its historic building outside of existing administrative processes. And Twang made this demand even though it had already waived its right to appeal the underlying administrative decision.

Contrary to Twang's assertion, there is no great debate about who may request the remedy of demolition under R.C. 3767.41(E). The City of Cincinnati, the trial judge, and the First District all agree that an owner can invoke this remedy only when: (1) a party with statutory standing invokes the public nuisance statute; (2) a public nuisance hearing is held; and (3) a court determines that a property is a statutory public nuisance. Those statutory prerequisites are not met here.

Twang is not a party with statutory standing to bring an R.C. 3767.41 claim. Standing under the Ohio Nuisance Statute is clearly and unambiguously conferred to limited parties by the Ohio General Assembly in R.C. 3767.41(B)(1)(a). As the First District correctly held, Twang is not entitled to a remedy for a claim it does not have standing to invoke. Further, the City of Cincinnati

dismissed its statutory nuisance claim before any public nuisance hearing was held. As such, Twang could not invoke R.C. 3767.41(E).

Twang contends that "most [public nuisance] litigation is initiated by owners who bring claims of insufficient notice, improper demolition, and inverse condemnation, to defend against the demolition of their property. This case bucks the trend." In a way, Twang is correct. This case bucks all trends of R.C. 3767.41 litigation because property owners do not—and *cannot*—sue themselves under the Ohio Nuisance Statute. Indeed, by arguing that it can, Twang bucks the trend of all litigation by seeking to create a case or controversy *with itself*. Regardless, unless this Court wishes to upend the standing doctrine, a centuries-old and basic tenet of litigation, this case does not concern a matter of public or general interest.

Twang made the choice to purchase a historic building. In doing so, Twang took the property subject to historic conservation laws, including regulations that might preclude demolition. Having made its choice and —and foregone its administrative appeal rights, Twang attempts to leverage the Ohio Nuisance Statute as a backdoor path to demolition. Twang's arguments purposefully contort and confuse the Ohio Nuisance Statute because it seeks to circumvent historic conservation laws. This backhanded maneuvering should be soundly rejected.

III. STATEMENT OF CASE AND FACTS

Twang purchased 819 Elm in January of 2014. 819 Elm is situated in the Ninth Street Historic District in Cincinnati. For over two years, Twang took no steps to maintain or rehabilitate the building. To ensure that the historically protected building was safe and avoid demolition by neglect, on August 8, 2016, the City ordered Twang to obtain a Vacated Building Maintenance License ("VBML"). *See* Cincinnati Municipal Code 1101-79 (requiring owners to register their VBML properties, pay an annual fee, and meet minimum compliance standards).

Twang ignored this order. It never brought 819 Elm into the bare minimum of compliance with VBML standards; it never paid its annual fees; and it never even bothered to file an application for the license. In response to its years-long flouting of orders related to building code violations, the City issued six civil fines to Twang. Twang ignored these too and it failed to appeal or pay a single fine. Because 819 Elm continued to deteriorate and lesser enforcement efforts failed to achieve compliance with the Cincinnati Building Code, the City initiated litigation with the goal of preserving 819 Elm and collecting the debts owed by Twang.

After the City filed suit, Twang applied for a certificate of appropriateness ("COA") from the Cincinnati Historic Conservation Board ("Board") seeking to demolish 819 Elm pursuant to the administrative processes set forth in Cincinnati Municipal Code ("C.M.C.") Chapter 1435. The Board held a hearing and issued a decision on November 19, 2018. Twang's application for a COA to demolish 819 Elm was unanimously denied. After failing to appeal this decision, and thus waiving their rights, *see* C.M.C. 1449-11, Twang took the novel approach of filing a counterclaim in the litigation to assert a claim against itself under R.C. 3767.41.

Now, seven years after purchasing 819 Elm, Twang admits it never initiated repairs. Because of Twang's disinvestment and refusal to comply with property maintenance laws, 819 Elm continues to deteriorate.

IV. ARGUMENT

> **Appellee's Proposition of Law No. 1, *Restated***: A property owner cannot pursue a declaration that its own property is a public nuisance under R.C. 3767.41 and, therefore, cannot independently pursue a remedial demolition order under R.C. 3767.41(E).

Twang attempts to reframe an "interested party's" right to make a "written request" for demolition of a nuisance property, as provided by R.C. 3767.41(A)(4) and 3767.41(E), as an independent cause of action under R.C. 3767.41. The clear language of the statute, the standing

doctrine, and common sense rebut this tortured interpretation.

1. Owners of nuisance properties do not have standing to pursue a nuisance declaration.

The First District correctly determined that Twang cannot pursue a declaration that its own property is a public nuisance under R.C. 3767.41 and, therefore, it cannot independently pursue a demolition order under R.C. 3767.41(E).

Ohio Revised Code 3767.41 is very specific about which parties may assert a public nuisance claim. A "civil action to enforce any local building, housing, air pollution, sanitation, health, fire, zoning, or safety code, ordinance, resolution, or regulation applicable to buildings" may be commenced:

> by a municipal corporation or township in which the building involved is located, by any neighbor, tenant, or by a nonprofit corporation that is duly organized and has as one of its goals the improvement of housing conditions in the county or municipal corporation in which the building involved is located * * *.

In enacting the nuisance statute, the Ohio General Assembly purposefully crafted it to ensure that only those parties with a direct interest in addressing nuisance properties could seek relief. *See* R.C. 3767.41(B)(1)(a). The parties that can pursue a public nuisance declaration are: (1) a municipal corporation or township in which the building is located, (2) a neighbor, (3) a tenant, or (4) certain nonprofit corporations. *Id.* The owner of the nuisance is not entitled to bring a public nuisance claim against itself. The basis for this limitation is obvious: the owner of a nuisance property has no case or controversy with itself, and if it desires to abate its own nuisance property, it may—and often must.

Twang is not, nor does it claim to be, any of the above-listed parties. As a result, the First District properly held that Twang cannot bring its own R.C. 3767.41 claim. Because the appellate

court's analysis of the Ohio Nuisance Statute, and the statute itself, is straightforward and accurate, and because this matter involves only Twang's self-interested goal to tear down a historic property, this Court should decline to exercise jurisdiction.

2. R.C. 3767.41(E) is not relevant here, where no nuisance declaration exists.

In its attempt to evade the clear language of Ohio's Nuisance Statute, Twang cites to R.C. 3767.41(E), which addresses remedies. Specifically, R.C. 3767.41(E) provides that:

> Upon the written request of any of the interested parties to have a building, or portions of a building, *that constitute a public nuisance* demolished because repair and rehabilitation of the building are found not to be feasible, the judge may order the demolition * * *.

(emphasis added). Twang posits that because it is an "interested party," it may wield R.C. 3767.41(E) to force the trial court to rule on its written request for demolition.

Despite Twang's suggestions to the contrary in its jurisdictional brief, the City and the First District Court of Appeals agreed that Twang is an "interested party" who may request demolition of its building—*if* that building "constitute[s] a public nuisance." R.C. 3767.41(E). But Twang's written request for demolition was premature.

Under R.C. 3767.41(B)(2)(b), the trial court in a public nuisance action "*shall* conduct a hearing at least twenty-eight days after the owner of the building and the other interested parties have been served with a copy of the complaint * * *." No property shall be declared a nuisance until a hearing is held where it is established that the property "is a menace to the public health, welfare, or safety; that is structurally unsafe, unsanitary, or not provided with adequate safe egress; that constitutes a fire hazard, is otherwise dangerous to human life, or is otherwise no longer fit and habitable * * *." R.C. 3767.41(A)(2)(a); R.C. 3767.41(B)(2)(b). A building does not

"constitute a public nuisance" for purposes of invoking R.C. 3767.41(E) until the mandatory public nuisance hearing is held and declaration is made. Absent a public nuisance hearing being held, there is no right to invoke the remedies under R.C. 3767.41(E).

Courts allow interested parties to pursue demolition under R.C. 3767.41(E) only done so after explicitly finding that the subject property is a public nuisance. *See*, e.g., *City of Hamilton v. Ebbing*, 12th Dist. Butler No. CA2011-01-001, 2012-Ohio-2250, ¶ 66 (considering demolition as an option only once a public nuisance was found to exist pursuant to the requisite hearing); *City of Marion v. 569 N. State St.*, 3d Dist. Marion No. 9-03-28, 2003-Ohio-6287, ¶¶ 15-17 (analyzing the request for demolition after affirming the finding of public nuisance post-hearing). In those cases, the plaintiffs pursuing public nuisance declarations were municipalities in which the properties were located and, therefore, were entitled to request such relief under R.C. 3767.41(B)(1). But Twang is the owner of 819 Elm, and is unable to prosecute a public nuisance claim against itself.

Twang maintains that an "interested party" under sub-section (E) is entitled to request a demolition under the nuisance statute *regardless* of whether a public nuisance hearing is held. This contention, as the First District recognized, is wholly unsupported by the law and seeks to contort the statute to undermine its essential purpose. Twang cannot assert that its own property is a public nuisance because it is not one of the parties identified in R.C. 3767.41(B)(1) who may initiate a statutory nuisance action. Further, there has been no hearing or declaration finding 819 Elm to be a public nuisance. Without these two necessary elements, R.C. 3767.41(E) is not in play and, thus, Twang cannot avail itself of it.

3. <u>The First District correctly determined that Twang lacks standing to assert an independent claim for demolition</u>.

"It is axiomatic that a party cannot sue itself." *Ohio Dept. of Human Servs. v. Ohio DOT*, 78 Ohio App.3d 658, 661, 605 N.E.2d 1007 (10th Dist. 1992); *Alternatives Unlimited-Special, Inc.*

v. Ohio Dept. of Edn., 168 Ohio App.3d 592, 2006-Ohio-4779, 861 N.E.2d 163, ¶ 46 (10th Dist.) ("a party may not sue itself"). Yet, this is exactly what Twang is attempting to do.

Twang's counterclaim alleged that "[b]ased on the condition of [819 Elm] which is the subject of this action, [it] is a nuisance." T.d. 35 at p. 8. Similarly, Twang's motion for partial summary judgment argued that it is "entitled to a judgment determining that [819 Elm] is a public nuisance * * * ." T.d. 60 at p. 1.

But the fact that Twang allowed the 819 Elm to sit in a dangerous and dilapidated state is not an injury caused by the City. And a party will only be found to have standing to raise a claim where it alleges, among other things, that it suffered an injury that is "fairly traceable" to a defendant's conduct. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). Because Twang cannot show that it has been harmed by the City's unlawful conduct, Twang does not have common law standing to sue the City. Put differently, Twang's counterclaim that 819 Elm is a public nuisance is not a claim against the City: it is a claim against itself. As such, Twang lacks standing to pursue this claim and is not entitled to any form of relief, including a decision on its premature "written request" for demolition. R.C. 3767.41(E). Other property owners in Ohio are not likely to seek such a "written request" about their own property because they will simply take care of their properties without any litigation whatsoever. The unique nature of this case makes it a poor one for this Court's review.

As the First District found, absent the requisite predicate hearing and declaration under R.C. 3767.41(B)(2)(b), Twang has no right to seek relief under R.C. 3767.41(E). Twang's current arguments show it is unsatisfied with how the First District applied the law because of the impact on their individual legal rights. This Court is not, however, an error court. And this appeal does not present a matter of great or general interest. Twang's novel attempt to get around that by

suggesting it can sue itself flies in face of both the law and common sense. As such, this Court should decline jurisdiction over this matter.

> **Appellee's Proposition of Law No. 2. *Restated***: Under R.C. 3767.41(B)(2)(b), a judge must make a determination, after a hearing, on whether a building constitutes a public nuisance.

Before a structure may be declared a public nuisance, R.C. 3767.41(B)(2)(b) requires the trial court to hold a hearing. No such hearing took place here, rendering Twang's R.C. 3767.41(E) request for demolition premature. Now, in an effort to dodge this statutory hearing requirement, Twang argues that a public nuisance determination may be established through a judicial admission or stipulation.

But such evidence cannot form the basis of a nuisance declaration under R.C. 3767.41 because any claimed judicial admissions would apply to facts, not legal conclusions. Only a court of law can make a declaration of public nuisance, and it may do so only following a hearing on the matter. R.C. 3767.41(B)(2)(b). Here, the trial court never completed a hearing or made a declaration. The parties never filed—and the court never accepted—a stipulation of public nuisance. This Court should reject Twang's bald attempts to re-write the record and circumvent the Ohio Public Nuisance statute by declining jurisdiction.

1. Judicial admissions apply to facts, not legal conclusions.

A judicial admission is a distinct and unequivocal statement of fact. *See Haney v. Law*, 1st Dist. Hamilton No. C-070313, 2008-Ohio-1843, ¶ 8, citing *Teagle v. Lint*, 9th Dist. Summit C.A. NO. 18425, 1998 Ohio App. LEXIS 1560, at *10 (Apr. 15, 1998). A judicial admission is "not a mere statement of a legal conclusion." *Teagle v. Lint*, 1998 Ohio App. LEXIS 1560, at *10. *See also IBEW, Local Union No. 8 v. Kingfish Elec., LLC*, 2012-Ohio-2363, 971 N.E.2d 425, ¶ 20 (6th Dist.) ("the admission must be of a material and competent fact, not merely a legal conclusion or

statutory definition."). While a judicial admission may arise from a statement of material and competent fact, "no such admission results from a statement of a legal conclusion." *Ohio Valley Associated Builders & Contrs. v. Rapier Elec., Inc.*, 12th Dist. Butler Nos. CA2013-07-110, CA2013-07-121, 2014-Ohio-1477, ¶ 36, quoting *In re Regency Village Certificate of Need Application*, 10th Dist. Franklin No. 11AP-41, 2011-Ohio-5059, ¶ 32, citing *Faxon Hills Constr. Co. v. United Broth. of Carpenters & Joiners of America*, 168 Ohio St. 8, 151 N.E.2d 12 (1958), paragraph one of the syllabus.

Whether 819 Elm is a statutory public nuisance is a legal conclusion. Twang cannot simply point to allegations raised in City pleadings to establish a nuisance as a matter of law. Similarly, Twang cannot rest on statements of fact made in attachments to the City's Motion for Partial Summary Judgment, as those facts do not entitle Twang to the legal conclusion it seeks. The fact specific he said/she said nature of this case weighs heavily in favor of this Court declining jurisdiction. This is not a case that affects Ohioans generally; it affects Twang solely. In sum, the decision as to whether the property is a public nuisance as defined by R.C. 3767.41(A)(2)(a) is a legal conclusion to be made by the trial court after a hearing. As such, this question cannot be decided by judicial admission or an allegation. To hold otherwise would thwart the process set forth in R.C. 3767.41.

2. <u>The oral stipulation that the Property was a public nuisance is not binding.</u>

Twang also argues that a statement made by the City's counsel is binding upon the parties and entitles Twang to summary judgment. However, this statement was not filed or formally accepted by the trial court, nor is such a stipulation determinative of the legal issue given the statute's hearing requirement.

The City agrees that "[a] stipulation, once entered into, filed and accepted by the court, is

binding upon the parties and is a fact deemed adjudicated for purposes of determining the remaining issues in the case." *City of Whitehall ex rel. Fennessy v. Bambi Motel*, 131 Ohio App.3d 734, 742, 723 N.E.2d 633 (10th Dist. 1998), citing *Horner v. Whitta*, 3d Dist. Seneca App. No. 13-93-33, 1994 Ohio App. LEXIS 1248 (Mar. 16, 1994). But there was no formal filing of any stipulation or agreement to the trial court here. Instead, at a January 7, 2019 hearing, the City was prepared to present its case at a hearing on its motion to declare the property a nuisance and appoint a receiver to *repair* it. During that hearing it is accurate that counsel for the City indicated the statutory requirements for declaring the property a nuisance were met. But the hearing never concluded, and no judicial determination was made because, among other things, the then-presiding trial court judge recused himself in response to a dilatory disclosure by counsel for Twang about a potential conflict of interest. But counsel's statement at an incomplete hearing conducted by a judge who recused himself due to a potential conflict is not equivalent to a judicial decisionmaker finding, based on the evidence of record, that the statute's requirements are met Shortly thereafter, the City moved to amend its complaint and chose not to include a statutory nuisance claim. Any prior statement or informal stipulation by the City simply does not entitle Twang to summary judgment on the issue of whether its property meets the criteria of the Ohio Nuisance Statute.

Twang cites *Hamilton v. Digonno*, 2013-Ohio-151, ¶ 23 (12th Dist.), as support for its idea that the requirements of R.C. 3767.41 are not "dispositive." *Hamilton* required the appellate court to determine whether the defendant property owner complied with the terms of an agreed entry, and compliance or non-compliance with that agreed entry was dispositive to that case. Specifically, the defendant property owner, after being ordered by the court to submit a rehabilitation plan for their property and to complete the work or risk losing the property, admitted during a hearing

before a magistrate judge that they failed to perform the repair work. The specific portion of *Hamilton* that Twang relies on relates exclusively to the appellate court's determination that the defendant property owner's admission regarding their failure to do this work supported the trial court's order in favor of the plaintiff municipality. *Hamilton* does not stand for the general proposition that R.C. 3767.41 does not mandate a hearing, but instead the *Hamilton* trial court, in its discretion and management of its docket, determined that the statutory requirements were met upon reviewing the stipulations and agreed entry presented to it. No such determination was made here.

Ohio Revised Code Section 3767.41(B)(2)(b) states that the trial court in a public nuisance action "*shall* conduct a hearing at least twenty-eight days after the owner of the building and the other interested parties have been served with a copy of the complaint * * *." This mandatory language indicates the legislature's intent that no property may be declared a public nuisance without a public nuisance hearing. And this Court's precedent is clear:

> In statutory construction, the word 'may' shall be construed as permissive and the word 'shall' shall be construed as mandatory unless there appears a clear and unequivocal legislative intent that they receive a construction other than their ordinary usage.

Dorrian v. Scioto Conservancy Dist., 27 Ohio St.2d 102, 271 N.E.2d 834 (1971), syllabus. *See also Ohio Civil Service Employees Asso. v. University of Cincinnati*, 3 Ohio App.3d 302, 304, 444 N.E.2d 1353 (1st Dist. 1982). Notwithstanding the unique circumstances before the *Hamilton* court, the Ohio Nuisance Statute unequivocally mandates that a hearing occur prior to a nuisance being declared.

This is a very unusual and fact-specific case without broad general appeal. Twang cannot

wield an informal stipulation by the City to circumvent a mandatory statutory requirement, and this Court should decline to exercise jurisdiction over Twang's second proposition of law.

V. CONCLUSION

Twang's arguments boil down to its desire to sue itself and avoid the City's historic conservation laws. This personal desire, couched as a property rights question, is insufficient to invoke this Court's jurisdiction. And it is a well settled principle of law that a party cannot sue itself. All this case presents to this Court is an opportunity to reaffirm that bedrock legal principle, which is unnecessary and a waste of the Court's limited resources. This Court should, therefore, decline jurisdiction over this matter.

Respectfully submitted,

ANDREW W. GARTH (0088905)
CITY SOLICITOR

/s/ *Jacklyn Gonzales Martin*
Jacklyn Gonzales Martin (0090242)
Assistant City Solicitor
801 Plum Street, Room 214
Cincinnati, Ohio 45202
Phone: (513) 352-3315
Fax: (513) 352-1515
jacklyn.martin@cincinnati-oh.gov
Counsel for Appellee City of Cincinnati

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing has been served upon the following by electronic mail on this 28th day of February 2022:

William F. Fecher
wbfecher@statmanharris.com

/s/ *Jacklyn Gonzales Martin*
Jacklyn Gonzales Martin (0090242)