STATE OF MICHIGAN

COURT OF APPEALS

CHAPMAN CUNNINGHAM, PATRICIA MULLANEY, JOANNE TOKATLIAN, CHRIST PITSES, ANASTASIA PITSES, and LILLION MCBRIEN,

Plaintiffs-Appellants,

v

CITY OF GROSSE POINTE WOODS and GROSSE POINTE PUBLIC SCHOOL SYSTEM,

Defendants-Appellees.

UNPUBLISHED
March 13, 2001

No. 212642
Wayne Circuit Court
LC No. 96-620465 CZ

Before: Smolenski, P.J., and Holbrook, Jr. and Gage, JJ.

PER CURIAM.

Plaintiffs sued defendants alleging that the installation of lights at the Grosse Pointe North High School athletic field and the occurrence of night games there created a nuisance, violated plaintiffs' contractual rights, and violated applicable municipal ordinances. Plaintiffs sought declaratory and injunctive relief preventing the conduct of evening sporting events at Grosse Pointe North and requiring removal of the athletic field lights. Following a bench trial, the trial court entered a judgment of no cause of action in favor of defendants. Plaintiffs appeal as of right. We affirm.

I

To relieve overcrowding at what was then the single high school in the City of Grosse Pointe Woods (hereinafter "City"), defendant Grosse Pointe Public School System (hereinafter "School System") during the 1960's developed plans to construct what would become Grosse Pointe North High School. Land was scarce, however, and the best available parcel was smaller than ideal for the school and also was zoned for residential purposes. The City rezoned the area to permit the school's construction. The City and the School System agreed that the school's construction would adhere to municipal ordinances and that the School System would maintain a green barrier, a band of grass and other plant materials, between the school and abutting residential properties. The School System further entered into several agreements with individual residents to provide fences separating their properties from the school. To assuage

some residents' concerns, school board members stated prior to construction that evening football games would not occur, and the school's athletic field was not equipped with lights.

In response to some community agitation during the 1990's to install lights at the athletic field and begin holding evening events, a request for lights was approved and the City ultimately granted zoning variances concerning the height and placement of four light towers.

Plaintiffs initially sought to enjoin installation of the lights. In 1996, the trial court denied plaintiffs' request for a preliminary injunction. Later that year, the lights were installed and several night games took place at Grosse Pointe North. Plaintiffs then sought a permanent injunction, complaining that the emanations of noise and light from the night games created a nuisance. Plaintiffs also asserted contractual rights, and alleged that various municipal ordinances were violated. Following a bench trial, the court entered judgment in favor of defendants with respect to each count of plaintiffs' amended complaint.

II

"When reviewing equitable actions, this Court employs review de novo of the decision and review for clear error of the findings of fact in support of the equitable decision rendered." *LaFond v Rumler*, 226 Mich App 447, 450; 574 NW2d 40 (1997). Findings are clearly erroneous when, although there is evidence to support them, the reviewing court on the entire record is left with the definite and firm conviction that a mistake has been committed. *Walters v Snyder*, 239 Mich App 453, 456; 608 NW2d 97 (2000).

III

Municipal Ordinances

In support of their other arguments, plaintiffs repeatedly cite allegations of municipal ordinance violations. We therefore commence our analysis by addressing these alleged ordinance violations. The ordinary rules of statutory construction apply to municipal ordinances. *Gora v City of Ferndale*, 456 Mich 704, 711; 576 NW2d 141 (1998). We review de novo the trial court's interpretation of municipal ordinances. *Ballman v Borges*, 226 Mich App 166, 168; 572 NW2d 47 (1997).

The City's Zoning Board of Appeals (ZBA) approved, because of practical difficulty, a "Rear Yard Variance and Height Variance for Installation of Lights at Grosse Pointe North Athletic Field." Grosse Pointe Woods Ordinances, § 5-14-8 affords the ZBA authority to issue variances, subject to certain limitations. See also MCL 125.585(9); MSA 5.2935(9) (permitting a board of appeals to "vary or modify any of its rules or provisions" in the face of "practical difficulties or unnecessary hardship").

Plaintiffs contend that the variances exceeded the board's authority to grant them, and challenge the propriety of the variance grants in light of various municipal ordinance provisions. The proper forum for interested persons to challenge a ZBA decision, however, is the circuit court, on direct review. MCL 125.585(11); MSA 5.2935(11). The circuit court's ruling then is subject to review in this Court by leave granted. MCR 7.203(B)(2). Because (i) plaintiffs did

not timely appeal as of right to the circuit court the ZBA's grant of variances, but instead brought the instant original action, and (ii) the record indicates that plaintiffs neither requested that the trial court treat their cause of action in part as an appeal of the ZBA's decision nor that the trial court so acted on its own initiative, the question of the variances' validity constitutes a collateral issue in this case that is not subject to adjudication.[1] See *Martin v Dep't of Corrections*, 168 Mich App 647, 653; 425 NW2d 205 (1988) (noting that "[a]djudications which may become final through lapse or exhaustion of appeal rights may not be disturbed by collateral attack"); see also *Krohn v City of Saginaw*, 175 Mich App 193, 195-196; 437 NW2d 260 (1988) (finding that when a party failed to timely invoke the statutory provisions concerning an appeal of a zoning board of appeals' variance grant, MCL 125.585(11); MSA 5.2935(11), the Court lacked subject matter jurisdiction to consider the merits of the party's untimely challenge).[2] Thus, we will presume the procedural and substantive validity of the variances, and accordingly regard the height and placement of the light towers as comporting with the City's ordinance scheme.

Plaintiffs also argue that the noise generated at evening football games exceeds the loudness permitted by ordinance. Grosse Pointe Woods Ordinances, § 8-4-11(B) provides in pertinent part as follows:

> It shall be unlawful for any person or the owner or occupant of any premises within the City to cause or permit any noise to be emitted from any equipment . . . under the control of such person or located upon the premises owned or under the control of such person which noise exceeds a sound level of eighty five (85) decibels in combination with and including ambient noise . . . .

Section 8-4-11(A) defines "ambient noise" as "all-encompassing noise associated with a given environment being a composite of sounds from all sources."

Plaintiffs insist that "ambient noise" includes human or crowd noise, in any combination. We agree with the trial court, however, that § 8-4-11(B) focuses on sounds emanating from equipment, not human voices or other nonmechanical sound. Although the definition of "ambient noise" plainly includes noise "from all sources" present at a given moment, the ordinance emphasizes "noise . . . *emitted from any equipment*" (emphasis added). We hold that where equipment represents the main source of the noise, the unambiguous terms of the ordinance restrict the noise level of the equipment, considered along with other sources of noise, to eighty-five decibels. Where the main source of noise exceeding eighty-five decibels is not mechanical in origin, mechanical sounds in the mix that do not themselves approach eighty-five

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[1] Moreover, this case comes to this Court on a claim of appeal, not by leave granted. Had the circuit court treated any part of the case below as a direct appeal from the decision of the ZBA, then that part of the case would not be subject to appeal in this Court by right. MCR 7.203(A)(1)(a).

[2] This Court in *Krohn* likewise observed that while "the trial court could have treated [the plaintiffs'] complaint as an application for leave to appeal," *id*. at 196, "[t]he fact is, however, the trial court did not choose to treat the complaint as an application for delayed appeal and plaintiffs never made such an application themselves." *Id*. at 197.

decibels do not bring the ordinance to bear. It would be illogical to reverse the focus of § 8-4-11(B) and hold that it covers noise overwhelmingly originating from sources other than equipment, as if any de minimis element of mechanical noise in the mix would then cause the total level to run afoul of the ordinance. *Tyler v Livonia Pub Schools*, 459 Mich 382, 395; 590 NW2d 560 (1999) (noting that statutes should be construed to avoid absurd results).

We further conclude that the trial court did not clearly err in finding that crowd noise, not equipment, occasionally caused the athletic field's noise level to exceed eighty-five decibels. *Walters*, *supra*. Based on the testimony presented at trial, the court correctly noted that ordinarily an announcer using the public address system does not speak at the climactic moments in a game, but rather waits until the crowd noise quiets. This conclusion comports with plaintiffs' own expert's report that crowd cheering, not mechanical noises, raised the sound levels beyond eighty-five decibels.[3]

IV

Nuisance

A

Plaintiffs argue that the game noise creates a common law nuisance. A private nuisance exists when an actor substantially and unreasonably interferes with a landowner's use and enjoyment of his or her land. *Adkins v Thomas Solvent Co*, 440 Mich 293, 304; 487 NW2d 715 (1992).

> [A]n actor is subject to liability for private nuisance for a nontrespassory invasion of another's interest in the private use and enjoyment of land if (a) the other has property rights and privileges in respect to the use or enjoyment interfered with, (b) the invasion results in significant harm (c) the actor's conduct is the legal cause of the invasion, and (d) the invasion is either (i) intentional and unreasonable, or (ii) unintentional and otherwise actionable under the rules governing liability for negligent, reckless, or ultrahazardous conduct. [*Id*., citing 4 Restatement Torts, 2d, §§ 821D-F, 822, pp 100-115.]

See also *Cloverleaf Car Co v Phillips Petroleum Co*, 213 Mich App 186, 193; 540 NW2d 297 (1995). As the trial court observed, there is no dispute in this case that plaintiffs are aggrieved by the light and noise that defendants have caused to invade their homes. At issue is the extent of the harm, and how the harms balance against the social utility of their cause. See *Adams v*

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[3] We further note that the School System consistently took the precaution of seeking permission from the City's Director of Public Safety to exceed the noise limitations on game nights, as authorized by § 8-4-11(F). Because there is no evidence that game noise ever exceeded eighty-five decibels in the absence of a temporary permit allowing this, the game noise must be considered to have comported with the City's ordinances, even without distinguishing between mechanical and human noise.

Cleveland-Cliffs Iron Co, 237 Mich App 51, 60-63; 602 NW2d 215 (1999) (distinguishing that aspect of nuisance from trespass).[4]

School officials testified that evening athletic events were intended to achieve the following: to offer a Friday evening activity for students; to increase the sporting event attendance of students, their families and school faculty, thus fostering a stronger sense of community; to avoid football scheduling conflicts with other school sporting events and student visits to prospective colleges that might also occur on Saturdays; to facilitate greater football media coverage and college recruitment possibilities; and to permit occasional lacrosse, soccer and track events on weekdays during early evening hours, when more parents could watch their children participate. The three school representatives who testified at trial agreed that the installation of lights had achieved all these results. These are the benefits that must be weighed against the consequent harms that plaintiffs suffer.

The disturbances of which plaintiffs complain must be adjudged by an objective standard. *Smith v Western Wayne Co Conservation Ass'n*, 380 Mich 526, 540; 158 NW2d 463 (1968). Concerning noise, plaintiffs averred that occasionally they must endure sound intensity as great as approximately ninety decibels. According to the evidence, including the report of plaintiffs' sound expert, the largest crowds surged to this level at the most exciting moments of a game. The expert detected bursts generating noise levels above eighty-five decibels eleven times during one game, and twenty-four times during another, the game pitting Grosse Pointe North against its cross town rival Grosse Pointe South. Our Supreme Court once likened eighty-eight decibels to "the noise inside a sedan in city traffic." *Smith*, *supra* at 539.[5] We have no doubt that these loudest sounds arising from the evening athletic events would be disturbing to a reasonable person.

We conclude, however, that the trial court did not clearly err in finding that those extreme eruptions of sound occurred sufficiently infrequently as to fall short of constituting an unreasonable burden, especially considered in light of the benefit that students, parents, faculty and the community derived from the evening events. *Walters*, *supra*. The record indicated that only evening varsity football games, of which three or four night games occurred at the Grosse Pointe North each season, had generated an intensity of fan participation creating noise levels above eighty-five decibels, and that most other evening events drew hardly enough spectators to create any such loud bursts of noise.

We also conclude that the trial court did not clearly err in determining that the amount of light that spilled onto plaintiffs' properties constituted a reasonable burden under the circumstances. According to the evidence, the lights generally were turned off by 10:00 p.m.,

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[4] Traditional principles of nuisance law, as reflected in the first Restatement of Torts, "'expected plaintiffs to bear uncompensated harms that might, for them, be quite severe, if the utility of the defendant's conduct to society at large was great enough.'" *Adams*, *supra* at 60, n 10, quoting Halper, *Untangling the Nuisance Knot*, 26 B C Envtl Aff L R 89, 122 (1998).

[5] Plaintiffs' expert explained that "[n]oise levels around say 80 [decibels] to 90 would be like being at [the] intersection of a busy roadway" or "behind a power lawn mower."

and, while on, supplied enough light to allow one plaintiff to read the label on a can of insecticide in her backyard at night, and to videotape outside at night with no additional lighting. Another plaintiff characterized the light spillage's intensity as comparable to natural light on a summer evening. Testimony indicated that plaintiffs have had to endure approximately one dozen evening events during an academic year. We find no error in the trial court's ruling that the frequency and extent of the light spillage from the athletic field fell short of constituting an unreasonable burden when balanced against the societal benefits obtained by holding some evening athletic events.[6] *Walters, supra*.

In summary, we detect no error in the trial court's finding that plaintiffs failed to establish a common law nuisance.[7]

B

Plaintiffs further assert that the evening sporting events constitute a nuisance per se. A nuisance per se is "an act, occupation, or structure which is a nuisance at all times and under any circumstances." *Martin v State*, 129 Mich App 100, 108; 341 NW2d 239 (1983). Plaintiffs suggest that the night games constitute a nuisance per se because in facilitating them defendants violated various municipal ordinances, citing MCL 125.587; MSA 5.2937 ("A building erected, altered, razed, or converted, or a use carried on in violation of a local ordinance or regulation adopted pursuant to this act is a nuisance per se."). Because we found no ordinance violations by defendant, we reject plaintiffs' suggestion.

Plaintiffs also argue that any light spillage onto adjoining property represents a nuisance per se when the light exists solely for entertainment or recreational purposes. Plaintiffs failed to preserve this issue for our review, however, because they fail to cite authority for this proposition. *Mudge v Macomb Co*, 458 Mich 87, 104-105; 580 NW2d 845 (1998). Furthermore, because a nuisance per se exists without regard for the surrounding circumstances, the nature of the source of the complained of irritant, entertainment or otherwise, is irrelevant to the inquiry.

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[6] Plaintiffs additionally argue that they purchased their homes at a time when no night games took place, and with the expectation that that policy would continue. Plaintiffs knew that a school existed when they chose to become the school's neighbors, however, and thus should be charged with notice that the future development of the neighborhood would be heavily influenced by developments naturally occurring at the school.

[7] Plaintiffs rely on *Carlock v Brewbaker's Inc*, unpublished opinion per curiam of the Court of Appeals, decided February 23, 1996 (Docket No. 171560), in which a panel of this Court concluded that a softball field constituted a nuisance to nearby residents. Aside from our disinclination to follow unpublished cases, MCR 7.215(C)(1), however, we find *Carlock* distinguishable. *Carlock* involved lights and noise generated by a softball facility seven nights per week for approximately half the year (see slip op at 2), a more pervasive source of irritation to nearby residents than the occasional night games that the instant plaintiffs must endure. Moreover, although softball may be considered a beneficial community activity, high school football, because of its natural and well attested linkage to high school education, is an activity demanding greater forbearance, under principles of nuisance law, from affected neighbors.

Moreover, as discussed above, we find inapt plaintiffs' characterization of the evening school events as mere entertainment or recreation.[8]

We conclude that the trial court correctly found no nuisance per se.

V

Contractual Claims

A

Plaintiffs additionally claim that the trial court erred in failing to recognize that they possessed contractual rights to prevent the installation of the lights and the holding of night games. "In Michigan, the essential elements of a valid contract are (1) parties competent to contract, (2) a proper subject matter, (3) a legal consideration, (4) mutuality of agreement, and (5) mutuality of obligation." *Thomas v Leja*, 187 Mich App 418, 422; 468 NW2d 58 (1991).

The trial court accepted plaintiffs' assertion that the May 10, 1965 letter agreement between defendants represented a contract. Plaintiffs assert that the various school-abutting neighbor fence agreements, the final site plan, and certain oral statements stemming from meetings between defendants and affected residents constituted part of that contract. Beyond their bald assertion, however, plaintiffs neither explain why nor cite authority for the proposition that such documents or oral representations must be considered part of the letter agreement. "This Court generally holds that a party's failure to argue a position or failure to identify relevant authority waives the issue." *Oneida Twp v Eaton Co Drain Comm'r*, 198 Mich App 523, 526, n 2; 499 NW2d 390 (1993). Regardless, plaintiffs' position lacks merit. Neither the letter agreement itself, nor the other communications to which plaintiffs refer, indicate that the latter should join the former as a combined statement of enforceable contract rights.

Plaintiffs suggest that the residents abutting the school effectively contracted to refrain from opposing the school's construction in exchange for assurances that no lights for night games ever would become part of the school property. Plaintiffs point to no evidence, however, that any resident contractually agreed to forebear pressing legal claims against the school.[9] If the residents were persuaded not to oppose the school by way of lawsuit, they nonetheless remained legally unconstrained to do so. Similarly, if the entities campaigning for the building of Grosse Pointe North initially guaranteed that certain conditions favoring the abutting residents would be respected, those entities were not thus contractually estopped from later advocating for further demands on the neighborhood.

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[8] Plaintiffs also attempt to characterize the light spillage as a trespass. Because light is not a tangible object, however, it cannot effect a trespass. *Adams*, *supra* at 69.

[9] "Surrender of even doubtful claims upon honest and reasonable belief in the validity of such claims is legal detriment amounting to consideration." *Barwin v Frederick & Herrud, Inc*, 62 Mich App 280, 286; 233 NW2d 258 (1975).

Concerning the fence agreements, a review of the three such contracts that plaintiffs appended to their brief on appeal reveals nothing to suggest that the residents who signed them thereby became contracting partners or third party beneficiaries to any other agreement. Furthermore, plaintiffs point to no contractual language in these agreements that defendants allegedly have violated by installing the lights, and we find no language in those agreements that might be so construed. We conclude that the trial court properly declined to consider the fence agreements part of the May 10, 1965 letter agreement between defendants, and properly ruled that the fence agreements were not violated by the lights' installation.

Plaintiffs likewise point to nothing in the final site plan that indicates that it is part of a contract, let alone that defendants are obliged to adhere in perpetuity to that specific plan.

Plaintiffs state that the residents whose homes abut school property relied on certain oral promises by the School System, but point to no specific promise attributable to defendants to the effect that lights and evening events forever would be barred. While evidence indicates that some residents relied on their real estate agents' assurances that no night events would occur, these can hardly be considered reasonable reliance induced by defendants. Any resident wishing to secure a contractual right to prevent lights and night games in the future would have been obliged to do more than rely on real estate agents' general impressions, or on political posturing.

Thus, plaintiffs have failed to show that they themselves contracted to prevent the installation of lights and the holding of evening athletic events.

B

Plaintiffs also theorize that they represent third party beneficiaries of the May 1965 letter agreement. In Michigan, a third party beneficiary of a contract stands in the shoes of the promisee and thus may enforce the contract against the promisor. MCL 600.1405; MSA 27A.1405. However, not everyone who benefits in some way from a contract enjoys the status of third party beneficiary. *Rieth-Riley Const Co, Inc v Dep't of Transportation*, 136 Mich App 425, 430; 357 NW2d 62 (1984). To create a third party beneficiary, a contract must expressly promise to act for the third party's benefit. *Dynamic Const Co v Barton Malow Co*, 214 Mich App 425, 428; 543 NW2d 31 (1995).

As the basis for their third party beneficiary claims, plaintiffs rely on the May 10, 1965 letter agreement between defendants, written by the president of the Board of Education to the City's mayor. Among the letter's many provisions, plaintiffs point to just one that could be considered as expressly identifying a class of persons intended to benefit from the agreement, which provision guarantees that the School System will maintain green barriers between the school and "adjoining residences." Plaintiffs argue that defendants have violated plaintiff Tokatlian's rights as a third party beneficiary under this provision by installing a light tower inside the green barrier adjoining her property, 8-½ feet from the property line.

We agree with the trial court that the letter agreement addressed matters concerning the community generally. Had the contract primarily concerned itself with green barriers provided for adjoining homeowners, or had the contract's many provisions consistently identified as beneficiaries the residents living adjacent to the school, then the contract might have created third

party beneficiaries. However, the various parts of a contract must be read together. *First Baptist Church of Dearborn v Solner*, 341 Mich 209, 215; 67 NW2d 252 (1954). Doing so in this instance reveals that notwithstanding the single reference to "adjoining residences," the parties to the letter intended to address general community concerns, not establish specific third party contractual rights. We further note that "adjoining residences" refers to places, not persons; that language within this document cannot be construed to create third party beneficiary rights in Tokatlian or any other plaintiff.

We conclude that the trial court properly dismissed plaintiffs' contractual claims.

Affirmed.

/s/ Michael R. Smolenski
/s/ Donald E. Holbrook, Jr.
/s/ Hilda R. Gage