

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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NORMA CAMP, EUGENE CHARDOUL, and  
NAN RUTH CHARDOUL,

UNPUBLISHED  
June 12, 2014

Plaintiffs,

and

ELDON E. JOHNSON, JOHN REIS, and  
EUGENE SAENGER, JR.,

Plaintiffs-Appellees,

v

No. 306066  
Charlevoix Circuit Court  
LC No. 07-082121-CH

CITY OF CHARLEVOIX, CITY OF  
CHARLEVOIX ZONING BOARD OF  
APPEALS, GERRY HARSCH, and DIANNE  
MANORE,

Defendants,

and

JAMES ANDERSON, PATRICIA ANDERSON,  
and APJ PROPERTIES, L.L.C.,

Defendants-Appellants.

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

PER CURIAM.

Defendants, James Anderson, Patricia Anderson, and APJ Properties, L.L.C. (“the Anderson defendants”), appeal as of right an order granting in part a motion for entry of order filed by plaintiffs, Norma Camp, Eldon E. Johnson, John Reis, and Eugene Saenger, Jr., denying the Anderson defendants’ motion for entry of order, and dismissing the case. Because the trial court erred in concluding that the Anderson’s request for relief had been rendered moot, we

reverse the trial court and remand for entry of an order in the Anderson defendants' favor consistent with this opinion.

The present case involves a zoning permit (permit 2850) issued by the Charlevoix Zoning Administrator to the Anderson defendants on March 26, 2007, authorizing construction of a single-family residence and an attached boathouse. Neighbors of the Anderson defendants opposed the project and, among other administrative and legal action aimed at preventing construction, they filed the underlying complaint in the present suit. As a result, the trial court issued an order for superintending control on March 24, 2009, requiring the city of Charlevoix Zoning Board of Appeals (ZBA) to review the zoning permit. After holding a hearing, the ZBA revoked the permit because certain features of the boathouse violated the Charlevoix Zoning Ordinance ("the Ordinance"). The Anderson defendants appealed the trial court's exercise of superintending control to this Court. On appeal, this Court reversed the trial court, finding that the trial court erred in its exercise of superintending control and concluding that the ZBA's decision to revoke the permit must be vacated. *Camp v Charlevoix*, unpublished opinion per curiam of the Court of Appeals, issued October 26, 2010 (Docket No. 291473).

On remand to the trial court, the Anderson defendants filed a motion for entry of order, arguing that, in accordance with this Court's opinion, the trial court should vacate the ZBA's revocation and reinstate permit 2850. In response, plaintiffs noted additional developments that had occurred while the prior appeal was pending in this Court. In particular, following the ZBA's revocation of permit 2850, but before this Court's reversal of the grant of superintending control, the Anderson defendants revised their plans to comply with the ZBA's decision on permit 2850, and the Zoning Administrator then issued a new zoning permit, known as permit 3071, to the Anderson defendants, on August 28, 2009. Despite legal opposition from plaintiffs regarding permit 3071, the Anderson defendants had since begun construction on the property in accordance with permit 3071. Based on these developments and amendments to the Ordinance in 2010, plaintiffs filed a motion for entry of order in the trial court, arguing both permits were null and void and that the Anderson defendants must adhere to the current Ordinance. After a hearing on the parties' competing motions for entry of order, the trial court granted in part plaintiffs' motion, declaring permit 2850 null and void, and denied the Anderson defendants' motion for entry of order to reinstate permit 2850. The Anderson defendants have again appealed to this Court.

On appeal, the Anderson defendants first argue that the trial court failed to comply on remand with this Court's prior opinion, *Camp*, unpub op at 3-4, and that the trial court violated the law of the case doctrine. We disagree. Whether the trial court on remand followed this Court's ruling is reviewed de novo as a question of law. *Augustine v Allstate Ins Co*, 292 Mich App 408, 424; 807 NW2d 77 (2011). This Court also reviews de novo whether the law of the case doctrine applies and to what extent it applies. *Id.*

"Under the law-of-the-case doctrine, this Court's determination of an issue in a case binds both the trial court on remand and this Court in subsequent appeals." *Id.* at 425. Accordingly, a question of law decided by this Court may not be decided differently on remand or in a subsequent appeal in the same case. *Ashker ex rel Estate of Ashker v Ford Motor Co*, 245 Mich App 9, 13; 627 NW2d 1 (2001). However, the law of the case doctrine applies only if the facts involved have remained materially the same. *Driver v Hanley (After Remand)*, 226 Mich

App 558, 565; 575 NW2d 31 (1997). As a related matter, when a case is remanded to a lower court, the lower court may “take such action as law and justice may require so long as it is not inconsistent with the judgment of the appellate court.” *K & K Constr, Inc v Dep’t of Environmental Quality*, 267 Mich App 523, 544; 705 NW2d 365 (2005) (citation omitted). “[W]hen an appellate court gives clear instructions in its remand order, it is improper for a lower court to exceed the scope of the order.” *Id.* Rather, the lower court must “strictly comply with the mandate of the appellate court.” *Id.* at 544-545 (citation omitted).

In this case, during the prior appeal, this Court concluded that the trial court erred in remanding this matter to the ZBA under the power of superintending control because (1) an appeal to the ZBA was time-barred by the Ordinance, (2) the ZBA did not fail to perform a clear legal duty, and (3) plaintiffs had not established that their right to appeal the Zoning Administrator’s decision within 30 days was an inadequate legal remedy. *Camp*, unpub op at 3-4. This Court thus reversed the trial court’s order with instructions to vacate the ZBA’s decision to revoke permit 2850. *Id.* This Court remanded for further proceedings consistent with its opinion and did not retain jurisdiction. *Id.* at 4. On remand, the trial court determined that any relief related to permit 2850 had been rendered moot by the Anderson defendants’ actions. In particular, the trial court opined that the Anderson defendants could not legally hold more than one zoning permit for the same site, and that the Anderson defendants had effectively abandoned permit 2850 when they revised their plans and obtained permit 3071.

Contrary to the Anderson defendants’ arguments, the trial court’s actions on remand were not inconsistent with this Court’s opinion and did not violate the law of the case. That is, in our previous decision we did not consider the legal effect of the issuance of permit 3071 or whether, by obtaining permit 3071, the Anderson defendants rendered relief relating to permit 2850 moot. Indeed, we did not discuss permit 3071 or consider the question of mootness in any way. Where, as in this case, we have not made a legal determination regarding mootness, and facts not presented to this Court have rendered the matter moot, we know of no authority to suggest that a trial court should not acknowledge the mootness of the issue on remand. In such circumstances, where an issue has actually become moot, a finding of mootness by the trial court violates neither our remand instructions nor the law of the case doctrine. Consequently, the Anderson defendants’ contentions in this regard are without merit.

In our judgment, the dispositive question on appeal involves consideration of whether the trial court properly determined the mootness of the relief sought by the Anderson defendants. In particular, the Anderson defendants argue on appeal that the trial court erred in finding relief related to permit 2850 had been rendered moot by the issuance of permit 3071. We agree.

Whether an issue is moot presents a question of law that is reviewed de novo. *Mich Chiropractic Council v Comm’r of the Office of Fin Ins*, 475 Mich 363, 369-371; 716 NW2d 561 (2006) (opinion by YOUNG, J.), overruled in part on other grounds by *Lansing Sch Ed Ass’n v Lansing Bd of Ed*, 487 Mich 349, 371 n 18; 792 NW2d 686 (2010). Courts generally do not decide moot issues. *B P 7 v Bureau of State Lottery*, 231 Mich App 356, 359; 586 NW2d 117 (1998). “An issue is moot if an event has occurred that renders it impossible for the court to grant relief.” *Gen Motors Corp v Dep’t of Treasury*, 290 Mich App 355, 386; 803 NW2d 698 (2010). “An issue is also moot when a judgment, if entered, cannot for any reason have a practical legal effect on the existing controversy.” *Id.*

In this case, the trial court explained its finding of mootness as follows:

In light of the subsequent actions taken by the Andersons to revise their plans, submit a new application and obtain a new permit, it is this Court's opinion [that] any action with respect to Defendants' first permit, No. 2850, is moot. When the Andersons revised their plans and sought and obtained a new zoning permit, effectively they abandoned the previous permit. . . . It is this Court's view that legally a property owner cannot hold more than one zoning permit for the same site and, given the Anderson Defendants' decision to move forward and obtain a new permit, this Court considers Permit No. 2850 to have no legal effect and to therefore be legally moot.

In short, the trial court opined that the Anderson defendant's decision to obtain permit 3071 rendered their request for the reinstatement of permit 2850 moot because: (1) they could not hold two permits for the same property, and (2) they had demonstrated an intention of abandoning permit 2850.

Contrary to the trial court's conclusions, we know of no authority, either generally or specific within the Ordinance at issue in this case, to suggest that a property owner may not legally hold two zoning permits in relation to his or her property. Indeed, the unusual circumstances of the present case provide an example of when, by necessity, a property owner might find himself in possession of two permits for the same project, and we know of no authority to prevent the property owner from electing under which permit he might wish to proceed. The trial court failed to provide any authority in support of its conclusions, merely opining in a footnote that simultaneous possession of two permits would "create confusion for the municipality and all those affected which would not support the purpose of promoting and protecting the public health, safety and general welfare of its inhabitants in accordance with the Zoning Ordinance." The policy views which the trial court espoused are not, however, a basis for assessing the legal viability of permit 2850. Instead, relative to this case, the issuance of permits is governed by the Ordinance, and ordinances are interpreted in the same manner as statutes, i.e., according to their plain language. *Whitman v Galien Twp*, 288 Mich App 672, 681-682; 808 NW2d 9 (2010). Thus, because the Ordinance in no way precludes the issuance of two permits for the same property, the trial court should not have imposed such a restriction. See *Tyson Foods, Inc v Dep't of Treasury*, 276 Mich App 678, 690; 741 NW2d 579 (2007) (recognizing a court must avoid reading anything into a legislative enactment that is not within the manifest intent of the legislative body as gleaned from the plain language). Any policy determinations, such as concern for the confusion that might accompany the issuance of multiple permits, presents a question properly left for the legislative body responsible for the Ordinance. See *Devillers v Auto Club Ins Ass'n*, 473 Mich 562, 589; 702 NW2d 539 (2005). Given that nothing prevents the Anderson defendants from holding both permit 2850 and permit 3071, the trial court erred in concluding on this basis that the issuance of permit 3071 left permit 2850 without legal effect and therefore moot.

Similarly, the trial court erred in concluding that the Anderson defendants abandoned permit 2850. For the Anderson defendants to have abandoned permit 2850 there would need to be intent to abandon the permit and "some act or omission on the part of the owner or holder which clearly manifests his voluntary decision to abandon." *Livonia Hotel, LLC v City of*

*Livonia*, 259 Mich App 116, 128; 673 NW2d 763 (2003). In this case, while it is true that the Anderson defendants sought the issuance of permit 3071, this fact alone does not demonstrate an abandonment of 2850. Indeed, given our conclusion that the Anderson defendants may hold both permit 2850 and permit 3071, the Anderson defendants' efforts to obtain permit 3071 have, at best, limited value in the assessment of whether they intended to abandon permit 2850. More importantly, while seeking permit 3071, and after it was issued, the Anderson defendants continued to tenaciously litigate their rights regarding permit 2850, both in this Court and the trial court. Their steadfast pursuit of the reinstatement of permit 2850 undermines any assertion that they clearly manifested an intent to abandon that permit. In light of clear evidence that the Anderson defendants had no intention of abandoning permit 2850, the trial court clearly erred in finding permit 2850 abandoned based on the issuance of permit 3071, and thus relief relating to permit 2850 was not rendered moot on this basis.

Accordingly, having concluded that the Anderson defendants could hold two permits and did not abandon permit 2850, we see no basis for the trial court's conclusion that relief related to permit 2850 had been rendered moot. The Anderson defendants may, if they wish, abandon permit 3071 in favor of permit 2850 and pursue construction under permit 2850. Indeed, on the unusual facts of this case, where the Anderson defendants have encountered years of litigation relating to their project, and in fact continue to litigate the viability of permit 3071, they have ample reason for seeking the reinstatement of permit 2850 and may well find themselves needing to revert to their plans under permit 2850. In sum, it was not impossible to grant the Anderson defendants' request for reinstatement of permit 2850 in keeping with our instructions to vacate the ZBA's revocation of permit 2850, nor was such relief without practical legal effect. See *Gen Motors Corp*, 290 Mich App at 386. Consequently, the trial court erred in concluding the matter had become moot. We therefore reverse the trial court's decision declaring permit 2850 null and void, and remand for entry of an order vacating the ZBA's revocation of permit 2850 and reinstating permit 2850 consistent with our prior decision in this case.

Finally, having determined the trial court erred in finding the issuance of permit 3071 rendered permit 2850 moot, we need not consider the Anderson defendant's additional arguments regarding their requests for equitable relief. We also decline to consider plaintiffs' equitable request that we declare the Anderson defendants lacked vested rights in either permit 2850 or permit 3071. The trial court expressly declined to consider the matter, meaning it is unpreserved, and we see no reason to consider the issue at this time. See *Heydon v MediaOne*, 275 Mich App 267, 281; 739 NW2d 373 (2007). Moreover, in urging declaration regarding the Anderson defendant's vested rights or lack thereof, plaintiffs are seeking more favorable relief than they obtained in the trial court, which they may not do because they failed to file a cross-appeal. *Truel v City of Dearborn*, 291 Mich App 125, 137; 804 NW2d 744 (2010). For these reasons, we decline to consider the vested rights issue.

Reversed and remanded for entry of an order in the Anderson defendants' favor consistent with this opinion. We do not retain jurisdiction. Defendant, being the prevailing party, may tax costs pursuant to MCR 7.219.

/s/ Cynthia Diane Stephens

/s/ Joel P. Hoekstra

/s/ Patrick M. Meter