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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: 06/05/2012  
RUTH A. WILLINGHAM,  
CLERK  
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IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION ONE

480 MOTORS, L.L.C., an Arizona ) No. 1 CA-CV 11-0410  
limited liability company, )  
 ) DEPARTMENT C  
Plaintiff/Appellant, )  
 )  
v. ) MEMORANDUM DECISION  
 ) (Not for Publication -  
 ) Rule 28, Arizona Rules  
CITY OF PHOENIX, ) of Civil Appellate  
 ) Procedure)  
Defendant/Appellee. )  
 )  
 )  
\_\_\_\_\_ )

Appeal from the Superior Court in Maricopa County

Cause No. CV 2009-031635

The Honorable John Christian Rea, Judge

**AFFIRMED**

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**D O W N I E**, Judge

¶1 480 Motors, L.L.C., and Alexis J., L.L.C.,  
(individually, "480 Motors" and "Alexis," but collectively,

"Appellants") challenge the dismissal of their complaint against the City of Phoenix and multiple fictitious defendants (collectively, the "City"). For the following reasons, we affirm.

#### FACTS AND PROCEDURAL HISTORY

¶2 480 Motors was licensed to operate a pawnshop on Cave Creek Road in Phoenix.<sup>1</sup> In December 2007, 480 Motors applied to the Maricopa County Sheriff's Office ("MCSO") to transfer its pawnbroker license to an Indian School Road location zoned intermediate commercial ("C-2"). Alexis purchased the Indian School property contingent on the license transfer. See A.R.S. § 44-1627(C) (pawnbroker license cannot be "sold or transferred without the approval of the sheriff or the sheriff's designee"). MCSO approved the transfer. 480 Motors began operating its pawnshop business at the Indian School location on December 13, 2007.

¶3 On June 5, 2008, the City notified Appellants that the pawnshop violated City Zoning Ordinance ("Ordinance") 623. That ordinance allows a pawnshop to operate in a C-2 zone if it has a

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<sup>1</sup> Pawnbrokers are "licensed by the sheriff of the county in which the person regularly conducts business." Ariz. Rev. Stat. ("A.R.S.") § 44-1627(A). Pawnbrokers must "obtain a separate license for each pawnshop owned by that pawnbroker." *Id.* § 44-1627(B); see also *id.* § 44-1621(11) (a pawnshop is "the location or premises at which a pawnbroker is licensed to regularly conduct the pawnbroker's business").

use permit and is located more than 500 feet from a residential area. Appellants did not obtain a use permit, and the Indian School pawnshop was within 500 feet of a residential area. Appellants were warned that they faced civil and criminal penalties if they did not cure the violation by July 10, 2008.

¶14 On June 20, 2008, Appellants filed a complaint against the City in CV 2008-014507 ("Complaint #1"). They sought declaratory and injunctive relief and argued that Ordinance 623 violated Arizona's Constitution and Arizona Revised Statutes ("A.R.S.") section 9-462.01(C) because it set more restrictive zoning requirements for pawnbrokers than for similarly situated businesses.<sup>2</sup> The City moved to dismiss, and the superior court dismissed Complaint #1 with prejudice, concluding it was barred by the statute of limitations.

¶15 On July 28, 2008, Alexis applied for a use permit and a variance for the Indian School pawnshop. The City's zoning administrator denied the request, and the City's Board of Adjustment ("Board") affirmed. In January 2009, the City issued a citation to Alexis for violating Ordinance 623.

¶16 In February 2009, 480 Motors filed a special action complaint in LC 2009-000089 ("Complaint #2") against the City,

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<sup>2</sup> Section 9-462.01 allows municipalities to establish zoning districts and regulations. Subsection C mandates that zoning requirements be uniformly applied within districts, but allows for "additional requirements" for "conditional" uses.

the Board, and the Board's members in their official capacities. See A.R.S. § 9-462.06(K). The complaint alleged that the decisions of the zoning administrator and Board should be reversed because: (1) Appellants were held to a "different standard of compliance" than similar businesses operating without restriction in a C-2 district,<sup>3</sup> (2) the findings were not supported by the evidence, (3) the decisions were "contrary to the rulings for other similarly situated pawnshops" and conferred a "special status/benefit upon national chain pawnshops to the detriment of locally owned independent pawnshops," (4) the decisions were contrary to City ordinances, state law, and the Board's "own prior rulings," and (5) the hearing process denied Appellants their due process and equal protection rights. Complaint #2 further alleged that the City "failed to appeal any of the rulings" dealing with similarly situated businesses and that respondents were "estopped from contesting the legitimacy" of Appellants' use permit and variance requests and had "waived" any arguments in opposition to their application.

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<sup>3</sup> Those businesses were secondhand dealers, check cashing businesses, and payday loan businesses. During the proceedings before the zoning administrator and Board, Appellants also compared their business to two "national chain pawnshops" and four other pawnshops that were reportedly granted use permits and variances.

¶17 The superior court stayed proceedings on the citation pending review of Complaint #2. To support their claim that the City "arbitrarily decides which pawnbrokers receive[] a variance or special use permit," Appellants moved to supplement the record to include findings of fact from another pawnbroker's successful application for a use permit and variance. The City opposed the motion, and the superior court denied it. After briefing and argument, the court concluded that sufficient evidence supported the denial of Appellants' requests and ruled that the Board had not acted arbitrarily or capriciously. It dismissed Complaint #2 and lifted the stay.

¶18 In July 2010, the pawnshop closed. Alexis admitted the zoning violation and paid a fine. Appellants filed CV2009-031635 ("Complaint #3") against the City, alleging that it routinely granted variances for pawnbrokers to operate within 500 feet of residential districts, that the City "failed to appeal a single decision" of the zoning administrator or Board granting a variance, and that 21 variances had been granted since 1992.<sup>4</sup> Appellants claimed the City's actions violated A.R.S. § 9-462.01(C); that the City, through the Board, wrongfully denied their application; and that Appellants lost business opportunities, revenue, and goodwill as a result.

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<sup>4</sup> Appellants filed their original complaint in the third action on October 6, 2009. The first amended complaint, filed October 4, 2010, is the subject of this appeal.

Appellants sought a writ of mandamus directing the City to issue a use permit and variance, as well as monetary damages.

¶9 The City moved to dismiss, arguing Complaints #1, #2, and #3 were "premised on the same facts and events" and were brought "by the same Plaintiffs against the same Defendants." After briefing and argument, the superior court ruled that Complaint #3 was barred under the doctrine of claim preclusion, stating:

With minor exceptions, the First Amended Complaint in this case is identical to the Complaint in CV 2008-014507 up to paragraph XVVI. The allegation in that paragraph was raised in LC 2009-000089. The only difference between the first two actions initiated by [Appellants] and this action is that [Appellants] served a Notice of Claim prior to filing this action seeking monetary damages. That is not new evidence. The factual allegations supporting [Appellants'] alleged right to monetary recovery are the same as in the previous two cases, both of which were decided adversely to the [Appellants].

The court dismissed Complaint #3 with prejudice. Appellants timely appealed. We have jurisdiction pursuant to A.R.S. § 12-1201(B).

#### DISCUSSION

¶10 Claim preclusion is a question of law that we review *de novo*. *Pettit v. Pettit*, 218 Ariz. 529, 531, ¶ 4, 189 P.3d 1102, 1104 (App. 2008) (citation omitted). "[A] final judgment on the merits in a prior suit involving the same parties or

their privies bars a second suit based on the same claim." *Airfreight Express Ltd. v. Evergreen Air Ctr., Inc.*, 215 Ariz. 103, 108, ¶ 12, 158 P.3d 232, 237 (App. 2007) (citation omitted). "If the same claim is involved relitigation of matters that were actually decided or that could have been decided is precluded." *W. Cable v. Indus. Comm'n*, 144 Ariz. 514, 518, 698 P.2d 759, 763 (App. 1985) (citation omitted).

¶11 We rely on the "same evidence" test in assessing claim preclusion. *Pettit*, 218 Ariz. at 532, ¶ 8, 189 P.3d at 1105. A later action is barred if "no additional evidence is needed to prevail in the [later] action than that needed in the [earlier]." *Phx. Newspapers, Inc. v. Dep't of Corr.*, 188 Ariz. 237, 240, 934 P.2d 801, 804 (App. 1997) (citations omitted).

¶12 Complaint #3 mentions for the first time the Planning and Development Department's role in the administrative process and alleges that numerous variances were granted to pawnshops operating within 500 feet of residential districts. The question becomes whether such additional claims permitted Appellants to "recast their claims under new theories." See *Phx. Newspapers*, 188 Ariz. at 241, 934 P.2d at 805 (explaining that the same evidence test allows litigants to "implicat[e] somewhat different facts" and "recast their claims under new theories"). We agree with the superior court that they did not.

¶13 The basis of Complaint #3 was Appellants' claim that the City "condoned the practice policy custom and/or procedure of its Board of Adjustment to arbitrarily pick and choose who will receive a variance to operate a pawnshop within 500 feet of a residential district." This same claim was asserted in Complaint #2, which alleged that the zoning administrator and Board decisions were arbitrary, capricious, and an abuse of discretion, and that the City "failed to appeal" variance approvals for similarly situated pawnshops. In Complaint #1 and #2, Appellants also cited specific examples of variances granted to similarly situated pawnbrokers and businesses.

¶14 Complaint #3 offers more specificity about the variances approved for other pawn businesses located within 500 feet of residential districts. For example, it specifies that 21 such variances have been granted since 1992, with half being approved after 2008. Complaint #3 also alleges that the City's Planning and Development Department "testified under oath" that Appellants failed to meet the criteria for a variance. Such details, though, merely support Appellants' consistent claim that the City granted variances to other pawnshops, even though they did not "fit the criteria" set forth in A.R.S. § 9-462.06 and/or Ordinance 307.<sup>5</sup> The additional facts were not necessary

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<sup>5</sup> In dismissing Complaint #2, the trial court noted and rejected Appellants' claim that "it was denied a variance and



to establish the claims in Complaint #3. Indeed, those claims could have been supported by the factual allegations contained in the earlier complaints. See *E.C. Garcia & Co., Inc. v. Ariz. Dep't of Revenue*, 178 Ariz. 510, 520, 875 P.2d 169, 179 (App. 1993) ("Two causes of action which arise out of the same transaction or occurrence are not the same for purposes of *res judicata* if proof of different or additional facts will be required to establish them.").

¶15 Complaint #3 also alleged that the City "wrongfully" denied a variance, but this claim was decided on the merits against Appellants in the special action proceeding. To the extent Complaint #3 challenged the constitutionality of the zoning requirements, that issue was raised in Complaint #1, which was dismissed on statute of limitations grounds. Dismissal of a claim on statute of limitations grounds is a final judgment on the merits for purposes of claim preclusion. See *Montano v. Browning*, 202 Ariz. 544, 546, ¶ 4, 48 P.3d 494, 496 (App. 2002) (citations omitted) ("[C]laims that are clearly brought outside the relevant limitations period are conclusively barred."); see also *In re Marino*, 181 F.3d 1142, 1144 (9th Cir. 1999) (citations omitted) ("[F]or *res judicata* purposes a

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special use permit despite the Board having granted similarly situated pawnbrokers special use permits and variances."

dismissal on statute of limitations grounds can be treated as a dismissal on the merits."); *Jordan v. Kan. City*, 929 S.W.2d 882, 886 (Mo. Ct. App. 1996) (citations omitted) ("A trial court's dismissal of an action on the basis of the statute of limitations is a final adjudication on the merits for purposes of *res judicata*").

¶16 We reject Appellants' claim that Complaint #3 was improperly dismissed because "the relief available [wa]s different." As the City correctly notes, Complaint #2 sought special action (formerly known as mandamus) relief in the form of an order reversing the denial of the use permit and variance. Complaint #3 also requested a writ of mandamus directing the City to issue the use permit and variance. Appellants cite no authority for the proposition that their request for monetary damages in Complaint #3, based on the very same conduct alleged in the previous actions, was sufficient to avoid claim preclusion. See *Cullum v. Cullum*, 215 Ariz. 352, 355 n.5, ¶ 14, 160 P.3d 231, 235 n.5 (App. 2007) (appellate courts do not consider arguments posited without authority).

¶17 Both parties request attorneys' fees and costs on appeal. We deny Appellants' request, as they are not the successful party. The City requests fees pursuant to A.R.S. § 12-341.01(C). Although we disagree with Appellants' substantive legal claims, we cannot conclude their appeal

"constitutes harassment, is groundless and is not made in good faith." See A.R.S. § 12-341.01(C). We therefore deny the City's fee request. As the successful party on appeal, though, the City is awarded its appellate costs upon compliance with ARCAP 21. See *id.* § 12-342.

**CONCLUSION**

¶18 The judgment of the superior court is affirmed.

/s/  
MARGARET H. DOWNIE, Judge

CONCURRING:

/s/  
MICHAEL J. BROWN, Presiding Judge

/s/  
ANN A. SCOTT TIMMER, Judge