

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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S & S DIESEL, INC.,

Plaintiff-Appellant,

v

VILLAGE OF HOLLY,

Defendant-Appellee.

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UNPUBLISHED

December 26, 2000

No. 208266

Oakland Circuit Court

LC No. 96-529919-CZ

Before: Bandstra, C.J., and Gage and Wilder, JJ.

PER CURIAM.

Plaintiff S & S Diesel, Inc. appeals as of right the trial court's grant of summary disposition, under MCR 2.116(C)(7) and (8). We affirm.

Plaintiff's shop was damaged in a fire in 1996. Defendant approved plaintiff's application for a permit to rebuild the damaged portion of the shop. During the course of reconstruction, plaintiff filed an application for a permit to build an addition. Defendant's zoning compliance officer, Paul Evans, informed plaintiff that a site plan would be required for review before a new permit would be issued. Evans outlined these requirements in a March 12, 1996 letter. On April 9, 1996, plaintiff's CEO, Steve Spencer, submitted a site plan and drawings. Evans wrote to Spencer on April 11, 1996, telling him that the site plan and drawings were incomplete and that his application could not be accepted and informing him of his right to appeal to the zoning board of appeals (ZBA).

On June 14, 1996, Spencer informed defendant that plaintiff was withdrawing its application for a permit to build an addition and that it was going to rebuild the existing building. Defendant informed Spencer that a site plan would be required, notwithstanding that a site plan had not been required before the reconstruction had begun in March. Spencer submitted and defendant approved a new site plan, with conditions that were to be set by Evans. On July 9, 1996, Evans sent a letter to plaintiff informing it of defendant's decision, and informing plaintiff of its right to appeal to the ZBA. On July 16, 1996, plaintiff filed an appeal with the ZBA challenging the necessity of a site plan. At its August 5, 1996 meeting, the ZBA rejected plaintiff's appeal on three bases: (1) plaintiff had not appealed within twenty-one days of the original determination, on March 12, 1996, that a site plan was required; (2) the ordinance

requirement for a site plan includes sites for reconstruction after demolition; and (3) the conditions imposed by the planning commission were lawfully imposed.

On September 10, 1996, plaintiff filed in the circuit court an “appeal and complaint,” challenging the ZBA’s ruling. The complaint incorporated the allegations contained in the appeal, and claimed a right to relief on the following bases: (1) the acts of defendant constituted a taking of plaintiff’s property without just compensation; (2) defendant had denied plaintiff due process; and (3) defendant’s actions constituted inverse condemnation. On July 30, 1997, the trial court entered a partial consent judgment, providing that (1) the appeal would be dismissed, (2) defendant would amend its ordinances to eliminate the requirement for a site plan for reconstruction of damaged buildings when the reconstruction would “not expand, add to, or otherwise modify the building as it existed prior to the casualty loss,” and (3) upon amendment of the ordinance, plaintiff would be entitled to the issuance of an occupancy permit for its premises. The consent judgment also provided that the stipulation would not “preclude S & S Diesel from pursuing all other claims it may have against the Village of Holly.”

Defendant moved for summary disposition under MCR 2.116(C)(7) and (8), contending that, because plaintiff had withdrawn his appeal, it had failed to exhaust its administrative remedies. The trial court granted the motion, concluding that the three causes of action all arose from the appeal and could not stand independently from the appeal. Plaintiff moved for reconsideration. The trial court denied plaintiff’s motion, concluding that plaintiff’s claims arose out of its claim of appeal, and thus should have been raised in the appeal.<sup>1</sup>

Plaintiff and defendant couched their arguments in the motion for summary disposition in terms of (1) whether the constitutional claims were separate from the appeal, and (2) whether plaintiff was required to exhaust its remedies with regard to the appeal before it could raise its constitutional claims. However, at oral argument before this Court, defendant argued essentially that the case had become moot because plaintiff has been allowed the use of its property without having to submit a site plan. We agree. A claim becomes moot when an event occurs that renders a court incapable of fashioning a remedy. *Frericks v Highland Twp*, 228 Mich App 575, 586; 579 NW2d 441 (1998); *Crawford County v Sec’y of State*, 160 Mich App 88, 93; 408 NW2d 112 (1988). In this case, the three constitutional causes of action were inextricably intertwined with the appeal. Both the appeal and the constitutional claims challenged the actions of the planning commission. As such, the constitutional claims serve merely as alternate theories of relief. See *Krohn v Saginaw*, 175 Mich App 193, 198; 437 NW2d 260 (1988). Plaintiff’s claims are, at their core, a constitutional challenge to the ordinance upon which the planning commission based its decision to deny plaintiff a permit. The amendment of the ordinance and the issuance of the permit plaintiff seeks render any further review an empty exercise.

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<sup>1</sup> The trial court further concluded that plaintiff’s appeal was untimely because it was filed in the circuit court more than twenty-one days after the decision of the ZBA. We need not review this basis for the trial court’s decision as we can affirm for the reasons stated. We note that the record is not clear regarding when the minutes of the August 5 ZBA meeting were certified. See *Davenport v GP Farms Zoning Bd*, 210 Mich App 400, 404-405; 534 NW2d 143 (1995).

We recognize that in one of its counts, plaintiff argued that there had been a temporary taking and that it was entitled to damages. If a temporary taking could be established, it may be compensable. See *First English Evangelical Lutheran Church of Glendale v County of Los Angeles*, 482 US 304, 321; 107 S Ct 2378; 96 L Ed 2d 250 (1987). However, neither in its response to defendant's motion for summary disposition nor in its brief on appeal did plaintiff argue its entitlement to damages for a temporary taking, which would be the only relief that distinguishes plaintiff's constitutional claims from its appeal. We conclude that any remaining claim for monetary relief has been forfeited.

The language of the consent judgment does not change our opinion on this issue. A consent judgment is of the nature of a contract, and interpreted as such. *Gramer v Gramer*, 207 Mich App 123, 125; 523 NW2d 861 (1994). We recognize that the consent judgment provided that plaintiff was not precluded from "pursuing all other claims it has against the Village of Holly." However, this provision merely articulated that the parties agreed to only a partial consent judgment; thus, the judgment did not purport to settle all claims by virtue of the judgment. However, the remaining claims were settled by operation of law. The appeal is moot, and this Court will not review it further.

We affirm.

/s/ Richard A. Bandstra

/s/ Hilda R. Gage

/s/ Kurtis T. Wilder