# STATE OF MICHIGAN

# COURT OF APPEALS

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| JULIE E. VISSER TRUST,<br><br>Plaintiff-Appellant,<br><br>v<br><br>CITY OF WYOMING, WYOMING PLANNING COMMISSION, JOHN LEE KOETJE, KOETJE INVESTOR LIMITED PARTNERSHIP, and KOETJE INVESTORS-CHATEAU LIMITED PARTNERSHIP,<br><br>Defendants-Appellees. | UNPUBLISHED<br>May 17, 2016<br><br>No. 325617<br>Kent Circuit Court<br>LC No. 13-000289-CH |

Before: RIORDAN, P.J., and SAAD and MARKEY, JJ.

PER CURIAM.

Plaintiff, the Julie E. Visser Trust, appeals as of right the trial court order granting summary disposition in favor of defendants pursuant to MCR 2.116(C)(10). We affirm.

## I. FACTUAL BACKGROUND[1]

This case involves a 4.1-acre parcel ("the Phase 4 parcel") owned by defendants John Koetje, Koetje Investor Limited Partnership, and Koetje Investors-Chateau Limited Partnership[2] in Wyoming, Michigan.[3] Before July 2012, the Phase 4 parcel was zoned R-1, single-family residential. The parcel was bordered to the north and west by the parcels on which Phase 1 and

[1] A more detailed description of the procedural history in this case is set forth in our earlier opinion. See *Julie E. Visser Trust v City of Wyoming*, unpublished opinion per curiam of the Court of Appeals, issued October 30, 2014 (Docket No. 317606).

[2] Defendants John Koetje, Koetje Investor Limited Partnership, and Koetje Investors-Chateau Limited Partnership will be referred to as "the Koetje defendants" in this opinion.

[3] The City of Wyoming and the Wyoming Planning Commission will be referred to as "the Wyoming defendants" in this opinion.

Phase 3 of the Chateau Village Apartments were built (hereinafter referred to as "the Phase 1 parcel" and "the Phase 3 parcel").

In January 2012, the Koetje defendants submitted a request to the Wyoming Planning Commission that the Phase 4 parcel be rezoned to R-4, multiple-family residential. With the rezoning request, the Koetje defendants submitted a site plan approval application, under which they sought approval to build Phase 4 of the Chateau Village Apartments—which would include 44 apartment units in three apartment buildings—on the Phase 4 parcel. Ultimately, the rezoning matter was forwarded to the city council, and the site plan application was tabled.

In July 2012, the city council approved the rezoning request, but the planning commission never approved the site plan. In November 2012, the Koetje defendants submitted a new site plan application to the planning commission,[4] which the commission approved on December 18, 2012.

In January 2013, plaintiff, who owns land abutting the 4.1-acre parcel, filed a complaint against defendants, alleging, *inter alia*, that the rezoning of the Phase 4 parcel and the approval of the site plan were invalid; that its property would lose value; and that it would lose enjoyment of the property. The trial court granted summary disposition in favor of defendants on all of plaintiff's claims. Plaintiff appealed, and we affirmed the grant of summary disposition on all of plaintiff's claims, except for its claim that approval of the site plan was invalid. *Julie E Visser Trust v Wyoming*, unpublished opinion per curiam of the Court of Appeals, issued October 30, 2014 (Docket No. 317606), pp 3-10. We concluded that the trial court erred in holding that it lacked jurisdiction over that claim and remanded the case for further proceedings. *Id.* at 3-5, 11.

On remand, the trial court issued the following order:

> Resulting from the opinion of our Court of Appeals in *The Julie E. Visser Trust v City of Wyoming*, the parties shall submit to this Court written briefs articulating their position with respect to the opinion of our Court of Appeals in this matter. The briefs (including a Judge's Copy) shall be submitted by both parties within 30 days of the date of this Order. Should the parties choose to file responses, they shall be submitted in conformity with MCR 2.119(C)(2). A status conference will be held by this Court on **Friday, December 12, 2014, at 8:30 a.m.** regarding the matter.

The parties submitted briefs, and the trial court granted summary disposition to defendants at the December 12, 2014 status conference.

## II. DUE PROCESS

[4] At some point before the new site plan application was submitted, the Phase 4 parcel was combined with the Phase 1 parcel and the Phase 3 parcel under one legal description.

Plaintiff first argues that the trial court violated its due process rights when it granted summary disposition to defendants at the status conference. We disagree.

## A. STANDARD OF REVIEW

This issue is unpreserved because plaintiff failed to raise a due process claim in the trial court. *King v Oakland Co Prosecutor*, 303 Mich App 222, 239; 842 NW2d 403 (2013). We are not required to review issues that are raised for the first time on appeal. *Smith v Foerster-Bolser Constr, Inc*, 269 Mich App 424, 427; 711 NW2d 421 (2006). However, we "may overlook preservation requirements if the failure to consider the issue would result in manifest injustice, if consideration is necessary for a proper determination of the case, or if the issue involves a question of law and the facts necessary for its resolution have been presented." *Id*. We will overlook the preservation requirements here because whether a party has been denied due process is a question of law, *Al-Maliki v LaGrant*, 286 Mich App 483, 485; 781 NW2d 853 (2009), and all the facts necessary to resolve the issue have been presented.

We review unpreserved constitutional claims for plain error affecting substantial rights. *Bay Co Prosecutor v Nugent*, 276 Mich App 183, 193; 740 NW2d 678 (2007). "Plain error occurs at the trial court level if (1) an error occurred (2) that was clear or obvious and (3) prejudiced the party, meaning it affected the outcome of the lower court proceedings." *Duray Dev, LLC v Perrin*, 288 Mich App 143, 150; 792 NW2d 749 (2010).

## B. ANALYSIS

As an initial matter, we reject plaintiff's claim that the trial court granted summary disposition *sua sponte* at the status conference. Before the first appeal in this case, defendants moved for summary disposition under MCR 2.116(C)(10), arguing, *inter alia*, that plaintiff has no documentary evidence demonstrating that there was a defect in the site plan approval process and, later, that the site plan was properly approved by the Wyoming Planning Commission because all required information was presented or waived by the Planning Department. After this case was remanded to the trial court, the court instructed the parties in its November 3, 2014 order to submit written briefs articulating their positions in light of this Court's previous opinion. The order specifically stated that a status conference would be held on December 12, 2014, that briefs shall be submitted by the parties within 30 days after entry of the order, and that response briefs shall submitted in accordance with MCR 2.119(C)(2). In their brief, the Wyoming defendants argued that defendants were entitled to summary disposition under MCR 2.116(C)(10), in part, because there was no genuine issue of material fact that the site plan complied with the requirements of the zoning ordinance. Similarly, in their brief, the Koetje defendants argued that defendants were entitled to summary disposition under MCR 2.116(C)(10) because (1) the affidavit and deposition testimony of Tim Cochran, the city planner for the city of Wyoming, established that the site plan complied with the zoning ordinance and the site plan approval process was valid, and (2) plaintiff had not presented any conflicting evidence. They also argued that plaintiff's challenge to the approval of the site plan was moot because the apartment buildings were fully constructed and occupied by residents. At the December 12, 2014 status conference, the trial court granted summary disposition in favor of defendants for the reasons stated in the brief submitted by the Koetje defendants. Accordingly, it is clear that the trial court did not grant summary disposition *sua sponte*. Cf. *Al-Maliki*, 286

Mich App at 486 (stating that the trial court considered the issue of causation *sua sponte* when no issue regarding causation was raised in the defendant's motion for summary disposition).

We similarly reject plaintiff's claim that it was denied due process when the trial court granted summary disposition in favor of defendants. "[D]ue process is a flexible concept, the essence of which is to ensure fundamental fairness." *Reed v Reed*, 265 Mich App 131, 159; 693 NW2d 825 (2005) (citations omitted). "Procedure in a particular case is constitutionally sufficient when there is notice of the nature of the proceedings and a meaningful opportunity to be heard by an impartial decision maker." *Id*.

Contrary to plaintiff's characterization of the record, it is apparent that it had notice that the trial court may conclude that summary disposition under MCR 2.116(C)(10) was proper at the status conference given the arguments raised by defendants in their briefs filed pursuant to the trial court's November 3, 2014 order. Additionally, it is clear that plaintiff had an opportunity to be heard. The trial court's order expressly allowed plaintiff to file a response to defendants' briefs. Moreover, the trial court allowed plaintiff to argue its position at the status conference before it granted summary disposition after defendants asserted, once again, that dismissal of plaintiff's claims was proper at that stage of the proceedings because there was no evidence that the site plain was deficient or improperly approved. Notably, at the hearing, plaintiff specifically contended that "at this point, *there is a factual question* as to how the site plan got approved despite the deficiencies that were clearly evident in this case." (Emphasis added.)

Thus, on this record, the procedure was constitutionally sufficient, and plaintiff has failed to demonstrate a plain error affecting its substantial rights.[5] See *Duray Dev, LLC*, 288 Mich App at 150; *Bay Co Prosecutor*, 276 Mich App at 193.[6]

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[5] In reaching this conclusion, we reject any suggestion by plaintiff that its due process rights were violated because the time requirements under MCR 2.116(G)(1)(a) were not followed in this case. Plaintiff has not cited any caselaw indicating that procedure is constitutionally deficient if the time requirements listed in MCR 2.116(G)(1)(a) are not followed, and we have found no authority in support of that proposition.

[6] Plaintiff claims that this Court "already ruled in favor of plaintiff with respect to [d]efendants' previous motion for summary disposition and remanded the case for further proceedings," such that the trial court's grant of summary disposition was improper under *Brownlow v McCall Enterprises, Inc*, ___ Mich App ___; ____ NW2d ___ (2016) (Docket Nos. 325843, 326903). Plaintiff improperly raises this claim for the first time in its statement of supplemental authority. See MCR 7.212(F). Nevertheless, this argument is factually inaccurate. In our earlier opinion, we held that the trial court erred in dismissing Count I of plaintiff's complaint solely on the basis that it lacked jurisdiction. We made no finding on the substantive issue of whether defendants were entitled to summary disposition as a matter of law with regard to the validity of the site plan. The law of the case doctrine applies here to the extent that we previously decided whether the trial court had jurisdiction over plaintiff's claim, as that was the only issue implicitly or

## III. SUMMARY DISPOSITION

Plaintiff also argues that the trial court erred in granting summary disposition under MCR 2.116(C)(10) to defendants. We conclude that plaintiff has failed to establish entitlement to relief.

### A. STANDARD OF REVIEW

We review *de novo* a trial court's grant or denial of summary disposition. *Moraccini v Sterling Hts*, 296 Mich App 387, 391; 822 NW2d 799 (2012). "A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint." *Cannon Twp v Rockford Pub Sch*, 311 Mich App 403, 411; 875 NW2d 242 (2015). When reviewing such a motion, we may only consider, in the light most favorable to the party opposing the motion, the evidence that was before the trial court, which consists of "the 'affidavits, together with the pleadings, depositions, admissions, and documentary evidence then filed in the action or submitted by the parties.' " *Calhoun Co v Blue Cross Blue Shield Michigan*, 297 Mich App 1, 11; 824 NW2d 202 (2012), quoting MCR 2.116(G)(5). Under MCR 2.116(C)(10), "[s]ummary disposition is appropriate if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008). "There is a genuine issue of material fact when reasonable minds could differ on an issue after viewing the record in the light most favorable to the nonmoving party." *Allison v AEW Capital Mgt, LLP*, 481 Mich 419, 425; 751 NW2d 8 (2008).

### B. ANALYSIS

Here, the trial court granted summary disposition in favor of defendants under MCR 2.116(C)(10) because it concluded that (1) the issue of whether the site plan approval was invalid was moot, (2) Cochran's testimony demonstrated that the approval was valid, and (3) plaintiff failed to demonstrate any factual basis for surviving summary disposition.

"As a general rule, an appellate court will not decide moot issues." *B P 7 v Bureau of State Lottery*, 231 Mich App 356, 359; 586 NW2d 117 (1998). "A case is moot when it presents only abstract questions of law that do not rest upon existing facts or rights. An issue is deemed moot when an event occurs that renders it impossible for a reviewing court to grant relief." *Id.* (citations omitted). Likewise, "[w]here the act that is sought to be enjoined has already been performed, an appeal is moot." *Kent Co Aeronautics Bd v Dep't of State Police*, 239 Mich App 563, 584; 609 NW2d 593 (2000) (holding that the issue of whether the trial court abused its discretion in denying the defendant's request for a preliminary injunction to prohibit the plaintiff from building a communications tower was moot because the tower had been built since the filing of the appeal), aff'd sub nom *Byrne v Michigan*, 463 Mich 652 (2001).

In its complaint, plaintiff requested, in part, that the trial court enjoin the Koetje defendants from making any improvements to the Phase 4 parcel. However, as plaintiff acknowledges, the apartment buildings on the Phase 4 parcel already have been constructed.

explicitly decided in the prior appeal as to the site plan. See *Brownlow*, ___ Mich App at ___; slip op at 5, 7.

Because the act that plaintiff sought to enjoin—*i.e.*, the construction of the apartment buildings—already has been performed, the specific issue of whether plaintiff was *entitled to an injunction* prohibiting the construction of the buildings, on the basis that the site plan was invalid or the approval process was improper, is now moot. *Id.*

However, the same is not necessarily true for the broader issue of whether the site plan approval was invalid. On appeal, plaintiff claims that this issue is not moot and that it is entitled to damages and abatement pursuant to MCL 125.3407. We agree that the issue is not moot. If the site plan was approved improperly—and if plaintiff is, in fact, entitled to relief under MCL 125.3407—no event has occurred that has rendered it impossible for the trial court to grant such relief. See *B P 7*, 231 Mich App at 359. Accordingly, the trial court erred in granting summary disposition to defendants on the basis that this issue is moot.

Under the Michigan Zoning Enabling Act, MCL 125.3101 *et seq.*, "[a] local unit of government may require the submission and approval of a site plan before authorization of a land use or activity regulated by a zoning ordinance." MCL 125.3501(1). "The procedures and requirements for the submission and approval of site plans shall be specified in the zoning ordinance." MCL 125.3501(3). "A decision rejecting, approving, or conditionally approving a site plan shall be based upon requirements and standards contained in the zoning ordinance . . . ." MCL 125.3501(4).

Article XXX (§§ 90-1000 through 90-1005) of the City of Wyoming Code of Ordinances sets forth site plan requirements and procedures. Site plan approval is required for numerous land uses and activities. In particular, the planning commission must conduct "[a] full site plan level review" for the development of multiple-family residential uses. Wyoming Code of Ordinances, § 90-1001. An application for approval "shall be submitted by the owner of an interest in the land for which site plan approval is sought, or the designated agent of the owner." Wyoming Code of Ordinances, § 90-1002(1). When a full site plan is required for approval, "[t]he application shall include a . . . full site plan that includes the information required by section 90-1003." Wyoming Code of Ordinances, § 90-1002(1). Table 90-1003, located under § 90-1003, lists the "site plan submittal requirements, [which] shall be included with and as part of the site plan(s) . . . submitted for review unless waived in writing by the city planner or chief building official." See Wyoming Code of Ordinances, § 90-1003. Table 90-1003 lists more than 50 requirements. *Id*. Section 90-1003(1) provides the following with regard to any items missing from a site plan:

> *Items not provided*. If any of the items are missing and have not been waived by the city planner or chief building official, the site plan shall list each missing item and the reason(s) why each listed item is not considered applicable. The city planner or chief building official shall determine if the missing item(s) must be included before allowing the application to move forward. An application shall not be considered complete and shall not move forward unless all items have been submitted and any waivers have been approved by the city planner or chief building official.

Site plan "approval shall be granted only if the site plan . . . meets all applicable standards set forth in this article and as outlined" in § 90-1004, which specifically requires that "[t]he site plan

shall include all required information in [sic] sufficiently complete and understandable form to provide an accurate description of the proposed use(s) and structure(s)." Wyoming Code of Ordinances, § 90-1004.

On appeal, plaintiff argues, "As the Court can see, the site plan is woefully deficient, lacking a majority of the requirements listed in table 90-1003." However, plaintiff does not identify which of the more than 50 requirements were missing from the site plan for the Phase 4 parcel.[7] Additionally, in support of this claim, plaintiff only cites a diminutive excerpt from Cochran's deposition. When the cited excerpt is read in context, it is clear that plaintiff was asking Cochran whether the site plan showed the dimensions of existing private roads, the dimensions and location of existing parking lots, the dimensions of parking islands, and the designation of fire lanes for the Phase 1 parcel and the Phase 3 parcel in addition to the Phase 4 parcel, which plaintiff characterized as the "full site" or "entire site."

Thus, we conclude that the testimony cited by plaintiff in support of its claim that the site plan failed to include the items listed in table 90-1003 only supports the argument that the site plan was required to include all of the requirements under table 90-1003 for the Phase 1, Phase 3, *and* Phase 4 parcels in order to comply with the zoning code. Although our review of the record reveals that this was plaintiff's position in the trial court, it has abandoned this claim on appeal.[8]

As such, plaintiff has left it to this Court to search through the deposition testimony of Cochran and Stalsonburg to find support for an argument that the site plan, limited to the Phase 4 parcel, did not include one or more of the numerous requirements listed under table 90-1003.

> A party may not leave it to this Court to search for authority to sustain or reject its position. An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims . . . . An appellant's failure to properly address the merits of his assertion of error constitutes abandonment of the issue. [*Peterson Novelties, Inc v City of Berkley*, 259 Mich App 1, 14; 672 NW2d 351 (2003) (quotation marks and citations omitted).]

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[7] Although plaintiff's brief in response to the trial court's November 3, 2014 order listed a series of violations, it did not cite any documentary evidence in support of each violation. Instead, earlier in its brief, it cited the entire depositions of Cochran and Stalsonburg for the general proposition that Stalsonburg and Cochran "both admitted in their depositions that all the provisions of the zoning ordinance were not met."

[8] In its brief on appeal, plaintiff provides no legal argument and cites no authority, from the municipal code or elsewhere, in support of its earlier claim that the site plan had to include the items listed in table 90-1003 for all three parcels in order to comply with the zoning ordinance. "An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, nor may he give only issues cursory treatment with little or no citation of supporting authority." *Peterson Novelties, Inc v Berkley*, 259 Mich App 1, 14; 672 NW2d 351 (2003) (citations omitted). Based on plaintiff's failure to provide any legal authority or argument for its position, we deem this claim abandoned.

Thus, we deem plaintiff's claim abandoned and decline to consider its argument that the site plan did not include the items required by table 90-1003. See *FMB-First Mich Bank v Bailey*, 232 Mich App 711, 717; 591 NW2d 676 (1998).

Even if we did not deem plaintiff's claim abandoned, and if we assume, *arguendo*, that the site plan was approved improperly because it did not include all of the requirements under table 90-1003, we still would conclude, as a matter of law, that plaintiff is not entitled to relief under MCL 125.3407. First, the statute does not allow for an award of damages on the basis of a nuisance per se. See *Travis v Preston*, 249 Mich App 338, 352; 643 NW2d 235 (2002) (stating, with regard to the former version of MCL 125.294, which was substantively identical in all relevant respects to MCL 125.3407, that "abatement of the nuisance is the only remedy the statute makes available to the court"). Second, only an official designated to administer or enforce the zoning ordinance may bring an action to abate a nuisance per se under MCL 125.3407. See *Towne v Harr*, 185 Mich App 230, 232; 460 NW2d 596 (1990) (interpreting the former version of MCL 125.294).

Although plaintiff may have been entitled to initiate a cause of action for common law public nuisance, pointing to a violation of the zoning code and the statutory provisions of MCL 125.3407 to establish the existence of such a nuisance, see *Towne*, 185 Mich App at 232, plaintiff never raised such a claim in these proceedings, both in the trial court and in this Court. Rather, plaintiff continually argued that it was entitled to abatement solely on the basis that the project constituted a nuisance per se and "ha[d] to be abated," without acknowledging that a showing of "special damages" is required to establish a public nuisance claim. *Towne*, 185 Mich App at 233; see also *Cloverleaf Car Co v Phillips Petroleum Co*, 213 Mich App 186, 190; 540 NW2d 297 (1995) ("A private citizen may file an action for a public nuisance against an actor where the individual can show he suffered a type of harm different from that of the general public."). We will not remand this case to allow plaintiff to proceed on a theory that it never argued or mentioned.

Finally, even if plaintiff's allegations and arguments in the trial court arguably comprised a public nuisance claim, plaintiff failed to make the requisite showing of "special damages." Although plaintiff alleged "special damages" in its amended complaint and identified similar allegations of damages in an interrogatory, the alleged damages amounted to no more than "the mere increase in traffic in the area" and "general economic and aesthetic losses," which are not sufficient to acquire standing to abate a general nuisance. *Unger v Forest Home Twp*, 65 Mich App 614, 617; 237 NW2d 582 (1975). See also *Towne*, 185 Mich App at 233; *Ken Cowden Chevrolet, Inc v Corts*, 112 Mich App 570, 574; 316 NW2d 259 (1982) (citing *Unger* in the context of discussing special damages in an action for public nuisance).

Moreover, in their brief in response to the trial court's November 3, 2014 order, in which they requested summary disposition pursuant to MCR 2.116(C)(10), the Koetje defendants emphasized that plaintiff had not proffered any evidence on the issue of damages in response to their previous motion for summary disposition, and they concluded that no evidence of damages had actually been submitted to the court apart from plaintiff's claim that its real property had declined in value since it was purchased. Subsequently, plaintiff provided no evidence of damages, and made no argument on the issue of damages, in its written response to defendants'

brief or during the hearing. Instead, it merely contended that abatement was required solely because the Phase 4 project constituted a nuisance per se.

Accordingly, because plaintiff failed to establish that it was entitled to the relief it seeks, we affirm the trial court's grant of summary disposition to defendants. See *Unger*, 65 Mich App at 617. See also *Messenger v Ingham Co Prosecutor*, 232 Mich App 633, 643; 591 NW2d 393 (1998) ("When this Court concludes that a trial court has reached the correct result, this Court will affirm even if it does so under alternative reasoning.").

## IV. CONCLUSION

Plaintiff has failed to establish that any of the claims of error raised on appeal warrant reversal of the trial court's grant of summary disposition in favor of defendants.

Affirmed. Defendants, as the prevailing parties, may tax costs pursuant to MCR 7.219.

/s/ Michael J. Riordan
/s/ Henry William Saad
/s/ Jane E. Markey