

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24



DIVISION ONE
FILED: 09/21/2010
RUTH WILLINGHAM,
ACTING CLERK
BY: GH

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

MARICOPA COUNTY, a political) No. 1 CA-SA 10-0176
subdivision of the State of)
Arizona,) DEPARTMENT E
)
Petitioner,) Maricopa County
) Superior Court
v.) No. CV2010-019989
)
THE HONORABLE J. RICHARD GAMA,) **DECISION ORDER**
Judge of the SUPERIOR COURT OF)
THE STATE OF ARIZONA, in and for)
the County of MARICOPA,)
)
Respondent Judge,)
)
COATING SPECIALISTS, INC., an)
Arizona Corporation and SKYCE)
STEEL, INC., an Arizona)
Corporation,)
)
Real Parties in Interest.)
_____)

This special action was considered by Presiding Judge Philip Hall and Judges Peter B. Swann and Sheldon H. Weisberg during a regularly scheduled conference held on September 14, 2010. After consideration, and for the reasons that follow, it is ordered that the Court of Appeals, in the exercise of its discretion, accepts jurisdiction and denies relief.

In this special action, petitioner asserts that the trial court erred when it entered a "formal written Order of Abatement

dated July 29, 2010," but allowed real parties in interest Coating Specialists, Inc. ("Coating") and Skyce Steel, Inc. ("Skyce") until November 30, 2010, "to either comply with the approved planning documents or cease further use and abate all further operations on the property." Petitioner contends that the trial court's decision to allow a period for compliance beyond the date of the order "sanctions continuation of public nuisances and criminal activities" in a manner that is contrary to public health, safety, and welfare.

This court's decision to accept special action jurisdiction is highly discretionary. Ariz. R.P. Spec. Act. 3. A primary consideration is whether the petitioner has an equally plain, speedy and adequate remedy by appeal. See Ariz. R.P. Spec. Act. 1(a); *Foulke v. Knuck*, 162 Ariz. 517, 519, 784 P.2d 723, 725 (App. 1989) (citations omitted). Because the timeline of appeal, even in an expedited matter, combined with the trial court's deadline would make this issue moot on appeal, we accept jurisdiction. See *Big D Constr. Corp. v. Court of Appeals*, 163 Ariz. 560, 563, 789 P.2d 1061, 1164 (1990) (allowing courts to consider moot cases when "significant questions of public importance are presented and are likely to recur.") (citation omitted).

We deny relief, however, for two reasons. First, the court had the equitable discretion to tailor its order of

abatement pursuant to A.R.S. § 11-815 (2001) because the violations were not a nuisance per se. See *Mutschler v. City of Phoenix*, 212 Ariz. 160, 165 n.7, ¶ 18, 129 P.3d 71, 76 n.7 (App. 2006) ("A nuisance per se or at law is '[a]n act, occupation, or structure which is a nuisance at all times and under any circumstances, regardless of location or surroundings.'") (emphasis added); *Heyne v. Loges*, 68 Ariz. 310, 313, 205 P.2d 586, 588 (1949) (holding a court abuses its discretion in failing to enjoin a nuisance per se). Cf. *City of Tucson v. Clear Channel Outdoor Inc.*, 218 Ariz. 172, 187, ¶ 53, 181 P.3d 219, 234 (App. 2008) (affirming the lower court's discretion to order "'illegal signs'" be brought into compliance with Tucson city code rather than be removed because they were not a nuisance per se).

There is no statutory requirement that an order of abatement take full effect immediately upon entry. Indeed, "abatement" is not defined by the statute. Black's Law Dictionary defines "abatement" to include "[t]he act of lessening or moderating; diminution in amount or degree." We perceive no inconsistency between this definition of abatement and the deadline contained in the court's order.

Second, contrary to petitioner's assertion, the court's decision did not allow ongoing "criminal" activity because the property owner was served with a notice of

violation. See A.R.S. § 11-815(D) ("If an alleged violator is served with a notice of violation . . . the alleged violator is not subject to a criminal charge arising out of the same facts."). Indeed, the County itself took measures before filing its civil action to permit respondents to remedy the violations even after the notice of violation was issued. We discern nothing in the court's order that constitutes an abuse of discretion or an act in excess of its legal authority under A.R.S. § 11-815.

/s/

Peter B. Swann, Judge