2015 IL App (2d) 131019-U
No. 2-13-1019
Order filed June 19, 2015

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

FOX VALLEY FAMILIES AGAINST PLANNED PARENTOOD, NANCY MALONEY, SOCORRO NIETO, CHAD FLOLO, NATALIE FLOLO, and CHARLES AMANING,	)	Appeal from the Circuit Court of Du Page County.
Plaintiffs-Appellants,	)	
v.	)	No. 08-MR-261
PLANNED PARENTHOOD OF ILLINOIS, as Successor in Interest to PLANNED PARENTHOOD/CHICAGO, GEMINI OFFICE DEVELOPMENT, LLC, 21ST CENTURY OFFICE DEVELOPMENT, LLC, THE CITY OF AURORA, THE AURORA ZONING BOARD OF APPEALS, ED SIEBEN, in His Official Capacity as Zoning Administrator of the City of Aurora, THE AURORA BUILDING CODE BOARD OF APPEALS, HERMAN BENEKE, in His Official Capacity as Building Official of the City of Aurora, THE PLANNING COMMISSION OF THE CITY OF AURORA, THE PLANNING AND DEVELOPMENT COMMITTEE OF THE CITY OF AURORA, and THOMAS WEISNER, in His Official Capacity as the Mayor of the City of Aurora,	)	
Defendants-Appellees,	)	Honorable Neal W. Cerne, Thomas C. Dudgeon,

(Kim Frachey, Plaintiff, v. Steve Trombley, Defendant).	))	Paul M. Fullerton, Judges, Presiding.

JUSTICE ZENOFF delivered the judgment of the court.
Justices Hutchinson and Spence concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court's judgment was affirmed in part and reversed in part where (1) the court properly dismissed counts II and III seeking administrative review of the decisions of the zoning board and the building code board; (2) the court properly dismissed count IV alleging due process violations; (3) the court properly granted summary judgment in favor of the Planned Parenthood defendants on plaintiffs' claim under section 11-13-15 of the Municipal Code that the property violates parking, setback, and landscaping zoning standards; (4) the court erred in granting summary judgment in favor of the Planned Parenthood defendants on plaintiffs' claim under section 11-13-15 that Planned Parenthood's use of the property violates the Aurora Zoning Ordinance; (5) the court abused its discretion in limiting discovery relating to count I; and (6) the court erred in striking the request for declaratory relief from count I.

¶ 2 After obtaining final plan approval and building permits from the city of Aurora (the city), Gemini Office Development, LLC (Gemini), constructed a building at the corner of East New York Street and North Oakhurst Drive in Aurora, Illinois. Before the city issued a final certificate of occupancy, a news article brought to light that the intended tenant of the building was Planned Parenthood of Illinois (Planned Parenthood). Prompted by protests, Mayor Thomas Weisner (the mayor) conducted an investigation into the permitting process, obtaining the opinions of outside counsel and ultimately determining that Gemini's failure to disclose Planned Parenthood as the intended tenant did not warrant denying a certificate of occupancy. A certificate of occupancy was issued and the facility opened. Subsequently, Fox Valley Families Against Planned Parenthood (Fox Valley Families) and several individuals who owned property near the facility, filed suit against Gemini, Planned Parenthood, the city, the mayor, and other defendants. Among other claims, they alleged that Planned Parenthood's use of the property violated the Aurora Zoning Ordinance (AZO).

¶ 3 Early in the proceedings, the trial court dismissed the claims against the city and the other municipal defendants, leaving plaintiffs' claim against the Planned Parenthood defendants that the use of the property violates the AZO. The trial court interpreted this claim as one for administrative review and therefore did not allow plaintiffs to pursue discovery. Ultimately, the court granted summary judgment in favor of the Planned Parenthood defendants on the claim, ruling that a legislative decision had been made approving of Planned Parenthood's use of the property and that plaintiffs could not establish that the decision was arbitrary and capricious.

¶ 4 Plaintiffs appeal, raising a number of issues. However, the key issue that we are called upon to decide is whether any legislative decision was made that Planned Parenthood's use of the property complies with the AZO. We conclude that no such decision was made. We also conclude that it was error to interpret plaintiffs' claim against the Planned Parenthood defendants as one for administrative review. Therefore, as explained below, we reverse the trial court's order granting summary judgment in favor of the Planned Parenthood defendants on plaintiffs' claim that the ongoing use of the property violates the AZO. We also hold that it was error to limit discovery on this issue and to strike plaintiffs' request for declaratory judgment relating to this issue. Otherwise, we affirm the trial court's judgment with respect to all other issues raised on appeal.

¶ 5 I. BACKGROUND

¶ 6 The following undisputed facts are taken from the record. Planned Parenthood is a not-for-profit corporation and is the sole and controlling member of 21st Century Office Development, LLC (21st Century), which, in turn, is the sole and controlling member of Gemini. In March 2006, Gemini purchased the parcel of land at issue. Shortly thereafter, Gemini filed a petition with the city seeking approval of its final plan for development of the property. Gemini

also filed various building permit applications. The petition and permit applications identified Gemini as the property owner and specified that the proposed use of the property was construction of a medical office building. In some of the permit applications, Gemini identified itself as the tenant, while in others it indicated that the tenant was "unknown at this time."

¶ 7 On October 27, 2006, the city's planning division issued a staff report recommending that Gemini's final plan for construction of the medical office building be approved. On November 1, 2006, the city's planning commission also recommended approval of the final plan.

¶ 8 On November 16, 2006, the city's planning and development committee, which consisted of three city council members, held a public hearing to address approval of the final plan. At the hearing, the committee discussed various aspects of the plan, including landscaping and sidewalks. One city council member asked whether the building was for a specific client, and an unidentified gentleman responded, "We're in negotiations with a tenant; we do not currently have a lease but we still want to move ahead." The council member later stated, "I'd be interested to know who your client is, when you can release that." At the conclusion of the hearing, the committee passed a resolution, unanimously approving the plan. The resolution was signed by the three city council members, the mayor, and the city clerk.

¶ 9 On January 12, 2007, the city's division of building and permits issued a building permit to Gemini. After receiving the building permit, Gemini proceeded with construction.

¶ 10 In July 2007, when construction was nearly complete, a *Chicago Tribune* news article revealed that Planned Parenthood was the intended tenant of the building. The article indicated that the facility was to be Planned Parenthood's first full-service site in the region in 20 years and reported that abortions would be performed there.

¶ 11 Shortly after the article was published, the city issued a temporary certificate of occupancy to Gemini. Less than two weeks later, amid protests, the mayor announced that the city would undertake a complete review of the development process. The mayor further indicated that the city would hire outside counsel to conduct the review and that the facility would not be permitted to open in the meantime. The city sent a letter to Gemini and Planned Parenthood instructing them not to open the facility until further notice.

¶ 12 The minutes of a September 11, 2007, city council meeting indicate that 57 speakers addressed the council regarding the Planned Parenthood facility. Among the speakers was Eric Scheidler, who is identified elsewhere in the record as the volunteer head and representative of Fox Valley Families. Another speaker was Vincent Tessitore, whose affidavit is included in the record. Tessitore was a volunteer coordinator for Fox Valley Families, and he informed the council that "the evidence showed that a long series of deceptions had been perpetrated by Gemini, which ha[d] turned out to be a wholly owned subsidiary of Planned Parenthood."

¶ 13 On October 1, 2007, the mayor publicized the written legal opinions that the city had solicited from Richard Martens, Phillip Luetkehans, and Kane County State's Attorney John Barsanti. The State's Attorney concluded that no criminal activity had occurred. Martens and Luetkehans concluded that Gemini's failure to disclose the tenant of the building was not a sufficient basis for denying a certificate of occupancy. Martens further indicated that Gemini had "substantially complied" with the applicable city codes.

¶ 14 Luetkehans reported that the property was "zoned B-2" and that "clinics and medical centers" were permitted in such zoning areas, as long as they did not perform "major surgery." Luetkehans also indicated that it had "come to [his] attention" that some neighboring property owners believed that the property fell within the special-use zoning category of "[s]ocial service

agencies, charitable organizations, health related facilities, meeting halls and similar uses when not operated for pecuniary profit," and that the property therefore required a special-use permit. Luetkehans noted that the AZO did not define the not-for-profit special-use category, and he opined that "[a]ny ambiguity in the zoning ordinances must be found in favor of the applicant."

¶ 15 Along with releasing the written legal opinions, the mayor offered the following statement in a press release:

> "Last month, serious questions were raised about whether Gemini Office Development and Planned Parenthood were forthcoming in their dealings with the city and followed all local laws. As Mayor, I felt that I had a responsibility to the citizens of Aurora to investigate those allegations and with the support of the City Council initiated three independent reviews of the process.
>
> Earlier today, Kane County State's Attorney John Barsanti cleared Planned Parenthood and Gemini Office Development of criminal wrongdoing. Both the Martens and Luetkehans reports indicate that Gemini and Planned Parenthood misrepresented certain tenant information. However, their reports also indicate that this is not a sufficient basis to deny an occupancy permit.
>
> The Luetkehans report found that while a medical clinic is a permitted use for that property, medical clinics are excluded from performing major surgeries under the City of Aurora's zoning definitions. Based on a review of this finding, the city has contacted Planned Parenthood for clear written assurance that only minor surgeries as defined by the Luetkehans report would be performed at this facility.
>
> Over the last few weeks, the City of Aurora has been inundated with thousands of phone calls, letters and requests from people who feel passionately about the abortion

issue. As elected officials, we are sworn to uphold the law regardless of our personal, emotional or even religious beliefs. Based on the opinions of these three attorneys, the City of Aurora has no legal basis to deny Planned Parenthood an occupancy certificate and thus the Building and Permits Division will move forward with issuing Planned Parenthood an occupancy certificate."

¶ 16 On October 1, 2007, after the mayor disclosed the written opinions, the city issued another temporary certificate of occupancy, authorizing the Planned Parenthood facility to open. On July 1, 2008, the city issued a final certificate of occupancy.

¶ 17 A. Administrative Appeal to the City's Zoning Board of Appeals

¶ 18 On October 2, 2007, plaintiffs filed an administrative appeal to the city's zoning board of appeals (the zoning board). Plaintiffs argued that Planned Parenthood's intended use of the property was not permitted under the AZO. According to plaintiffs, the zoning standards applicable to a "B-B Business Boulevard District" (B-B district) applied to the property. Under the AZO, one permitted use in a B-B district is "[o]ffices, business and professional, including medical clinics." However, they argued, a special-use permit is required for charitable organizations and not-for-profit health-related facilities. Plaintiffs contended that Planned Parenthood fell within the special-use category but had failed to obtain a special-use permit. Plaintiffs asked the zoning board to "declare the Final Plan null and void and to declare any actions pursuant to the approval of such Final Plan null and void."

¶ 19 The city filed a motion to dismiss the appeal for lack of jurisdiction. According to the city, the zoning board only had jurisdiction to review decisions of the city's zoning administrator, whose most recent decision with respect to the property was the staff report

completed in October 2006. Furthermore, the city argued, state law required an appeal to the zoning board to be taken within 45 days of the decision being appealed.

¶ 20 On January 7, 2008, the zoning board issued a written order dismissing plaintiff's appeal for lack of jurisdiction. The board agreed that administrative appeals had to be filed within 45 days of a decision of the zoning administrator, which made the appeal untimely.

¶ 21 B. Administrative Appeal to the City's Building Code Board of Appeals

¶ 22 On July 21, 2008, plaintiffs filed an administrative appeal to the city's building code board of appeals (the building code board). They challenged the building official's issuance of the final certificate of occupancy on July 1, 2008, as well as the "orders, decisions, and determinations" that "culminated" in issuance of the certificate. Plaintiffs argued that the permits and the temporary and final certificates of occupancy were "invalid" because they were the results of Gemini's fraudulent misrepresentations.

¶ 23 The city filed a motion to dismiss plaintiffs' administrative appeal for lack of jurisdiction. It argued that the building code board only had jurisdiction to review decisions of the building official, and that an appeal had to be taken within 20 days of the decision being challenged. The city argued that the only decision of the building official that occurred within 20 days of plaintiffs' appeal was the issuance of the final certificate of occupancy.

¶ 24 On September 10, 2008, the building code board issued a written decision granting the city's motion to dismiss the appeal as untimely as to all decisions other than the issuance of the final certificate of occupancy.

¶ 25 On September 24, 2008, the building code board conducted an evidentiary hearing to address the issuance of the final certificate of occupancy. The city presented evidence that, shortly before the certificate was issued, the only construction items to be completed were

included on a "punch list" resulting from a final inspection. The city's evidence further established that Gemini had corrected all of the items on the punch list. Plaintiffs presented no contrary evidence. At the conclusion of the hearing, the building code board denied plaintiffs' appeal, reasoning that the building official properly issued the final certificate of occupancy.

¶ 26 C. Plaintiffs' Action in the Circuit Court

¶ 27 On February 13, 2008, plaintiffs commenced this action in the circuit court of Du Page County against Planned Parenthood; Gemini; 21st Century; the city; the mayor; the planning commission; the planning and development committee; Ed Sieben, the city's zoning administrator; Herman Beneke, the city's building official; the zoning board; and the building code board. On January 5, 2010, plaintiffs filed a second amended complaint.

¶ 28 In addition to the undisputed facts recounted above, plaintiffs alleged the following. The property on which Gemini constructed the Planned Parenthood facility is located in the Fox Valley East Planned Development District (FVEPDD), which the city created by ordinance in 1973. On December 7, 1993, the city passed Ordinance No. 093-124, which approved a "Plan Description Modification" of the FVEPDD. The modification provided that the zoning standards applicable to B-B districts applied to all "Business Areas" in the FVEPDD that had "not yet been Final Planned and Final Platted." It further provided that "[o]nly the uses that are permitted uses on December 7, 1993, or which subsequently become permitted uses in a B-B [district] of the Zoning Ordinance shall be permitted uses in the Business Areas of the [FVEPDD]." According to plaintiffs, the property at issue is located in a "Business Area" of the FVEPDD and, therefore, must comply with the city's zoning ordinances applicable to B-B districts.

¶ 29 The complaint further alleged that, throughout the development process, Gemini failed to disclose that Planned Parenthood was the intended tenant of the building. According to

plaintiffs, because Planned Parenthood is a not-for-profit organization, its intended use of the property fell within the special-use category that included charitable organizations and not-for-profit health-related facilities. However, Gemini never obtained a special-use permit. Plaintiffs further alleged that, in December 2006, after Gemini's final plan was approved but before a building permit issued, the city amended the AZO so that properties falling within the special-use category that included charitable organizations and not-for-profit health-related facilities were no longer permitted in B-B districts.

¶ 30 To support their claim that Planned Parenthood's use fell within the special-use category, plaintiffs alleged that Planned Parenthood had obtained $8.05 million in tax-free bonds from the Illinois Finance Authority to fund the construction of the facility. In its application for the bonds, Planned Parenthood represented that it is operated exclusively for charitable purposes and not for profit. In addition, Planned Parenthood indicated that it intended to use the facility as a "full service center," providing community education and voter education in addition to health-related services. Plaintiffs alleged that the facility had a large community room and a call center.

¶ 31 Additionally, the complaint alleged, the final plan that Gemini submitted to the city for approval contained violations of the zoning standards applicable to B-B districts. According to plaintiffs, the AZO required 96 10-foot wide parking spaces with 25 feet of backup space and a front yard that is 35 feet deep. The final plan included only 70 9-foot wide parking spaces with 24 feet of backup space and a front yard that was 30 feet deep. Plaintiffs further alleged that a line of trees planted on the property extended into "the visibility and clearance zone required for driver safety." According to plaintiffs, Gemini did not seek or obtain variances, modifications, or exceptions from the parking, setback, or landscaping requirements.

¶ 32 Count I of the second amended complaint sought a declaratory judgment pursuant to section 2-701 of the Illinois Code of Civil Procedure (Code) (735 ILCS 5/2-701 (West 2010)) and injunctive relief pursuant to section 11-13-15 of the Illinois Municipal Code (Municipal Code) (65 ILCS 5/11-13-15 (West 2010)). Plaintiffs alleged that the Planned Parenthood facility "was and remains an ongoing prohibited use" under the AZO. They further alleged that Gemini's final plan, "as submitted and constructed," violated the parking, setback, and landscaping standards applicable to B-B districts. A number of other allegations related to Gemini's purported "fraud" and other irregularities during the process of obtaining final plan approval and building permits. Plaintiffs alleged that they were "substantially affected" by the zoning violations, and they sought a declaration that the property violated the AZO and an injunction barring use and occupancy of the property.

¶ 33 Pursuant to the Illinois Administrative Review Law (735 ILCS 5/3-101 *et seq*. (West 2010)), count II sought review of the zoning board's January 9, 2008, decision dismissing plaintiffs' administrative appeal. Plaintiffs alleged, among other things, that because a number of administrative officials made zoning-related decisions throughout the development process, plaintiffs' appeal to the zoning board was not untimely.

¶ 34 Count III sought review of the building code board's "decision dismissing the action for want of jurisdiction." Because city ordinance does not provide for administrative review of decisions of the building code board, plaintiffs sought review of the decision pursuant to the common-law writ of *certiorari*. Plaintiffs alleged that it was error to dismiss their administrative appeal as untimely.

¶ 35 Count IV alleged violations of the due process clause of the Illinois Constitution (Ill. Const. 1970, art. 1, § 2) and of section 11-13-25(b) of the Municipal Code (65 ILCS 5/11-13-

25(b) (West 2010)). Plaintiffs alleged that they were not given "meaningful and timely notice of the relevant violations of Aurora law committed by defendants." They requested that all of the decisions made by "Aurora officials and/or agencies" that were described in the complaint be declared "illegal, *ultra vires*, and void."

¶ 36 Count V alleged a violation of the equal protection clause of the Illinois Constitution (Ill. Const. 1970, art. 1, § 2) in that the decision by the city and "its related defendants" to issue "illegal" final plan approvals, building permits, and certificates of occupancy "deprived plaintiffs of the equal protection of the laws."

¶ 37 D. Motions to Dismiss and the May 21, 2010, Order

¶ 38 On February 2, 2010, Planned Parenthood, Gemini, and 21st Century (the Planned Parenthood defendants) filed a motion to dismiss counts I, II, and III of plaintiffs' second amended complaint pursuant to section 2-615 of the Code (735 ILCS 5/2-615 (West 2010)). Defendants argued that plaintiffs had failed to exhaust their administrative remedies, failed to allege any specific injury resulting from the alleged errors in the development process, and failed to allege any ongoing violations of the AZO.

¶ 39 Also on February 2, 2010, the city, the mayor, the zoning administrator, the building official, the planning and development committee, and the planning commission (the city defendants) filed a motion to dismiss the second amended complaint pursuant to section 2-615 of the Code. They argued that declaratory relief was unavailable because their interests and plaintiffs' interests were not "opposing interests" and no actual controversy existed. They further argued that section 11-13-15 of the Municipal Code, which is a "private attorney general" provision, does not permit actions against municipal defendants. Defendants also argued that the

second amended complaint failed to state causes of action for violations of due process and equal protection.

¶ 40 On February 5, 2010, the zoning board and the building code board filed a combined motion pursuant to section 2-619.1 of the Code (735 ILCS 5/2-619.1 (West 2010)) seeking, in the alternative, summary judgment on counts II and III or dismissal pursuant to section 2-615 of the Code. They argued that they properly dismissed plaintiffs' administrative appeals.

¶ 41 On May 21, 2010, Judge Neal W. Cerne ruled on defendants' motions. The court granted the city defendants' motion and dismissed them from the case. With respect to the remaining defendants, the court struck the request for declaratory relief from count I, but declined to dismiss the remainder of count I. The court then stayed proceedings on count I, ruling that it was "somewhat dependent upon the resolution of [c]ounts II and III." The court also dismissed counts IV and V, ruling that neither stated a cause of action.

¶ 42 Addressing the administrative review counts, the court ruled that counts II and III alleged sufficient facts to state causes of action against the zoning board and the building code board, respectively. It dismissed counts II and III as to all other defendants. On the record, the court explained that, even if plaintiffs' appeals to the zoning board and the building code board were untimely, plaintiffs alleged that the Planned Parenthood defendants' actions deprived them of the opportunity to timely file their administrative appeals. The court stated that "it would be a violation of due process to block their appeals as untimely if that untimeliness was due to the deception as they have alleged."

¶ 43 E. Motions to Dismiss and the March 19, 2012, Order

¶ 44 On January 18, 2011, with leave of court, the zoning board and the building code board filed a section 2-619(a)(9) motion to dismiss counts II and III of plaintiffs' second amended

complaint. They again argued that dismissal was proper because plaintiffs' administrative appeals had been untimely as a matter of law.

¶ 45 On May 13, 2011, Judge Thomas C. Dudgeon denied the motion to dismiss. On the record, however, the court explained that it was vacating the portion of Judge Cerne's May 21, 2010, order ruling that plaintiffs' allegations of fraud tolled the time for filing their administrative appeals. The court then explained that, in order to state a cause of action in counts II and III, plaintiffs needed to allege facts identifying the official who made each decision being challenged, the date of each decision, and the dates on which plaintiffs filed their administrative appeals. The court said that "the current state of the pleadings," which lacked much of this information, made it difficult to rule on the motion. The court concluded that, based on the pleadings, it was unable to determine whether the respective boards properly dismissed the administrative appeals.

¶ 46 On September 2, 2011, with leave of court, plaintiffs filed a "First Supplement" to counts II and III of their second amended complaint. The amendment to count II alleged that the zoning board erred in failing to "overturn" the zoning administrator's October 2006 staff report. The amendment to count III alleged that the building code board erred in failing to vacate the building official's issuance of the final certificate of occupancy on July 1, 2008.

¶ 47 On September 22, 2011, the zoning board and the building code board filed a combined motion to dismiss amended counts II and III pursuant to sections 2-615 and 2-619(a)(9) of the Code. They argued that plaintiffs' supplemental allegations failed to establish that plaintiffs' administrative appeals were timely. However, with respect to plaintiffs' appeal to the building code board, defendants admitted that plaintiffs' appeal had been timely insofar as they challenged the building official's issuance of the final certificate of occupancy. Nevertheless,

defendants argued, there was no basis for reversing the building code board's decision, because at the hearing before the board, plaintiffs presented no evidence.

¶ 48 On March 19, 2012, Judge Paul M. Fullerton granted the motion to dismiss counts II and III pursuant to section 2-619(a)(9) of the Code. The court explained that, in the administrative appeal that was the subject of count II, plaintiffs challenged the zoning administrator's October 2006 staff report recommending approval of the Planned Parenthood defendants' final plan. However, plaintiffs did not file their appeal to the zoning board until October 1, 2007, nearly a year later, which was untimely.

¶ 49 Regarding count III, the court explained that the only decision that plaintiffs timely challenged was the building official's issuance of the final certificate of occupancy. However, the trial court's review was limited to the evidence contained in the administrative record. The court ruled that, because plaintiffs presented no evidence before the building code board, there was no possible basis for reversing the board's decision.

¶ 50 After dismissing counts II and III of the second amended complaint, the court lifted the stay on count I and ordered the parties to complete written discovery within 90 days.

¶ 51 F. Motion for Protective Order and the October 5, 2012, Order

¶ 52 On June 1, 2012, the Planned Parenthood defendants filed a motion for a protective order limiting discovery. They argued that, in essence, count I of the second amended complaint sought review of the city's zoning and permitting decisions, rather than abatement of any ongoing ordinance violations. They maintained that, because the city reached its decisions based on a public record that had already been produced, no further discovery was necessary.

¶ 53 Plaintiffs responded that they were challenging ongoing violations of the city's zoning ordinances because the AZO did not permit Planned Parenthood's ongoing use of the property.

Plaintiffs further argued that the administrative record was not a substitute for discovery because it was "tainted" by defendants' misrepresentations during the development process.

¶ 54 On October 5, 2012, the court granted the Planned Parenthood defendants' motion. The court agreed that plaintiffs, in essence, challenged the city's "zoning classification" of the property, and concluded that the evidence would be limited to that contained in the administrative record.

¶ 55 G. Motion for Summary Judgment and the August 29, 2013, Order

¶ 56 On March 20, 2013, the Planned Parenthood defendants filed a motion for summary judgment on count I of the second amended complaint. They argued that, "at its core," count I sought review of the city's decision to treat defendants' clinic as a medical office building rather than as another type of property requiring a special-use permit. Defendants argued that this was a "legislative decision" that the city reached "after careful consideration and based upon the facts in the record" and that plaintiffs could not meet their burden of establishing that the city's decision to treat the clinic as a medical office building was "arbitrary and capricious." Defendants further argued that, in alleging that certain "physical elements" of the property violated zoning standards, plaintiffs ignored that defendants "could, and did, seek exceptions to certain requirements" of the AZO. Furthermore, defendants argued that the property was zoned as a "Planned Development District" and was not subject to the "narrower provisions of the B-B Business Boulevard zoning requirements."

¶ 57 Plaintiffs responded that the city's decisions approving Gemini's final plans, issuing building permits, and issuing temporary and final certificates of occupancy were not legislative decisions. Plaintiffs maintained that the issue of whether the Planned Parenthood facility complied with the AZO was a legal question that the trial court should review independently and

without deferring to the city's decisions. According to plaintiffs, the AZO's unambiguous terms established that Planned Parenthood's use of the facility fell within the special-use category that included charitable organizations and not-for-profit health-related facilities.

¶ 58 Plaintiffs further argued that there was no evidence that the Planned Parenthood defendants ever requested or obtained variances from the applicable zoning standards. Plaintiffs contended that the city had misapprehended the zoning for the property as "B-2" when the property actually was subject to B-B district standards. According to plaintiffs, defendants could not rely on the city's erroneous permitting decisions to excuse their ongoing violations.

¶ 59 Plaintiffs also argued that summary judgment was improper because they were entitled to further discovery. Attached to plaintiffs' response was an Illinois Supreme Court Rule 191(b) (eff. Jan. 4, 2013) affidavit from Scheidler, the volunteer head and representative of Fox Valley Families. Scheidler indicated that plaintiffs had been unable to obtain testimony from various witnesses due to their hostility or unwillingness. The witnesses included the building official, the zoning administrator, the mayor, and the city council members who sat on the planning and development committee. Scheidler believed that the witnesses would testify that, during the development process, they were unaware of Planned Parenthood's intended use of the property and that they had mistakenly believed that the property was subject to B-1, B-2, or B-3 zoning standards.

¶ 60 On August 29, 2013, the trial court granted the Planned Parenthood defendants' motion for summary judgment. The court explained that plaintiffs were "requesting administrative review" of the city's decision to treat the Planned Parenthood facility as a medical office building or clinic rather than as a property falling within a special-use category. The court ruled that this was a legislative decision subject to reversal only if arbitrary and capricious. The court

found that the city had "a rational basis" for the decision. The court further determined that there was no genuine issue of material fact as to Planned Parenthood's violation of any zoning standards relating to parking, setback, or landscaping, because the city had approved these aspects of the development. The court entered judgment in favor of the Planned Parenthood defendants and dismissed the case with prejudice.

¶ 61 Plaintiffs timely filed a notice of appeal from the orders of August 29, 2013; October 5, 2012; March 19, 2012; May 13, 2011; and May 21, 2010.

¶ 62 II. ANALYSIS

¶ 63 Before reaching the merits, we must address two preliminary matters: (1) our jurisdiction; and (2) plaintiffs' request that we consider property tax documents not included in the record.

¶ 64 Although neither party questions this court's jurisdiction over the appeal, we have a duty to address the issue *sua sponte*. *Davis v. City of County Club Hills*, 2013 IL App (1st) 123634, ¶ 10. A question arises as to this court's jurisdiction, because plaintiffs contend in their brief that this appeal "arises from two consolidated cases." The cases are case No. 08-MR-261, the procedural background of which we have outlined above, and case No. 08-MR-1624, in which plaintiffs filed a one-count complaint seeking administrative review of an August 27, 2008, decision of the zoning board dismissing plaintiffs' administrative appeal challenging the issuance of the final certificate of occupancy. On February 2, 2009, the trial court consolidated the two cases, but reserved the issue of consolidation for purposes of trial. No order appears in the record resolving the one-count complaint in case No. 08-MR-1624.

¶ 65 Where two or more actions are not merged into a single suit, but are only consolidated for purposes of convenience, including ease of discovery, they retain their separate identities. *Nationwide Mutual Insurance Co. v. Filos*, 285 Ill. App. 3d 528, 532 (1996). Under those

circumstances, a final judgment resolving one of the actions in its entirety is appealable without a finding pursuant to Illinois Supreme Court Rule 304(a) (eff. Feb. 26, 2010), despite the fact that one or more of the other actions remain pending. *Nationwide Mutual Insurance Co.*, 285 Ill. App. 3d at 532. Here, plaintiffs' two cases were not merged into a single action. Rather, the trial court reserved the issue of consolidating them for trial. Thus, the cases retained their separate identities. This conclusion is supported by the consideration that all of the motions and rulings resulting in this appeal related solely to plaintiffs' complaint in case No. 08-MR-261. Therefore, plaintiffs' notice of appeal from the court's final judgment in that case confers jurisdiction on this court, despite the fact that case No. 08-MR-1624 remains pending.

¶ 66 We now turn to plaintiff's request that we consider property tax documents not included in the record. After briefing was completed, plaintiffs filed a motion asking this court either to take judicial notice of, or supplement the record with, a number of documents relating to Planned Parenthood's application for a property tax exemption for the property. According to plaintiffs, the documents support their claim that Planned Parenthood's not-for-profit use of the property violates the AZO. All of the defendants filed objections to the motion, and we ordered the motion taken with the case. We now deny the motion.

¶ 67 We agree with defendants that the record on appeal may be supplemented pursuant to Illinois Supreme Court Rule 329 (eff. Jan. 1, 2006) only with evidence that was before the trial court. See *Jones v. Ford Motor Co.*, 347 Ill. App. 3d 176, 180 (2004) ("The rule *** allows the record on appeal to be supplemented only with evidence actually before the trial court."). Because the documents attached to plaintiffs' motion were not presented to the trial court, it would be inappropriate to supplement the record with them.

¶ 68 We also agree that taking judicial notice of the documents is unnecessary. The property tax documents go to the merits of plaintiffs' claim that Planned Parenthood's use of the property violates the AZO. In this appeal, we do not reach that issue. Because the property tax documents are irrelevant to our resolution of the appeal, we decline to take judicial notice of them. See *Central Austin Neighborhood Ass'n v. City of Chicago*, 2013 IL App (1st) 123041, ¶ 27 (declining to take judicial notice of materials that were irrelevant to resolving the issue on appeal).

¶ 69 We now address the merits. On appeal, plaintiffs argue that the trial court erred in (1) dismissing counts II and III seeking administrative review of the decisions of the zoning board and the building code board, (2) dismissing count IV alleging violations of the due process clause of the Illinois Constitution, (3) entering summary judgment in the Planned Parenthood defendants' favor on count I, (4) entering the protective order limiting discovery, and (5) striking the request for declaratory judgment from count I. Plaintiffs do not challenge the dismissal of count V alleging violation of equal protection.

¶ 70 As we explain below, we hold that the trial court properly dismissed the administrative review counts (counts II and III) and the due process count (count IV). We also hold that the court properly granted summary judgment in favor of the Planned Parenthood defendants on that aspect of count I alleging that the property violates parking, setback, and landscaping standards. However, because we conclude that no legislative decision was made approving of Planned Parenthood's use of the property, we hold that it was error to grant summary judgment in the Planned Parenthood defendants' favor on count I insofar as it alleged that Planned Parenthood's ongoing use of the property violates the AZO. We also hold that it was error to limit discovery on this issue and to strike the request for declaratory relief on this issue.

¶ 71 A. March 19, 2012, Dismissal of Counts II and III

¶ 72 We first address the dismissal of the administrative review counts. Plaintiffs contend that the trial court erred in dismissing counts II and III of the second amended complaint pursuant to section 2-619 of the Code. Initially, we note that plaintiffs mistakenly direct their argument against the trial court's judgment. In an administrative review action, the appellate court reviews the agency's decision, not the trial court's decision. *Lambert v. Downers Grove Fire Department Pension Board*, 2013 IL App (2d) 110824, ¶ 23. The applicable standard of review depends upon whether the issue presents a question of law, a question of fact, or a mixed question of law and fact. *American Federation of State, County & Municipal Employees, Council 31 v. State Labor Relations Board*, 216 Ill. 2d 569, 577 (2005). When an appeal presents a question of law, our review is *de novo*. *American Federation of State, County & Municipal Employees, Council 31*, 216 Ill. 2d at 577. Here, plaintiffs challenge the zoning board's and the building code board's decisions dismissing their administrative appeals. This presents a question of law reviewed *de novo*. See *Williams v. Board of Review*, 395 Ill. App. 3d 337, 339-40 (2009) (reviewing *de novo* the timeliness of an application to an administrative agency).

¶ 73 We note that plaintiffs offer no argument addressing the building code board's September 24, 2008, decision denying on the merits plaintiffs' challenge to the building official's issuance of the final certificate of occupancy. As we explained in the background section, the building code board ruled that plaintiffs' administrative appeal was not untimely insofar as they challenged the issuance of the final certificate of occupancy. Following an evidentiary hearing, however, the board determined that the certificate was properly issued and denied plaintiffs' appeal. Because plaintiffs do not challenge this ruling, they have forfeited the issue on appeal.

Ill. S. Ct. R. 341(h)(7) (eff. Feb. 6, 2013) ("Points not argued are waived and shall not be raised in the reply brief, in oral argument, or on petition for rehearing.").

¶ 74 Plaintiffs' only argument with respect to counts II and III is that their administrative appeals to the zoning board and the building code board were timely based on *Doyle v. City of Crystal Lake*, 183 Ill. App. 3d 405 (1989). According to plaintiffs, *Doyle* stands for the proposition that an administrative appeal is not untimely if taken shortly after a property owner discovers that he or she is aggrieved by the challenged decision. Plaintiffs maintain that, under *Doyle*, their administrative appeals were timely because they "did not become 'aggrieved' " until the city issued a temporary certificate of occupancy on October 1, 2007, and a final certificate of occupancy on July 1, 2008.

¶ 75 Section 11-13-12 of the Municipal Code provides in pertinent part that "any person aggrieved" by a zoning administrator's decision may take an appeal to the municipality's zoning board of appeals within 45 days of the decision being challenged. 65 ILCS 5/11-13-12 (West 2012). Similarly, section 3(a) of the city's Rules and Regulations for the Building Code Board of Appeals provides that "any person aggrieved" may take an appeal to the building code board from any decision of the building official within 20 business days of the decision.

¶ 76 In *Doyle*, the plaintiffs filed an administrative appeal to the zoning board of the city of Crystal Lake seeking review of the zoning administrator's determination that the proposed construction of a garage was a permitted use under city ordinance. *Doyle*, 183 Ill. App. 3d at 406. The zoning administrator's determination took the form of an unpublicized inter-office memorandum. *Doyle*, 183 Ill. App. 3d at 406. Plaintiffs filed their appeal to the zoning board more than 45 days after the zoning administrator's decision but within 45 days of the issuance of a building permit for the garage. *Doyle*, 183 Ill. App. 3d at 406-07. The appellate court

determined that the plaintiffs' appeal to the zoning board was timely, because the zoning administrator's inter-office memorandum was "advisory and tentative in nature" and was "unknown to any potentially interested parties." *Doyle*, 183 Ill. App. 3d at 408-09. Thus, the decision did not trigger the 45-day appeal period. *Doyle*, 183 Ill. App. 3d at 409.

¶ 77 *Doyle* is distinguishable based on the unpublished inter-office memorandum. Unlike *Doyle*, plaintiffs have cited nothing in the record indicating that the decisions that they sought to challenge in their administrative appeals were internal or unpublicized. In fact, the record reveals that the planning and development committee approved Gemini's final plan following a public hearing. The hearing occurred on November 16, 2006, more than 10 months before plaintiffs' administrative appeal to the zoning board.

¶ 78 Furthermore, we cannot accept plaintiffs' contention that they did not discover that they were "aggrieved" until October 1, 2007. In *Doyle*, the court reasoned that the plaintiffs did not discover that they were "aggrieved" by the zoning administrator's decision until a building permit was issued, which was the first public action relating to the subject property. *Doyle*, 183 Ill. App. 3d at 410. Here, the city issued a building permit to Gemini on January 12, 2007. By the end of July 2007, when the *Chicago Tribune* article was published, construction was nearly complete. At the very latest, plaintiffs knew that they were "aggrieved" by the end of July 2007, when Planned Parenthood's involvement was public knowledge and the building was nearly complete. Yet, plaintiffs did not file their administrative appeal to the zoning board until October 1, 2007, and they did not file their appeal to the building code board until July 21, 2008. Based on these facts, the boards properly determined that plaintiffs' appeals were untimely.

¶ 79 B. May 21, 2010, Dismissal of Count IV

¶ 80 We next address the dismissal of the due process count. Plaintiffs argue that the trial court erred in dismissing count IV pursuant to section 2-615 because the city's approval of the "illegal development" violated due process. Plaintiffs assert that the city did not provide them with notice or an opportunity to be heard and that their "right to seek administrative review was foreclosed *** before they had any conceivable awareness they were 'aggrieved.' "

¶ 81 The trial court dismissed count IV pursuant to section 2-615 of the Code. A section 2-615 motion challenges the legal sufficiency of a complaint based on defects apparent on its face. *Pooh-Bah Enterprises, Inc. v. County of Cook*, 232 Ill. 2d 463, 473 (2009). A court should dismiss a cause of action under section 2-615 only if it is apparent that the plaintiff can prove no set of facts that would entitle him or her to relief. *Pooh-Bah Enterprises*, 232 Ill. 2d at 473. In ruling on such a motion, a court must accept as true all well-pleaded facts and all reasonable inferences drawn from those facts. *Pooh-Bah Enterprises*, 232 Ill. 2d at 473. Our review is *de novo*. *Pooh-Bah Enterprises*, 232 Ill. 2d at 473.

¶ 82 Section 11-13-25(b) of the Municipal Code (65 ILCS 5/11-13-25(b) (West 2012)) provides that "[t]he principles of substantive and procedural due process apply at all stages of the decision-making process and review of all zoning decisions." "Procedural due process is founded upon the notion that prior to a deprivation of life, liberty or property, a party is entitled to ' "notice and opportunity for [a] hearing appropriate to the nature of the case." ' " *Passalino v. City of Zion*, 237 Ill. 2d 118, 124 (2010) (quoting *Jones v. Flowers*, 547 U.S. 220, 223 (2006), quoting *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950)).

¶ 83 Plaintiffs' due process claim fails as a matter of law. In count IV, plaintiffs incorporated by reference the prior 93 paragraphs of the complaint and then alleged in conclusory fashion that "plaintiffs lacked meaningful and timely notice of the relevant violations of Aurora law

committed by defendants." Plaintiffs failed to identify which "relevant violations of Aurora law" triggered plaintiffs' right to "meaningful and timely notice." We note that the AZO provides for notice and a hearing on an application for a zoning variance (AZO § 10.5-2 (approved June 29, 2006)), a special-use permit (AZO § 10.6-3.3 (approved June 29, 2006)), or a zoning ordinance amendment (AZO § 11.5-1 (approved June 29, 2006)). However, plaintiffs allege in their complaint that defendants never applied for or obtained any variances, special-use permits, or zoning amendments. Thus, accepting the truth of the complaint's allegations, we are unable to determine which actions allegedly triggered plaintiffs' right to notice and a hearing.

¶ 84 The thrust of plaintiffs' allegations is that, because the Planned Parenthood defendants' intended use of the property qualified as a special use, they were required to apply for a special-use permit but failed to do so. However, plaintiffs identify no legal authority suggesting that a municipality must provide notice and a hearing when a permit applicant fails to disclose its intentions for the property. In fact, such a rule would be impractical—a municipality cannot be expected to anticipate that a routine permit applicant is concealing its true intentions.

¶ 85 Furthermore, accepting plaintiffs' allegations as true, it is the Planned Parenthood defendants who are responsible for any failure on the city's part to provide notice and a hearing, because they allegedly concealed their intentions for the property. This is fatal to plaintiffs' due process claim, which can only be brought to challenge the actions of a state actor. *Nicholson v. Chicago Bar Ass'n*, 233 Ill. App. 3d 1040, 1047 (1992) (citing *National Collegiate Athletic Ass'n v. Tarkanian*, 488 U.S. 179 (1988)). The trial court properly dismissed count IV.

¶ 86 C. August 29, 2013, Order Granting Summary Judgment on Count I's Claim that the Property Violates Parking, Setback, and Landscaping Standards

¶ 87 Plaintiffs' arguments addressing the propriety of summary judgment in defendants' favor on count I fall into two categories: (1) those related to plaintiffs' allegations that the Planned Parenthood facility violates parking, setback, and landscaping zoning standards; and (2) those related to plaintiffs' allegation that Planned Parenthood's use of the property violates the AZO. Because the parties address these allegations separately, we do so as well. We begin with count I's allegations that the property violates parking, setback, and landscaping standards.

¶ 88 Plaintiffs argue that it was error to enter summary judgment in defendants' favor on this aspect of count I. According to plaintiffs, defendants neither sought nor received variances, modifications, or exceptions from the zoning standards applicable to B-B districts. Plaintiffs maintain that the city's erroneous decision to approve the final plan and issue permits cannot excuse defendants' ongoing violations of these standards.

¶ 89 The Planned Parenthood defendants respond that the planning and development committee approved of the number and size of the parking spaces, the setback, and the landscaping. Therefore, according to defendants, plaintiffs cannot attack these aspects of the property in a suit under section 11-13-15.

¶ 90 Summary judgment is appropriate when the pleadings, depositions, and admissions, together with any affidavits, show that there is no genuine issue of material fact and that the movant is entitled to judgment as a matter of law. 735 ILCS 5/2-1005(c) (West 2012). Our standard of review is *de novo*. *Passalino*, 237 Ill. 2d at 124.

¶ 91 Count I was brought under section 11-13-15 of the Municipal Code. That section provides, in pertinent part, that when any building or structure is constructed or used in violation of a municipal zoning ordinance, "any owner or tenant of real property, within 1200 feet in any direction of the property *** 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 *** to restrain, correct, or abate the violation." 65 ILCS 5/11-13-15 (West 2012). A trial court with jurisdiction over such an action is authorized to issue a restraining order, a preliminary injunction, or a permanent injunction. 65 ILCS 5/11-13-15 (West 2012). The purpose of the section is to afford relief to private landowners in cases where municipal officials are slow or reluctant to act, or where their actions do not protect the landowners' interests. *Dunlap v. Village of Schaumburg*, 394 Ill. App. 3d 629, 638 (2009).

¶ 92 We agree with the Planned Parenthood defendants that, because the planning and development committee approved of the parking, setback, and landscaping aspects of Gemini's final plan, plaintiffs cannot now challenge those aspects of the property in a suit under section 11-13-15. Although Planned Parenthood's status as the intended tenant was unknown to the planning and development committee, the parking, setback, and landscaping aspects of the final plan were known to the committee at the time it approved the final plan. Furthermore, as we explain below, we need not decide whether the committee's approval of the parking, setback, and landscaping aspects of Gemini's final plan was an administrative or legislative decision.

¶ 93 If the committee's approval of the parking, setback, and landscaping aspects of Gemini's final plan was an administrative decision, plaintiffs cannot now challenge the decision through a suit under section 11-13-15 of the Municipal Code. Where a party challenges an administrative agency's decision, and either the Administrative Review Law or the common law writ of *certiorari* provides a remedy, a court may not redress the party's grievances through any other type of action. See *Hawthorne*, 204 Ill. 2d at 252 ("Where the Administrative Review Law is applicable and provides a remedy, a court may not redress a party's grievances through any other type of action."); *Dubin v. Personnel Board of the City of Chicago*, 128 Ill. 2d 490, 498-99

(1989) (holding that, where the common law writ of *certiorari* provides a remedy, it is the sole method available for challenging an administrative agency's decision). Although plaintiffs attempted to challenge the committee's approval of Gemini's final plan through an administrative appeal to the zoning board, the zoning board properly dismissed the appeal, as we explained above. Furthermore, although plaintiffs appealed to the zoning board, the AZO provides that a decision of the planning and development committee, approving or disapproving of a final plan for development of property in a planned development district, is appealable to the city council, not to the zoning board. AZO § 10.7-12.5 (approved June 29, 2006). Nothing in the AZO or the Municipal Code provides that a decision of the planning and development committee, or of the city council in the event of an appeal to that body, is subject to review pursuant to the Administrative Review Law. Therefore, if the planning and development committee's approval of the final plan was an administrative decision, then the proper method for challenging that decision was through a timely petition for common law writ of *certioriari*. See *King's Health Spa, Inc. v. Village of Downers Grove*, 2014 IL App (2d) 130825, ¶ 35 (explaining that, where the Administrative Review Law has not been expressly adopted, the writ of *certiorari* provides a means of judicial review). Plaintiffs failed to avail themselves of this remedy, and therefore they are barred from challenging the decision through a suit pursuant to section 11-13-15. See *Dubin*, 128 Ill. 2d at 498-99.

¶ 94 Alternatively, if the planning and development committee's approval of the parking, setback, and landscaping aspects of the final plan was a legislative decision, plaintiffs have not identified any genuine issue of material fact as to whether the approval of these aspects of the plan was arbitrary and capricious. A legislative zoning decision is reviewable only for arbitrariness as a matter of substantive due process (*Millineum Maintenance Management, Inc. v.*

County of Lake, 384 Ill. App. 3d 638, 642 (2008)) and will be upheld unless it is " 'arbitrary, capricious or unrelated to the public health, safety and morals.' " *Dunlap*, 394 Ill. App. 3d at 649 (quoting *La Salle National Bank of Chicago v. Cook County*, 12 Ill. 2d 40, 46-47 (1957)). A court's review of a legislative zoning decision "requires not that a court independently reevaluate facts or assert independent judgment, but rather that a court intervene only where there was no rational basis for the challenged decision." *Millineum Maintenance*, 384 Ill. App. 3d at 653.

¶ 95 Plaintiffs' only argument for the invalidity of the planning and development committee's approval of the parking, setback, and landscaping aspects of Gemini's final plan is that these aspects of the plan violate the AZO's standards applicable to B-B districts. However, a home-rule municipality's failure to follow the criteria set forth in its own zoning ordinance does not make its decision arbitrary and capricious; rather, the decision is invalid only if arbitrary and capricious as a matter of substantive due process. *Landmarks Preservation Council of Illinois v. City of Chicago*, 125 Ill. 2d 164, 179-80 (1988); *Rodriguez v. Henderson*, 217 Ill. App. 3d 1024 (1991). Plaintiffs have not identified any genuine issue of material fact that would render the committee's decision invalid on this basis. Therefore, if the planning and development committee's approval of Gemini's final plan was a legislative decision, it bars plaintiffs' claim that the property violates the AZO's parking, setback, and landscaping standards.

¶ 96 D. August 29, 2013, Order Granting Summary Judgment on Count I's Claim that Planned Parenthood's Use of the Property Violates the AZO

¶ 97 We now turn to count I's allegations that Planned Parenthood's ongoing use of the property violates the AZO. Again, the trial court granted summary judgment in favor of the Planned Parenthood defendants on this aspect of count I because it concluded that a legislative decision had been made approving of Planned Parenthood's use of the property and that

plaintiffs could not establish that the decision was arbitrary and capricious. As we explain below, we hold that no such legislative decision has been made and that summary judgment on this aspect of count I was improper.

¶ 98 Plaintiffs argue that the trial court erred in granting summary judgment on this aspect of count I. According to plaintiffs, the city's approval of the facility as a medical office building or clinic "was not really a decision at all," and certainly was not a legislative decision, given that the city never passed any ordinances or issued any "formal opinions" as to the propriety of Planned Parenthood's intended use. Therefore, plaintiffs contend that this court should review the issue of whether Planned Parenthood's use of the property complies with the AZO independently without regard to any decision that the city has made. Plaintiffs maintain that, under the AZO's unambiguous terms, Planned Parenthood's use of the property violates the AZO.

¶ 99 The Planned Parenthood defendants respond that the city has made a legislative decision approving of their use of the property. They contend that the "unprecedented review process" that the mayor undertook after Planned Parenthood's intended use of the property came to light was "clearly 'legislative' in nature." They maintain that the decision to issue a certificate of occupancy following the review "involved input and decision-making by the highest levels of Aurora's elected officials." Defendants assert that the city's decision cannot be overturned unless it was arbitrary, capricious, or unrelated to the public health, safety, and morals. They contend that plaintiffs cannot meet this burden and that summary judgment in defendants' favor therefore was proper.

¶ 100 *Dunlap* provides helpful guidance. In *Dunlap*, the defendant village, through an ordinance passed by the village board, granted a zoning variance authorizing property owners to

construct a patio room that extended within 19 feet of the property's rear lot line. *Dunlap*, 394 Ill. App. 3d at 631. The plaintiff, an adjacent property owner, filed suit against the village and the neighbors under section 11-13-15. *Dunlap*, 394 Ill. App. 3d at 632. On appeal from the grant of summary judgment in the defendants' favor, the court held that the village was not a proper defendant in an action under section 11-13-15. *Dunlap*, 394 Ill. App. 3d at 638. The court explained that, while section 11-13-15 provides a private right of action against a private landowner to enjoin a zoning violation, it does not provide a private right of action against a municipality. *Dunlap*, 394 Ill. App. 3d at 638 (citing *Heerey v. Berke*, 179 Ill. App. 3d 927, 934 (1989), and *City of Aurora v. Navar*, 210 Ill. App. 3d 126, 138 (1991)).

¶ 101 Addressing the effect of the variance on the plaintiff's claim against the defendant landowners, the court noted: "It would seem that if the variance were invalid, it would not extend any protection to the [defendants] against suit by a neighbor under section 11-13-15, even though that neighbor could not use that section to challenge the variance through a direct suit against the Village." *Dunlap*, 394 Ill. App. 3d at 643. The court then determined that, because the decision to grant the variance was legislative in nature, the standard for assessing its validity was whether it was arbitrary, capricious, or unrelated to the public health, safety, and morals. *Dunlap*, 394 Ill. App. 3d at 648-49. Ultimately, the court held that there was no genuine issue of material fact as to the variance's validity and that summary judgment was proper. *Dunlap*, 394 Ill. App. 3d at 649.

¶ 102 Plaintiffs and the Planned Parenthood defendants both rely on *Dunlap* to support their positions on appeal. Defendants argue that, as in *Dunlap*, the city made a legislative decision approving their use of the property, and that plaintiffs cannot establish that the decision was arbitrary and capricious. Plaintiffs, by contrast, note that the defendant landowners in *Dunlap*

applied for and obtained a variance, while the Planned Parenthood defendants never applied for a special-use permit. Thus, according to plaintiffs, there has been no legislative decision approving of Planned Parenthood's use of the property.

¶ 103 In order to determine *Dunlap*'s applicability to this case we must address two decisions: (1) the mayor's decision, made after obtaining the three legal opinions, to allow the issuance of a certificate of occupancy; and (2) the planning and development committee's approval of Gemini's final plan. We address the potential impact of each of these decisions, and we conclude that neither is similar to the variance in *Dunlap*.

¶ 104 We first address the mayor's decision. We agree with plaintiffs that the mayor's decision does not qualify as a legislative decision. The city council, not the mayor, is the city's legislative body. See *Erlinger v. City Council of the City of Belleville*, 28 Ill. App. 3d 324, 325 (1975) ("the City Council is a legislative body"). Indeed, the mayor is the city's chief executive officer, not a legislative official. City of Aurora Code of Ordinances § 2-44(1) (approved Dec. 14, 1999). The record contains the mayor's statement announcing in a press release his decision to allow the temporary certificate of occupancy to issue, which clearly does not qualify as legislative action. Moreover, nothing in the record indicates that the city council passed an ordinance approving of the mayor's decision to allow the issuance of a certificate of occupancy. See *Erlinger*, 28 Ill. App. 3d at 325 (describing ordinances as "the usual and customary means by which municipal legislative bodies act"). Furthermore, the AZO does not give the mayor any role in the process of approving final plans in a planned development district or power to issue certificates of occupancy. Rather, the planning and development committee is charged with approving or denying final plans for the development of properties in planned development districts (AZO § 10.7-12.2 (approved June 29, 2006)), and the committee's decisions are appealable to the city

council (AZO § 10.7-12.5 (approved June 29, 2006)). Thus, unlike the variance in *Dunlap*, the mayor's decision does not qualify as a legislative decision that has any impact on plaintiffs' claim.

¶ 105 We now turn to the planning and development committee's approval of the use of the property as reflected in Gemini's final plan. We agree with plaintiffs that it cannot be treated like the variance in *Dunlap*. The variance in *Dunlap*, which by statute was treated as a legislative decision (see 625 ILCS 5/11-13-25 (West 2012)),[1] authorized the neighbors to construct a patio room that extended within 19 feet of the property's rear lot line. *Dunlap*, 394 Ill. App. 3d at 631. The plaintiff's suit under section 11-13-15 alleged that the patio room violated the zoning ordinance because it extended within 19 feet of the property line. *Dunlap*, 394 Ill. App. 3d at 631-32. Thus, the basis for the alleged zoning violation was the very thing that the variance authorized, making the variance an impediment to the plaintiff's suit.

¶ 106 Here, the planning and development committee approved of Gemini's final plan to construct a medical office building, and plaintiffs contend that Planned Parenthood is using the building as something else, specifically, a charitable organization or a not-for-profit health-related facility. Thus, the basis for the alleged zoning violation is not the very thing that the planning and development committee approved. In other words, because the planning and development committee did not address the identity of the tenant and the tenant's ultimate use of the property beyond that of a medical clinic, it did not decide whether that information affected

[1]Section 11-13-25(a) of the Municipal Code provides that "[a]ny decision by the corporate authorities of any municipality *** in regard to any petition or application for a special use, variance, rezoning, or other amendment to a zoning ordinance shall be subject to de novo judicial review as a legislative decision." 625 ILCS 5/11-13-25 (West 2012).

the use category applicable to the property. Therefore, the committee's decision cannot be treated like the variance in *Dunlap*. Consequently, summary judgment in favor of the Planned Parenthood defendants on this aspect of count I was improper.

¶ 107 We emphasize that we express no opinion on the merits of plaintiffs' claim that Planned Parenthood's ongoing use of the property violates the AZO, even though plaintiffs maintain that this court should make that determination. Given the procedural posture of this case, it would be premature for this court to do so. We simply hold that it was error for the trial court to grant summary judgment in favor of the Planned Parenthood defendants on plaintiffs' claim that Planned Parenthood's ongoing use of the property violates the AZO. The Planned Parenthood defendants were not entitled to judgment as a matter of law on this claim on the basis that the city made a legislative decision approving of Planned Parenthood's use. No legislative decision approving of Planned Parenthood's use was made; neither the mayor's decision nor the planning and development committee's decision qualified as a legislative decision approving of Planned Parenthood's use.

¶ 108 E. October 5, 2012, Order Limiting Discovery

¶ 109 Plaintiffs also challenge the trial court's decision to limit discovery. They contend that the court erroneously treated count I as seeking administrative review and that it improperly limited discovery on that basis. According to plaintiffs, because count I did not seek administrative review, they were entitled to discovery on any relevant matter.

¶ 110 The Illinois Supreme Court Rules permit liberal pretrial discovery. *Durfour v. Mobile Oil Corp.*, 301 Ill. App. 3d 156, 160 (1998). Supreme Court Rule 201(b)(1) (eff. July 30, 2014) states, "[e]xcept as provided in these rules, a party may obtain by discovery full disclosure regarding any matter relevant to the subject matter involved in the pending action." Relevancy

means any material that will be admissible at trial or that leads to admissible evidence. *Durfour*, 301 Ill. App. 3d at 160. A discovery ruling will not be disturbed absent an abuse of discretion. *Ramos v. Kewanee Hospital*, 2013 IL App (3d) 120001, ¶ 76. A court abuses its discretion where its ruling is arbitrary or unreasonable or where no reasonable person would take the court's view. *Hayward v. C.H. Robinson Co.*, 2014 IL App (3d) 130530, ¶ 45.

¶ 111 The trial court limited discovery because it interpreted count I of plaintiffs' complaint as seeking administrative review of the city's "zoning classification" of the property. In an administrative review action, the court and the parties are limited to the evidence contained in the record developed at the administrative level. *Millineum Maintenance*, 384 Ill. App. 3d at 642. The court may not " 'conduct a hearing *de novo*' " based on evidence that was not presented to the administrative agency. *Millineum Maintenance*, 384 Ill. App. 3d at 642 (quoting *Acevedo v. Department of Employment Security*, 324 Ill. App. 3d 768, 773 (2001)).

¶ 112 We conclude that the trial court misinterpreted the legal basis for count I. The count did not seek administrative review, but injunctive relief pursuant to section 11-13-15 of the Municipal Code. As we have explained, section 11-13-15 is not an alternative means to challenge a municipality's administrative zoning decisions. Rather, when a party seeks to challenge an administrative zoning decision, a court can address the party's grievance only through an action under the Administrative Review Law or a petition for writ of *certiorari*. See *Hawthorne*, 204 Ill. 2d at 252; *Dubin*, 128 Ill. 2d at 498-99. In such a case, the court and the parties would be limited to the evidence contained in the administrative record. *Millineum Maintenance*, 384 Ill. App. 3d at 642. However, the same limitation does not apply in a proper claim under section 11-13-15. See *Dunlap*, 394 Ill. App. 3d at 634-36 (addressing the depositions, affidavits, and other evidence presented by the parties in support of and opposition

to summary judgment involving a claim under section 11-13-15). Therefore, the trial court abused its discretion in limiting discovery relating to count I.

¶ 113 We note that, on remand, the only claim remaining before the court will be plaintiffs' claim in count I that Planned Parenthood's ongoing use of the property violates the AZO. We clarify that the issue before the court on remand will not be the validity of the planning and development committee's approval of the final plan. Any alleged fraud, misrepresentations, or irregularities in the approval process are irrelevant at this point. The issue is whether Planned Parenthood's ongoing use of the property violates the AZO because it does not fall within the approved use as a medical office building or clinic. Plaintiffs are entitled to obtain by discovery full disclosure regarding any matter relevant to this claim.

¶ 114 F. May 21, 2010, Order Striking Request for Declaratory Relief from Count I

¶ 115 Plaintiffs argue that the trial court erred in striking their request for declaratory relief from count I. They maintain that declaratory relief may be incident to other claims and that they adequately alleged a "tangible legal interest in enforcing the zoning and building" ordinances and an "actual controversy between the parties with respect to their respective interests." Again, we review a section 2-615 dismissal *de novo*. *Pooh-Bah Enterprises*, 232 Ill. 2d at 473.

¶ 116 The declaratory judgment statute authorizes a trial court to, "in cases of actual controversy, make binding declarations of rights, having the force of final judgments, whether or not any consequential relief is or could be claimed, including the determination, at the instance of anyone interested in the controversy, of the construction of any statute, municipal ordinance, or other governmental regulation, *** and a declaration of the rights of the parties interested." 735 ILCS 5/2-701(a) (West 2012). "The essential requirements of a declaratory judgment action are: (1) a plaintiff with a legal tangible interest; (2) a defendant having an opposing interest; and

(3) an actual controversy between the parties concerning such interests." *Beahringer v. Page*, 204 Ill. 2d 363, 372 (2003). "An 'actual controversy' exists if there is a legitimate dispute admitting of an immediate and definite determination of the parties' rights, the resolution of which would help terminate all or part of the dispute." *First of America Bank, Rockford, N.A. v. Netsch*, 166 Ill. 2d 165, 173 (1995). Declaratory relief "may be obtained by means of a pleading seeking that relief alone, or as incident to or part of a complaint, counterclaim or other pleading seeking other relief as well." 735 ILCS 5/2-701 (b) (West 2012).

¶ 117 The record does not disclose the trial court's reasons for striking the request for declaratory relief from count I, and we can discern no appropriate basis for the decision. Plaintiffs have a tangible legal interest insofar as they allege that they or their properties are substantially affected by Planned Parenthood's purported violation of the AZO. There exists an actual controversy between plaintiffs and the Planned Parenthood defendants as to whether Planned Parenthood's use of the property violates the AZO. Finally, resolution of the controversy would terminate at least "some part" of the controversy, since plaintiffs have to prove a zoning ordinance violation in order to obtain injunctive relief under section 11-13-15 of the Municipal Code. See *In re Marriage of Best*, 228 Ill. 2d 107, 117 (2008) (holding that declaratory relief was available where a declaratory ruling on the validity, scope, and application of a premarital agreement would end "some part" of the parties' dispute over the availability of spousal support and health insurance coverage).

¶ 118 Furthermore, the fact that a cause of action was available to plaintiffs in the form of their claim under section 11-13-15 of the Municipal Code does not render declaratory relief unavailable. " 'Because the declaratory judgment procedure does not replace but merely adds to existing remedies a form of judgment to declare the rights of the parties, the existence of other

remedies does not preclude judgment for declaratory relief, even though such other remedies may be equally effective.' " *Beahringer*, 204 Ill. 2d at 374 (quoting Ill.Ann.Stat., ch. 110, par. 2–701, Historical & Practice Notes, at 6–7 (Smith–Hurd 1983)); see also *Illinois State Toll Highway Authority v. Amoco Oil Co.*, 336 Ill. App. 3d 300, 311 (2003) (holding "that a trial court may not dismiss a claim for declaratory relief on the sole ground that another remedy is available"). Thus, we conclude that the trial court erred in striking the request for declaratory relief from count I, insofar as plaintiffs seek a declaration that Planned Parenthood's use of the property violates the AZO.

¶ 119 III. CONCLUSION

¶ 120 For the foregoing reasons, we reverse the August 29, 2013, order granting summary judgment in favor of the Planned Parenthood defendants on that aspect of count I claiming that Planned Parenthood's ongoing use of the property violates the AZO. We remand for further proceedings on this aspect of count I. We also reverse the May 21, 2010, order striking the request for declaratory relief from count I, insofar as there is an actual controversy between plaintiffs and the Planned Parenthood defendants as to whether Planned Parenthood's ongoing use of the property violates the AZO. Finally, we reverse the October 5, 2012, order limiting discovery relevant to plaintiffs' claim in count I that Planned Parenthood's ongoing use of the property violates the AZO. Although plaintiffs on remand will be entitled to obtain by discovery full disclosure regarding any matter relevant to this claim, we clarify that any alleged fraud or irregularities in the process of approving Gemini's final plan for development of the property, or in the process of issuing building permits or certificates of occupancy, are irrelevant at this point. As to all other issues, we affirm the trial court's judgment.

¶ 121 Affirmed in part, reversed in part, and remanded.