UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

PETER MACHLUP,	)	**Case No. 1:10-cv-316**
	)	
Plaintiff,	)	**Judge Dan Aaron Polster**
	)	
vs.	)	**MEMORANDUM OF OPINION**
	)	**AND ORDER**
JEFF T. ASHBY, *et al.*,	)	
	)	
Defendants.	)	

Before the Court is the Motion to Dismiss filed by Defendants Jeff T. Ashby and the City of Lakewood (**Doc #: 2**). For the reasons discussed, *infra*, Defendants' motion is granted.

When ruling on a motion to dismiss, the facts, as alleged by Plaintiff, are assumed to be true. *Jackson v. City of Columbus*, 194 F.3d 737, 745 (6th Cir. 1999). On January 3, 2007, Plaintiff Peter Machlup was deeded an interest in real property located at 1570 Woodward Avenue in Lakewood, Ohio. (Doc #: 1-1 at ¶11.) However, Plaintiff did not record his deed. (Id. at ¶12.) On March 24, 2009, the property and contents within the premises were damaged by fire, smoke and water. (Id. at ¶13.) Pursuant to Lakewood Ordinances §1306.521 and §1306.522, Defendant Jeff Ashby, Assistant Director of the Division of Building and Housing,

and James Fillar, Assistant Building Commissioner, declared the property a nuisance and gave notice of intent to demolish the property. (Id. at ¶14.)

On October 29, 2009, Plaintiff, via certified mail, requested the Lakewood Board of Building Standards and Building Appeals (the "Board") review the declaration of the property as a public nuisance. (Id. at ¶¶15-16.) A notice of appeal was also sent by email to Ashby, who confirmed receipt of the appeal request on October 30, 2009. (Id. at ¶17.) That same day, Ashby notified Plaintiff that additional notarized documents, a completed formal application and a $25.00 fee would be required to add the appeal to the Board's calendar. (Id. at ¶18.) Plaintiff requested a statutory basis for these requirements. (Id. at ¶20.) Ashby, via email, replied that "since you are not formally recognized as a registered stake holder on the property [sic], I cannot accept an appeal from you." (Id. at ¶21.) This was followed by a telephone conversation between Ashby and Plaintiff, also on October 30, 2009, during which Ashby explained that the law department authorized his decision. (Id. at ¶22.)

On December 30, 2009, Plaintiff filed the instant complaint in the Cuyahoga County Court of Common Pleas, alleging four causes of action under 42 U.S.C. §1983. (Doc #: 1-1.) Count I alleges that Ashby deprived Plaintiff of the constitutional right of due process, the right to redress under Ohio Const. Art 1 §1.16 and the right to appeal under Lakewood Ordinance §1306.522 by refusing to grant Plaintiff a hearing. Count II alleges a procedural due process claim against Ashby for a conflict of interest in being both the adverse party and responsible for scheduling the Board's docket. Count III alleges that Lakewood Ordinance §156.04 violates due process by requiring a $25.00 fee that is not refundable even if the appellant prevails. Count IV alleges a municipal liability claim against the City for engaging in

policies and customs intended to prevent Plaintiff from legal redress and for failing to properly train and supervise its employees.

On February 11, 2010, Defendants removed the case to this Court on federal question grounds.[1] The next day Defendants filed the instant motion to dismiss. (Doc #: 2.) As Plaintiff has filed his opposition brief (Doc #: 6) and Defendants have replied (Doc #: 7), the motion is now ripe for adjudication.

Defendants' first basis for dismissal is that Plaintiff failed to exhaust his state law remedies before bringing the instant complaint. Under Lakewood Ordinance §1306.522(e)(1)(A), "[t]he owner, agent or person in control of a public nuisance structure shall have a right to appeal to the Board of Building Standards and Building Appeals from the notice of the decision of the Commissioner as provided in this section within ten (10) days of the service of the Commissioner's notice." If the Board rejects the appeal, the owner "shall have the right to appeal the decision and order of the Board to a court of competent jurisdiction." Id. at §1306.522(e)(2).

Plaintiff has not appealed the decision of the Board to a court of competent jurisdiction but instead has brought this complaint under 42 U.S.C. §1983. In order to bring a §1983 claim prior to exhausting state court remedies, Plaintiff must demonstrate that the available state court remedies are inadequate to satisfy procedural due process.[2] *Magnum*

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[1]Though Plaintiff's complaint was filed on December 30, 2009, Defendants' removal was timely because the complaint was not served until January 21, 2010.

[2]As a threshold matter, Plaintiff must first establish the existence of a constitutionally protected property interest. *Bauss v. Plymouth Township*, 233 Fed. App'x 490, 496 (6th Cir. 2007). Defendants argue that Plaintiff did not have a property interest in 1570 Woodward Avenue because he neither recorded his deed nor provided any evidence of the deed's existence. However, because in a motion to dismiss, the facts as alleged by the plaintiff are assumed to be true, by

Towing & Recovery v. City of Toledo, 287 Fed. App'x 442, 447 (6th Cir. 2008).

The state court remedy at issue here is contained within Ohio Revised Code Chapter 2506. Pursuant to R.C. §2506.01(A), "[e]very final order, adjudication, or decision of any officer, tribunal, authority, board, bureau, commission, department, or other division 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 ..." "If an appeal is taken in relation to a final order, adjudication, or decision ... the court may find that the order, adjudication, or decision is unconstitutional, illegal, arbitrary, capricious, unreasonable, or unsupported by the preponderance of substantial, reliable, and probative evidence on the whole record." *Id*. at §2506.04.

Thus, a Board decision may be reviewed by the Cuyahoga County Court of Common Pleas and may be overturned on any number of grounds. Review by a state court with the power to reverse the Board's decision is more than sufficient to meet procedural due process requirements. Accordingly, because R.C. §2506 satisfies constitutional procedural due process requirements, Plaintiff must exhaust his state court remedies before bringing a §1983 suit.

The Court rejects Plaintiff's contention that he exhausted his remedies by bringing the §1983 claim in state court. Rather, Plaintiff's state court suit must be an administrative appeal of Ashby and/or the Board's decision.

Moreover, the Court is unconvinced by Plaintiff's argument that because Ashby did not present Plaintiff's appeal to the Board, there is no final order to appeal. Ashby rejected

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specifically alleging that he received a deed on January 3, 2007, Plaintiff has alleged facts sufficient to establish the existence of a property interest.

Plaintiff's appeal because Plaintiff did not provide the documentation Ashby believed was necessary to bring an appeal before the Board. Ashby's decision that Plaintiff did not satisfy the prerequisites for bringing an appeal to the Board was itself reviewable by a state court under R.C. §2506. Thus, because Plaintiff has failed to exhaust state court remedies that satisfy procedural due process requirements, Counts I and II, dealing specifically with the decision not to accept Plaintiff's appeal, are dismissed.

Count III, which claims that Lakewood Ordinance §156.04 violates due process by charging a non-refundable $25.00 fee for an appeal before the Board, must also be dismissed. A *de minimis* fee of $25.00 is reasonable and does not serve as a barrier to access the appeals process. *See Hampton v. Hobbs*, 106 F.3d 1281, 1285 (6th Cir. 1997) ((“There is nothing unreasonable in requiring ... [a] plaintiff ... to make some contribution, however minimal, to ask him to some small degree to put his money where his mouth is ...”) (citation and internal quotations omitted)); *Ortwein v. Schwab*, 410 U.S. 656, 658-60 n. 5 (1973) (due process clause does not require waiver of filing fee for welfare benefits litigation). Moreover, Plaintiff has not alleged that he is indigent and that the $25.00 fee prevented him from pursuing an appeal.

Finally, because Counts I, II and III do not state an underlying constitutional violation, the Count IV municipal liability claim, pursuant to *Monell v. Dept. of Social Services of City of New York*, 436 U.S. 658, 691 (1978) for failure to train and/or supervise must necessarily be dismissed. The inability to allege a constitutional violation necessarily precludes the determination that the constitutional violation resulted from a municipality's policies, customs or deliberate indifference. *City of Los Angeles v. Heller*, 475 U.S. 796. 799 (1986).

For the reasons discussed, *supra*, Defendants' Motion to Dismiss (**Doc #: 2**) is

hereby **GRANTED** and the instant complaint is **DISMISSED WITH PREJUDICE**.

IT IS SO ORDERED.

/s/Dan Aaron Polster May 10, 2010
Dan Aaron Polster
United States District Judge