No. 2—09—0902
Order filed January 28, 2011

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

JULIE M. REED, E. WAYNE REED III, TONI MARTELL, NELSON MARTELL, LISA GEISLER, KRISTIN GEATI and STEPHEN GEATI,	)	Appeal from the Circuit Court of Kane County.
Plaintiffs-Appellants,	)	
v.	)	No. 08—CH—2857
VILLAGE OF WEST DUNDEE, WAL-MART REAL ESTATE BUSINESS TRUST, PLATT W. HILL, HEIDI HILL, FELICITE H. REGAN, and SPRING HILL MALL, INC.	)	
Defendants-Appellees.	)	
(General Growth Properties, Inc., and Spring Hill Mall, LLC, defendants).	)	Honorable Michael J. Colwell, Judge, Presiding.

JUSTICE BURKE delivered the judgment of the court.
Justices McLaren and Zenoff concurred in the judgment.

ORDER

Held: We determine that: (1) section 10—12—6(B)(3)(f)(3) of the Municipal Code is unconstitutional and unenforceable; thus, the subject property did not revert to an R-2 zoning classification and any argument relating to reversion of property need not be addressed; (2) the proposed development does not violate the maximum allowable ground area ratio; and (3) plaintiffs' claim that the adoption of the ordinances are arbitrary, capricious, and unreasonable fails to state a claim and cannot be brought

> against non-municipal employees; however, the trial court abused its discretion by not allowing plaintiffs to amend this claim. Accordingly, we affirmed in part, reversed in part, and remanded the cause to allow plaintiffs to replead their claim against the municipal defendant that the adoption of the ordinances were arbitrary, capricious and unreasonable.

Plaintiffs, Julie M. Reed, E. Wayne Reed III, Toni Martell, Nelson Martell, Lisa Geisler, Kristin Geati, and Stephen Geati, own property neighboring the subject property at issue in this case where the developers wished to build a 24-hour, Wal-Mart Supercenter (Supercenter). Plaintiffs filed a two-count action against the Village of West Dundee (Village), Wal-Mart Real Estate Business Trust (Wal-Mart), Platt W. Hill, Heidi Hill, Felicite H. Regan, Spring Hill Mall, Inc., Spring Hill Mall, LLC, and General Growth Properties, Inc., seeking declaratory and injunctive relief, alleging that the granting of a special use and related zoning relief was unconstitutional under substantive and procedural due process principles (count I) and violated section 11—3—15 of the Municipal ILCS ode (65 ILCS 5/11—13—15 (West 2008)) (count II). The circuit court of Kane County dismissed plaintiffs' complaint with prejudice, and it denied plaintiffs' motion to strike the Village's affidavit. Plaintiffs appeal the trial court's decision in dismissing their complaint with prejudice. For the reasons set forth below, we affirm the judgment of the trial court in part, reverse in part, and remand the cause for further proceedings.

FACTS

The Subject Property

The following facts are not disputed. The subject property is an area of approximately 31 acres of vacant land divided into three separate parcels at the southwest corner of Huntley Road and Elm Avenue in the Village. Plaintiffs are individual owners of separate, single-family homes located either adjacent to or in close proximity to the subject property. The subject property is owned by

defendants Platt Hill, Heidi Hill, Felicite Regan, Spring Hill Mall, LLC, Spring Hill Mall, Inc., and General Growth Properties, Inc.

Following a hearing, the Village rezoned the subject property on October 2, 2000, from R-2 Single Family Detached Dwelling District (R-2) to B-2 Regional Business District (B-2) pursuant to ordinance No. 00—31 (West Dundee Ordinance No. 00—31), for certain common property known as Spring Hill West. The Village previously granted a special use permit for a planned development to allow for the development of an approved Meijer retail store on a substantial portion of the subject property. See West Dundee Ordinance No. 08—27.

Wal-Mart's Proposed Development

In early 2008, Wal-Mart and the owners of the subject property filed a planning and zoning development application with the Village seeking approval to develop the Supercenter on the subject property. Wal-Mart requested the grant of a special use to amend Ordinance No. 00—31 to allow for the development of the Supercenter.

The Zoning and Adopted Ordinances

On June 16, 2008, the Village board adopted the following ordinances (collectively referred to as the ordinances): (1) Ordinance No. 08—27 (West Dundee Ordinance No. 08—27), which granted (a) a special use amending Ordinance No. 00—31, thereby granting a special use for the planned development of the Supercenter (b) a special use to allow outdoor garden sales, and (c) approval of the preliminary development plan for the Supercenter; (2) Ordinance No. 08—28 (West Dundee Ordinance No. 08—28), which granted certain variations from the zoning regulations and sign ordinance; (3) Ordinance No. 08—29 (West Dundee Ordinance No. 08—29), which authorized the approval of the preliminary and final plat of resubdivision; and (4) Ordinance No. 08—30 (West

Dundee Ordinance No. 08—30), which granted approval of the preliminary plan of subdivision for the Supercenter West Dundee planned unit development (P.U.D.) subdivision.

Complaint for Declaratory and Injunctive Relief

On September 12, 2008, plaintiffs filed a two-count complaint, within 90 days of the passage of the above cited ordinances, for declaratory and injunctive relief arising from the Village's approval of the ordinances. In the complaint, plaintiffs challenged the validity of the ordinances that granted zoning relief for the subject property, alleging violations of their procedural and substantive due process rights against all defendants (count I) and asserting a claim against the non-municipal defendants under section 11—13—15 of the Municipal Code (count II).

With respect to count I, plaintiffs alleged that the subject property is actually zoned R-2, not B-2, which does not allow, as a permitted or special use, the commercial use of a Supercenter. Plaintiffs maintained that the zoning classification automatically reverted from B-2, which was granted in 2000, to its previous classification of R-2 because the previous developer did not apply for a building permit within six months of the Village's adoption of the B-2 zoning classification pursuant to section 10—12—6(B)(3)(f)(3) (West Dundee Municipal Code §10—12—6(B)(3)(f)(3)) of the Village's zoning regulations. Plaintiffs alleged that defendants erroneously assumed that the subject property's zoning classification was B-2 and misstated the subject property's zoning classification as such in planning and zoning documents, published notices of public hearings, statutory notices to surrounding landowners, including plaintiffs, and at the Village board meetings where the ordinances and resolutions were discussed and adopted. Plaintiffs claimed that these misstatements of the subject property's zoning classification violated both their procedural and substantive due process rights, as the hearing process was based upon an erroneous declaration of

the zoning classification, thereby rendering the hearing process meaningless and the ordinances null and void. Plaintiffs further alleged that, even if the subject property was classified as B-2, the ordinances are arbitrary, capricious, and unreasonable because plaintiffs will be exposed to "consequences that will negatively impact the value of their property" and "impact their quiet enjoyment of their home and quality of life." Plaintiffs alleged that the ordinances were arbitrary, capricious, and unreasonable also because the passage of the ordinances violated section 10—8—3 (West Dundee Municipal Code §10—8—3) of the Village's zoning regulations by allowing a development consisting of buildings and structures that would exceed 35% of the total ground area of the planned development.

With respect to count II, plaintiffs alleged that the non-municipal defendants intend to engage in conduct that violates the Village's zoning regulations under section 11—13—1.1 of the Municipal Code (65 ILCS 5/11—13—1.1 (West 2008)), and the United States (U.S.) and Illinois constitutions by constructing and developing the subject property in a manner inconsistent with R-2 zoning. As a result of the alleged violations, plaintiffs sought injunctive relief under section 11—13—15 of the Municipal Code.

Defendants' Motion to Dismiss

On October 14, 2008, the Village moved to dismiss plaintiffs' complaint pursuant to section 2—619(a) of the Code of Civil Procedure (Code) (735 ILCS 5/2—619(a) (West 2008)). Wal-Mart then filed its combined sections 2—615 and 2—619 motion to dismiss (see 735 ILCS 5/2—619.1 (West 2008)). Defendants, Platt W. Hill, Heidi Hill, and Felicite H. Regan, Spring Hill Mall, LLC, Spring Hill Mall, Inc., and General Growth Properties, Inc. filed motions to dismiss, adopting the arguments from and joining in Wal-Mart's motion to dismiss. On February 23, 2009, pursuant to

leave granted by the trial court, the Village filed in support of defendants' motions to dismiss, the supplemental affidavit of Cathleen Tymoszenko, the director of community development for the Village, which related to Meijer's efforts to obtain a building permit within six months of the passage of Ordinance No. 00--31. Plaintiffs moved to strike the affidavit.

The Trial Court's Ruling

On April 15, 2009, the trial court entered a letter opinion granting defendants' motions to dismiss with prejudice and denying plaintiffs' motion to strike Tymoszenko's supplemental affidavit. The memorandum of opinion acknowledged the theories alleged in plaintiffs' complaint, however, it addressed only the issue of whether section 10—12—6(B)(3)(f)(3) of the Village's zoning regulations was unconstitutional, and held that it was. The trial court held that section 10—12—6(B)(3)(f)(3) does not satisfy due process. Accordingly, the trial court found that section was unenforceable. The court concluded that the subject property did not revert to its previous zoning classification of R-2 but remained B-2.

Plaintiffs filed a motion to reconsider, questioning why the court considered only the issue of the constitutionality of section 10—12—6(B)(3)(f)(3) and failed to rule on their independent claims for relief, misapplied the law in its ruling on the motions to dismiss, and failed to provide a basis for denying plaintiffs' motion to strike Tymoszenko's supplemental affidavit. The trial court denied plaintiffs' motion to reconsider and reaffirmed its order dismissing plaintiffs' complaint in its entirety with prejudice. The trial court did not state under which section of the Code it granted the dismissal.

Plaintiffs timely appeal, seeking review of the dismissal order and the denial of their motion for reconsideration. We granted the motion of defendants Platt W. Hill, Heidi Hill, Felicite H.

Regan, and the Village to join in the appellee brief of defendant Wal-Mart. Plaintiffs did not bring this appeal against defendants General Growth Properties, Inc. or Spring Hill Mall, LLC, as they had filed voluntary petitions seeking bankruptcy protection.[1]

ANALYSIS

Plaintiffs' Arguments

Plaintiffs contend that the trial court erred in determining that the zoning classification did not revert to R-2 based on its conclusion that section 10—12—6(B)(f)(3) is unconstitutional, and erred in dismissing their complaint for injunctive and declaratory relief without considering the other allegations. Plaintiffs argue that the trial court failed to address their alternative contentions regarding whether: (1) the ordinances granting the development are arbitrary, capricious, and unreasonable, as it would (a) negatively and uniquely impact plaintiffs' properties and (b) violate the Village's zoning regulation by exceeding the 35% maximum; and (2) the proposed construction and development of the Supercenter in a manner inconsistent with the zoning regulations violates the Village's zoning regulations, section 11—13—1.1 of the Municipal Code, and the U.S. and Illinois constitutions, which would allow plaintiffs injunctive relief against defendants under section 11—13—15 of the Municipal Code. Plaintiffs finally contend that the trial court abused its discretion by failing to strike Tymoszenko's supplemental affidavit and by not allowing plaintiffs leave to amend their complaint.

Wal-Mart's Response

[1]Although the bankruptcy stay was lifted against General Growth Properties, Inc. and Spring Hill Mall, LLC during the pendency of the appeal, they nevertheless are not parties to this appeal.

As to count I, Wal-Mart responds that plaintiffs' arguments which concern the reversion of the subject property to R-2 fail as a matter of law. In support, Wal-Mart maintains the following: (1) section 10—12—6(B)(f)(3) of the Village's zoning regulations is unenforceable because it fails to satisfy due process; (2) under the rules of statutory construction, section 10—12—6(B)(f)(3) is inapplicable; (3) the zoning classification of the subject property did not revert because the previous developer complied with section 10—12—6(B)(f)(3), (4) even if section 10—12—6(B)(f)(3) was applicable, the Village is a home-rule municipality and is not required to adhere to the zoning regulation in exercising its zoning powers; and, (5) plaintiffs' challenge of the zoning classification is time-barred. Wal-Mart further contends that plaintiffs' claims that the impact of passing the ordinances would violate their quiet enjoyment fail as a matter of fact and law because plaintiffs failed to plead facts sufficient to satisfy the rational basis standard for determining the validity of an ordinance. Wal-Mart also points out that the proposed construction and development of the Supercenter does not violate the 35% maximum.

As to count II, Wal-Mart contends that, because the zoning regulations were not violated and the subject property did not revert to a zoning classification of R-2, plaintiffs' arguments have no basis. With respect to the trial court's decision regarding amending the complaint, Wal-Mart contends that plaintiffs did not offer any proposed amendments to their claim before the trial court, or to this court for that matter, and did not otherwise attempt to demonstrate that they could allege specific facts to sustain their claims, and therefore, the trial court did not abuse its discretion by failing to allow an amended complaint.

Standard of Review

The legal theories for proceeding on a motion to dismiss under sections 2—615 and 2—619 differ. A section 2—615 motion attacks the legal sufficiency of the complaint by asserting that it fails to state a cause of action upon which relief can be granted. *T&S Signs v. Village of Wadsworth*, 261 Ill. App. 3d 1080, 1083 (1994). Under that section, "[d]ismissal is appropriate only where, viewing the allegations in the light most favorable to the plaintiff, it is clear that no set of facts can be proved under the pleadings that will entitle the plaintiff to relief." *Gilchrist v. Synder*, 351 Ill. App. 3d 639, 642 (2004).

Under section 2—619, a party admits the legal sufficiency of the complaint but asserts an affirmative defense or other matter which avoids or defeats the claim. *T&S Signs, Inc.*, 261 Ill. App. 3d at 1083. Similar to a motion brought under section 2—615, a motion to dismiss under section 2—619 admits all well-pleaded facts. *Geick v. Kay*, 236 Ill. App. 3d 868, 874.

Although the trial court did not state under which section of the Code it granted the dismissal, we affirm the trial court's dismissal of the reversion claim and the ground area claim pursuant to section 619(a)(9), as these claims are barred by other affirmative matter defeating the claims. Regardless of the basis for the dismissal, we review *de novo* the grant of a motion to dismiss under either section 2—615 or section 2—-619. *Westfield Insurance Co. v. Birkey's Farm Store, Inc.*, 399 Ill. App. 3d 219, 231 (2010); *McGee v. Snyder*, 326 Ill. App. 3d 343, 347 (2001) (the grant of a hybrid motion to dismiss filed pursuant to section 2—619.1 of the Code is also subject to *de novo* review). We may affirm the trial court's dismissal for any reason appearing in the record. *Geick*, 236 Ill. App. 3d at 873.

Reversion of the Zoning Classification

We first address plaintiffs' contention that the subject property, which had been zoned B-2 under Ordinance No. 00—31, automatically reverted to R-2 when the previous developer failed to apply for a building permit within six months of the Village's adoption of the B-2 zoning classification as set forth in section 10—12—6(B)(3)(f)(3) of the Village's zoning regulation. The trial court held that section 10—12—6(B)(3)(f)(3) is unenforceable because it fails to satisfy procedural due process considerations. We agree with the trial court's determination.

All zoning matters must satisfy due process protections. *Wells v. Village of Libertyville*, 153 Ill. App. 3d 361, 366 (1987). 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.' " *Jones v. Flowers*, 547 U.S. 220, 223 (2006), quoting *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950). See also *Passalino v. City of Zion*, 237 Ill. 2d 118, 124 (2010). An ordinance is a patently unlawful use of the zoning power which ordains a change in zoning without any of the procedural steps or substantive considerations necessary thereto. *Andres v. Village of Flossmoor*, 15 Ill. App. 3d 655, 663 (1973). See also *Kamysz v. Village of Wheeling*, 65 Ill. App. 3d 629, 635-36 (1978).

Section 10—12—6(B)(3)(f)(3) provides:

> "In any case where an amendment has been granted covering a specific lot or lots and a building permit has not been applied for within six (6) months after the date of granting thereof, or use under the new amendment made on any of said lot or lots, then without further action by the zoning board of appeals and village president and board of trustees, such amendment shall automatically be null and void and of no further force or effect." West Dundee Municipal Code §10—12—6(B)(3)(f)(3).

The trial court relied on the case of *Andres*, in which the provision in the ordinance at issue provided that, if the conditions imposed on the subject property were not met, the property must revert to an R-2 Single-Family Residential District. The *Andres* court reasoned that an automatic reversion clause in a municipal zoning ordinance was "a patently unlawful use of the zoning power which ordains a change in zoning without any of the procedural steps or substantive considerations necessary thereto." *Andres*, 15 Ill. App. 3d at 663. The *Andres* court concluded that the conditional rezoning ordinance was null and void *ab initio*. *Andres*, 15 Ill. App. 3d at 663.

Similarly, the automatic reversion clause in section 10—12—6(B)(3)(f)(3) provides that reversion is automatic and does not permit a procedure that would allow an affected party notice or a hearing upon reversion. As stated in *Andres*, the automatic reversion of the property without notice or a hearing is "a patently unlawful use of zoning power" in violation of due process requirements. This renders section 10—12—6(B)(3)(f)(3) unenforceable.

Plaintiffs contend that the trial court erroneously ignored *Goffinet v. Christian County*, 65 Ill. 2d 40 (1976), which held that automatic reversion provisions are not unconstitutional *per se*. Plaintiffs misconstrue *Goffinet*.

The case of *Goffinet* also involved a conditional zoning ordinance that contained a reversion clause. The *Goffinet* court distinguished the conditions present in its ordinance from those "clearly *** improper" conditions found in *Andres*, that reverted the zoning without notice or opportunity to be heard. *Goffinet*, 65 Ill. 2d at 50-51. While the ordinance in *Goffinet*, like the ordinance in *Andres*, was silent as to what procedures would be followed before reversion, the court noted that such ordinances are not invalid *per se*, and thereafter, it conducted a due process analysis. It found that the reversion clause in its case was valid because the entire zoning ordinance afforded due

process safeguards. *Goffinet*, 65 Ill. 2d at 53. The court noted that the ordinance scheme required a "finding [to be] made by the enforcement officer that *** the conditions placed on the rezoning amendment *** were not complied with," that an adverse determination by the enforcing officer may be appealed to the zoning board of appeals by the holder of the permit or the owner of the land, and that this would allow the affected party a hearing before the board to present his case. *Goffinet*, 65 Ill. App. 2d at 53-54. Thus, the *Goffinet* court did not agree or disagree with the *Andres* holding and *Goffinet* does not stand for the proposition that automatic reversion ordinances are enforceable without satisfying due process.

Plaintiffs also rely on *American National Bank & Trust Co. of Chicago v. Village of Arlington Heights*, 115 Ill. App. 3d 342 (1983), and *National Boulevard Bank of Chicago v. Village of Schaumburg*, 76 Ill. App. 3d 388 (1979), in support of the argument that an automatic reversion ordinance is enforceable without satisfying due process. We do not find these cases support plaintiffs' argument either. Unlike the present case, which involves a general reversion clause, both cases cited involved conditional zoning ordinances, but each court concluded that the conditions specific to the property in question set forth in the ordinances had not been fulfilled within the required time, and thus, they had expired upon their own terms. *American National*, 115 Ill. App. 3d at 344-46; *National Boulevard*, 76 Ill. App. 3d at 392, 396.

Plaintiffs attempt to distinguish two other cases, *Kamysz* and *Spiker v. City of Lakewood*, 198 Colo. 528, 603 P. 2d 130 (Colo. 1979). Although we agree with plaintiffs that *Spiker* is non-precedential, we find both cases instructive here.

In *Kamysz*, the court examined the propriety of a general reversion ordinance similar to section 10—12—6(B)(3)(f)(3), which provided:

> "Where the corporate authorities have enacted an ordinance pursuant to the provisions of this title amending the zoning designation on a parcel or tract of land, the ordinance shall become null and void and the property shall revert to its prior zoning within two years of the date of the enactment of the ordinance, unless work thereon is substantially under way. The corporate authorities may, upon written application of the owner, within the two year period, extend the time within which the ordinance shall remain in effect, under extenuating circumstances, by the enactment of a new ordinance." *Kamysz*, 65 Ill. App. 3d at 634.

The plaintiff property owner failed to begin construction on a development project within the two years required under the ordinance. Prior to reverting the zoning for the plaintiff's property, the Village of Wheeling sent personal notice to him that the ordinance would be applied to his property unless he obtained an extension. Without a hearing, the Village then denied the plaintiff's request for an extension and informed him that his property would be rezoned to its previous classification the next day.

Although the plaintiff received personal notice of the impending reversion and was given an opportunity to apply for an extension, the *Kamysz* court held that, under section 11—13—14 of the Municipal Code, the ordinance mandating automatic reversion of the zoning for the plaintiff's property was unenforceable as applied to that property because the ordinance failed to comport with due process. The court found the ordinance to be insufficient because the plaintiff was not afforded a hearing or any real opportunity to protest the change to the zoning classification for his property at the time it took place. *Kamysz*, 65 Ill. App. 3d at 635-36. If the reversion ordinance in *Kamysz* failed to withstand due process scrutiny under those facts, then the reversion ordinance at issue here

must also fail, as the due process of notice afforded to the plaintiff in *Kamysz* went beyond what section 10—12—6(B)(3)(f)(3) affords the non-municipal defendants here.

In *Spiker*, the court struck down on due process grounds a zoning ordinance that property would automatically revert to the prior zoning classification if a property owner did not gain plat approval within one year of rezoning. *Spiker*, 198 Colo. at 532, 603 P.2d at 132-33. Plaintiffs assert that this case is distinguishable also because the municipality in *Spiker* was not a home-rule municipality, like the Village here, which is not bound to follow a state statute requiring a public hearing before rezoning can take place. Although a home-rule municipality may exercise its zoning power without interference, it must still comport with constitutional requirements, as well as, applicable state or federal law. See, *e.g.*, *Landmarks Preservation Council of Illinois v. City of Chicago*, 125 Ill. 2d 164, 178-79 (1988). Here, the automatic reversion ordinance does not comport with the constitutional requirements of due process.

Finally, plaintiffs assert that we should follow *Colwell v. Howard County*, 31 Md. App. 8, 354 A. 2d 210 (1976), because it is more consistent with Illinois law regarding reversion. *Colwell* addressed a conditional zoning ordinance containing a reversion clause, but it held that a property owner is not entitled to due process with respect to zoning classifications until he obtains a vested right in the zoning ordinance. *Colwell*, 31 Md. App at 15, 354 A. 2d at 215. This is inconsistent with Illinois statutory and case law, which requires that any change to a zoning ordinance comply with due process of proper notice and a hearing to consider the change. See, *e.g.*, 65 ILCS 5/11—13—14, 5/11--13--25(b) (West 2008); *Goffinet*, 65 Ill. 2d at 53-54.

In sum, we find section 10—12—6(B)(3)(f)(3) is not enforceable as violative of due process. Based on this decision, we need not address plaintiffs' arguments that defendants violated plaintiffs'

procedural and substantive due process rights by incorrectly stating in notices and during the public hearing process that the subject property was zoned B-2. We also need not address the claim alleged in count II regarding whether the proposed construction and development of the Supercenter by the non-municipal defendants in a manner inconsistent with the zoning regulations will violate the Village's zoning regulations, section 11—13—1.1 of the Municipal Code, and the U.S. and Illinois constitutions, as these contentions are based on plaintiffs' assertion that the subject property reverted to a R-2 classification. Although the trial court did not state under which section of the Code it granted the dismissal of these claims, we assume that it dismissed these claims pursuant to section 2—619, as the claims are barred by other affirmative matter defeating them.

Plaintiffs' Due Process Claims

We next examine plaintiffs' contention that, even if the subject property is zoned B-2, the legislation granting the zoning relief should be invalidated because it is arbitrary, capricious, and unreasonable, as it would adversely impact the value of plaintiffs' property and their quality of life, and the proposed Supercenter exceeds limitations of the total ground area for a P.U.D., as provided in §10—8—3 of the Village's zoning regulations (West Dundee Municipal Code §10—8—3). We find plaintiffs' due process challenges do not set forth sufficient facts to state a claim and have no basis in law, respectively.

Adverse Impact on Plaintiffs' Property

Plaintiffs' Pleading

In Illinois, a plaintiff must plead sufficient facts to establish that the challenged ordinance did not satisfy the rational basis standard. See, *e.g.*, *Napelton v. Village of Hinsdale*, 229 Ill. 2d 296, 305

(2008). Under our fact-pleading requirements, a plaintiff pleads "sufficient facts" only when he offers specific factual allegations that support each and every element of the claims upon which he seeks recovery. *Storm & Assoc. v. Cuculich*, 298 Ill. App. 3d 1040, 1051 (1998). The plaintiff's burden of pleading is not met by "mere conclusions of law or fact" where those conclusions are "unsupported by specific factual allegations." *Anderson v. Vanden Dorpel*, 172 Ill. 2d 399, 408 (1996). To sustain a cause of action, the plaintiff must allege facts sufficient to bring his claims within the scope of the cause of action asserted. *Hirsch v. Feuer*, 299 Ill. App. 3d 1076, 1081 (1998). If a pleading does not contain all of the required factual allegations, it must be dismissed for failure to state a cause of action. *Keef v. Widuch*, 321 Ill. App. 3d 571, 581 (2001).

As to the adverse impact a zoning ordinance would have on property, the supreme court has identified factors, known as the *LaSalle* factors (*LaSalle National Bank of Chicago v. Cook County*, 12 Ill. 2d 40, 46-47 (1957)), that courts should consider in conducting a rational basis analysis with respect to an as-applied challenge, which is applicable in this case. A zoning ordinance is presumed valid, and a successful challenge requires proof, by clear and convincing evidence, that its enactment was arbitrary, capricious, or unrelated to the public health, safety, and morals. *LaSalle*, 12 Ill. 2d at 46. If the reasonableness of a zoning ordinance is merely debatable, the courts will not interfere. *Rodriguez v. Henderson*, 217 Ill. App. 3d 1024, 1028 (1991).

The failure of a complaint to plead a cause of action in terms of all the La Salle factors may indicate its vulnerability to dismissal; however, dismissal should not occur if the pleading theory otherwise supports a claim of unconstitutional arbitrariness or capriciousness. Ordinarily, the *LaSalle* factors have been used to judge the strength of a plaintiff's case after a full presentation of

evidence at trial. Not all of them can even be meaningfully applied at an earlier stage. See *Rodriguez*, 217 Ill. App. 3d at 1030.

In determining whether a municipal ordinance is valid to a plaintiff's as-applied zoning challenge of the subject property, the following factors are to be taken into account: (1) the existing uses and zoning of nearby property; (2) the extent to which property values are diminished by the particular zoning restriction; (3) the extent to which the destruction of property values promotes the health, safety, morals, or general welfare of the public; (4) the relative gain to the public as compared to the hardship imposed upon the individual property owner; (5) the suitability of the subject property for the zoned purpose; (6) the length of time the property has been vacant as zoned considered in the context of the land development in the area in the vicinity of the subject property; (7) the community need for the proposed use; and (8) the care with which the community has undertaken its development plan. *Thornber v. Village of North Barrington*, 321 Ill. App. 3d 318, 326 (2001), citing *La Salle*, 12 Ill. 2d at 46-47.

Here, plaintiffs pled that they own property within 1,200 feet of the subject property and that their property will be substantially affected by the proposed development in a manner distinct in both quality and quantity from any injury suffered by the public as a whole, as they will sustain special damage to their property and liberty interest in a way different from the general public. Plaintiffs further alleged that their "possessory and ownership interest in their properties are unique and one of a kind and their interest in the use and enjoyment of said properties free from the impact of the violations of the Zoning Regulations cannot be measured," and that they "will suffer irreparable harm in the use and enjoyment of their properties and such irreparable harm is presumptively established upon proof of violation of the zoning regulations and the statutes of the State of Illinois."

Plaintiffs' complaint fails to plead any specific facts in support of their claim that address the *LaSalle* factors, and they fail to plead facts that, if proved, would weigh the factors in plaintiffs' favor. The complaint does not set forth any facts showing that the Village acted arbitrarily, capriciously, or unreasonably in passing the ordinances. It lacks any specific facts demonstrating that the development of the Supercenter on the subject property is not reasonably related to the public interest or welfare. Instead, plaintiffs summarily conclude that the ordinances are arbitrary, capricious, and unreasonable based on, for example: excessive noise generated by shoppers blaring their car radios, the parking lot lights causing an intrusion into plaintiffs' homes, excessive traffic congestion, and vibrations caused by service vehicles. However, plaintiffs fail to plead any facts to demonstrate how the development of the Supercenter will diminish the value of their property or the extent of the alleged diminution. See *Napleton*, 229 Ill. 2d at 319-20, n. 4 (finding that the plaintiff's allegation that the ordinance diminished her property value by several thousand dollars was conclusory).

Plaintiffs also do not plead any specific facts tending to show that the subject property is not suitable for a Supercenter, even though the subject property is located adjacent to Spring Hill Regional Shopping Mall and a Home Depot. Although no one *LaSalle* factor controls, the question of whether the property is zoned in conformity with the surrounding existing uses and whether those uses are uniform and established is of paramount importance. *Lapp v. Village of Winnetka*, 359 Ill. App. 3d 152, 170 (2005).

Additionally, plaintiffs do not plead any specific facts sufficient to demonstrate that the non-municipal defendant is a state actors. A due process claim can only be brought against a "state actor." See *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937, 73 L. Ed. 2d 482, 495,102 S. Ct. 2744,

2754 (1982), and *Methodist Medical Center of Illinois v. Taylor*, 140 Ill. App. 3d 713, 717 (1986)). Plaintiffs also do not raise an argument in their appellants' brief that they are seeking any affirmative relief from the non-municipal defendant for due process violations, and therefore, we may consider that plaintiffs have abandoned any due process claim against the non-municipal defendant. Because our review of a 2—615 motion to dismiss is *de novo*, we find this claim was properly dismissed, as no set of facts can be proved under the pleadings that will entitle plaintiffs to relief.

The Village's Code and Zoning Regulations of Maximum Building Coverage Ratio

We next address plaintiffs' contention that the ordinances are arbitrary and capricious because the proposed development and building of the Supercenter would contravene §10—8—3, which limits the total ground area for a P.U.D. Section 10—8—3 provides that "[t]he total ground area occupied by buildings and structures shall not exceed thirty five percent (35%) of the total ground area of the planned development." West Dundee Municipal Code §10—8—3. Plaintiffs claim the building coverage for the Supercenter exceeds the required 35% limit.

In arriving at this conclusion, plaintiffs alleged that "Wal-Mart is proposing to develop a one-story Supercenter on the Subject Property that will contain 186,868 total [square feet] of floor area, a parking area with approximately 979 parking spaces and a detention pond on approximately 27½ acres." Plaintiffs claim that the parking area is a "structure" as defined in the Village's zoning regulations and, therefore, should be included in the building coverage ratio for the subject property. We find no support for plaintiffs' claim.

The Village zoning regulations define "parking area" and "structure" as follows:

> "Parking Area: A suitably surfaced and permanently maintained area, either within or outside of a building, of sufficient size to store one standard automobile, but in no event

> less than ten feet by twenty feet (10' x 20'), exclusive of passageways, driveways or other means of circulation or access.
>
> Structure: Anything constructed or erected, the use of which requires more or less permanent location on the ground or attached to something having a permanent location on the ground including, but without limiting the generality of the foregoing, advertising sign, backstops for tennis courts and pergolas." West Dundee Municipal Code §10—2—1.

"Building" is defined as "[a]ny structure built for the support, shelter or enclosure of persons, animals, chattels or moveable property of any kind, and which is permanently affixed to the land." West Dundee Municipal Code §10—2—1. In the preamble to the zoning definitions section, it states that "the word 'building' shall include the word 'structure.' " West Dundee Municipal Code §10—2—1.

We conclude that, in this case, the asphalt parking area does not meet the definition of a building or structure, and the plain language of the zoning regulations excludes this type of parking area in calculating the thirty five percent (35%) maximum. Thus, we agree with defendants that the properly calculated ratio of buildings and structures to the total ground area of the planned development is approximately 15.6%, which is well below the 35% maximum. Accordingly, because the ratio does not contravene the zoning regulation, plaintiffs' argument has no basis and fails as a matter of law. We therefore affirm the trial court's dismissal of this claim pursuant to section 2—619.

Dismissal of the Complaint with Prejudice

We last address plaintiffs' contention that the trial court abused its discretion in dismissing their complaint with prejudice. Plaintiffs maintain that, to the extent the complaint is deficient, they should be entitled to amend it.

Parties do not have an absolute right to amend, because the allowance of an amendment of a pleading rests within the sound discretion of the trial court. *Misselhorn v. Doyle*, 257 Ill. App. 3d 983, 987 (1994). Although section 2—616(a) of the Code (735 ILCS 5/2—616(a) (West 2008)) allows amendments to pleadings to be liberally construed, a party desiring to file an amended pleading should include it in the record. If this is not done, the reviewing court is not in a position to say that justice would be served by giving leave to amend. *Kostur v. Indiana Insurance Co.*, 192 Ill. App. 3d 859, 866 (1989).

In this case however, the trial court did not allow plaintiffs to replead, having never addressed whether the ordinances were arbitrary, capricious, and unreasonable. Under these circumstances, the trial court preempted plaintiffs from being prepared to file a new pleading by failing to apprise them in advance of the purported defect in their complaint and preempted the filing of an amended pleading by denying them leave to file an amended complaint. While we set forth reasons why this particular claim fails to state a cause of action, the trial court abused its discretion in dismissing this claim with prejudice by denying plaintiffs leave to amend the claim. Accordingly, we reverse the trial court's order granting defendants' motion to dismiss with prejudice and remand this cause for further proceedings. On remand, plaintiffs should be given an opportunity to replead the claim that the adoption of the ordinances were arbitrary, capricious and unreasonable but only against the municipal defendant.

CONCLUSION

Based on the preceding analysis, the judgment of the circuit court of Kane County is affirmed in part and reversed in part and the cause is remanded for further proceedings consistent with this opinion.

Affirmed in part and reversed in part; cause remanded.