

2012 IL App (2d) 111007-U
No. 2-11-1007
Order filed November 27, 2012

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IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

SAMUEL EDDINS,)	Appeal from the Circuit Court
)	of Du Page County.
Plaintiff-Appellee,)	
)	
v.)	No. 11-CH-861
)	
JAMES L. JOHANNESSEN and BARBARA)	
R. JOHANNESSEN,)	Honorable
)	Terence M. Sheen,
Defendants-Appellants.)	Judge, Presiding.

JUSTICE McLAREN delivered the judgment of the court.
Justice Burke specially concurred.
Justice Birkett specially concurred.

ORDER

Held: (1) Trial court's denial of defendants' motion to stay proceedings was appealable under Supreme Court Rule 307(a)(1); (2) plaintiff, who was part of the administrative permitting process in favor of defendant neighbor's zoning application, cannot subsequently attack municipality's decisions through the administrative process, and, further, cannot evade the force of unappealed administrative decisions by seeking relief under section 11-13-15 of Municipal Code; (3) contention that house was not built according to plans agreed to by plaintiff and defendant neighbors during course of administrative application process addressed as breach of contract claim.

¶ 1 Defendants, James and Barbara Johannesen, take this interlocutory appeal from the trial court's denial of their motion to stay proceedings. We affirm and remand the cause for further proceedings.

¶ 2 I. BACKGROUND

¶ 3 On February 27, 2006, the Johannesens purchased the property located at 222 E. Fourth Street in Hinsdale. Plaintiff, Samuel Eddins, owned the property at 202 E. Fourth, immediately west of defendants' property. The Johannesens intended to replace the house located on the property with a larger house. Eddins was involved in the zoning of the Johannesens' property from the beginning. See *Johannesen v. Eddins*, 2011 IL App. (2d) 110108. After he signed the Johannesens' original application for a zoning variance as a "Nominal Applicant," he contacted David Cook, the Hinsdale village manager, with the goal of getting Cook to overturn the building department's front setback calculation; Cook issued a determination letter in which he found the submitted calculation to be incorrect, and he increased the front setback. *Johannesen*, 2011 IL App (2d) 110108, ¶¶ 5-6. Eddins was also actively involved in opposing the Johannesens' appeal of that ruling to the Hinsdale Zoning Board of Appeals (ZBA). *Johannesen*, 2011 IL App (2d) 110108, ¶ 7. Following various administrative proceedings before the Village and its ZBA and proceedings in the circuit court of Du Page County and this court (see *Johannesen*, 2011 IL App (2d) 110108), the ZBA approved the Johannesens' application for a zoning variance from certain frontyard and sideyard setback requirements on October 10, 2007. The application noted that "the variations sought *** are necessary to achieve the implementation of the agreement between Applicant [the Johannesens] and Mr. and Mrs. Eddins, and approved by the Village." Both Eddins and his attorney spoke in favor of the variance at that meeting. Further, the site plan and building plans accompanying the

application were “those which form the agreement between Applicant and Mr. and Mrs. Eddins, and which are approved by the Village, subject to the grant of the variations sought herein.” Exhibit E attached to the application noted that floor plans and exterior elevations for the new home were on file with the Village but would be provided to the ZBA prior to the public hearing. The Village had twice required the Johannesens to resubmit the building plans in advance of the variance approval because the maximum floor area contained in the plans exceeded the zoning code. One week later, the Village issued building permits and a Certificate of Zoning Compliance. Construction of the new house ensued, and, on October 6, 2008, the Village’s Department of Community Development issued a “CERTIFICATE OF OCCUPANCY/COMPLETION.”

¶ 4 In February 2011, Eddins filed a complaint for injunctive and equitable relief pursuant to section 11-13-15 of the Municipal Code (Code) (65 ILCS 5/11-13-15 (West 2010)), seeking to prevent the Johannesens from using the nine-bedroom house that they had built on their property until it was “brought into full compliance with the Village’s Zoning Code.” According to Eddins, the Village “mistakenly found the proposed residence to be in compliance with” the zoning code and issued a building permit to the Johannesens in error. The Village and its consultants incorrectly interpreted provisions of the zoning code and the Johannesens provided false and misleading information that the Village and its consultants failed to investigate and correct. Further, Eddins alleged that the house, as constructed, did not comply with the mistakenly-approved plans. As a result, the floor area of the house exceeded the Code’s limitations by 225 to 700 square feet, while both the house and the detached garage exceeded the zoning code’s height limitations.

¶ 5 The Johannesens moved to dismiss the complaint under section 2-619 of the Code of Civil Procedure, arguing that: (1) the trial court lacked subject matter jurisdiction because Eddins had

failed to exhaust his administrative remedies and did not timely seek administrative review; and (2) the complaint was barred under the doctrines of waiver, *laches*, and estoppel. The trial court denied the motion on July 26, 2011, “without prejudice” to the Johannesens’ ability to later assert the affirmative defenses addressed in their motion.

¶ 6 Eddins then filed a “REQUEST FOR ACCESS TO REAL ESTATE FOR THE PURPOSE OF INSPECTION” pursuant to Supreme Court Rule 214 (eff. Jan. 1, 1996), seeking access to both the Johannesens’ lot and the interior of their house for the taking of measurements, photographs and video to determine floor area, use of the house, height of the house, and compare the house to the approved building plans. The Johannesens then moved to stay the proceedings in their entirety “until such time as Eddins exhausts his administrative remedies.” The trial court denied this motion on September 11. The court ordered that any inspection of the Johannesens’ property be conducted by an expert, not Eddins. Further, any inspection was to be conducted from outside the home, and no photography or videotaping of the home was permitted. On October 7, 2011, the Johannesens filed a notice of interlocutory appeal as a matter of right under Supreme Court Rule 307(a)(1) (eff. Feb. 26, 2010).

¶ 7

ANALYSIS

¶ 8 Eddins has filed a motion to dismiss this appeal for a lack of jurisdiction, which we have taken with the case. According to Eddins, the Johannesens’ motion to stay the proceedings is substantively nothing more than a motion to reconsider the trial court’s denial of their motion to dismiss. Further, as neither the denial of a motion to dismiss nor the denial of a motion to reconsider such a decision is a final order nor a proper basis for an interlocutory appeal under Illinois Supreme

Court Rule 307(a) (eff. Feb. 26, 2010), this court has no jurisdiction to hear this appeal. We disagree.

¶ 9 Courts have treated a trial court's denial of a motion to stay as a denial of a request for a preliminary injunction. *Hastings Mutual Insurance Co. v. Ultimate Backyard, LLC*, 2012 IL App (1st) 101751, ¶ 28 (subject to revision or withdrawal); *Lundy v. Farmers Group, Inc.*, 322 Ill. App. 3d 214, 216 (2001). A stay is injunctive in nature; thus, an order granting or denying a stay "fits squarely" within Rule 307(a). *Hastings Mutual Insurance Co.*, ¶ 28; *Rogers v. Tyson Foods, Inc.*, 385 Ill. App. 3d 287, 288 (2008). A trial court's denial of a stay is treated as a denial of a request for a preliminary injunction, which is appealable under Rule 307(a)(1). *Hastings Mutual Insurance Co.*, ¶ 28; *Beard v. Mount Carroll Mutual Fire Insurance Co.*, 203 Ill. App. 3d 724, 727 (1990). Orders staying or denying the stay of proceedings are reviewable. *Stein v. Krislov*, 405 Ill. App. 3d 538, 541 (2010). Thus, we have jurisdiction to hear this appeal, and we deny Eddins' motion to dismiss.

¶ 10 Ordinarily, the proper standard of review for an appeal brought pursuant to Rule 307(a)(1) is whether the trial court abused its discretion. *Household Finance Corp. III v. Buber*, 351 Ill. App. 3d 550, 553 (2004). However, where no disputed facts are presented to the trial court, and this court is presented with review of a legal question, we will review *de novo* that issue. See *Id.*

¶ 11 Although the parties have not addressed Eddins' complaint in this manner, we note that the complaint is, in essence, a two-count complaint. Eddins sought relief under section 11-13-15 of the Code because: (1) the Village both approved the Johannesens' plans and issued the building permit in error; and (2) the house, as actually constructed, did not comply with the plans, improperly

approved as they allegedly were. Thus, we will apply the Johannesens' contentions of error to each "count" of Eddins' complaint.

¶ 12 Section 11-13-15 of the Code provides in relevant part:

"In case any building or structure, including fixtures, is constructed, reconstructed, altered, repaired, converted, or maintained, or any building or structure, including fixtures, or land, is used in violation of an ordinance * * * any owner or tenant of real property, within 1200 feet in any direction of the property on which the building or structure in question is located who shows that his property or person will be substantially affected by the alleged violation, in addition to other remedies, may institute any appropriate action or proceeding (1) to prevent the unlawful construction, reconstruction, alteration, repair, conversion, maintenance, or use, (2) to prevent the occupancy of the building, structure, or land, (3) to prevent any illegal act, conduct, business, or use in or about the premises, or (4) to restrain, correct, or abate the violation. * * *

In any action or proceeding for a purpose mentioned in this section, the court with jurisdiction of such action or proceeding has the power and in its discretion may issue a restraining order, or a preliminary injunction, as well as a permanent injunction upon such terms and under such conditions as will do justice and enforce the purposes set forth above.

* * *

An owner or tenant need not prove any specific, special or unique damages to himself or his property or any adverse effect upon his property from the alleged violation in order to maintain a suit under the foregoing provisions." 65 ILCS 5/11-13-15 (West 2010).

¶ 13 The Johannesens first contend that the trial court lacked subject matter jurisdiction to consider Eddins' complaint because Eddins failed to exhaust his administrative remedies in compliance with the Administrative Review Law (735 ILCS 5/3-101 *et seq.* (West 2010)). Section 11-13-13 of the Code provides in part that "All final administrative decisions of the [zoning] board of appeals under this Division 13 shall be subject to judicial review pursuant to the provisions of the Administrative Review Law." 65 ILCS 5/11-13-13 (West 2010)). An administrative decision is defined as "any decision, order or determination of any administrative agency rendered in a particular case, which affects the legal rights, duties or privileges of parties and which terminates the proceedings before the administrative agency." 735 ILCS 5/3-101 (West 2010). According to the Johannesens, a party that wants to object under the Zoning Enabling Act to mistakes or errors in an administrative decision must present those objections to the appropriate administrative authority before seeking review in the courts; thus, Eddins should have raised the alleged violations of the zoning code to the village building authorities and proceeded, if necessary, to the courts under administrative review.

¶ 14 The doctrine of exhaustion of remedies helps to establish a proper relationship between administrative bodies and the court system. *Village of South Elgin v. Waste Management of Illinois, Inc.*, 348 Ill. App. 3d 929, 934 (2004). In general, a party aggrieved by an administrative action must first pursue all available administrative remedies before resorting to the courts. *Village of South Elgin*, 348 Ill. App. 3d at 934. The purpose behind this doctrine is to allow an administrative body to develop a factual record and to permit it to apply the special expertise that it possesses. *Village of South Elgin*, 348 Ill. App. 3d at 934-35. In addition, the aggrieved party might succeed before the

administrative body, obviating the need for judicial involvement and conserving judicial resources.

Village of South Elgin, 348 Ill. App. 3d at 935.

¶ 15 The Village issued building permits and a Certificate of Zoning Compliance in October 2007, and the Department of Community Development issued an occupancy permit in October 2008. Section 9-1-14 of the Village Code provides that “Any person aggrieved by an action taken, order issued, or determination made pursuant to this title by the village *** may appeal for reconsideration by filing a written application for appeal *** not more than twenty (20) days after such action, order, or determination.” (Emphasis added.) Hinsdale Village Code Title 9, § 9-1-14. No appeal for reconsideration of the decisions to issue the permits was filed. Thus, the period for appealing the granting of the building and occupancy permits expired long before Eddins filed his current suit. The decisions to grant those permits became final and binding and were not subject to collateral attack. See *Bull v. American National Bank & Trust Co.*, 112 Ill. App. 2d 32, 38 (1969). See also *CBS Outdoor, Inc. v. Village of Itasca*, 2011 IL App. (2d) 101117, ¶ 17 (90-day period for seeking judicial review of a municipality’s decision on a petition for a special use permit under section 11-13-25 of the Code was “not optional,” and the municipality’s decision was “deemed valid” after the 90 days had run).¹ This is especially so where Eddins was not only involved in the administrative process,

¹ I cite to *CBS Outdoor, Inc.* and its analysis of section 11-13-25 only for the proposition that statutorily-provided periods of review are not optional. I disagree with Justice Birkett that the 90-day limitation period provided in section 11-13-25 controls the outcome of this case. See *infra* ¶¶ 41-43. Section 11-13-25 applies to decisions “in regard to any petition or application for a special use, variance, rezoning, or other amendment to a zoning ordinance.” 65 ILCS 5/11-13-25(a) (West 2010). Johannesen did apply for a variance, the application for which included a survey and

he was a party to it. He signed on to the Johannesens' original application for a variance as a "Nominal Applicant" and even approved the building plans at issue here as part of "the agreement between Applicant and Mr. and Mrs. Eddins, and which are approved by the Village, subject to the grant of the variations." In his special concurrence, Justice Burke notes Eddins' participation in the zoning process in favor of, and to the benefit of, Johannesens' application; however, he fails to address the significance of this favorable participation.² Eddins' support of Johannesen's application makes Justice Burke's reliance on *Bull* inappropriate. In *Bull*, the plaintiff successfully opposed the granting of a building permit to the defendant in administrative hearings before the zoning administrator and the zoning board of appeals; the defendant began building after obtaining a permit via an application that was filed without notice and granted while the defendant's appeal of the earlier rejection was still pending. The plaintiff had a choice of remedies: review the allowance of the second permit in the administrative process or use section 11-13-15 to prohibit a zoning violation that had already been declared in the administrative process. *Bull*, 112 Ill. App. 2d at 37. The

building plans, which was granted by the ZBA on October 10, 2007. However, Eddins did not challenge the ZBA's issuance of the variance; instead, Eddins challenged the Village's issuance of building and occupancy permits based on the Village's alleged mistaken approval of Johannesen's building plans. While the building plans and the variance application were related, the Village's approval of the building plans and issuance of building and occupancy permits are not the same as the ZBA's approval of the zoning variance.

²Further, Justice Burke minimizes this support, limiting it to support of Johannesen's "attempt to secure front and side yard setback variance" (*infra* ¶ 30) and failing to acknowledge that the building plans were part of Johannesen's application.

plaintiff in *Bull* did not seek to stop via section 11-13-15 that which she had supported and agreed to in the prior administrative proceedings. Here, Eddins had injected himself deeply into, and was part of, the administrative permitting process in favor of Johannesens' zoning application, which included the building plans. He cannot attack those decisions through the administrative process, and he "cannot evade the force" of the unappealed decisions. See *Bull*, 112 Ill. App. 2d at 39. We posit this without citation to precedential authority (see *infra* ¶ 28) because our research has not uncovered a case in which a party who supported and agreed to a zoning application and building plans in the administrative process later sought to use section 11-13-15 to stop the implementation of those plans. As the administrative decisions to grant the various permits were final, deemed valid, and binding, there is no further administrative review to exhaust.

¶ 16 A party will not be required to exhaust administrative remedies when it would be patently useless to seek relief before a local body or where an administrative agency is unable to provide an adequate remedy. *Midland Hotel Corp. v. Director of Employment Security*, 282 Ill. App. 3d 312, 320 (1996). As Eddins cannot obtain relief via the administrative process, a stay to the proceedings in order to exhaust non-existent remaining administrative remedies would provide no practical effect. Therefore, we can find no error in the trial court's denial of the motion for a stay as it relates to this portion of Eddins' complaint.

¶ 17 Justice Burke takes issue with our determination that exhaustion of administrative remedies is not required, viewing it as an "an improper interlocutory review of the denial of defendants' section 2-619 motion." *Infra* ¶ 30. Apparently, we are not to indicate a rationale for such a holding because it might affect future proceedings or provide a conclusion to an issue not presently before us. Justice Burke does not cite to any authority that would preclude the adjudication of an issue of

law when that adjudication is the basis for a holding that affirms the trial court's decision. It would seem that he claims that, in an interlocutory appeal, we must affirm on the rationale provided by the trial court, even if that rationale is incorrect, in order to avoid ruling on an issue in the case that is not presently before us. Such a view places this court in the untenable position of either affirming the trial court without providing a *ratio decidendi* or affirming on the basis of (and despite) improper arguments made to the trial court and the rulings made thereon. We are not so limited. We are not, as Justice Burke asserts, "determining that plaintiff is estopped from proceeding with this claim," nor are we "reversing the trial court's denial of defendant's section 2-619 motion." *Infra* ¶ 30. We have been asked on appeal to determine whether the proceedings below should have been either dismissed or stayed until Eddins exhausted his administrative remedies. Logic suggests that we first determine whether any administrative remedies requiring exhaustion even exist. The implications of our determination that Eddins had no such remedies to exhaust must play out in the trial court.

¶ 18 While the remedy provided by section 11-13-15 is "in addition to other remedies" (see 65 ILCS 5/11-13-15 (West 2010)), this does not mean that the section 11-13-15 remedy overrides or makes inapplicable the obligations incurred by Eddins by his prior activities. Section 11-13-15 was never intended to allow parties to the administrative process, to collaterally attack a final, binding administrative decision. Therefore, since section 11-13-15 is inapplicable to Eddins' attack on the issuance of the permits, the trial court shall not award attorney fees under that section for this part of the litigation. See 65 ILCS 5/11-13-15 (West 2010).

¶ 19 "Count II" of Eddins' complaint alleged that the house, as actually constructed, did not comply with the approved plans. The violation alleged here clearly arose outside of the administrative proceedings that led to the issuance of the permits. The Village would take an interest

in the completed product's adherence to the plans only insofar as it affected zoning and building code requirements. However, the plans that were submitted with the Johannesens' zoning variance application were "those which form the agreement between Applicant and Mr. and Mrs. Eddins, and which are approved by the Village, subject to the grant of the variations sought herein." In essence, the agreed-upon plans submitted with the Johannesens' application was a settlement agreement amongst Eddins, the Johannesens, and the Village presented to the quasi-judicial ZBA. A settlement agreement is a contract, the construction and enforcement of which is governed by principles of contract law. *Law Offices of Colleen M. McLaughlin v. First Star Financial Corp.*, 2011 IL App (1st) 101849, ¶ 18. Thus, Eddins has actually raised an issue of breach of contract, and we can see no reason why the proceedings for a breach of contract would need to be stayed. We find no error in the trial court's denial of a stay as to the portion of the complaint alleging that the house as built did not comply with the plans.

¶ 20 Justice Burke complains that we "unnecessarily recast[] plaintiff's complaint as now sounding in breach of contract by making factual findings regarding the nature and extent of an agreement between plaintiff, defendants, and the village." *Infra* ¶ 32. We do not recast the complaint;³ we explain it. This court is not required to take the facts only as the parties prioritize and characterize them and apply the law only as the parties argue that it should be applied. Facts can

³While it is not relevant to the issues raised in this interlocutory appeal, we must note that, along with their answer to Eddins' complaint, Johannesen filed a counterclaim alleging breach of oral agreement and an affirmative defense of settlement based on Eddins' breach of "an agreement that purported to settle the matters raised in the complaint." The concept of breach of contract is not alien to this case and is not here created from whole cloth.

be taken out of context, causes of action misstated, arguments muddled. The trial court and the parties are better served when we explain how we relate the law to the facts in the record than when we remand a cause for unexplained reasons and expect them to figure out why we did what we did. This court may search the record and affirm the trial court on any basis appearing in the record, conserving and efficiently using judicial resources. See *Dyer v. Zoning Board of Appeals of Arlington Heights*, 179 Ill. App. 3d 294, 299 (1989). We thus promote judicial economy by preventing unnecessary, confused, and repetitive litigation. See *Law Offices of Nye and Associates, Ltd. v. Boado*, 2012 IL App (2d) 110804, ¶ 14.

¶ 21 Future proceedings on this remaining claim are pursuant to the agreement between Eddins and the Johannesens, as approved by the Village. As such, attorney fees would ordinarily be granted only if they are provided in the agreement. However, as we have stated, the section 11-13-15 remedy exists “in addition to other remedies.” If Eddins proves some method of recovery in addition to a breach of contract (*e.g.*, that the house as built exceeded both the terms of the agreement *and*, consequently, the zoning code), he may be entitled to fees pursuant to section 11-13-15.

¶ 22 We emphasize here the fact that this interlocutory appeal deals only with the issue of whether the trial court erred in denying the Johannesens’ motion to stay the proceedings. In no way are we addressing the merits of any affirmative defenses that the Johannesens have raised in their pleadings in the trial court, and this opinion shall not be used to foreclose the use of those or any other affirmative defenses that the Johannesens may raise in any future proceedings.

¶ 23

III. CONCLUSION

¶ 24 For these reasons, the judgment of the circuit court of Du Page County denying a stay of proceedings is affirmed, and the cause is remanded for further proceedings.

¶ 25 Affirmed.

¶ 26 JUSTICE BURKE, specially concurring:

¶ 27 I agree with the majority that we have jurisdiction over this appeal. I also agree with the ultimate decision to affirm the trial court's judgment denying the stay of proceedings. We part company in the analysis of the issues presented.

¶ 28 Concerning plaintiff's attack on the building plans, the majority agrees with the trial court that it would be patently useless to order plaintiff to exhaust his administrative remedies. The majority then, in effect, dismisses this portion of the complaint holding that section 11-13-15 of the Code is inapplicable to plaintiff's attack on the issuance of the permits. Without citation to authority, the majority posits that plaintiff, as a party to the administrative process, is barred from filing an adjoining landowner's action.

¶ 29 Plaintiff has argued throughout the proceedings on this motion for stay that the motion was defendants' veiled attempt to seek reconsideration, and now on appeal, improper interlocutory review of the denial of their motion to dismiss pursuant to section 2-619 of the Code of Civil Procedure. The majority has now granted, in part, that motion.

¶ 30 Plaintiff signed defendants' zoning variance application as a "nominal applicant," and was involved in proceedings on the variance. Plaintiff supported defendant's attempt to secure front and side yard setback variance. The trial court denied defendants' section 2-619 motion, holding that plaintiff was not required to exhaust his administrative remedies concerning his present building height and square footage complaint because the variance proceedings that plaintiff participated in were strictly limited to front and sideyard setbacks. The majority has now ruled that plaintiff's participation made him a "party" to the administrative process, which forecloses his present action

regarding the building plans. On this issue, we have undertaken an improper interlocutory review of the denial of defendants' section 2-619 motion by determining that plaintiff is estopped from proceeding with this claim. Here, we are not simply affirming on a rationale not provided by the trial court, we are reversing the trial court's denial of defendant's section 2-619 motion.

¶ 31 Section 11-13-15 of the Code allows an adjoining landowner to bring an action "in addition to other remedies." As indicated by the trial court, plaintiff's participation in the zoning process may certainly be relevant to defendants' affirmative defenses of waiver and estoppel, but under the plain language of the statute, plaintiff is not foreclosed from bringing this action regarding the building plans. See *Bull*, 112 Ill. App. 2d at 36-37 (While the plaintiff could have appealed to the zoning board, she also could choose to seek relief under section 11-13-15 of the Code.)

¶ 32 Turning to plaintiff's allegation that the house was not actually constructed in compliance with the approved plans, I agree with the majority that "[t]he violation alleged here clearly arose outside of the administrative proceedings." *Supra*, ¶ 18. Does that not end the inquiry as to whether the proceedings should be stayed for plaintiff to exhaust his administrative remedies? The majority does not explain, but unnecessarily recasts, plaintiff's complaint as now sounding in breach of contract by making factual findings regarding the nature and extent of an agreement between plaintiff, defendants, and the village. The trial court was correct when it determined that such factual findings should be made by the trier of fact.

¶ 33 JUSTICE BIRKETT, specially concurring.

¶ 34 I agree with my colleagues that we have jurisdiction over this appeal. I also agree to affirm the trial court's judgment denying the motion to stay the proceedings. I also agree that because there were no disputed facts presented on the issue of the stay, our review is *de novo* rather than an abuse

of discretion. *Household Finance Corp. III v. Buber*, 351 Ill. App. 3d 550, 553 (2004). Justice McLaren concludes that section 11-13-15 of the Code is inapplicable to portions of plaintiff's complaint, specifically paragraphs 21 through 27, which generally allege that the Village did not comply with the zoning code in approving the plans and that the building, as constructed, does not comply with the Village's zoning code. I agree that section 11-13-15 may not be used to attack the decisions of the ZBA, but not because of plaintiff's failure to exhaust administrative remedies. Instead, section 11-13-15 cannot be used to attack the decisions of the ZBA because plaintiff's allegations are time barred and the trial court lacked jurisdiction to hear them. I also agree with Justice Burke that Justice McLaren unnecessarily discusses contract principles. I do not agree with Justice Burke's conclusion that "plaintiff is not foreclosed from bringing this action regarding the building plans." (¶ 31, Justice Burke, specially concurring). I therefore write separately to explain how I arrived at the same result as my colleagues.

¶ 35 Justice McLaren cites to *CBS Outdoor, Inc. v. Village of Itasca*, 2011 IL App (2d) 101117, ¶ 17, for the proposition that the 90-day period for seeking judicial review of a municipality decision on a petition for a special use under section 11-13-25 of the Code was "not optional." (Majority opinion, ¶ 15). However, *CBS Outdoor* did not involve an adjoining landowner action under section 11-13-15 of the Code. It is clear that the Adjacent Landowner Act (65 ILCS 5/11-13-15 (West 2010)) "does not provide a cause of action against the city by a landowner." *Heerey v. Berke*, 179 Ill. App. 3d 927, 934 (1989); *Dunlap v. Village of Schaumburg*, 394 Ill. App. 3d 629, 638-39 (2009). There is an exception to this rule when the municipality is being sued as the offending landowner. See *Ruissard v. Village of Glen Ellyn*, 406 Ill. App. 3d 644, 663 (2010).

¶ 36 Paragraphs 21 through 27 of plaintiff's complaint as well as his prayer for relief are set out below:

“21. Based upon the analysis performed by TPI, the Village mistakenly found the proposed residence to be in compliance with the Village's Zoning Code and issued permits that allowed Johannesen to construct the house.

22. The plans that TPI and the Village approved did not, in fact, comply with the Village's Zoning Code. The building, as described in the April 9, 2007 application violated the Zoning Code in the following respects:

a. The floor exceeded the limitations set forth in the Zoning Code, as properly interpreted, by 225 to 700 square feet;

b. The height of the principal residence which has a mansard roof, exceeds the allowable height limited as properly calculated under the Zoning Code.

c. The height of the detached garage, which has a mansard roof, exceeds the 15 foot height limited by approximately 4.5 feet.

23. The Village's approval of the application was in error both because TPI and the Village incorrectly interpreted provisions of the Zoning Code and because Johannesen intentionally provided false and misleading information in the application, which TPI and the Village failed to investigate and correct.

24. Johannesen knew that the ZBA and the Circuit Court has made a determination which effectively lowered the lot area and the maximum floor area of the building, but submitted an application that exceeded the 8,700 square foot limit.

25. On information and belief, the Village compounded this problem because it did not inform its consultant, TPI, of the ongoing dispute regarding lot area and its resolution of the dispute, which resulted in a smaller lot area. After it received TPI [*sic*] report, which mistakenly approved the plan, the Village failed to review or question TPI [*sic*] erroneous calculations.

26. The Village issued a building permit for the residence even though Johannesen did not comply with the Village's Zoning Code (or obtain necessary variance(s) from same).

27. Because the application was approved in error, and building permits were issued in error, Johannesen's house, as actually constructed, does not comply with the Village's Zoning Code, including the limitations on height and floor area set forth in the Zoning Code.”

¶ 37 At the conclusion of his complaint, plaintiff requested that the court enjoin defendants' use of the house unless and until the house is brought into full compliance with the Village's zoning code.

¶ 38 The *Dunlap* case involved an adjacent landowner suit against the Village of Schaumburg and their neighbors, the Wehmeiers, regarding the decision of the Village to issue a zoning variance to the Wehmeiers that allowed them to build a patio room at the back of their home. The Village filed a motion to dismiss pursuant to section 2-615 of the Code of Civil Procedure (735 ILCS 5/2-615 (West 2006)) contending that *Dunlap* could not maintain an action against any of the defendants under section 11-13-15 of the Code. The trial court denied the motion, finding that “although a cause of action did not lie against any of the defendants under section 11-13-15, *Dunlap* could nevertheless proceed under the 2006 amendment to section 11-13-25(a).” *Id.* at 633. The Village

later filed a motion for summary judgment in which the Wehmeiers joined. The trial court granted the defendants' motion for summary judgment. On appeal, the first district reaffirmed that section 11-13-15 "has been consistently held not to provide a right of action against a city." *Id.* at 638. The court went on to also reject "Dunlap's argument that the 2006 amendment to the Zoning Enabling Act, which created section 11-13-25(a) of the Code, provides an independent right of action against the Village." *Id.* at 642. The court agreed with the Village that "the intent of the legislature in enacting this amendment to the Zoning Enabling Act was not to expand private landowner's rights to take judicial action against municipal zoning decisions, but rather to clarify that when such challenges are properly made, the decisions are to be reviewed under standards for legislative actions." *Id.* at 642. As Justice McLaren noted, pursuant to section 11-13-25(a), "[a]ny action seeking the judicial review of such a decision shall be commenced not later than 90 days after the date of the decision." 725 ILCS 5/11-13-25 (a) (West 2010).

¶ 39 Plaintiff has completely misconstrued his ability to maintain a suit which challenges the actions of the Village and the ZBA. Section 11-13-25(a) is part of the Zoning Enabling Act and must be construed *in pari materia* with other sections of that Act. Its purpose is to "prevent violations of a zoning ordinance, that is unauthorized uses. It does not create another method of judicial review of an order of the Zoning Board of Appeals." *222 East Chestnut Street v. Lakefront Realty Corp.*, 256 F.2d 513, 516 (1958).

¶ 40 Plaintiff contends that he "was categorically not required to exhaust any administrative remedies that might be available to him." He argues that "[a]s contemplated by section 11-13-15, neighboring landowners need not affirmatively inject themselves into the permitting process before filing suit to challenge an illegal building." Citing *LaSalle National Bank v. Dubin Residential*

Communities Corp., 337 Ill. App. 3d 345 (2003), plaintiff claims that he had no mandatory duty to object at the time the building permit or certificate of occupancy was issued and his failure to object was not a bar to the section 11-13-15 claim. He also argues that because he was not required to exhaust his administrative remedies before filing suit, “the 35 day appeal period set forth in the Administrative Review Law is wholly irrelevant to plaintiff’s claim.” Plaintiff then states, “[a]s made clear in *Dubin Residential*, any time constraints for plaintiffs to file an action under section 11-13-15 are established by the equitable principles of *laches****and****laches* is a fact based affirmative defense that is generally inappropriate for resolution on a motion to dismiss.”

¶ 41 Plaintiff’s reliance on *Dubin Residential* for the proposition that *laches* is the only time constraint on his filing of a cause of action pursuant to section 11-13-15 is misplaced. The appellate court opinion in *Dubin Residential* was issued on February 18, 2003. The Zoning Enabling Act was amended by P.A. 94-1027, eff. July 14, 2006, with the enactment of section 11-13-25(a), which provides that any action seeking judicial review of a decision involving “any special use, variance, rezoning or other amendment to a zoning ordinance adopted by the corporate authorities of any municipality, home rule or non-home rule***shall be commenced not later than 90 days after the date of such decision.” 65 ILCS 5/11-13-25(a) (West 2010). Curiously, neither party cites to section 11-13-25(a). However, we have an independent obligation to ensure that jurisdiction is proper. *People ex rel. Madigan v. Illinois Commerce Commission*, 231 Ill. 2d 370, 387 (2008), (citing *Franson v. Micelli*, 172 Ill. 2d 352, 355 (1996)). In cases where the court is conferred power to adjudicate by virtue of a statute, the court’s jurisdiction is strictly limited by the statute. *In re Rami M.*, 285 Ill. App. 3d 267, 272 (1996). The 90-day limitation in section 11-13-25(a) is a jurisdictional limitation rooted in the Illinois Constitution. Circuit courts enjoy “original jurisdiction

of all justiciable matters,” but only possess “such power to review administrative actions as provided by law.” Ill. Const. 1970, art. VI, § 9. Plaintiff has attempted, by judicial review, to set aside the findings and orders of the ZBA. Plaintiff is correct that the 35-day appeals period set forth in the Administrative Review law does not apply to his claim. However, as the First District found in *Dunlap*, section 11-13-25(a), “merely clarifies the terms under which suits properly initiated under section 11-13-15(a) are to be conducted.” *Dunlap*, 394 Ill. App. 3d at 639.

¶42 During the proceedings below on defendants’ motion to dismiss, plaintiff argued that “he has a right to, if you will, step into the issue of [*sic*] a municipality, if you will, who has made an erroneous decision by issuing a permit that should not have been issued or has failed to make a proper decision in the administration of the applicable code or ordinance.” Plaintiff may have a point, but no matter whose shoes he steps in, he has put them on too late. Paragraphs 21 through 27 of his complaint plainly challenges the approval of the building plans and the issuance of the occupancy permits on the ground that the Village did not comply with the zoning code and is therefore governed by the 90-day limitation in section 11-13-25(a) of the Code. The decision of the ZBA was made on October 10, 2007. Plaintiff filed his complaint on February 11, 2011. Because plaintiff’s complaint challenging the decisions of the zoning board of appeals is time barred, the trial court did not err in denying the motion to stay.

¶43 Justice McLaren does not agree that section 11-13-25 “has any application to this case” because Eddins challenges the Village’s issuance of the building and occupancy permits rather than decisions “in regard to any petition or application for a special use, variance, rezoning or other amendment to a zoning ordinance.” 65 ILCS 5/11-13-25(a) (West 2010). I disagree with my colleague. In approving the application for a set-back variance, the ZBA had before it and

considered the plans for the home which included the elevations and square footage. Counsel for the Johannesens stated that “[I]t is our understanding that the Village is prepared to issue demolition and construction permits based on those plans, subject to your granting of the requested variances.” Also, the partial findings of the ZBA as read by Chairman Nelson on October 7, 2007, indicate that the grant of the variance was “premised upon the location of the new residence being substantially as depicted in the survey, attached as Exhibit A, being the same Exhibit A attached to the application, and *the design of the new residence being substantially as depicted in the plans attached hereto as Exhibit B and Exhibit C, comprised on two pages which have been filed and received tonight, all of which shall be substantially complied with.*” It is clear from the record that approval of the variance was conditioned on the home being constructed “substantially as depicted in the plans.” While the Johannesens’ petition was for set-back variances, the ZBA’s decision included approval of the plans. Eddins had 90 days to challenge this decision.

¶ 44 I agree with my colleagues that the trial court was correct in denying the motion to stay after the allegation in paragraph 28 that the house “as actually constructed, does not comply with the plans and specifications” that were approved because section 11-13-15 does not require exhaustion of administrative remedies. Like my colleagues, in affirming the trial court’s denial of a stay, I am in no way suggesting that plaintiff’s prior activities will not result in estoppel of his claims; or that he is not guilty of *laches*.