IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

BONITA BURKS, AN INDIVIDUAL,
Plaintiff/Appellant,

v.

CITY OF MARICOPA, AN ARIZONA MUNICIPAL CORPORATION;
CITY OF MARICOPA CITY COUNCIL, IN ITS OFFICIAL CAPACITY;
CHRISTIAN PRICE, IN HIS OFFICIAL CAPACITY AS
CITY OF MARICOPA MAYOR; MARVIN L. BROWN,
IN HIS OFFICIAL CAPACITY AS CITY OF MARICOPA
VICE MAYOR AND COUNCILMEMBER;
PEGGY CHAPADOS, IN HER OFFICIAL CAPACITY
AS CITY OF MARICOPA COUNCILMEMBER; JULIA R. GUSSE,
IN HER OFFICIAL CAPACITY AS CITY OF MARICOPA COUNCILMEMBER;
VINCENT MANFREDI, IN HIS OFFICIAL CAPACITY AS
CITY OF MARICOPA COUNCILMEMBER; NANCY SMITH,
IN HER OFFICIAL CAPACITY AS CITY OF MARICOPA COUNCILMEMBER;
HENRY WADE JR., IN HIS OFFICIAL CAPACITY AS CITY OF
MARICOPA COUNCILMEMBER;
CITY OF MARICOPA PLANNING AND ZONING COMMISSION;
KAZI HAQUE, IN HIS OFFICIAL CAPACITY AS CITY OF MARICOPA
PLANNING AND ZONING ADMINISTRATOR,
Defendants/Appellees,

and

PRIVATE MOTORSPORTS GROUP LLC,
AN ARIZONA LIMITED LIABILITY COMPANY,
Real Party in Interest/Appellee.

No. 2 CA-CV 2017-0177
Filed July 16, 2018

Appeal from the Superior Court in Pinal County
No. S1100CV201701360
The Honorable Robert C. Olson, Judge

AFFIRMED

COUNSEL

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By Kristin M. Mackin
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MEMORANDUM DECISION

Presiding Judge Vásquez authored the decision of the Court, in which Judge Eppich and Chief Judge Eckerstrom concurred.

V Á S Q U E Z, Presiding Judge:

¶1 Bonita Burks appeals the trial court's judgment in favor of the City of Maricopa and various officials (collectively the City) and Private Motorsports Group LLC (PMG) in her action to enjoin the permitting and construction of an automobile racing facility. Burks argues the court erred in dismissing this action for lack of standing. Alternatively, she contends the standing requirement should be waived. For the following reasons, we affirm.

Factual and Procedural Background

¶2 The material facts in this case are undisputed. In July 2017, Burks filed a complaint against the City and PMG seeking a declaratory judgment and injunctive relief to prevent the permitting and construction of an automobile racing facility at the northwest corner of Ralston Road and State Route 283 in Maricopa. The proposed facility would sit on 280 acres and include two automobile racetracks totaling 4.2 miles, a clubhouse, storage facilities, garage condominiums, and a go-kart racing track. Burks's

complaint challenged the City's and PMG's compliance with the appropriate regulations during the transition from Maricopa's old zoning code, established when the city was incorporated in 2003, to its new zoning code, established in 2014.

¶3 In her complaint, Burks maintained that the proposed property for the racing facility was designated as "CI-2 – Industrial Zone" under the old code and that a racetrack is only permitted on property zoned "GC – General Commercial," "GO – General Office," or "SC – Shopping Center" under the new code. She thus reasoned that PMG needed to have the property rezoned and then be granted a conditional-use permit to comply with the new code. Because PMG sought a conditional-use permit without first rezoning the property, Burks argued that PMG's request was "improper, unlawful, and violates the New Code."

¶4 In addition, Burks alleged that, shortly after the Maricopa City Council approved PMG's application for a conditional-use permit, a referendum application was filed with the City to allow its citizens to vote on that decision at the next general election. However, according to Burks, the City Council then passed Ordinance No. 17-07, which allows the City Council to call for a special election on referendums. She reasoned that Ordinance No. 17-07 "was employed as a mere pretext in order to expedite the vote on the Referendum" regarding PMG's conditional-use permit.

¶5 With her complaint, Burks filed a motion for a temporary restraining order and requested an evidentiary hearing on the matter. The City and PMG opposed the motion, arguing that "Burks lacks standing and is not entitled to injunctive relief." In a related motion to dismiss, the City and PMG asserted that Burks lacked standing because "[s]he lives more than five miles from the affected Property and did not sustain special damages or any particularized injury." The trial court scheduled oral argument, directing that "all issues shall be heard together," and ordered the parties to try to resolve "all evidentiary matters." After further briefing on whether to hold an evidentiary hearing, the court denied Burks's request. However, during the hearing, the court allowed the parties to present testimony and exhibits as part of a "limited [e]videntiary [h]earing." The parties also stipulated to consolidating "all pending requests in a hearing on the merits," pursuant to Rule 65(a)(2), Ariz. R. Civ. P.

¶6 The trial court subsequently issued an under-advisement ruling, concluding that Burks "lack[ed] standing to challenge the issuance of the use permit, since there is no evidence that [she] will suffer any injury

that is more substantial than suffered by the community at large." The court also declined to waive standing, noting that "courts are highly reluctant to grant such an exception." Although it went on to address the issue of the City's and PMG's compliance with the regulations, the court explained that its findings were "dicta and non-binding on the parties." It noted that it was addressing the merits of Burks's complaint because the City and PMG "request[] that all issues be heard," "time is of the essence," "judicial economy is served by considering this issue," and "an appellate court may ultimately exercise its discretion to waive standing." The court concluded that the City and PMG needed to comply with the new zoning code but had failed to do so. It further found that the language in the new code did not "nullify the statutory authority of the City Council to adopt [Ordinance No. 17-07]" because that was a "matter of legislative discretion." The court entered a judgment in favor of the City and PMG. This appeal followed. We have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1) and 12-2101(A)(1).

Standard of Review

¶7 The parties have differing views on our standard of review. Burks maintains we must apply the standard for a motion for summary judgment because the trial court relied on documents outside of the complaint in making the standing determination. *See Ctr. Bay Gardens, L.L.C. v. City of Tempe City Council*, 214 Ariz. 353, ¶ 14 (App. 2007). The City and PMG contend that, because the court made factual findings after conducting a "trial on the merits pursuant to the parties' stipulation," we must accept those findings unless clearly erroneous. *See In re $26,980 U.S. Currency*, 199 Ariz. 291, ¶ 9 (App. 2000). We agree with Burks. *See Blanchard v. Show Low Planning & Zoning Comm'n*, 196 Ariz. 114, ¶ 11 (App. 1999) ("Because the trial court in considering the motion to dismiss heard evidence extrinsic to the complaint, we treat this motion to dismiss as a motion for summary judgment.").

¶8 Although as part of the limited evidentiary hearing the trial court consolidated all pending motions, including the motion to dismiss on standing grounds, standing is a threshold question that must be resolved before the merits of a case can be addressed. *See Sears v. Hull*, 192 Ariz. 65, ¶ 9 (1998) (court need not address merits of claims where plaintiffs lack standing). Moreover, Burks requested an evidentiary hearing only on the merits of her underlying zoning claims, not on standing. In any event, the evidence that was presented at the hearing apparently was related to the merits. Accordingly, we apply the summary-judgment standard of review.

¶9 "In reviewing a motion for summary judgment, we determine de novo whether any genuine issues of material fact exist and whether the trial court properly applied the law." *Ctr. Bay Gardens, L.L.C.*, 214 Ariz. 353, ¶ 15; *see also* Ariz. R. Civ. P. 56(a). We view the facts and all reasonable inferences therefrom in the light most favorable to the party against whom the judgment was entered. *Bothell v. Two Point Acres, Inc.*, 192 Ariz. 313, ¶ 2 (App. 1998). When "there are [no] fact issues that require resolution, whether a party has standing to sue is a question of law, which we review de novo." *Ctr. Bay Gardens, L.L.C.*, 214 Ariz. 353, ¶ 15; *see also Aegis of Ariz., L.L.C. v. Town of Marana*, 206 Ariz. 557, ¶ 16 (App. 2003).

¶10 "To gain standing to bring an action, a plaintiff must allege a distinct and palpable injury." *Sears*, 192 Ariz. 65, ¶ 16. In other words, plaintiffs must "show a particularized injury to themselves." *Bennett v. Brownlow*, 211 Ariz. 193, ¶ 17 (2005). In zoning cases, standing is generally limited "to those individuals who have sustained special damage to their interest in real property." *Buckelew v. Town of Parker*, 188 Ariz. 446, 450 (App. 1996).

Discussion

¶11 As a preliminary matter, Burks urges this court to abrogate the standing requirement. "Arizona courts consistently have required as a matter of judicial restraint that a party possess standing to maintain an action." *Sears*, 192 Ariz. 65, ¶ 24; *see also Ariz. Ass'n of Providers for Persons with Disabilities v. State*, 223 Ariz. 6, ¶ 16 (App. 2009) (for reasons of judicial policy, Arizona courts impose rigorous standing requirement). Indeed, "[t]he requirement is important," in part, because "our state constitution does not contain a 'case or controversy' provision analogous to that of the federal constitution." *Sears*, 192 Ariz. 65, ¶ 24; *see also Bennett v. Napolitano*, 206 Ariz. 520, ¶¶ 17-19 (2003). The requirement thus "ensure[s] that we do not issue advisory opinions, that the case is not moot and that the issues will be fully developed." *City of Tucson v. Pima County*, 199 Ariz. 509, ¶ 11 (App. 2001). Consequently, we decline Burks's invitation to abrogate the standing requirement.

¶12 The thrust of Burks's argument on appeal is that the trial court erred in finding she lacked standing to bring this action. According to Burks, "no case in Arizona" requires "strict proof of an idiosyncratic injury threatened to the plaintiff and the plaintiff only" to establish "standing to challenge a city's complete disregard of its own zoning code." She also argues that adjacency to the subject property "has never been required." She therefore reasons that, "because strict idiosyncra[s]y of [a] threatened

injury and adjacency to a proposed use are not required for standing, Arizona cases implicitly recognize that there may be instances," like here, "where threatened pernicious effects of a proposed change in use may diminish in some relationship to proximity."

¶13 We find a comparison of *Buckelew* and *Blanchard* instructive. In *Buckelew*, this court considered whether the plaintiff had standing to compel the Town of Parker to abate a zoning violation on an RV park adjacent to his residence. 188 Ariz. at 448. We explained, "[T]o have standing, [the plaintiff] must plead damage from an injury peculiar to him or at least more substantial than that suffered by the general public." *Id.* at 452. We concluded the plaintiff's amended special-action complaint met this requirement because he alleged that his residence shared a common boundary with the RV park and that various conditions on the park interfered with the use and enjoyment of his property. *Id.* Specifically, he alleged "noise emanating from the park; littering and threats of violence by tenants; fire and health hazards, including raw sewage; increased criminal activity in the RV park; and destruction of his personal property by children living at the RV park." *Id.* We thus determined, "The damage is both peculiar to [the plaintiff] and more substantial than that sustained by the public, notwithstanding the fact that neighboring landowners may also suffer the same or similar damage." *Id.*

¶14 In *Blanchard*, the primary issue was whether various plaintiffs—including LeVeta Challis—had standing to challenge the City of Show Low's rezoning of a parcel of land to accommodate a Wal-Mart Supercenter. 196 Ariz. 114, ¶¶ 1, 7, 12. This court first rejected the city's argument that Challis lacked standing because she did not own property "directly adjacent to the rezoned parcel." *Id.* ¶ 17. We explained, "While proximity is a factor to be considered in determining standing, a neighborhood or other discrete area may be affected by zoning changes and not all landowners need to be directly adjacent to the subject property to be harmed by the proposed rezoning." *Id.* We repeated, "To have standing, a plaintiff 'must plead damage from an injury peculiar to him or at least more substantial than that suffered' by the community at large." *Id.* ¶ 20, *quoting Buckelew*, 188 Ariz. at 452. However, we added, "Allegations of general economic or aesthetic losses in an area, without instances of injury particular to the plaintiff, are generally not sufficient to create standing." *Id.* We ultimately concluded Challis lacked standing because she lived approximately 1,875 feet from the rezoned parcel, she did not appear at the hearings, and no evidence was presented about any particular harm to her property—other than the general allegations of harm contained in the

complaint and testimony from the plaintiffs' expert about general harm to the area. *Id.* ¶ 21.

¶15 Based on the clear directives in *Buckelew* and *Blanchard*, we agree with Burks that she was not required to show "strict idiosyncrasy" of a possible injury or "direct adjacency" to the proposed racing facility to establish standing. She was, however, required to plead damage from an injury peculiar to her or at least more substantial than that suffered by the general public. *See Blanchard*, 196 Ariz. 114, ¶ 20; *Buckelew*, 188 Ariz. at 450-52. We thus turn to that question.

¶16 In her complaint, Burks alleged that, "upon information and belief, construction of the proposed motorsports facility . . . will result in, among other things, significantly increased noise, odors, dust, gas, and smoke emanating from the Property, all of which uniquely and negatively affect [her] use and enjoyment of her Property." In addition, she maintained that construction of the facility will "result in significantly increased traffic resulting in longer drive times, increased fuel consumption, and . . . an increased safety risk" to her. She claimed that these injuries "are peculiar to her and/or at least more substantial than that suffered by the community at large."

¶17 However, noticeably absent from Burks's complaint is the distance from her property to the proposed racing facility. Instead, she alleged she lives "close to the property at issue." But as the City and PMG pointed out in their motion to dismiss, Burks lives more than five miles away. Burks does not dispute this fact. Although proximity is not dispositive, it is nonetheless relevant. *See Blanchard*, 196 Ariz. 114, ¶ 17. As discussed above, the plaintiff in *Buckelew* had standing when his property was adjacent to the RV park, 188 Ariz. at 452, but Challis lacked standing in *Blanchard* when her property was 1,875 feet from the proposed Wal-Mart, 196 Ariz. 114, ¶ 21.

¶18 Proximity is an important factor here because "the nature of the [proposed racing facility makes] the harms greater to [those] located close to the property." *Ctr. Bay Gardens, L.L.C.*, 214 Ariz. 353, ¶ 25. Burks seems to recognize this by arguing that "landowners further away from a proposed use may be affected in a way that could be characterized as 'less substantial' than those closer by" but still have standing. However, given a five-mile radius, Burks's alleged harms would likely apply to some degree to all those located within the corresponding seventy-eight-and-one-half-square-mile area from the proposed facility.

¶19 Burks's allegations thus appear to be in the nature of "general economic or aesthetic losses in [the] area." *Blanchard*, 196 Ariz. 114, ¶ 20. We agree with the trial court that Burks has not "provided any evidence of any particular injury to her, except [the] general allegations" in her complaint. Accordingly, we also agree with the court that Burks failed to establish an injury that is peculiar to her or at least more substantial than that suffered by the community at large. *Cf. Nautilus of Exeter, Inc. v. Town of Exeter*, 656 A.2d 407, 407-08 (N.H. 1995) (plaintiffs' properties located between .8 and six miles away too remote from proposed hospital to confer standing to challenge zoning board's approval of construction); *Laughman v. Zoning Hearing Bd. of Newberry Twp.*, 964 A.2d 19, 22-23 (Pa. Commw. Ct. 2009) ("[T]he owners of property one-half mile and one mile or more away from the challenged zoning area have been deemed to not be in close proximity in order to confer standing on those challenging a change to the zoning ordinance or map.").

¶20 In her reply brief, Burks nevertheless argues "it is nearly a straight line from the racetrack to [her] home, almost all on State Route 238" and she "will likely suffer more harm in the form of traffic and congestion than other Maricopa residents who are not directly in the traffic line of fire by virtue of their close proximity to the east west arterial that the racing facility would be on." But Burks did not make this argument below. It is therefore waived on appeal, and we do not address it further. *See Marquette Venture Partners II, L.P. v. Leonesio*, 227 Ariz. 179, ¶ 21 (App. 2011); *see also Dawson v. Withycombe*, 216 Ariz. 84, ¶ 91 (App. 2007) ("We will not consider arguments made for the first time in a reply brief.").

¶21 Lastly, as mentioned above, Burks did not present evidence of any particular harm to her, and nothing in the record indicates she sought to enlarge the scope of the limited evidentiary hearing after the trial court decided to admit evidence on the underlying zoning dispute.[1] *See*

[1]It appears that Burks did not attend the hearing. We also do not have a transcript of the hearing. Burks, as the appellant, had the obligation to timely provide this court with the transcripts and other documents necessary to consider the issues raised on appeal. *See* Ariz. R. Civ. App. P. 11(c)(1)(A); *see also Myrick v. Maloney*, 235 Ariz. 491, ¶ 11 (App. 2014). The City and PMG pointed this out in their answering briefs, but in reply Burks asserted that "each party decides whether to order a transcript or portion thereof," suggesting her decision not to include the transcript was intentional. Thus, although Burks attempted to file the transcript after

Blanchard, 196 Ariz. 114, ¶ 21. Accordingly, we conclude she lacks standing to bring this challenge. *See Ctr. Bay Gardens, L.L.C.*, 214 Ariz. 353, ¶ 15; *see also Aegis of Ariz., L.L.C.*, 206 Ariz. 557, ¶ 16.

¶22 Alternatively, Burks contends this court should waive the standing requirement. "[A]s a matter of discretion, we can waive the requirement of standing," but "we do so only in exceptional circumstances, generally in cases involving issues of great public importance that are likely to recur." *Sears*, 192 Ariz. 65, ¶ 25; *see also Home Builders Ass'n of Cent. Ariz. v. Kard*, 219 Ariz. 374, ¶ 28 (App. 2008). "The paucity of cases in which we have waived the standing requirement demonstrates both our reluctance to do so and the narrowness of this exception." *Sears*, 192 Ariz. 65, ¶ 25. For example, in *Sears*, our supreme court declined to address issues regarding a gaming compact that raised no issue of great public importance. *Id.* ¶ 29.

¶23 On appeal, Burks reasons that "[z]oning is based upon the police power of the state . . . and is a matter of statewide importance." She further contends that the question "presented here will inevitably recur." She recognizes "that courts should [not] sit as 'super zoning commissions' and second-guess zoning decisions," but she maintains "where an entire municipal system for arriving at those very decisions has been thwarted, standing should [be] . . . waived to preserve the opportunity for the courts to review and correct abuses by local governments."

¶24 We too recognize that zoning is an important issue with potentially widespread impact. *See Sandblom v. Corbin*, 125 Ariz. 178, 184 (App. 1980) (authority to enact zoning ordinances derives from police power and requires strict compliance because ordinances "act in derogation of common law property rights"). However, this specific zoning issue is restricted to Maricopa and stems from the transition between Maricopa's old zoning code and new zoning code. We therefore disagree with Burks that this case presents an issue of statewide importance that is likely to recur. *See Sears*, 192 Ariz. 65, ¶ 25 & n.11; *cf. Rios v. Symington*, 172 Ariz. 3, 5 & n.2 (1992) (not addressing "potential standing issues" in case involving "dispute at the highest levels of state government"). In addition, this case does not involve a constitutional question. *Cf. Goodyear Farms v. City of Avondale*, 148 Ariz. 216, 217 & n.1 (1986) (overlooking standing challenge and addressing merits of case that required court to consider whether

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the case was submitted to this court for decision, we ordered it stricken from the record on appeal.

Arizona statute on municipal annexation violated equal protection clauses of federal and state constitutions).

¶25 Moreover, when a governmental body "enacts a zoning ordinance or amendment thereto, it acts in a legislative capacity." *Sandblom*, 125 Ariz. at 184. Because the City was acting in its legislative capacity here, we are disinclined to waive standing. *See Napolitano*, 206 Ariz. 520, ¶ 33.

¶26 Burks nevertheless suggests we should waive standing in this case because the trial court "reached the merits . . . in [her] favor." But our focus is whether the case involves "issues of great public importance that are likely to recur." *Sears*, 192 Ariz. 65, ¶¶ 25-28; *see also Fernandez v. Takata Seat Belts, Inc.*, 210 Ariz. 138, ¶ 18 (2005) (considering whether case involves matter of statewide importance, constitutional questions, or issue of great public importance). "[W]hether or not [Burks] has a strong case on the merits" does not inform our decision. *Ctr. Bay Gardens, L.L.C.*, 214 Ariz. 353, ¶ 28. Accordingly, based on all these considerations, we conclude that Burks's action "does not raise issues sufficiently important to bring [it] within the narrow boundaries that justify a waiver of standing." *Sears*, 192 Ariz. 65, ¶ 31.

Disposition

¶27 For the foregoing reasons, we affirm the trial court's judgment in favor of the City and PMG. The City and PMG have requested and are entitled to their costs on appeal as the prevailing parties, *see* A.R.S. § 12-341, contingent upon their compliance with Rule 21(b), Ariz. R. Civ. App. P.