STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF LIVINGSTON

MATEM, LLC, a Michigan limited liability company, and LIVINGSTON COUNTY CATHOLIC CHARITIES, a Michigan nonprofit corporation,

Plaintiffs,

v

LOUIS PADNOS IRON AND METAL COMPANY, a Michigan corporation, PADNOS MANUFACTURING, INC., a Michigan corporation, and PADNOS HOWELL, INC., a Michigan corporation,

Defendants.
_____/

Case No. 21-31183-CZ
Hon. L. Suzanne Geddis

ORDER

At a session of the 44th Circuit Court,
held in the City of Howell, Livingston County,
on the 5th day of April, 2022.

THIS MATTER HAVING COME BEFORE THE COURT on Defendants' Motion for Summary Disposition Pursuant to MCR 2.116(C)(5) and MCR 2.116(C)(8), the Court having reviewed Defendants' Motion and Brief, as well as Plaintiffs' Response, having heard oral arguments and being otherwise fully advised in the premises, finds as follows:

I. BACKGROUND:

This dispute involves 56 acres of land, located at 645 Lucy Road in Howell, owned by Padnos Manufacturing and Padnos Howell (Padnos)[1]. A salvage yard is currently operated on the property. The Padnos property abuts land with different zoning designations, including general commercial, light industrial, and residential. Padnos desires to construct and operate a metal

[1] Padnos Iron & Metal Company is the parent corporation of Padnos Manufacturing and Padnos of Howell.

shredding operation on the property. The Padnos parcel is zoned I-2 (general industrial), which does not permit a metal processing facility. It can only be allowed as a special land use.

Matem, LLC (Matem) owns an office building on a nearby parcel of land, located at 2020 E. Grand River in Howell, which it leases to Livingston County Catholic Charities (LCCC). LCCC operates various charitable and outreach programs from the property.

The City of Howell's Planning Commission (City) voted 5-2 to approve Padnos' request for a Special Land Use Permit (SLUP), but conditioned it on Padnos obtaining 3 variances from the City's Board of Zoning Appeals (BZA), regarding enclosing the shredder and paving the site[2].

The BZA held public hearings and unanimously denied Padnos' applications. Padnos then filed an appeal to this Court, and Matem and LCCC intervened. Thereafter, Padnos and the City moved to dismiss the Appeal as they had reached a Settlement, which provided Padnos would not to seek a variance, but instead would comply with the City's Zoning Ordinance. Matem and LCCC objected to the Settlement, arguing the provisions of the Site Plan attached to the Settlement Agreement, did *not* comply with the Ordinance. This Court granted Padnos' motion, and the Appeal was dismissed.

On June 17, 2021, Matem and LCCC filed a one count Complaint alleging Public Nuisance. In response, Padnos filed the instant Motion for Summary Disposition under MCR 2.116 (C)(5), asserting Matem and LCCC lack standing due to their failure to allege and prove 'special damages' necessary in a nuisance per se claim, and that any damages alleged are speculative. Padnos also seeks summary disposition under MCR 2.116 (C)(8), asserting Matem and LCCC's Complaint fails to state a claim since the City has already determined there is no violation of the Zoning Ordiance, Matem and LCCC have no right to question a Settlement reached in 'good faith', and there is no nuisance per se to abate since the Padnos shredding facility has not yet been constructed.

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[2] The 3 variances included the following:

(1) that the shredder be allowed to operate outdoors and not be fully enclosed by a building [as required by Ordinance Section 4.06(1)(3)(A)].
(2) that the truck and other driving areas of the property not be paved with a hard surface [as required by Ordinance Section 5.13(F)], and,
(3) that scrap materials and other storage piles not be located on paved, hard surfaces [as required by Ordinance Section 5.13(F)].

A. MCR 2.116(C)(5) and Standing

A violation of a zoning ordinance constitutes a public nuisance that, by itself, "gives no right of action to an individual and must be abated by the appropriate public officer." *Towne v. Harr*, 185 Mich App 230, 231-232; 460 NW2d 596 (1990). However, a private individual who can "show damages of a special character distinct and different from the injury suffered by the public generally" may bring an action to abate a public nuisance arising from the violation of a zoning ordinance. *Id. See also Cloverleaf Car Co. v Phillips Petroleum Co.,* 213 Mich App 186; 540 NW2d 297 (1995). The law is clear that Matem and LCCC must allege and ultimately prove special damages.

Padnos asserts Matem and LCCC cannot demonstrate that any harm they may suffer would be different from the types of harm experienced by the rest of the community. Padnos contends the types of harm Matem and LCCC complain about, increased traffic, pollution, noise, dust, odors, vibrations, fire and toxic run-off from the operation, are precisely the same types of harm that might be suffered by the community in general.

Matem and LCCC note that in Padnos' Site Plan, the shredding equipment is not enclosed and the enclosure/building is open at the top and without a roof. They assert the facilty, as proposed, would uniquely harm both Matem and LCCC due the nature of their property and the specific services provided there, in that:

- LCCC provides onsite services for people with special needs, Alzheimer's and dementia. They also offer mental health, substance abuse, foster care and adoption services, which rely on in-person, group and family counseling sessions.
- LCCC operates one of the only adult daycare facilities in Livingston County.
- Many of LCCC's services take place outside and would be compromised by the shredding operation, materially diminishing the quality of the services LCCC can provide.
- LCCC will be forced to stop renting the space from Matem and will lose patients.
- Matem will find it difficult/impossible to acquire new tenants in its office building, depriving Matem of the value and use of its property.

Essentially, Matem and LCCC's assert that if Padnos were to operate the facility without enclosing the shredding equipment and without a roof on the enclosure, there is a great likelihood Matem's property will be rendered unusable as office space. Likewise, LCCC will lose patients, the facility it operated from for 2 decades and the ability to service vulnerable

members of the community. These damages are special and unique to Matem and LCCC and are not shared by the community at large. This Court rejects Padnos' argument that Matem and LCCC will suffer the same harm as their neighbors, and finds Matem and LCC have standing to assert a claim to equitable relief from a zoning violation.

Accordingly, because this the Court finds these Plaintiffs' can establish special damages and have standing, Defendants' Motion for Summary Disposition under MCR 2.116(C)(5), is DENIED.

B. The Settlement Agreement and Site Plan

Padnos asserts the Settlement Agreement, dated January 25, 2021, between the City and Padnos was reached in 'good faith', and therefore, Matem and LCCC have no right to question or attack it. The Settlement Agreement was signed on behalf of the City by Howell Mayor Nick Proctor, and City Clerk Jane Cartwright, as well as a representative of Padnos. Neither Matem, nor LCCC, were parties to the Agreement.

The Settlement Agreement, at paragraph 2, expressly states "if Padnos constructs a shredder enclosure substantially consistent with the renderings attached… and the architectural drawings", then Padnos "has complied with the Second Condition [of the SLUP] and with Section 4.06(l)(3)(A). That paragraph also provides that "if Padnos paves the site as shown on the site plan attached, than "Padnos has complied with the Second Condition and with Section 5.13(F) and Section 10.06(b) of the City's Zoning Ordinance".

Matem and LCCC note the Settlement Agreement expressly requires Padnos to comply with the applicable sections of the Zoning Ordinance. They contend the Site Plan attached to the Settlement Agreement *does not* comply in material respects and would not prevent the harm sought to be mitigated by the Zoning Ordinance requirements. Matem and LCCC take issue with the Site Plan in that (1) the metal shredder is not fully enclosed and the shredding equipment is not enclosed at all, and, (2) the enclosure itself does not constitute a building as required by the Ordinance as it has no roof[3].

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[3]Matem and LCCC seem to acknowledge that were Padnos to *actually* comply with the Zoning Ordinance by constructing a fully enclosed building with a roof and paving the property as the Ordinance directs, they could not be heard to complain about its construction.

Padnos argues the City's authority to settle the case is akin to its ability to grant a use variance in that a zoning board has the authority to allow a use in a zoning district that would not otherwise be allowed. While the City could have granted a variance to Padnos, it chose not to do so. Instead, the parties entered into a settlement which requires Padnos to comply with the Ordinance. The problem here is that the plans submitted by Padnos do not appear to do so[4].

While it is true that a court must give deference to a municipality's interpretation of its own ordinance, see *Macenas v Vill of Michians*, 433 Mich 380, 398; 446 NW2d 102 (1989), that does not mean courts must turn a blind eye to a site plan that, on its face, fails to comply with a city's ordinance. *See Pave v Grosse Pointe*, 279 Mich 254; 271 NW (1937); *Davis v River Rouge Bd of Educ*, 406 Mich 486, 490; 280 NW2d 453 (1979). The Zoning Ordinance calls for a structure to be fully enclosed. Here, the Site Plan and attached drawings show only a partial enclosure that does not contain all of the shredding equipment. Moreover, the proposed enclosure does not qualify as a building as while it has walls, it does not have a roof. It strains logic to contend that wire mesh on top of an enclosure meets the requirement of "fully enclosed", and agreeing otherwise does not make it so.

C. Nuisance Per Se

In this case, the Padnos metal shredding operation has not been constructed. Padnos asserts the operation may or may not come to fruition. Matem and LCCC assert it is not necessary for them to wait until the shredding facility is constructed to bring a nuisance per se claim since the Site Plan, as approved by the City, violates the Zoning Ordinance. They further note that if they wait until the facility is partially or fully constructed, Padnos will assert Plaintiffs sat on their rights and are guilty of laches.

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[4]Ordinance Section 2.02, defines a building as a structure...used for the shelter or accommodation of...equipment...[as] **having a roof** supported by columns or walls...

Ordinance Section 4.06(L)(3)(A), which addresses Special Land Use and salvage yards, calls for, "**a completely enclosed building**" for "all industrial processes involving the use or equipment for cutting, compressing or packaging...".

Plaintiffs' Complaint contains one count for public nuisance. Public nuisance is defined in *Cloverleaf Car Co. v Phillips Petroleum Co.*, 213 Mich App 186, 190; 540 NW2d 297 (1995), as:

> "[A]n unreasonable interference with a common right enjoyed by the general public." The term "unreasonable interference" includes conduct that (1) significantly interferes with the public's health, safety, peace, comfort, or convenience, (2) is proscribed by law, or (3) is known or should have been known by the actor to be of a continuing nature that produces a permanent or long-lasting, significant effect on these rights. 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.

MCL 125.3407, governs the abatement of nuisances, nuisance per se, and administration and enforcement of zoning ordinance, and provides in it part:

> Except as otherwise provided by law, a use of land or a dwelling, building, or structure, including a tent or recreational vehicle, used, erected, altered, razed, or converted in violation of a zoning ordinance or regulation adopted under this act is a nuisance per se.

MCL 125.3407 does not address or govern situations where a violation of an ordinance is anticipated. Instead, it addresses the "use of land"…"used, erected, altered, razed or converted"…"in violation of a zoning ordinance". While the Court is clearly authorized to abate a nuisance per se, the Court cannot abate that which does not exist. Plaintiffs cannot, at this point in time, establish the Zoning Ordinance has been violated. Accordingly, this Court dismisses Plaintiffs' Complaint without prejudice so as to allow Plaintiffs to return to this Court should Padnos commence construction on the project, or operate the facility, in a manner that is not in compliance with the applicable Zoning Ordinance.

Accordingly, Defendants' Motion for Summary Disposition under MCR 2.116(C)(8), as to failure to state a claim, is GRANTED, and Plaintiffs' Complaint is dismissed without prejudice. This is a final order and closes the case.

IT IS SO ORDERED.

L S Geddis

Hon. L. Suzanne Geddis, (P35307)
Circuit Court Judge