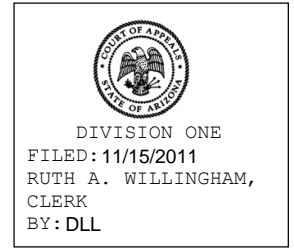


NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED  
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.  
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);  
Ariz. R. Crim. P. 31.24

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION ONE



DB LAND HOLDINGS, LLC, a Utah ) 1 CA-CV 11-0096  
limited liability company; DUANE )  
BARNSON, an individual, ) DEPARTMENT C  
)  
Plaintiffs/Appellants, ) **MEMORANDUM DECISION**  
) (Not for Publication -  
v. ) Rule 28, Arizona Rules of  
) Civil Appellate Procedure)  
TOWN OF FREDONIA, ARIZONA, an )  
Arizona municipal corporation, )  
)  
Defendant/Appellee. )  
)

Appeal from the Superior Court in Coconino County

Cause No. CV2009-0073

The Honorable Mark R. Moran, Judge

**AFFIRMED**

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William P. Ring, P.C. )  
By William P. Ring )  
Attorneys for Plaintiffs/Appellant )

Flagstaff

LaSota & Peters, P.L.C. )  
By Jeffrey T. Murray )  
Attorneys for Defendant/Appellee )

Phoenix

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W I N T H R O P, Chief Judge

¶1 Plaintiffs/Appellants, DB Land Holdings, L.L.C. and  
Duane Barnson (collectively, "DB Land Holdings"), appeal the

superior court's ruling dismissing DB Land Holdings' complaint against Defendant/Appellee, Town of Fredonia ("Fredonia" or "the town").<sup>1</sup> DB Land Holdings argues that the superior court over-extended the principles of res judicata and collateral estoppel to preclude claims and issues that they assert were not litigated in an earlier lawsuit between the same parties. For the following reasons, we affirm.

### **FACTS AND PROCEDURAL HISTORY<sup>2</sup>**

¶12 In 1973, Sands Development Corporation ("Sands") subdivided a parcel of property in Fredonia that came to be known as Shiprock Estates. A plat map of the subdivision was recorded at that time, which included a statement above the signatures of Fredonia's mayor and city recorder that the map had been presented to the city council on September 21, 1973, "at which time this plat was approved and accepted." Over the years, Fredonia has reviewed construction plans and issued building permits for the construction of single family homes in Shiprock Estates. No fewer than eighteen single family homes

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<sup>1</sup> Because the superior court was provided with and required to consider documents beyond just the pleadings, the motion to dismiss decided by the superior court is more appropriately considered a Rule 56 motion for summary judgment. See generally *Ariz. R. Civ. P. 12(b); Frey v. Stoneman*, 150 Ariz. 106, 108-09, 722 P.2d 274, 276-77 (1986).

<sup>2</sup> Many of the facts provided herein are taken from our previous memorandum decision in *DB Land Holdings, L.L.C. v. Town of Fredonia*, 1 CA-CV 08-0797 (Ariz. App. Nov. 19, 2009) (review denied June 2, 2010).

have been built in Shiprock Estates, for which Fredonia provides water and wastewater utility services, police and fire protection, and maintenance for one of its three main roads.

¶3 In 1982, Fredonia passed a series of subdivision regulations. Among the provisions of Fredonia's subdivision regulations are specific standards for roadways, curbs, and a drainage system, and a requirement that engineering plans for the installation of street, sewer, electric, and water utilities be submitted to the public works director by the subdivider. See Fredonia Subdiv. Regs. §§ 14-4-9, 14-4-11, 14-5-7, 14-5-8, 14-5-10. Section 14-6-1 of Fredonia's subdivision regulations provides, "No building permit shall be issued by the public works director unless there has been full compliance with the provisions of this chapter by the owner or prior owners of the property to be improved." In essence, § 14-6-1 prohibits the issuance of a building permit in a subdivision that does not meet the requirements of the regulations. The record includes minutes of town council meetings indicating that engineered plans for the infrastructure of Shiprock Estates were never submitted to the town despite the need to do so.

¶4 DB Land Holdings, L.L.C., is the current owner of twenty-six lots in Shiprock Estates. It purchased the properties from various individuals and Sands for the purpose of constructing homes for sale or reselling for custom home

construction. On January 16, 2008, building permits were issued to DB Land Holdings for lots 23 and 24 in Shiprock Estates.<sup>3</sup>

¶15 On January 22, 2008, Fredonia's town council held a meeting, at which members discussed issues concerning Sands and Shiprock Estates. The town council ultimately decided that construction in the subdivision should be halted until the subdivision provided adequate infrastructure. Meeting minutes reflect that the Planning and Zoning Commission recommended that Sands "be required to install all utilities to the lot lines before any additional building permits are issued." That commission also recommended improvements in street lighting, curbs and gutters, and streets, with the cost shared equally between Sands and Fredonia. The minutes noted that several council members had been working on the issue "for quite some time." A council member expressed the belief that the original approval of the development was an approval to go forward, but that no final subdivision plan with engineered drawings had ever been approved. The town council unanimously agreed, subject to approval by Fredonia's attorney, to "place a moratorium on building permits until engineered drawings of the water system, power, drainage and sewer can be brought in and a subdivision approved by Planning and Zoning, and Town Council." The next

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<sup>3</sup> On April 29, 2008, certificates of occupancy were issued for the houses built on lots 23 and 24.

day, Fredonia's town manager contacted Barnson, the registered agent for DB Land Holdings, L.L.C., and advised him that the council had declared a moratorium on construction at Shiprock Estates.

¶16 Barnson spoke at another town council meeting on February 21, 2008, and asked what improvements were required. Members of the council explained that Sands had been asked several times to submit engineered drawings of power, water, sewer, and drainage plans but never did so. The council further declared that it would meet to set minimum requirements for improvements based on the subdivision regulations.

¶17 On June 24, 2008, Barnson requested a building permit for construction of a home on another lot, lot 25, within Shiprock Estates. Fredonia refused to consider the requested permit.

¶18 On July 30, 2008, DB Land Holdings filed a "Complaint in Special Action" for mandamus and a "Petition for Order to Show Cause" (collectively, "DBI") against Fredonia, its mayor, and its town manager. The complaint in DBI alleged that Fredonia and its officials had breached their official duties by placing a moratorium on the issuance of building permits at Shiprock Estates without following the statutory requirements of Arizona Revised Statutes ("A.R.S.") section 9-463.06 (2008). Citing Rule 3, Ariz. R.P. Spec. Act., the complaint contended

that, by imposing a moratorium without complying with § 9-463.06, Fredonia and its officials had acted in excess of their jurisdiction and legal authority, taken an arbitrary and capricious position, and wantonly abused their official discretion. The complaint further argued that, by refusing to accept Barnson's application for a building permit, Fredonia and its officials had failed to exercise the discretion they had a duty to exercise as a matter of law. For relief, the complaint sought an order dissolving the moratorium and directing the town manager to accept DB Land Holdings' building permit applications for every lot it owns in Shiprock Estates and to timely process them.

¶19 In answering the complaint and responding to the petition for order to show cause, Fredonia conceded that the declaration of a moratorium was improper and ineffective as a matter of law under the statute. Fredonia, however, affirmatively asserted that it was not necessary to declare a development moratorium to decline building permits in Shiprock Estates because Shiprock Estates was not a lawful subdivision and, even if it were, DB Land Holdings had no vested right to develop its properties in violation of Fredonia's subdivision regulations. Fredonia attached town council meeting minutes from 1973 and 1986 that reflected a discussion of road improvements and waterline construction to be performed by the

developer. Fredonia also attached a letter dated August 20, 2008, from its civil engineer, Marvin Wilson, who described problems associated with the lack of an approved drainage plan, including poorly defined drainage swales, the absence of culverts at intersections, and driveways blocking drainage swales. The letter noted that the absence of a drainage plan created the risk of flooding, damage to infrastructure, and environmental hazards adverse to the health and safety of residents.

¶10 At the Order to Show Cause hearing, Fredonia's attorney argued that no moratorium had been declared because the action by the town council had been taken subject to his approval, and he had not approved the action. He further argued that the moratorium statute did not apply because, by its own terms, A.R.S. § 9-463.06 did not apply to the denial or delay of permits because they were inconsistent with applicable statutes, rules, zoning, or other ordinances. See A.R.S. § 9-463.06(I)(3). Fredonia's counsel explained that the issuance of the building permits would violate § 14-6-1 of the Fredonia Subdivision Regulations, and the town council was concerned with the condition of roads, the condition of drainage, and the lack of streetlights. Counsel argued that, despite the recording of the plat with the signatures of the mayor and city recorder, the minutes of the town council meeting in which the plat was

accepted did not demonstrate any action by the council approving the subdivision, and that, regardless whether the plat was approved, DB Land Holdings had no vested right to develop property in violation of existing subdivision regulations.

¶11 Wilson testified that developing an area increases the number of surfaces impervious to water, increasing the runoff. He further testified that an examination of one lot indicated the soil in the area was collapsible soil that water could compress and cause to lose mass, and that it would be inappropriate and could be reckless to proceed with further developing the subdivision without a drainage plan. He also acknowledged that the town council did not have his report when it decided on January 22, 2008, to stop issuing permits in the subdivision.

¶12 DB Land Holdings argued that any concerns regarding improvements were the responsibility of Fredonia because the subdivision had long ago been approved and the roads dedicated to the town.

¶13 The superior court denied DB Land Holdings' request for special action relief. In its ruling, the court found that the moratorium on the issuance of new building permits was not in compliance with A.R.S. § 9-463.06 and was therefore invalid as a reason for denying DB Land Holdings' building permits, Shiprock Estates is a legal subdivision, and if DB Land



Holdings' building permit was denied solely due to Fredonia's invalid moratorium on building permits, then relief should be granted. The court further found, however, that substantial evidence existed that DB Land Holdings' application for a building permit was denied because they were not in compliance with the subdivision's regulations passed in 1982, the 1982 regulations applied to DB Land Holdings, and the facts did not support a finding of estoppel. The court also stated that for the foregoing reasons, DB Land Holdings had "other plain, speedy and adequate remedies available to them." The court then reasoned that although Shiprock Estates is a lawful subdivision, DB Land Holdings did not have legal entitlement to building permits until they complied with the reasonable development standards set forth in Fredonia's subdivision regulations, and issuing building permits would jeopardize the public health, safety, and welfare if they violated the subdivision regulations.

¶14 DB Land Holdings filed a timely appeal from the superior court's ruling in DBI denying the request for special action relief. Fredonia filed a cross-appeal challenging the superior court's determination that Shiprock Estates is a lawful subdivision.<sup>4</sup>

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<sup>4</sup> Fredonia expressly asserted that it sought review of the cross-issue only if this court did not sustain the superior

¶15 While the appeal was pending, DB Land Holdings filed a second complaint ("DBII") on January 22, 2009, requesting damages for the wrongful denial of its building permit and the effect of the town's actions on the value of its other lots.<sup>5</sup> In DBII, DB Land Holdings alleged new counts that were not raised in DBI, including (1) violations of their rights to due process and equal protection under the Arizona Constitution; (2) diminution in value of their property pursuant to A.R.S. § 12-1134 (Supp. 2010); (3) violation of DB Land Holdings' civil rights pursuant to 42 U.S.C. § 1983; and (4) intentional and grossly negligent infliction of damages and distress. The parties agreed to stay the proceedings in DBII pending this court's decision in DBI.

¶16 On November 19, 2009, this court affirmed the superior court's denial of special action relief in DBI. We determined that the superior court had accepted jurisdiction because it ruled on the merits. We further held that the superior court did not abuse its discretion by ultimately denying special action relief, despite finding partially in favor of DB Land Holdings with regard to the moratorium issue. We concluded

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court's denial of special action relief. Because the superior court's ruling was affirmed, the cross-appeal was not addressed.

<sup>5</sup> The parties in DBI and DBII are effectively the same, and the complaint in DBII relies on essentially the same set of facts as in DBI.

that, although the town council had characterized the action as imposing a moratorium on building, DB Land Holdings' permit request was actually denied because the town was enforcing the existing prohibition on construction that was not in compliance with Fredonia's subdivision requirements. We further concluded that DB Land Holdings would have no right to build in violation of the regulations, even if the regulations had been enacted after it had purchased its property, and Fredonia was within its power to enforce its regulations.

¶17 After this court's memorandum decision in DBI, the superior court in DBII ordered that the parties brief the court on the possible precedential effects of DBI. In its brief, DB Land Holdings argued that the principles of claim and issue preclusion should have limited application in DBII. DB Land Holdings conceded that privity existed between the parties, however, and that DBI had determined that Shiprock Estates is a legal subdivision, DB Land Holdings' building permit was denied because the subdivision was not in compliance with the town's subdivision regulations, and substantial evidence supported the town's decision. DB Land Holdings also conceded that claim preclusion prevented re-litigation of the moratorium issue and the town's alleged failure to comply with A.R.S. § 9-463.06, and that they had made no claim to building permits based on a vested rights theory.

¶18 Fredonia argued that DBI should control and DBII should be dismissed because the principles of res judicata (claim preclusion) and collateral estoppel (issue preclusion) prevented further litigation of DBII. The town noted that with few exceptions, the allegations contained in the complaint in DBI were the same as the allegations in the complaint in DBII, and argued that DB Land Holdings was essentially re-alleging the same claims and merely adding damages based on, and stemming from, those same allegations. Fredonia maintained that "all of [DB Land Holdings'] damage counts stem from the Town's proper refusal to process and issue building permits in a substandard, incomplete subdivision." Arguing that the facts and legal theories underpinning the allegations in DBI were the same as in DBII, the town maintained that this court's decision in DBI resolved DBII with finality.

¶19 On October 12, 2010, the superior court ruled in favor of Fredonia. In pertinent part, the court reasoned as follows:

In DBI the legal issue was whether the Town of Fredonia was acting arbitrarily and capriciously in deciding not to issue any further building permits for the Shiprock Estates subdivision until the applicants were in compliance with the regulations adopted by the town in 1982. All of the causes of action in DBII are based on the same assumption that the Town has acted illegally and in violation of the Plaintiffs' right to a building permit. Both causes of action alleged that the Plaintiffs were damaged by the Defendant's actions. Although the description of the injury and the form in which it was characterized is different from DBI to DBII, it is for all practical purposes,

the same alleged injury. In DBI they are characterized as delay which resulted in [ ] "taking all of the economic value of Plaintiffs' property within Shiprock Estates with the intentional and consequential economic damages resulting therefrom." The injuries alleged in DBII are broken down into allegations of specific tort actions, as noted above. There are no new facts alleged in DBII which have been pled or which have arisen since the DBI ruling which would provide the Plaintiffs an independent legal basis to support the alleged tort actions in the amended complaint in DBII. In short, everything is the same in both actions, but the Plaintiffs have repackaged the lawsuit and chosen a different procedural mechanism to pursue the alleged injury. This is an important fact for the Court to consider. It was the Plaintiffs in DBI that chose to bring their case as a special action. They alleged that "There is no other equally plain, adequate or speedy method to appeal Defendants' refusal to perform an official duty." Obviously there were other means available to Plaintiffs because less than three months after the decision in DBI and while it was pending on appeal, the Plaintiffs filed a new complaint in DBII.

The Court concludes that DBII is barred by *res judicata*. The basic issue in both cases is the same: Did the Town of Fredonia violate the law or their duty when they denied the Plaintiffs a building permit in Shiprock Estates[?] *Minjares [v. State, 223 Ariz. 54, 219 P.3d 264 (App. 2009)]* can be distinguished from the present case because in that case the issue of the rate of interest had never been litigated. Here, Judge Newton [of the superior court] held a hearing [in DBI] and considered evidence before making his ruling. The evidence he considered included the issue of whether the Town of Fredonia had violated the law or their duty by denying Plaintiffs a building permit. The Plaintiffs have argued that DBII is not barred because they have raised new claims in DBII that were not heard in DBI and could not have been raised in a special action. The Court respectfully disagrees. The claims and the alleged injury are identical in both actions. Although the Plaintiffs in DBII set forth specific alleged torts in each of the claims in the Amended Complaint, the basic claim that Plaintiffs were denied the right to the issuance of a building

permit is the same claim that was decided on the merits by J. Newton. Judge Newton found no violation of Plaintiffs' rights, and ruled that the Town of Fredonia was within its rights and in compliance with the law when they chose to enforce their regulations.

It stands to reason that if the Town of Fredonia acted legally, then no cause of action could be maintained for a violation of Plaintiffs' rights, and no damages could be proven. Plaintiffs chose to raise their claims in DBI via a special action complaint. That procedural choice may have limited the extent of the relief or damages sought in that action, but it was their choice. All of the claims pled in DBII *could have been raised and determined* in DBI. [Minjares, supra]. Plaintiffs should not be rewarded with a "second bite of the apple" because they chose to file a special action complaint in DBI rather than the action they chose in DBII. Under either issue preclusion or claim preclusion, the binding opinion by Judge Newton in DBI, as affirmed by the Court of Appeals opinion, is *res judicata* as to all claims raised by the Plaintiffs in DBII.

**IT IS ORDERED granting Defendant's motion to dismiss.**

(Record citations omitted.)

¶20 DB Land Holdings filed a timely notice of appeal. We have jurisdiction pursuant to A.R.S. § 12-2101(A)(1) (West 2011).<sup>6</sup>

#### **ANALYSIS**

##### *I. The Merits*

¶21 DB Land Holdings argues that the superior court erred in dismissing its complaint and granting summary judgment in

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<sup>6</sup> The Arizona Legislature recently renumbered A.R.S. § 12-2101. See 2011 Ariz. Sess. Laws, ch. 304, § 1 (1st Reg. Sess.) (effective July 20, 2011).

favor of the town. They argue that the superior court over-extended the principles of res judicata and collateral estoppel to bar their litigation of damages claims following DBI. They further argue that the difference between DBI and DBII lies in their contention of specific injuries and damages resulting from the town's actions that they contend could not be alleged and litigated in DBI because DBI was a special action.

¶22 We review *de novo* the trial court's grant of summary judgment and the court's application of the law. *Andrews v. Blake*, 205 Ariz. 236, 240, ¶ 12, 69 P.3d 7, 11 (2003); *State Comp. Fund v. Yellow Cab Co.*, 197 Ariz. 120, 122, ¶ 5, 3 P.3d 1040, 1042 (App. 1999). In our review, we construe the facts and reasonable inferences in the light most favorable to the opposing party. *Wells Fargo Bank v. Ariz. Laborers, Teamsters & Cement Masons Local No. 395 Pension Trust Fund*, 201 Ariz. 474, 482, ¶ 13, 38 P.3d 12, 20 (2002); *Strojnik v. Gen. Ins. Co. of Am.*, 201 Ariz. 430, 433, ¶ 10, 36 P.3d 1200, 1203 (App. 2001). Summary judgment is proper if no genuine issues of material fact exist and the moving party is entitled to judgment as a matter of law. *Orme Sch. v. Reeves*, 166 Ariz. 301, 309, 802 P.2d 1000, 1008 (1990); Ariz. R. Civ. P. 56(c)(1). We will affirm summary judgment only if the facts produced in support of the claim have so little probative value, given the quantum of evidence required, that no reasonable person could find for its

proponent. *Orme Sch.*, 166 Ariz. at 309, 802 P.2d at 1008. The mere existence of a "scintilla" of evidence that creates the "slightest doubt" is insufficient to withstand a motion for summary judgment. *Id.*

¶123 "Whether *res judicata* applies in particular circumstances is a question of law that we review de novo." *Minjares*, 223 Ariz. at 58, ¶ 12, 219 P.3d at 268 (citations omitted). The doctrine of *res judicata* precludes a claim "when a former judgment on the merits was rendered by a court of competent jurisdiction and the matter now in issue between the same parties or their privities was, or might have been, determined in the former action." *Hall v. Lalli*, 194 Ariz. 54, 57, 977 P.2d 776, 779 (1999) (citations omitted). "Moreover, if two actions involving the same issues and parties are pending at the same time, when a judgment in one becomes final it may be raised in bar of the other, regardless of which action was b[e]gun first . . . ." *Day v. Wiswall's Estate*, 93 Ariz. 400, 402, 381 P.2d 217, 219 (1963) (citations omitted).

¶124 Under *res judicata*, "a final judgment, entered on the merits in a prior suit involving the same parties or their privies, bars a second suit on the same cause of action and is conclusive as to facts which actually were or could have been decided." *Hall v. Lalli*, 191 Ariz. 104, 106, 952 P.2d 748, 750 (App. 1997) (citation omitted). "Under collateral estoppel,



once an issue is actually and necessarily determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits." *Corbett v. ManorCare of Am., Inc.*, 213 Ariz. 618, 624, ¶ 16, 146 P.3d 1027, 1033 (App. 2006) (citation omitted).

¶25 In DBI, this court determined that the town's action, although characterized as a moratorium, was in effect a determination to enforce the existing prohibition on construction in a substandard, incomplete subdivision. Further, this court held that Fredonia is within its power to enforce its regulations. This court therefore held that Fredonia acted appropriately in denying DB Land Holdings' request for another building permit.

¶26 We agree with the superior court that DB Land Holdings alleged no new facts and circumstances in DBII that would provide them with an independent legal basis to support their claims for damages in DBII. The theories of damages in DBII are, for all practical purposes, premised on the same injury derived from the same contention alleged in DBI - that the town acted arbitrarily and capriciously in deciding not to issue additional building permits until it could ensure that further construction was in compliance with Fredonia's subdivision regulations.

¶127 Although DB Land Holdings intimates that the timing of the town's decision to enforce its subdivision regulations is suspect and questions the "excessive ransom" the town may seek in ensuring that the subdivision regulations are met, DB Land Holdings alleges no specific facts to support its damages claims. This court previously determined that the town could enforce its subdivision regulations and prohibit construction until there is compliance with those regulations. Simply questioning whether the town might have some improper, underlying motivation for enforcing the regulations it has the power and necessity to enforce is, absent more, insufficient to withstand summary judgment. See *Orme Sch.*, 166 Ariz. at 309, 802 P.2d at 1008. In this case, given our holding in DBI, DB Land Holdings has failed to allege, much less demonstrate, specific facts that would support their claims for damages. As alleged, DBI and DBII are effectively the same cause of action, albeit with the added claims of damages in DBII. Accordingly, the superior court did not err in applying the doctrine of res judicata to DBII.

*II. Costs and Attorneys' Fees*

¶128 Finally, both parties request costs and attorneys' fees on appeal pursuant to Rule 21, ARCAP. DB Land Holdings is not the prevailing party on appeal. Further, as we advised the parties in our previous memorandum decision in DBI, ARCAP 21 is

a procedural rule that does not provide a substantive basis for an award of attorneys' fees. See *Tilley v. Delci*, 220 Ariz. 233, 239, ¶ 19, 204 P.3d 1082, 1088 (App. 2009) (citation omitted). Consequently, we deny both parties' requests for attorneys' fees on appeal. We do, however, award Fredonia its costs on appeal upon compliance with ARCAP 21.

**CONCLUSION**

¶29 The superior court's ruling dismissing DB Land Holdings' complaint against the town is affirmed.

\_\_\_\_\_/S/\_\_\_\_\_  
LAWRENCE F. WINTHROP, Chief Judge

CONCURRING:

\_\_\_\_\_/S/\_\_\_\_\_  
MICHAEL J. BROWN, Presiding Judge

\_\_\_\_\_/S/\_\_\_\_\_  
PHILIP HALL, Judge