

STATE OF MICHIGAN
COURT OF APPEALS

PAMELA B. JOHNSON TRUST, by ELDON E.
JOHNSON, Trustee,

UNPUBLISHED
August 19, 2014

Plaintiff-Appellant,

v

JAMES ANDERSON, PATRICIA ANDERSON,
APJ PROPERTIES, L.L.C., and CITY OF
CHARLEVOIX,

Nos. 315397, 316024
Charlevoix Circuit Court
LC No. 11-084523-CH

Defendants-Appellees.

Before: STEPHENS, P.J., and HOEKSTRA and METER, JJ.

PER CURIAM.

These consolidated appeals involving a zoning dispute arise from the same lower court proceedings. In Docket No. 315397, plaintiff, Pamela B. Johnson Trust, by Eldon E. Johnson, Trustee, appeals as of right two orders granting summary disposition, the first granting summary disposition to defendant, city of Charlevoix (“the City”), and the second granting summary disposition to defendants, James Anderson, Patricia Anderson, and APJ Properties, L.L.C. (“the Anderson defendants”). In Docket No. 316024, plaintiff appeals as of right two orders granting attorney fees and costs, the first granting attorney fees and costs in favor of the City, and the second granting attorney fees and costs in favor of the Anderson defendants. For the reasons explained in this opinion, we affirm.

I. FACTS AND PROCEDURAL HISTORY

In 2007 the Charlevoix Zoning Administrator issued a zoning permit, permit 2850, to the Anderson defendants, authorizing construction of a single-family residence and an attached boathouse. Neighbors opposed to the Anderson defendants’ project initiated an administrative appeal, which was dismissed as untimely, and also filed suit in Charlevoix Circuit Court, seeking declaratory and injunctive relief on the ground that the Anderson defendants’ project would violate provisions of the City’s zoning ordinance (“the Ordinance”). The trial court issued an order for superintending control and remanded the matter to the Charlevoix Zoning Board of Appeals (“the ZBA”) to review the issuance of permit 2850, resulting in the ZBA’s revocation of permit 2850 because certain features of the boathouse violated the Ordinance. An appeal to this

Court followed, and, emphasizing that the time for appeal to the ZBA had passed, this Court reversed the trial court's order remanding the matter to the ZBA. This Court remanded the case to the trial court, indicating that the ZBA's decision to revoke the Anderson defendants' permit must be vacated. *Camp v Charlevoix*, unpublished opinion per curiam of the Court of Appeals, issued October 26, 2010 (Docket No. 291473), unpub op at 3-4.¹

After the ZBA's revocation of permit 2850, but before issuance of this Court's opinion requiring that the revocation be vacated, the Anderson defendants modified their construction plans to comply with the ZBA's decision and they obtained another zoning permit for the same construction project, known as permit 3071. In continued opposition to the project, plaintiff filed an appeal to the ZBA regarding permit 3071, alleging numerous Ordinance violations. After conducting public hearings, on May 19, 2010, the ZBA ultimately upheld the issuance of permit 3071. Thereafter, on June 21, 2010, the City adopted amendments to the Ordinance, including changes to the requirements for boathouses. The amended Ordinance became effective on July 21, 2010.

On June 3, 2010, plaintiff filed an appeal to the trial court from the ZBA's decision regarding permit 3071. The appeal proved unsuccessful and, on November 11, 2010, the trial court entered an order affirming the ZBA's decision. During the course of that appeal, plaintiff did not argue that the 2010 amendments to the Ordinance should apply to the Anderson defendants' project.

In December of 2010, the Anderson defendants applied for, and received, a building permit to begin construction of the boathouse under zoning permit 3071. Construction on the Anderson defendants' project began in early January 2011, and they finished the first phase of construction in May 2011. At the same time, plaintiff's legal challenges to the project continued.

When the construction began in January 2011, plaintiff filed an ex parte motion to stay enforcement of permit 3071, which the trial court denied. Plaintiff then filed a new lawsuit claiming that the Anderson defendants' project overburdened an easement. In that action, plaintiff filed another ex parte motion for a temporary restraining order and a preliminary injunction, which the trial court denied.² Yet another ex parte motion for a temporary restraining order was denied in March of 2011. In May of 2011, plaintiff twice sought enforcement action

¹ On remand following this Court's decision, the trial court held that permit 2850 was null and void in light of the subsequent issuance of another zoning permit for the same project (known as permit 3071, which is discussed *infra*). We have since reversed the trial court's determination and again remanded for reinstatement of permit 2850. *Camp v Charlevoix*, unpublished opinion per curiam of the Court of Appeals, issued June 12, 2014 (Docket No. 306066).

² Ultimately, on remand following an appeal to this Court, the trial court found no cause of action against the Anderson defendants and dismissed plaintiff's suit, a decision which this Court affirmed. See *Pamela B Johnson Trust v Anderson*, unpublished opinion per curiam of the Court of Appeals, issued June 4, 2013 (Docket No. 309913); *Pamela B Johnson Trust v Anderson*, unpublished order of the Court of Appeals, issued February 11, 2014 (Docket No. 309913).

from the Zoning Administrator, claiming that the Anderson defendants' project violated provisions of the Ordinance. However, during these proceedings, plaintiff did not raise any argument regarding the applicability of the 2010 Ordinance amendments to the Anderson defendants' project.

Plaintiff first asserted the applicability of the 2010 amendments in a letter to the City's attorney dated June 27, 2011. On July 8, 2011, plaintiff sent a letter to the Zoning Administrator, arguing that the City should revoke permit 3071 because it did not comply with the 2010 amendments to the Ordinance. By this point in time, the Anderson defendants had, by their estimate, invested at least \$1.8 million in the construction project. The Zoning Administrator declined to take enforcement action, reasoning that plaintiff could have raised its arguments at a prior ZBA hearing. The ZBA upheld this decision, and the trial court affirmed the ZBA's determination.³ Following a stay mandated by plaintiff's ZBA appeal, the Anderson defendants resumed on-site construction in September 2011.

On December 2, 2011, plaintiff filed the present lawsuit asserting several claims against the Anderson defendants, including a nuisance claim and five counts relating to the Anderson defendants' alleged violation of the Ordinance, most of which were premised on the argument that the 2010 amendments to the Ordinance should apply to the Anderson defendants' project. On March 26, 2012, plaintiff amended the complaint to assert claims against the City as well, specifically, a takings claim and allegations of a denial of procedural and substantive due process. Plaintiff requested declaratory and injunctive relief and damages.

The Anderson defendants filed an answer denying liability and asserting numerous affirmative defenses, including laches, collateral estoppel, failure to join claims, equitable estoppel, and failure to state a claim. Likewise, the City filed an answer denying liability and asserting various affirmative defenses, including laches, governmental immunity, lack of a sufficient property interest to justify due process protection, and failure to state claims. Following the close of discovery, the Anderson defendants moved for summary disposition pursuant to MCR 2.116(C)(8) and (C)(10), and the City filed a separate motion for summary disposition under MCR 2.116(C)(7), (C)(8), and (C)(10).

After conducting a hearing, the trial court granted both summary disposition motions. With respect to the Anderson defendants' motion, relying on MCR 2.116(C)(10), the trial court concluded that all of plaintiff's claims were barred by the doctrine of laches, and that, in addition, collateral estoppel applied to bar relitigation of the Anderson defendants' compliance with setback/side yard requirements as well as prohibitions against residential use of the boathouse as described in the Ordinance. The trial court also granted summary disposition

³ This Court has denied leave to appeal the lower tribunal decisions upholding the Zoning Administrator's denials of plaintiff's requests for enforcement actions. See *Johnson v Charlevoix Zoning Bd of Appeals*, unpublished order of the Court of Appeals, entered February 15, 2013 (Docket No. 308618); *Johnson v Charlevoix Zoning Bd of Appeals*, unpublished order of the Court of Appeals, entered February 15, 2013 (Docket No. 309936).

regarding plaintiff's private nuisance claim under MCR 2.116(C)(8), concluding plaintiff had failed to state a claim on which relief could be granted.

Regarding the City's motion, the trial court determined that plaintiff had not shown a constitutionally protected property interest as required to establish a substantive or procedural due process violation, nor was the government conduct so arbitrary and capricious as to shock the conscience as required to support a substantive due process claim. The trial also concluded that the City's alleged acts or omissions could not be the proximate cause of plaintiff's damages because actual ownership and control of the property remained with the Anderson defendants, meaning that plaintiff had failed to state a claim in avoidance of governmental immunity. Finally, regarding plaintiff's takings claim, the trial court applied the balancing test set forth in *Penn Central Transp Co v New York*, 438 US 104, 124; 98 S Ct 2646; 57 L Ed 2d 631 (1978), concluding that plaintiff's claim must fail because plaintiff could not show interference with reasonable investment-backed expectations. On March 11, 2013, the trial court entered separate orders granting summary disposition to the Anderson defendants and to the City. Plaintiff then filed a claim of appeal from those orders (Docket No. 315397).

Meanwhile, the City and the Anderson defendants each moved for case evaluation sanctions, both seeking recovery of costs and attorney fees. The City's motion explained that the case evaluation panel had recommended a \$25,000 award against the City, which the City accepted but plaintiff rejected. Likewise, the Anderson defendants' motion explained that the case evaluation panel had recommended a \$75,000 award against the Anderson defendants, which the Anderson defendants accepted but plaintiff rejected. In response to both motions, plaintiff argued that the trial court should decline to award costs, pursuant to the "interest of justice" exception in MCR 2.403(O)(11).

Following a hearing, the trial court rejected plaintiff's contentions and entered separate orders awarding costs and attorney fees of \$26,491.16 to the City and \$49,511.66 to the Anderson defendants. Plaintiff then filed a claim of appeal from those orders (Docket No. 316024). Thereafter, this Court consolidated plaintiff's appeals.

II. STANDARD OF REVIEW

We review de novo a trial court's decision on a motion for summary disposition. *Hackel v Macomb Co Comm*, 298 Mich App 311, 315; 826 NW2d 753 (2012). The present case implicates MCR 2.116(C)(7), (C)(8), and (C)(10). Under MCR 2.116(C)(7), we consider affidavits, pleadings, and other documentary evidence, construing them in the light most favorable to the nonmoving party, to determine whether the moving party is entitled to judgment as a matter of law. *Alcona Co v Wolverine Environmental Prod, Inc*, 233 Mich App 238, 246; 590 NW2d 586 (1998). In comparison, a motion under MCR 2.116(C)(8), tests the legal sufficiency of a claim. *Capitol Props Group, LLC v 1247 Ctr Street, LLC*, 283 Mich App 422, 425; 770 NW2d 105 (2009). Considering only the pleadings, and accepting all factual allegations as true, a motion under MCR 2.116(C)(8) should be granted "only when the claim is so clearly unenforceable as a matter of law that no factual development could possibly justify recovery." *Id.*

“In reviewing a motion under MCR 2.116(C)(10), this Court considers the pleadings, admissions, affidavits, and other relevant documentary evidence of record in the light most favorable to the nonmoving party to determine whether any genuine issue of material fact exists to warrant a trial.” *Walsh v Taylor*, 263 Mich App 618, 621; 689 NW2d 506 (2004). “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). Where no genuine issue regarding any material fact exists, summary disposition is appropriate 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).

III. LACHES

On appeal, plaintiff first argues that the trial court erred in granting summary disposition based on a finding that plaintiff’s claims relating to the 2010 amendment of the Ordinance were barred by the doctrine of laches.⁴ A trial court’s application of equitable doctrines, such as laches, is reviewed de novo. *Yankee Springs Twp v Fox*, 264 Mich App 604, 611; 692 NW2d 728 (2004) (citation omitted). Pursuant to this doctrine, because equity requires a plaintiff to exercise reasonable diligence in vindicating his or her rights, when a plaintiff fails to do so, a court may withhold relief on the ground that the plaintiff is chargeable with laches. *Knight v Northpointe Bank*, 300 Mich App 109, 114; 832 NW2d 439 (2013). Laches may bar recovery both at law and in equity. *Eberhard v Harper-Grace Hosps*, 179 Mich App 24, 37; 445 NW2d 469 (1989), citing *Kaminski v Wayne Co Bd of Auditors*, 287 Mich 62, 67; 282 NW 902 (1938). For laches to apply, there must be a passage of time involving an “unreasonable delay that results in circumstances that would render inequitable any grant of relief to the dilatory plaintiff.” *Yankee Springs Twp*, 264 Mich App at 612. Thus, in addition to the passage of time, a defendant asserting laches must demonstrate a lack of due diligence by the plaintiff and that the plaintiff’s delay resulted in prejudice to the defendant. *Id.* “It is the prejudice occasioned by the delay that justifies the application of laches.” *Knight*, 300 Mich App at 115. However, because an individual seeking equitable relief must do so with clean hands, a party with unclean hands may not assert the equitable defense of laches. *Attorney General v PowerPick Player’s Club of Mich, LLC*, 287 Mich App 13, 52; 783 NW2d 515 (2010).

In this case, the trial court properly found that the requirements for invoking laches were satisfied. There was a significant passage of time between the adoption of the 2010 amendments and plaintiff’s attempt to assert the applicability of the 2010 Ordinance. In particular, the

⁴ In relation to its arguments regarding the applicability of the doctrine of laches, plaintiff has also offered the cursory assertion that the Anderson defendants have also violated the 2009 version of the Ordinance in certain respects. Plaintiff has failed, however, to explain why the Anderson defendants’ alleged violation of the 2009 version of the Ordinance would render inapplicable the doctrine of laches. Because the issue is insufficiently briefed, we deem it abandoned and need not consider it. See *State Treasurer v Sprague*, 284 Mich App 235, 243; 772 NW2d 452 (2009). In any event, the majority of plaintiff’s claims which do implicate the 2009 Ordinance were barred by collateral estoppel as discussed *infra*.

Ordinance amendments were adopted on June 21, 2010 and became effective on July 21, 2010. Plaintiff first raised the argument that the Ordinance amendments applied to permit 3071 approximately one year later, in a June 27, 2011, letter to the City's attorney. Plaintiff then filed the current lawsuit nearly another six months later, on December 2, 2011. In total, plaintiff waited close to a year and half before initiating the present legal action.

During this passage of time, plaintiff failed to exercise due diligence in asserting its complaints under the 2010 Ordinance. That is, plaintiff possessed the requisite knowledge of the law and facts to enable it to bring suit long before it did so. Specifically, the amendments at issue became effective in July of 2010 at a meeting attended by plaintiff's counsel, and plaintiff, as an entity dealing with the municipality, is charged with knowledge of the Ordinance provisions. See *Hughes v Almena Twp*, 284 Mich App 50, 78; 771 NW2d 453 (2009). Plaintiff also had knowledge of the Anderson defendants' construction plans and the alleged violations of which it now complains. As early as 2007, when the first zoning permit, permit 2850, was issued, plaintiff complained about aspects of the project that are the focus of the present action, demonstrating plaintiff's knowledge of the building plans.⁵ Further, plaintiff owns property adjacent to the Anderson defendants' construction site and, as a result, was clearly aware of the construction that began in January of 2011 as evidenced by the multiple legal and administrative actions undertaken to stop construction. Knowing of the 2010 amendments and the Anderson defendants' construction plans, plaintiff then had ample opportunity over the course of many months, and in the context of numerous administrative and legal challenges, to raise the applicability of the 2010 amendments. Yet, plaintiff nevertheless failed to assert the applicability of the amendments to the project, waiting to raise the matter until June of 2011, after the Anderson defendants had completed the first phase of construction. On these undisputed facts, plaintiff failed to exercise due diligence in raising its current claims.⁶

In addition, plaintiff's delay in asserting the applicability of the 2010 Ordinance plainly prejudiced the Anderson defendants who undertook the first stage of construction between January of 2011 and May of 2011, expending, as a conservative estimate, approximately \$1.8 million dollars in the process. Even if plaintiff is correct that, of that \$1.8 million, "only" \$150,000 has thus far been expended on the construction of the boathouse, an expenditure of that magnitude would still constitute a showing of prejudice suffered by the Anderson defendants as a result of plaintiff's delay. In sum, the undisputed facts show that there has been a significant

⁵ For example, on May 15, 2007, and June 26, 2007, plaintiff wrote documents complaining about the size of the planned boathouse, even stating specific dimensions. In addition, plaintiff filed a lawsuit in 2007 alleging that the upper boathouse level was "all living area." By the admission of plaintiff's own counsel, the plans approved in permit 3071 were "99% the same" as the plans approved in permit 2850.

⁶ To the extent plaintiff suggests that it was not required to raise the applicability of the 2010 Ordinance because, according to plaintiff, permit 3071 expired on November 18, 2010, the provision of the ZBA by-law on which it relies applies only to variance decisions of the ZBA. Permit 3071 is not a variance decision of the ZBA. Thus, any argument based on the purported expiration of permit 3071 is without merit.

passage of time during which plaintiff failed to exercise due diligence and, as a result of which, the Anderson defendants suffered prejudice. Laches thus applies to bar plaintiff's claims, both legal and equitable, against the Anderson defendants, and, no material question of fact remaining, the trial court did not err in granting the Anderson defendants' motion for summary disposition on this basis.

In challenging this conclusion, plaintiff asserts on appeal that the Anderson defendants may not invoke the doctrine of laches because they have "unclean hands." See *PowerPick Player's Club of Mich, LLC*, 287 Mich App at 52. In particular, plaintiff alleges that the Anderson defendants could have begun construction of the boathouse before the effective date of the 2010 amendments of the Ordinance, and that the Anderson defendants were aware before beginning construction that the 2010 amendments had been adopted. Contrary to plaintiff's arguments, the Anderson defendants did not have 11 months to begin construction between the issuance of permit 3071 and the effective date of the 2010 amendments because a statutory automatic stay was in effect for most of that period due to plaintiff's ZBA appeal.⁷ See MCL 125.3604(3). Further, although the Anderson defendants are charged with knowledge of the 2010 amendments, see *Hughes*, 284 Mich App at 78, it does not follow that they were aware of the amendments' applicability to permit 3071, which was issued in 2009, long before the effective date of the 2010 amendments. See *Dingeman Advertising, Inc v Algoma Twp*, 393 Mich 89, 98; 223 NW2d 689 (1974) ("[T]he average holder of such a permit, even if he had notice of the change of ordinance, would not necessarily presume that the new ordinance applied to him."). Indeed, in this case, the Anderson defendants presented evidence that a City official orally advised them that permit 3071 would be governed by the Ordinance in effect at the time that the permit was issued and plaintiff has presented no evidence to contradict this assertion. Having obtained all the necessary building permits and oral assurances from a City official that the old Ordinance applied, the Anderson defendants reasonably proceeded on the well-founded belief that their project was governed by a prior version of the Ordinance. This conduct does not demonstrate that the Anderson defendants have "unclean hands" and they were not precluded from asserting the doctrine of laches.

IV. COLLATERAL ESTOPPEL

Plaintiff also argues on appeal that the trial court erred in concluding that collateral estoppel barred plaintiff's claims regarding the residential use of the boathouse and the alleged side yard and setback violations. Although the trial court relied on MCR 2.116(C)(10) in respect

⁷ Although plaintiff has asserted that an automatic stay was not in effect due to an order of the trial court, the record shows that the order in question was entered *before* plaintiff's appeal to the ZBA relating to permit 3071. Indeed, as plaintiff's counsel conceded at oral argument, the order was entered in response to a motion filed by plaintiff even before the issuance of permit 3071. Obviously, on these facts, the trial court's order did not involve consideration of plaintiff's appeal to the ZBA on September 24, 2009, and it was this appeal which triggered the automatic stay provided for in MCL 125.3604(3). Thus, contrary to plaintiff's arguments, a stay was clearly in effect during the relevant time period.

to this issue, summary disposition on the basis of collateral estoppel is properly granted under MCR 2.116(C)(7).⁸ *Minicuci v Scientific Data Mgt, Inc*, 243 Mich App 28, 42; 620 NW2d 657 (2000). The application of the doctrine of collateral estoppel is a question of law that is reviewed de novo. *Estes v Titus*, 481 Mich 573, 578-579; 751 NW2d 493 (2008).

“Collateral estoppel, or issue preclusion, precludes relitigation of an issue in a subsequent, different cause of action between the same parties or their privies when the prior proceeding culminated in a valid final judgment and the issue was actually and necessarily determined in the prior proceeding.” *Ditmore v Michalik*, 244 Mich App 569, 577; 625 NW2d 462 (2001). For the doctrine to apply, “(1) a question of fact essential to the judgment must have been actually litigated and determined by a valid and final judgment; (2) the same parties must have had a full and fair opportunity to litigate the issue; and (3) there must be mutuality of estoppel.” *Monat v State Farm Ins Co*, 469 Mich 679, 682-684; 677 NW2d 843 (2004). “A decision is final when all appeals have been exhausted or when the time available for an appeal has passed.” *Leahy v Orion Twp*, 269 Mich App 527, 530; 711 NW2d 438 (2006). Mutuality of estoppel exists if the party asserting collateral estoppel would have been bound by the previous litigation if the judgment had gone against that party. *Monat*, 469 Mich at 684-685. Collateral estoppel also applies to administrative determinations, provided that they are adjudicatory in nature, there is a right to appeal, and the Legislature intended to make the decision final absent an appeal. *Nummer v Dep’t of Treasury*, 448 Mich 534, 542; 533 NW2d 250 (1995).

In this case, the ZBA addressed and decided plaintiff’s complaints relating to the residential use of the boathouse and the side yard/setback requirements, and the ZBA’s decisions in this regard are unaffected by the 2010 amendments to the Ordinance. In particular, the ZBA’s decision on May 19, 2010 considered the alleged residential use of the boathouse, concluding that the challenged amenities in the boathouse were associated with the docking of a boat and thus permissible within the Ordinance definition of “boathouse.” Similarly, the ZBA addressed and decided the side yard/setback issue relating to plaintiff’s assertion that an eastern foundation wall is located in the side yard of the Anderson defendants’ property, impermissibly close to the boundary of plaintiff’s property. The ZBA resolved the issue, considering the same Ordinance provisions on which plaintiff now relies and concluding that the above ground wall complied with the Ordinance provisions, but that underground portions needed to be removed. Plaintiff later appealed the ZBA’s May 19, 2010 decision, and it was affirmed by the trial court.

Given the ZBA’s proceedings and ultimate decision on these issues, the requirements for establishing collateral estoppel are satisfied. Questions of fact essential to the judgment, i.e., the residential use of the boathouse and side yard/setback issues, were actually litigated and determined by a valid and final judgment in the ZBA in an action between the same parties. Plaintiff had a full and fair opportunity to litigate the issues in the ZBA, and appeals from the ZBA decision have been exhausted. Mutuality of estoppel exists because the Anderson

⁸ “An order granting summary disposition under the wrong court rule may be reviewed under the correct rule.” *Wickings v Arctic Enterprises, Inc*, 244 Mich App 125, 147; 624 NW2d 197 (2000) (citation omitted).

defendants would have been bound by the ZBA decision if it had gone against them. *Monat*, 469 Mich at 682-685. Further, the ZBA's administrative determination was adjudicatory in nature, plaintiff had a right to appeal (which was exercised), and the Legislature intended to make the decision final absent an appeal. Cf. *Nummer*, 448 Mich at 544 ("There is absolutely no legislative intent for this multiplicity of litigation."). Accordingly, the trial court properly determined that these claims are barred by collateral estoppel.

V. PRIVATE NUISANCE

Plaintiff also challenges the trial court's determination that summary disposition was appropriate under MCR 2.116(C)(8) because plaintiff failed to state a claim on which relief could be granted in regard to his allegations of private nuisance. By definition, a private nuisance refers to "a nontrespassory invasion of another's interest in the private use and enjoyment of land." *Adkins v Thomas Solvent Co*, 440 Mich 293, 302; 487 NW2d 715 (1992). In other words, "the gist of a private nuisance action is an interference with the occupation or use of land or an interference with servitudes relating to land." *Id.* at 303. An actor is liable for private nuisance involving 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. [*Cloverleaf Car Co v Phillips Petroleum Co*, 213 Mich App 186, 193; 540 NW2d 297 (1995) (citation omitted).]

In this case, plaintiff's complaint failed to allege that the Anderson defendants committed a nontrespassory invasion that was either (1) intentional and unreasonable or (2) unintentional and otherwise actionable under the rules governing liability for negligent, reckless, or ultrahazardous conduct. In particular, count VI of plaintiff's first amended complaint alleged that the construction, height, and location of the boathouse on the Anderson defendants' property comprised a nuisance that would cause various types of harm or damage to plaintiff and to plaintiff's property. There were no factual allegations, however, that the purported invasion was intentional and unreasonable, or that it was unintentional and otherwise actionable.⁹ Thus, even

⁹ In a single sentence, plaintiff contends on appeal that it should be "entitled to amend its complaint to conform to the evidence." However, plaintiff does not elaborate on how it would amend its complaint so as to state a claim on which relief could be granted, and the record does not suggest that the Anderson defendants committed an intentional and unreasonable, or otherwise actionable invasion. On this record, amendment would be futile and an opportunity to amend was not required. See MCR 2.116(I)(5); *Ormsby v Capital Welding, Inc*, 471 Mich 45, 52-53; 684 NW2d 320 (2004).

accepting plaintiff's allegations as true, it has failed to state a claim on which relief may be granted and summary disposition was appropriate under MCR 2.116(C)(8).¹⁰

VI. DUE PROCESS

Regarding the City's motion for summary disposition, plaintiff first asserts on appeal that the trial court erred in determining that plaintiff lacked a protected property interest for purposes of his substantive and procedural due process allegations against the City. In particular, plaintiff maintains that, as an adjacent property owner, he had a constitutionally protected interest in the City's enforcement of the Ordinance relative to the Anderson defendants' property. We disagree.

We review de novo constitutional issues and other questions of law. *Cummins v Robinson Twp*, 283 Mich App 677, 690; 770 NW2d 421 (2009). Likewise, the proper interpretation of statutes and ordinances is reviewed de novo. *Gmoser's Septic Serv, LLC v East Bay Charter Twp*, 299 Mich App 504, 509; 831 NW2d 881 (2013). Ordinances are interpreted in the same manner as statutes, meaning that clear and unambiguous language must be enforced as written. *Ahearn v Bloomfield Charter Twp*, 235 Mich App 486, 498; 597 NW2d 858 (1999).

Both the federal and state constitutions guarantee that a person may not be deprived of life, liberty, or property without due process of law. *In re Parole of Hill*, 298 Mich App 404, 412; 827 NW2d 407 (2012), citing US Const, Am XIV; Const 1963, art 1, § 17. Due process is defined similarly in both constitutions, and has been recognized as including substantive and procedural due process components. *Hanlon v Civil Serv Comm*, 253 Mich App 710, 722-723; 660 NW2d 74 (2002). The substantive component of due process protects against the arbitrary exercise of governmental power, while the procedural component requires constitutionally sufficient safeguards in proceedings to ensure the protection of life, liberty, and property interests. *Bonn v City of Brighton*, 495 Mich at 209 223-223; 848 NW2d 380 (2014). Whether substantive or procedural due process is implicated, the overarching touchstone of due process is "protection of the individual against arbitrary action of the government." *Wolff v McDonnell*, 418 US 539, 558; 94 S Ct 2963; 41 L Ed 2d 935 (1974); *Mettler Walloon, LLC v Melrose Twp*, 281 Mich App 184, 198; 761 NW2d 293 (2008).

As an initial matter, a plaintiff claiming a deprivation of procedural or substantive due process must demonstrate the presence of a constitutionally-protected interest in life, liberty, or property. *Bonn*, 495 Mich at 225-226; *Mettler Walloon, LLC*, 281 Mich App at 209. If such an interest does not exist, due process affords the complainant no protection. *Bonn*, 495 Mich at 226. Relevant to the present dispute, the law clearly recognizes that a property owner has an interest in the use and possession of his or her real estate which is entitled to the protections of due process. *Id.* However, we are unaware of any Michigan cases that have considered whether

¹⁰ Having determined the trial court properly granted summary disposition regarding all claims against the Anderson defendants, we need not reach the Anderson defendants' unpreserved, alternative grounds for affirmance involving equitable estoppel and compulsory joinder.

a neighbor has constitutionally protected property rights relating to the enforcement of zoning ordinances on adjacent property which he does not own or use.

To assess whether such a property right exists, we begin with the well-recognized principle that property interests are not created by the federal Constitution, but rather derive from “existing rules or understandings that stem from an independent source such as state law-rules or understandings[.]” *Bd of Regents of State Colleges v Roth*, 408 US 564, 577; 92 S Ct 2701; 33 L Ed 2d 548 (1972). Because property interests are created by independent sources, the existence and dimensions of the claimed property interest must be determined by reference to the independent source, such as the particular statute or rule in question. See *id.*; *Cleveland Bd of Ed v Loudermill*, 470 US 532, 538; 105 S Ct 1487; 84 L Ed 2d 494 (1985). Neither a plaintiff’s abstract need for a benefit or his unilateral expectation of an interest gives rise to a property interest. *Roth*, 408 US at 577; *Hanlon*, 253 Mich App at 723. Instead, the claimant must possess a “legitimate claim of entitlement” or “a justifiable expectation.” *Hanlon*, 253 Mich App at 723; *Silver v Franklin Twp Bd of Zoning Appeals*, 966 F2d 1031, 1036 (CA 6, 1992). Such justifiable expectations and legitimate entitlements exist where there are “rules or mutually explicit understandings that support [a plaintiff’s] claim of entitlement to the benefit” *Perry v Sindermann*, 408 US 593, 601; 92 S Ct 2694; 33 L Ed 2d 570 (1972). However, there is “no protected property interest in the procedure itself.” *Richardson v Twp of Brady*, 218 F3d 508, 518 (CA 6, 2000). Further, if a governmental entity has discretion in its decision-making, a party challenging the decision lacks a legitimate claim of entitlement or a justifiable expectation in the outcome sufficient to create a protected property interest. *McClain v NorthWest Community Corrections Ctr Judicial Corrections Bd*, 440 F3d 320, 330 (CA 6, 2006); *Triomphe Investors v City of Northwood*, 49 F3d 198, 203 (CA 6, 1995).

In this case, plaintiff asserts that its claimed property interest arises from the City’s Ordinances and the Michigan Zoning Enabling Act, MCL 125.3101 *et seq.* In particular, plaintiff characterizes the boathouse as a special use within the meaning of the 2010 Ordinance and asserts that, by requiring notice to neighbors, a hearing, and compatibility of special uses with adjacent property, the Michigan Zoning Enabling Act created a property right in the enforcement of the relevant Ordinance. Even accepting plaintiff’s characterization of the boathouse as a “special use,” we disagree with the assertion that the requirements of the Michigan Zoning Enabling Act give rise to a property right because the authority exercised by officials in regard to the granting of a request for a special use is wholly discretionary, and thus plaintiff lacks a legitimate claim of entitlement or a justifiable expectation in the outcome.

Specifically, pursuant to the Michigan Zoning Enabling Act, a legislative body has the option of providing for special land uses in a zoning district, which must be subject to the review and approval of an official as set forth in the zoning ordinance. MCL 125.3502(1). According to MCL 125.3502(4), “[t]he body or official designated to review and approve special land uses may deny, approve, or approve with conditions a request for special land use approval.” (emphasis added.) Through its use of the permissive term “may,” the statute makes plain that the power to grant special use requests is discretionary. See *In re Forfeiture of Bail Bond*, 276 Mich App 482, 492; 740 NW2d 734 (2007) (“It is well settled that the statutory term ‘may’ is

permissive and therefore indicative of discretion.”).¹¹ Indeed, although plaintiff emphasizes the statutory provisions requiring notice to adjacent landowners and hearings on special uses, plaintiff ignores the language in these statutes underscoring the discretionary nature of the power involved in a special use decision. For instance, notice to adjacent landowners is required by MCL 125.3502(2), which provides that: “Upon receipt of an application for a special land use *which requires a discretionary decision*, the local unit of government shall provide notice of the request” (emphasis added). See also MCL 125.3103(2). Similarly, at the initiative of the official responsible for approving the special use or upon request, “a public hearing shall be held before a *discretionary decision* is made on the special land use request.” MCL 125.3502(3) (emphasis added). See also MCL 125.3504(4) (“Reasonable conditions *may* be required with the approval of a special land use, planned unit development, or other land uses or activities permitted by *discretionary decision*.”) ((emphasis added)).

As the above-cited provisions make clear, the procedural rules regarding notice and hearings did not give rise to a constitutionally protected property interest. That is, the City retained discretion in the granting or denial of special use request. In light of this discretion, plaintiff lacks a legitimate claim of entitlement or a justifiable expectation in the outcome of the City’s decision whether to authorize construction of the Anderson defendants’ boathouse. See *Triomphe Investors*, 49 F3d at 202-203 (a city code provision stating that “a special use permit may be granted” provided discretion to a city council to grant or deny a special use permit, thus defeating any argument that a party was entitled to a special use permit).¹² Hence, plaintiff does not have a protected property interest. *Id.* at 203-204. Because plaintiff cannot make the threshold showing that it has a protected property interest, it has failed to establish a procedural or substantive due process claim. *Stone*, 855 F2d at 172; *Mettler Walloon, LLC*, 281 Mich App at 209.

Similarly, plaintiff also frames the Anderson defendant’s project as a variance under the 2009 Ordinance, asserting that the notice and hearing requirements relating to review by the ZBA under the Michigan Enabling Act gave rise to a legitimate claim of entitlement and thus a property right. Accepting plaintiff’s contention that the procedures for granting a variance were required to be followed, plaintiff again has failed to establish that it had a legitimate claim of

¹¹ The City Ordinance in this case similarly provides for discretionary power to grant special use requests, stating: “Certain land use activities entitled ‘special uses’ *may* be authorized in the various zoning districts but only if adequate safeguards are provided to ensure the protection of the public health, safety and general welfare.” 2010 Charlevoix City Ordinance, § 5.261(1) (emphasis added).

¹² Based on recognition of the discretionary nature of zoning decisions, numerous courts have similarly rejected the existence of a property right in the enforcement of zoning provisions on a neighbor’s property. See, e.g., *Horne v Mayor & City Council of Baltimore*, 349 Fed App’x 835, 840 (CA 4, 2009); *Horton v City of Smithville*, 117 Fed App’x 345, 347-348 (CA 5, 2004); *Gagliardi v Village of Pawling*, 18 F3d 188, 192-193 (CA 2, 1994); *Anderson v Collins*, unpublished opinion of the United States District Court for the Eastern District of Kentucky, issued July 14, 1998 (Docket No. 2:96-CV-269).

entitlement or a justifiable expectation in the outcome because the ZBA's authority in relation to this issue of a variance was discretionary. "The zoning board of appeals *may* reverse or affirm, wholly or partly, or modify the order, requirement, decision, or determination and *may* issue or direct the issuance of a permit." MCL 125.3604(6) (emphasis added). See also MCL 125.3604(1), (7), (8), (9) (prescribing the ZBA's authority to grant variances, including, in subsection (7), the use of the permissive term "may"); MCL 125.3606(1)(d) (providing that on appeal from a ZBA decision, the circuit court shall review the record to ensure that the ZBA's decision, "[r]epresents the reasonable exercise of *discretion* granted by law to the" ZBA) (emphasis added). The term "may" indicates that the ZBA has discretion in deciding whether to uphold the issuance of a permit or grant a variance. *Triomphe Investors*, 49 F3d at 203; *In re Forfeiture of Bail Bond*, 276 Mich App at 492. Although plaintiff argues that the Ordinance contains standards or criteria that must be followed, the above-cited provisions reflect that the ZBA has sufficient discretion in making its determination such that plaintiff is not entitled to a particular outcome. Cf. *Triomphe Investors*, 49 F3d at 203 (noting that the use of the term "may" in a city code granted sufficient discretion to the city council to undercut any argument that the plaintiff had an entitlement to a special use permit once four factors listed in the code were satisfied). Accordingly, given the ZBA's discretion, plaintiff lacks a legitimate claim of entitlement or a justifiable expectation in a particular outcome, and thus cannot establish that it has a property interest for the purpose of a due process claim. *Id.* at 203-204. Because plaintiff cannot establish a property interest for purposes of its due process claims, the trial court properly granted summary disposition to the City on these issues.¹³ MCR 2.116(C)(10).

VII. TAKINGS CLAIM

Plaintiff next contends that the trial court erred in granting summary disposition as to its Fifth Amendment takings claim because a regulatory taking occurred that interfered with plaintiff's reasonable investment backed expectations. We disagree.

Our review of constitutional issues is de novo. *Cummins*, 283 Mich App at 690. Pursuant to the Fifth Amendment, private property shall not "be taken for public use, without just compensation." US Const, Am V; see also Const 1963, art 10, § 2. In the absence of a physical occupation of property, a taking may be found where a governmental regulation overburdens a

¹³ In regard to plaintiff's substantive due process claim, we note also that plaintiff failed to present any facts that indicated the City officials engaged in conduct so outrageous or arbitrary so as to shock the conscience. See *Mettler Walloon, LLC*, 281 Mich App at 197-198. Plaintiff's only assertion in this regard is that the Zoning Administrator failed to apply Michigan law regarding vested rights and instead discussed Montana law. Although it may have been unnecessary for the Zoning Administrator to consult sources from other jurisdictions given that Michigan case law addresses the issue of vested rights, see, e.g., *City of Lansing v Dawley*, 247 Mich 394, 397; 225 NW 500 (1929), consideration of this source was, at most, incorrect or ill-advised, and it thus does not implicate substantive due process concerns. *Collins v City of Harker Hts, Texas*, 503 US 115, 129; 112 S Ct 1061; 117 L Ed 2d 261 (1992); *Mettler Walloon, LLC*, 281 Mich App at 206.

property interest. *K & K Constr, Inc v Dep't of Natural Resources*, 456 Mich 570, 576; 575 NW2d 531 (1998) (“*K & K Constr, Inc I*”). Two relatively narrow categories of regulatory action are deemed *per se* takings for Fifth Amendment purposes. *Lingle v Chevron USA, Inc*, 544 US 528, 538; 125 S Ct 2074; 161 L Ed 2d 876 (2005). First, a permanent physical invasion of property, however minor, requires just compensation. *Id.* Second, a regulation that deprives an owner of all economically beneficial use of the property also constitutes a taking. *Id.*; *Cummins*, 283 Mich App at 707.

It is undisputed that, in the present case, the City has not physically occupied or invaded plaintiff’s property, and plaintiff does not claim that it has been deprived of *all* economically beneficial use of its property. Thus, to establish a taking, plaintiff must satisfy the *Penn Central* balancing test. Under the *Penn Central* balancing test, a reviewing court engages in an ad hoc, factual inquiry focused on three factors: “(1) the character of the government’s action, (2) the economic effect of the regulation on the property, and (3) the extent by which the regulation has interfered with distinct, investment-backed expectations.” *K & K Constr, Inc I*, 456 Mich at 577, citing *Penn Central Transp Co*, 438 US at 124.

Under the first factor, to assess the character of the governmental action in this case, we “place the challenged regulatory action along a spectrum ranging from an actual[] physical taking on one extreme, to a far-reaching, ubiquitous governmental regulation that provides all property owners with an average reciprocity of advantage on the other.” *K & K Constr, Inc v Dep't of Environmental Quality*, 267 Mich App 523, 558; 705 NW2d 365 (2005) (“*K & K Constr, Inc II*”). Situating the City’s conduct on this spectrum it is plain that nothing akin to a physical taking occurred in the present case as evidenced by plaintiff’s continued retention and use of its property. Further, the contested permit was issued in relation to a broad, ubiquitous regulatory scheme that burdens and benefits all citizens of the City relatively equally. See *id.* at 559. Plaintiff has presented no evidence that similarly situated property owners were treated differently from plaintiff. Cf. *Cummins*, 283 Mich App at 720 (finding the first *Penn Central* factor weighed against finding a regulatory taking where a township enforced a building code equally to all similarly situated landowners). Thus, because the issuance of permit 3071 comprised a regulatory action under a comprehensive, broadly based regulatory scheme, and nothing akin to a physical invasion has occurred, this factor weighs heavily against finding a compensable regulatory taking.

The second *Penn Central* factor is the economic effect of the regulation on the property. While there is no set formula, this factor requires comparison of the value of the property removed by the regulation with the value of the property that remains. *K & K Constr, Inc I*, 456 Mich at 588. In this case, plaintiff presented an appraisal indicating that following the installation of the Anderson defendants’ boathouse, the value of plaintiffs’ property decreased from \$2,570,600 to \$1,670,600. This decrease in value, by itself, is insufficient to establish a compensable taking. *Penn Central*, 438 US at 131.¹⁴ On the contrary plaintiff’s appraisal

¹⁴ Indeed, the analyses in *Penn Central* and *K & K Constr, Inc II* reflect that no regulatory taking occurred in cases involving a far greater diminution in property value than occurred here. See

reflects that the property retains significant value, and plaintiff may continue use of the property as a seasonal residence. Cf. *Chelsea Investment Group LLC v City of Chelsea*, 288 Mich App 239, 262-263; 792 NW2d 781 (2010) (finding plaintiff could not establish a taking where the land retained value and the plaintiff remained free to use the property). Therefore, although there is evidence that the value of plaintiff's property decreased to some extent, this factor by itself does not establish a compensable taking.

The final *Penn Central* factor is the extent by which the regulation has interfered with distinct, investment-backed expectations. A key consideration is whether the plaintiff had notice of the applicable regulatory regime. *K & K Constr, Inc II*, 267 Mich App at 555. In this case, plaintiff indisputably had notice of the Ordinance and the Zoning Administrator's authority to administer the Ordinance by issuing zoning permits. The record is devoid of evidence that plaintiff purchased its seasonal home with a reasonable expectation that the City would decline to authorize construction of a boathouse on adjoining properties.¹⁵ On the contrary, it would have been reasonable to assume when purchasing the property that a neighbor may wish to construct a boathouse, given the properties' location on a lake. Further, plaintiff does not assert that its property is used to make a profit; rather, the property is used as a seasonal residence. See *Cummins*, 283 Mich App at 721 (noting, in connection with the third *Penn Central* factor, that the "plaintiffs do not assert that their property is used to make a profit; rather, they use their property for residential purposes"). The property continues to be used for this purpose and it retains substantial value. All these things considered, there has been no interference with reasonable investment-backed expectations, and this factor weighs heavily against finding a compensable taking. Given that, on the undisputed facts, the *Penn Central* factors weigh heavily against a finding of a regulatory taking, the trial court properly granted summary disposition to the City regarding the taking claim.¹⁶

VIII. CASE EVALUATION SANCTIONS

Lastly, plaintiff challenges the trial court's award of case evaluation sanctions to both the Anderson defendants and the City. In particular, plaintiff argues that the trial court failed to apply the interest of justice exception under MCR 2.403(O)(11). We disagree.

Penn Central, 438 US at 131, and cases cited therein; *K & K Constr, Inc II*, 267 Mich App at 554, n 31, n 32, and cases cited therein.

¹⁵ In fact, much of plaintiff's complaint relies on the 2010 amendments of the Ordinance, which were adopted long after plaintiff bought its property, and thus could not have given rise to a reasonable investment-backed expectation when plaintiff purchased the property.

¹⁶ Having determined the trial court properly granted summary disposition regarding all claims against the City, we need not consider whether the trial court properly determined that the City was not a proximate cause of plaintiff's damages or the City's alternative, unpreserved grounds for affirmance, including whether the City deliberately engaged in improper acts, absolute governmental immunity from suit under 42 USC 1983 based on a lack of motivating custom or policy, res judicata, and laches.

Generally, the decision whether to award case evaluation sanctions under MCR 2.403(O) is reviewed de novo as a question of law. *Peterson v Fertel*, 283 Mich App 232, 235; 770 NW2d 47 (2009). However, a trial court's determination whether to apply the interest of justice exception in MCR 2.403(O)(11) is reviewed for an abuse of discretion. *Harbour v Correctional Med Servs, Inc*, 266 Mich App 452, 465; 702 NW2d 671 (2005). An abuse of discretion occurs when the trial court's decisions falls outside the range of reasonable and principled outcomes. *Smith v Khouri*, 481 Mich 519, 526; 751 NW2d 472 (2008).

Michigan follows the American rule regarding payment of attorney fees and costs, meaning that attorney fees are not recoverable from the losing party as costs except in those instances where they are expressly authorized by statute or court rule. *Haliw v Sterling Hts*, 471 Mich 700, 707; 691 NW2d 753 (2005); MCL 600.2405(6). Case evaluation sanctions are expressly provided for in MCR 2.403(O)(1), which states that: "If a party has rejected [a case] evaluation and the action proceeds to verdict, that party must pay the opposing party's actual costs unless the verdict is more favorable to the rejecting party than the case evaluation." The term "verdict" includes "a judgment entered as a result of a ruling on a motion after rejection of the case evaluation." MCR 2.403(O)(2)(c). The case evaluation sanctions provided for in MCR 2.403(O)(1) are generally mandatory. See *Haliw v Sterling Hts (On Remand)*, 266 Mich App 444, 447; 702 NW2d 637 (2005).

However, "[i]f the 'verdict' is the result of a motion as provided by subrule (O)(2)(c), the court may, in the interest of justice, refuse to award actual costs." MCR 2.403(O)(11). Only "unusual circumstances" may be used to invoke the interest of justice exception, including, for example, cases where a legal issue of first impression or public interest is present, where the law is unsettled and substantial damages are at issue, where there is a significant financial disparity between the parties, where the effect on third persons may be significant, or where there is misconduct on the part of the prevailing party. *Harbour*, 266 Mich App at 466. When a trial court exercises its discretion under the interests of justice exception it must articulate the bases for its decision. *Haliw (On Remand)*, 266 Mich App at 447.

In this case, it is undisputed that plaintiff rejected the case evaluation awards, the Anderson defendants and the City accepted their respective case evaluations, and the orders granting summary disposition to defendants constitute judgments entered as a result of rulings on motions after the rejection of the case evaluation. Moreover, the verdicts were less favorable to plaintiff than the respective case evaluation awards. Accordingly, entry of case evaluation sanctions was required pursuant to MCR 2.403(O)(1).

In the trial court, plaintiff asserted the applicability of the interest of justice exception, and the trial court considered plaintiff's various arguments, including the assertion that the law in Michigan was not fully settled in regard to an adjacent property owner's rights. Cognizant of the competing concerns, the trial court determined that the case did not present unusual circumstances in which it would be appropriate to deny case evaluation sanctions. On the facts of this case, we discern no abuse of discretion in this regard.

Affirmed. Defendants being the prevailing party may tax costs pursuant to MCR 7.219.

/s/ Cynthia Diane Stephens

/s/ Joel P. Hoekstra

/s/ Patrick M. Meter