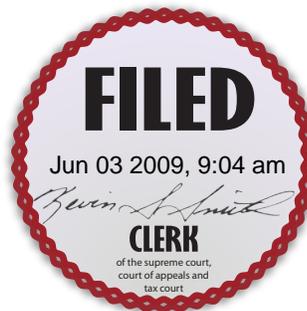


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE  
COURT OF APPEALS OF INDIANA**

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ROBERT EVANS, CHERYL EVANS, )  
JERRY MICKELSON, JULIA MICKELSON, )  
MICHAEL TREISTER, AND )  
DANA TREISTER, )

Appellants-Plaintiffs, )

vs. )

RICHARDSON WILDLIFE )  
SANCTUARY, INC., )

Appellee-Defendant. )

No. 64A03-0808-CV-416

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APPEAL FROM THE PORTER CIRCUIT COURT  
The Honorable Mary R. Harper, Judge  
Cause No. 64D05-0708-PL-7502

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**June 3, 2009**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**VAIDIK, Judge**

## **Case Summary**

Richardson Wildlife Sanctuary, Inc. (“RWS”), a non-profit organization, attempted to create a wildlife sanctuary in the town of Dune Acres, Indiana. After the Dune Acres Town Council denied RWS permission to create the sanctuary, three Dune Acres couples brought suit against RWS, seeking a preliminary injunction to stop RWS from altering the property further and to force RWS to remove the structures it had already built. Upon RWS’ motion, the trial court dismissed the complaint for failure to state a claim. The plaintiffs then filed both an amended complaint and a motion to correct errors and reconsider. The trial court denied the motion to correct errors and reconsider, and the plaintiffs appeal the dismissal of their complaints. We affirm the dismissal of their complaints for failure to state a claim upon which relief can be granted.

## **Facts and Procedural History**

In 1960, Flora Richardson, a resident of Dune Acres, a town in Porter County, Indiana, passed away. Pursuant to Richardson’s will, in 1963, RWS, a non-profit organization formed in 1958, inherited Richardson’s Dune Acres property. At that time and ever since, the property was located within a residential zoning district. Over forty years later, in 2005, RWS obtained a permit to demolish the residence and restore the property to its natural condition. However, in 2007, RWS, now acting without a permit, removed several trees, excavated a portion of the property, removed some of the blacktop on the property, and installed four parking bumps. RWS then petitioned the Dune Acres Town Council for permission to use the property as a park-like wildlife sanctuary. The

Council denied the petition to use the property as a wildlife sanctuary and declared its decision final.

The plaintiffs—Robert and Cheryl Evans, Jerry and Julia Mickelson, and Michael and Dana Treister (collectively, the plaintiffs)—also reside in Dune Acres. In their original complaint against RWS, the plaintiffs cite several Dune Acres ordinances that they allege RWS has violated. The plaintiffs alleged that RWS' unauthorized renovations have caused the property to be in a condition that is injurious to the health of Dune Acres residents and interferes with the comfortable enjoyment of life and property of all the residents of Dune Acres, specifically the plaintiffs. The plaintiffs also alleged that RWS' use of the property is a public nuisance under Indiana Code § 32-30-6-6 and a common nuisance under Dune Acres Town Ordinance § 46-292(b). Additionally, the plaintiffs alleged that RWS' use of the property is a commercial use which increases traffic, debris, garbage, and the need for police services. The plaintiffs' complaint does not allege that RWS violated the Council's decision or further excavated the property. As for relief, the plaintiffs asked the trial court for a preliminary injunction ordering RWS to cease any further construction or other activity and to remove all the previously-erected structures that violate any town ordinances.

RWS responded to the complaint with a motion to dismiss for failure to state a claim. After a hearing, the trial court granted the motion to dismiss on two grounds: that an action to enforce a town ordinance must be brought by a municipal corporation, not an individual, and that the plaintiffs could not succeed on a public nuisance theory because they failed to plead a special and peculiar injury. On April 17, 2008, the plaintiffs filed

both a motion to correct errors and reconsider and an amended complaint. In the amended complaint, the plaintiffs specified that they live adjacent to the RWS property. They also alleged that because of the four parking bumps and a staircase providing beach access to Lake Michigan from the property, “the Property has become a party beach on multiple occasions, with unsupervised groups of young people using the Property to blare radios, shoot fireworks, and start beach fires,” Appellants’ App. p. 61, and that these activities are injurious to the plaintiffs, the adjacent landowners.

The trial court held a hearing on the motion to correct errors and reconsider. At the hearing, the trial court asked whether the amended complaint was also set for hearing at that time. Counsel for the plaintiffs responded that, because both the motion to correct errors and reconsider regarding the original complaint and the amended complaint were before the court,

procedurally we may not be perfectly in the right place, but counsel may agree with me if the motion to correct errors, um, is not granted then the amended complaint would probably go out on the same basis as the initial complaint. So I—because of the way the Court ruled. So either the—either they’re both good or neither one of them are any good.

Tr. p. 5. After the hearing, the trial court issued an order entitled “Order Denying Plaintiffs’ Motion to Correct Error and Motion to Reconsider.” In the order, the trial court stated that the motion to correct errors and reconsider was deemed denied by operation of law. The trial court did not mention the amended complaint in its order. The plaintiffs now appeal.

### **Discussion and Decision**

On appeal, the plaintiffs contend that the trial court erred in dismissing their complaint pursuant to Trial Rule 12(B)(6). A motion to dismiss for failure to state a claim tests the legal sufficiency of the claim, not the facts supporting it. *Charter One Mortgage Corp. v. Condra*, 865 N.E.2d 602, 604 (Ind. 2007). Thus, our review of a trial court’s grant or denial of a motion based on Trial Rule 12(B)(6) is *de novo*. *Id.* When reviewing a motion to dismiss, we view the pleadings in the light most favorable to the nonmoving party, with every reasonable inference construed in the nonmovant’s favor. *Id.* A complaint may not be dismissed for failure to state a claim upon which relief can be granted unless it is clear on the face of the complaint<sup>1</sup> that the complaining party is not entitled to relief. *Reich*, 888 N.E.2d at 242.

This case is in an unusual procedural posture. As our Court has previously stated, when a motion to dismiss for failure to state a claim is granted, “[a] plaintiff is entitled *either* to amend his complaint pursuant to Trial Rule 12(B)(6) and Trial Rule 15(A), or to elect to stand upon his complaint and to appeal from the order of dismissal.” *Thacker v. Bartlett*, 785 N.E.2d 621, 624 (Ind. Ct. App. 2003) (emphasis added). Here, however, the plaintiffs have attempted to pursue both remedies. Ordinarily, an amended complaint replaces the original for all purposes. *McKenna v. Turpin*, 128 Ind. App. 636, 151 N.E.2d 303, 305 (1958). Thus, by amending their complaint after the motion to dismiss was granted, the plaintiffs technically lost their right to appeal the original complaint. *Anderson v. Anderson*, 399 N.E.2d 391, 406 n.30 (Ind. Ct. App. 1979).

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<sup>1</sup> We note that the plaintiffs attached various extraneous documents to their complaint as exhibits. There is no indication that the trial court considered these materials, and they do not influence our decision. As such, we will not treat the motion to dismiss as a motion for summary judgment. *See Reich v. Lincoln Hills Christian Church, Inc.*, 888 N.E.2d 239, 242 (Ind. Ct. App. 2008).

Nevertheless, the parties in this case proceeded on the original complaint after the filing of the amended complaint. The trial court set a hearing on the motion to correct errors and reconsider the dismissal of the original complaint. At the hearing, counsel for the plaintiffs stated that the trial court's ruling on the original complaint governed the amended complaint as well. Appellants' Br. p. 2 n.1; Tr. p. 5. In the Appellants' Brief and the Appellee's Brief, the parties debate the validity of the original complaint; the plaintiffs do not argue the validity of the amended complaint until their Reply Brief.<sup>2</sup> Because the proceedings thus far have addressed the original complaint and the trial court's order denying the motion to correct error and reconsider does not mention the amended complaint, and these are the proceedings that are before us, we choose to address the legal sufficiency of the original complaint. *See Anderson*, 399 N.E.2d at 406 n.30. However, counsel's comments at trial indicate confusion about whether the amended complaint was also before the court. As a matter of judicial economy, we will also address the sufficiency of the amended complaint.

### **I. The Original Complaint**

The trial court dismissed the plaintiffs' original complaint on two grounds. First, the trial court found that actions to enforce town ordinances must be brought by a municipal corporation, not individuals. Second, the trial court found that the plaintiffs had failed to allege a special and peculiar injury to them, as required by individuals seeking to abate or enjoin a public nuisance. As for the public nuisance ground, the

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<sup>2</sup> Appellants are not permitted to present new arguments in their reply briefs, and any argument not raised in the initial brief is waived for appeal. *See Felsher v. Univ. of Evansville*, 755 N.E.2d 589, 593 n.6 (Ind. 2001); *see also* Ind. Appellate Rule 46(C). Waiver notwithstanding, as discussed below, we conclude that the trial court did not err by dismissing the amended complaint.

plaintiffs argue in their brief that the intent of the original complaint was to assert a private right of action based on RWS' ordinance violations and agree that a private party generally does not have a right of action against a public nuisance. Appellants' Br. p. 12. Because the plaintiffs do not challenge on appeal the trial court's ruling on the public nuisance claim in the original complaint, we address only the first ground for dismissing the original complaint.

Although we reach the same conclusion as the trial court regarding the original complaint, we do so for a different reason. Finding that only municipal corporations, but not individuals, can bring an action to enforce town ordinances, the trial court relied on Indiana Code § 34-28-5-1(b), which reads in part, "An action to enforce an ordinance shall be brought in the name of the municipal corporation." Indiana Code ch. 34-28-5 governs infraction and ordinance violation enforcement proceedings, which are classified as special civil proceedings but are quasi-criminal in nature. *See Cunningham v. State*, 835 N.E.2d 1075, 1079 n.4 (Ind. Ct. App. 2005) ("In referring to speeding infractions as 'quasi-criminal in nature,' we are simply saying that the procedures through which these actions are adjudicated bear a likeness to those procedures employed in adjudicating criminal offenses."), *trans. denied*.

The plaintiffs here are not "prosecuting" RWS for the violations of Dune Acres town ordinances or seeking to force the town to enforce the ordinances. Rather, they are seeking injunctive relief under a private right based on the violations of the ordinances.<sup>3</sup>

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<sup>3</sup> We note that the plaintiffs have standing because they allege in the original complaint that the condition and use of the RWS property interferes with the comfortable enjoyment of life and property of all Dune Acres residents, and they allege that they are Dune Acres residents. *See City of Gary ex rel. King v. Smith & Wesson Corp.*, 801 N.E.2d 1222, 1248 (Ind. 2003). Additionally, the case is not moot

In the original complaint, the plaintiffs cite several Dune Acres municipal ordinances. The plaintiffs cite Dune Acres Town Ordinance § 46-112, which provides in part that the purpose of the zoning regulations is to encourage the continued use of the land in the residential district for single-family detached dwellings and to discourage commercial uses or any use that would generate either traffic other than normal residential traffic or a need for increased public services. The plaintiffs cite Dune Acres Town Ordinance § 46-113, which provides, among other things, that parks can only be created and managed by or with the authorization of the town. The plaintiffs allege that the four parking bumps on the RWS property violate Dune Acres Town Ordinance § 46-152(e)(2), which prohibits parking spaces within the residential district unless there is a permitted use that requires accessory parking spaces. Also, the plaintiffs allege that the tree removal, excavation, blacktop removal, and parking bump installation, all done without a permit, violate Dune Acres Town Ordinances §§ 10-77, 10-25, 46-156, and 46-275.

The plaintiffs contend that Indiana case law recognizes a private right to seek injunctive relief for the violation of municipal ordinances, and we agree. The Indiana Supreme Court first found such a right in *First National Bank of Mt. Vernon v. Sarlls*, 129 Ind. 201, 28 N.E. 434 (1891). The Court stated that if a party shows that a structure expressly violates a valid municipal ordinance, even if the structure would not be a nuisance *per se*, and the structure causes special and irreparable injury, the party is entitled to an injunction. *Id.* at 435. The Indiana Supreme Court again considered the ordinance violation cause of action in *Fidelity Trust Co. v. Downing*, 224 Ind. 457, 68

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because, although the Dune Acres Town Council denied RWS permission to use the land as a park-like sanctuary and the plaintiffs do not allege that RWS has continued construction in violation of the Town Council decision, the plaintiffs contend that the unauthorized renovations have not been cured.

N.E.2d 789 (1946), and decided that the plaintiffs were not required to exhaust their remedies by appealing the City Controller's decision to issue the permit for the construction of the complained-of structure before seeking injunctive relief for violation of an ordinance. *Id.* at 791.

Our Court has also addressed private actions seeking injunctive relief for the violation of an ordinance. In *Laws v. Lee*, 471 N.E.2d 1229 (Ind. Ct. App. 1984), *reh'g denied*, a landowner, Laws, believed that a neighboring mobile home owned by the Beagle family and a travel trailer owned by the Craft family each violated Rockville residential ordinances, but the board of zoning appeals and trial court denied relief. Our Court remanded with instructions to grant the injunction Laws requested—removal of the vehicles—because it enabled the trial court to eradicate the zoning violations. *Id.* at 1235. Finally, in *Ross v. Harris*, 860 N.E.2d 602 (Ind. Ct. App. 2006), *trans. denied*, our Court found that, pursuant to *Laws* and *Fidelity Trust Co.*, the plaintiffs were not required to appeal the issuance of the permit to the defendants and affirmed the trial court's grant of an injunction ordering the defendants to remove the portion of the 55-foot tall tower addition to their home that violated the 30-foot maximum height provided in residential building height ordinances.

As demonstrated by the cases described above, individuals are entitled to seek injunctive relief against the violation of a municipal ordinance. However, in this case, the trial court correctly dismissed the plaintiffs' original complaint for injunctive relief. To bring the claim, pursuant to *First National Bank of Mt. Vernon*, they were required to

allege that RWS had violated a municipal ordinance *and* that the violation caused them special and irreparable harm.

As stated previously, the complaint does allege that RWS has violated various Dune Acres ordinances. However, the complaint fails to allege a harm that is special to the plaintiffs, as opposed to the other residents of Dune Acres, and irreparable. The plaintiffs alleged that the state of the RWS property was “injurious to the health *of the residents of the Town of Dune Acres,*” “interferes with the comfortable enjoyment of life and property of *all the residents of the Town of Dune Acres,* and specifically those of the Plaintiffs,” and that the “use of the property is a commercial use which encourages increased traffic, increased police services, increased debris and garbage, is contrary to single family continuation of the community, and interferes with the quiet enjoyment *of the neighboring property.*” Appellants’ App. p. 14, 15 (emphases added). The plaintiffs did not specify in the complaint that they were the neighboring landowners; instead, they merely asserted that they were residents of Dune Acres. Although the plaintiffs state that their comfortable enjoyment of life and property is “specifically” affected, they do not allege how their comfortable enjoyment is impacted in some way that is different from the other residents. Thus, the plaintiffs failed to allege that RWS’ violations of the Dune Acres ordinance caused them special and irreparable harm. As a result, it was proper for the trial court to dismiss the original complaint, and we affirm the dismissal.

## **II. The Amended Complaint**

Because of the parties’ confusion, we address the amended complaint as a matter of judicial economy.

### *A. Municipal Ordinance Violations*

We acknowledge that the amended complaint is more specific and detailed than the original complaint. In it, the plaintiffs do allege that they live adjacent to the RWS property, that RWS has violated the same ordinances as before, and that RWS' use of the property has lessened their property values.

We nevertheless find as a matter of law that the plaintiffs have failed to allege in the amended complaint that the ordinance violations have caused them special, irreparable, and serious harm as required, pursuant to *First National Bank of Mt. Vernon*, for actions seeking injunctive relief for ordinance violations. The plaintiffs allege several ordinance violations: RWS removed trees without a permit, removed blacktop without a permit, excavated the property without a permit, and installed four parking bumps. However, the essence of the complaint is not that the tree removal, blacktop removal, excavation, and parking bump installation have caused the plaintiffs special and irreparable harm but that these violations have made it possible for third parties to use the RWS property to access the beach of Lake Michigan, where third parties gather in groups, blare music, and light fireworks and bonfires.

Because the heart of the complaint is against the third parties and there is no allegation of facts in the complaint showing that RWS invited third parties, actively encouraged third parties to use the property to access the beach, or even knew about third parties on the property, the complaint does not establish that the injunctive relief requested would stop the parties on the beach of Lake Michigan. Thus, the amended complaint fails to state a claim for which relief can be granted on this ground.

## *B. Nuisance*

In their Reply Brief, the plaintiffs contend for the first time that the amended complaint is sufficient to state a claim for both a public and private nuisance, including nuisance *per se* and nuisance *per accidens*. We reiterate that these arguments are waived but would still be unsuccessful if they were not waived. In the amended complaint, the plaintiffs allege that RWS' unauthorized renovations have caused the property to be in a condition that is injurious to the health of the Dune Acres residents and specifically to the plaintiffs as they live adjacent to the RWS property. They allege that the condition and use of the RWS property for unauthorized and illegal purposes interferes with the comfortable enjoyment of life and property for all the Dune Acres residents and specifically the plaintiffs, as they live adjacent to the RWS property. They also allege that RWS' use of the property is a public nuisance under Indiana Code § 32-30-6-6 and Dune Acres Town Ordinance § 46-292(b) because of offensive noise, increased traffic, increased police presence, and increased garbage and debris on the RWS property. The plaintiffs describe RWS' impermissible use of the property as

a public parking lot with the stairs on the Property used to access the beach of Lake Michigan. . . . Because of the public parking lot and beach access the Property provides, the Property has become a party beach on multiple occasions, with unsupervised groups of young people using the Property to blare radios, shoot fireworks, and start beach fires, activities which are injurious enough to adjacent property owners, specifically Plaintiffs, and have been egregious enough for Plaintiffs to involve town police.

Appellants' App. p. 61.

In Indiana, nuisances are defined by Indiana Code § 32-30-6-6, which provides: "Whatever is: (1) injurious to health; (2) indecent; (3) offensive to the senses; or (4) an

obstruction to the free use of property; so as essentially to interfere with the comfortable enjoyment of life or property, is a nuisance, and the subject of an action.” Nuisances may be public, affecting an entire neighborhood or community, or private, affecting a single or determinate number of people. *Wernke v. Halas*, 600 N.E.2d 117, 120 (Ind. Ct. App. 1992). Both public and private nuisances are further divided into nuisances *per se* and nuisances *per accidens*. A nuisance *per se* cannot be lawfully carried on. *Id.* A nuisance *per accidens* might be otherwise lawful but becomes a nuisance by virtue of the circumstances surrounding it. *Id.*

Just as for the ordinance violation claim, the essence of the nuisance claim is the harm caused by third parties who are using the RWS property to access the beach. The plaintiffs do not allege that RWS is profiting by or otherwise inviting third parties to use its property, but merely that RWS owns the land and has made it possible for third parties to park on the property and access the beach.

Nuisance cases in which the party responsible for the nuisance is not the landowner are rare. *See Gray v. Westinghouse Elec. Corp.*, 624 N.E.2d 49, 53 n.2 (Ind. Ct. App. 1993), *reh’g denied, trans. denied*; *see also Hopper v. Colonial Motel Props., Inc.*, 762 N.E.2d 181 (Ind. Ct. App. 2002), *trans. denied*. But to be held responsible for a nuisance on the defendant’s property, the defendant must have some connection to the harmful activity. *See Joseph Schlitz Brewing Co. v. Sheil*, 45 Ind. App. 623, 88 N.E. 957 (1909), *reh’g denied, trans. denied*. However, the plaintiffs here have failed to allege facts showing that RWS even knows about, let alone is more significantly tied to, the parties on the beach.

Additionally, we find as a matter of law under the facts alleged in this case that blacktop removal, tree removal, excavation, and parking bumps cannot here rise to the level of a nuisance. The law does not deal in trifles, and especially so for nuisance cases, where property rights may be impacted. *Wernke v. Halas*, 600 N.E.2d 117, 122 (Ind. Ct. App. 1992). “Mere annoyance and inconvenience will not support an action for a nuisance because the damages resulting therefrom are deemed *damnum absque injuria* in recognition of the fact life is not perfect.” *Sherk v. Ind. Waste Sys., Inc.*, 495 N.E.2d 815, 818 (Ind. Ct. App. 1986).

To conclude, we affirm the trial court’s dismissal of the plaintiffs’ original complaint for failure to state a claim and find that the amended complaint likewise fails to state a claim upon which relief can be granted.

Affirmed.

RILEY, J., and DARDEN, J., concur.