IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

THE FRIENDS OF SUPERIOR, INC.,

Plaintiff,

v.

MEMORANDUM AND ORDER
06-C-629-S

CITY OF SUPERIOR,

Defendant.

Plaintiff Friends of Superior, Inc. commenced this action on November 1, 2006 to enjoin demolition of the Palace Theater. However, on that same day and the next day, prior to service of the complaint, defendant City of Superior demolished the building rendering the request for injunction moot. On December 20, 2006 plaintiff filed an amended complaint alleging that the demolition of the theater was a violation of section 106 and 110(k) of the National Historic Preservation Act ("NHPA"), 16 U.S.C. §§ 740f and 470h-2(k). Plaintiff seeks a declaration that defendant violated the NHPA and for an injunction against defendant's receipt of federal funds for use in connection with the project encompassing the destruction of the theater and against the destruction of other historic buildings. Jurisdiction is alleged under 28 U.S.C. § 1331. The matter is presently before the Court on defendant's motion for summary judgment. The following facts are undisputed for purposes of the pending motion.

FACTS

The Palace Theater, 1102 Tower Avenue, Superior, Wisconsin was built in 1917 and closed as a theater in 1982. Douglas County acquired the theater by property tax forfeiture in 1997. Douglas County sold the theater to defendant for one dollar in 2002. Defendant considered an effort to restore the theater, but abandoned the idea in 2006.

On January 17 2006 defendant purchased the Odyssey tavern building at 1028 Tower Avenue. On February 21, 2006 defendant purchased the End Zone tavern building at 1026 Tower Avenue. On August 7, 2006 defendant published notice of intent to seek $376,900 in federal funds for the purchase and demolition of the Odyssey and End Zone properties. On September 12, 2006 defendant submitted a request for Community Development Block Grant Entitlement from the U.S. Department of Housing and Urban Development (HUD") for the demolition of the buildings and green space development at the site.

In late July and early August 2006 defendant solicited bids for salvage rights to the Palace Theater. On September 20, 2006 defendant entered a contract to sell John McCarthy the combined salvage rights to the Palace Theater, End Zone and Odyssey properties.

On October 13, 2006 Dianne McGinnis, a member of plaintiff, filed an action in the Circuit Court for Douglas County, Wisconsin

seeking a temporary restraining order against demolition of the Palace Theater. The restraining order was denied after a hearing on October 13, 2006. On November 1, 2007 defendant began demolishing the theater. Although defendant had not yet been served with a complaint in this action, it became aware of the action and defendant's mayor ordered immediate demolition in part to avoid the potential cost of a federal action to enjoin demolition.

On November 21, 2006 defendant withdrew its request for release of funds for use in the acquisition and demolition of the Odyssey and End Zone taverns. On November 30, HUD acknowledged receipt of defendants request to withdraw the application for the Odyssey-End Zone grant. No funds had ever been released to defendant in connection with the grant request. Defendant had not conducted any review under section 106 of the grant application or the demolition of the three buildings.

MEMORANDUM

Defendant challenges plaintiff's standing to bring the present action. Alternatively, defendant seeks summary judgment on the merits of the claim that it failed to comply with any obligations under the NHPA. Plaintiff opposes both positions, asserting that the aesthetic interests of its members supports standing and that properly viewing the End Zone, Odyssey and Palace Theater demolitions as a single project, plaintiff violated FHPA

requirements.

Because questions of jurisdiction must be resolved before the merits of an action are addressed, the Court first considers plaintiff's standing to pursue this action. Article III standing has three components: 1) an injury or threat of injury that is concrete and actual or imminent 2) traceability of the injury to the defendant's conduct; and 3) the likelihood that a favorable decision would provide the plaintiff with a remedy. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992). Plaintiff bears the burden to prove each element. Id. at 561. At the summary judgment stage plaintiff must set forth specific facts pursuant to Rule 56(e) sufficient to prove the elements. Id.

It is plausible that defendant's demolition of the Palace Theater caused injury to plaintiff's members, who appreciated the theater's aesthetic value, thereby satisfying components 1 and 2. However, because none of the relief sought in the complaint could provide plaintiff a remedy for that injury the third element is absent as a matter of law and plaintiff lacks standing to bring this action.

The amended complaint seeks six forms of relief: (1)declare that defendant failed to comply with the NHPA, (2) declare that destruction of the theater violated the NHPA, (3) declare that defendant may not use federal funds for any aspect of the proposed project which involved destruction of the Palace Theater, (4)

terminate all federal services, funding and permits concerning the ongoing project on the site of the demolished properties, (5) enjoin any actions by defendant which might threaten other historic property, (6) other relief the Court may deem appropriate. None of those requests provide a remedy for the alleged injury.

Plaintiff's injury stems entirely from the theater's destruction, an action which is inherently incapable of repetition and whose injury is complete. Relief requests (1), (2), (3) and (4) seek to admonish and punish defendant for its alleged past misdeed. None of those requested forms of relief provides a remedy to plaintiff for the injury to plaintiff's aesthetic interests from the theater's destruction. Rather, the requested remedies merely further the general public interest in faithfully executing the enforcement of the principles of the NHPA which, though perhaps laudable, are not sufficient to satisfy the third component for standing. Steel Co. v. Citizens for a Better Environment, 523 U.S. 83, 106 (1998). Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc., 528 U.S. 167, 188 (2000)(private plaintiffs may not sue to assess penalties for wholly past violations).

> By the mere bringing of his suit every plaintiff demonstrates his belief that a favorable judgment will make him happier. But although a suitor may derive great comfort and joy from the fact that the United States Treasury is not cheated, that a wrongdoer gets his just deserts, or that the Nation's laws are faithfully enforced, that psychic

> satisfaction is not an acceptable Article III remedy because it does redress a cognizable Article III injury. Relief that does not remedy the injury suffered cannot bootstrap a plaintiff into federal court; that is the very essence of the redressability requirement.

Steel Co., 523 U.S. at 107 (citations omitted).

The first two requests for relief fall clearly into the "psychic satisfaction" category. The second two, while they might arguable relate to an ongoing violation of the statute, in no way redress plaintiff's injury for the destruction of the Palace Theater. Plaintiff and its members are not injured by defendant's receipt of federal funds nor by the ongoing green space development on the site of the demolition. Blocking federal funds to the City is identical to forcing an imposition of penalties to be paid to the government. Saving money for the United States treasury, like forcing payments to it, is not remediation of plaintiff's injury from defendant's past conduct. Id. at 106.

This leaves request for relief 5 (enjoining threats to other historic properties) which, while it does seek a form of remedy to plaintiff, in no way relates to the actual injury of which plaintiff complains. Plaintiff might be injured by the destruction of some other historic building, but there is no suggestion of such a building in the record, and certainly no indication that any destruction is imminent so as to satisfy the first element of the standing inquiry. Finally, the Court can envision no available relief under the catch-all sixth category of relief requested which

could satisfy the third component of standing and sustain jurisdiction.

CONCLUSION

Any injury to plaintiff and its members resulted from a single past act – the destruction of the Palace Theater. Plaintiff does not have standing to sue based on this injury because plaintiff does not suggest any possible, constitutionally cognizable remedy which might be provided by the Court. Accordingly, the matter must be dismissed for want of federal jurisdiction.

ORDER

IT IS ORDERED that defendant's motion for summary judgment is GRANTED.

IT IS FURTHER ORDERED that judgment be entered dismissing plaintiff's complaint for lack of jurisdiction.

Entered this 23rd day of February, 2007.

BY THE COURT:

S/

JOHN C. SHABAZ
District Judge