2017 IL App (2d) 170031-U
No. 2-17-0031
Order filed October 3, 2017

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

CHRISTOPHER MOORE, ELIZABETH MOORE, and BILLIE MacARTHUR,	)	Appeal from the Circuit Court of Lake County.
Plaintiffs-Appellants,	)	
v.	)	No. 06-CH-358
SUSAN FERRIS, ANDREW FERRIS, RICHARD FERRIS, and THE CITY OF LAKE FOREST,	)	Honorable Mitchell L. Hoffman, Margaret A. Marcouiller,
Defendants-Appellees.	)	Judges, Presiding.

JUSTICE BIRKETT delivered the judgment of the court.
Presiding Justice Hudson and Justice Schostok concurred in the judgment.

ORDER

¶ 1 *Held*: The City properly amended its Historic Preservation Ordinance, and plaintiffs waived their assertion of the constitutional infirmity of the amended ordinance. The City ratified the grant of a certificate of appropriateness to the Ferris defendants, including the necessary variances; plaintiffs' petition for a writ of *certiorari* was therefore properly quashed. The circuit court correctly granted summary judgment in favor of the Ferris defendants on plaintiffs' claims of zoning ordinance violations and properly denied plaintiffs' attorney fees and costs under the Municipal Code.

¶ 2 This case returns to us for the third time. In 2006, plaintiffs, Christopher and Elizabeth Moore and Billie MacArthur, filed an action against defendant, Susan Ferris, seeking injunctive relief for defendant's alleged violations of various ordinances of defendant, the City of Lake Forest. The matter advanced to a bench trial, and the circuit court of Lake County entered a directed finding in favor of Ferris and against plaintiffs. Plaintiffs appealed and we reversed and remanded the cause. *Moore v. Ferris*, No. 2-08-0434 (2009) (unpublished order under Supreme Court Rule 23) (*Moore I*).

¶ 3 The cause continued its process through the circuit court, with the parties eventually coming to issue over the 5th amended complaint. During that process, plaintiffs remained the same, but the subject property had been conveyed to Ferris's husband and then her son, so Andrew Ferris and Richard Ferris were both added as parties defendant. (For convenience, we will refer to all of the Ferris defendants as "Ferris.") In addition, plaintiffs added the City as a party defendant. The 5th amended complaint sought injunctive relief against Ferris and attorney fees pursuant to section 11-13-15 of the Illinois Municipal Code (Municipal Code) (65 ILCS 5/11-13-15 (West 2006)) (count I), a declaratory judgment against the City seeking to find that its Historic Preservation Ordinance (now codified City of Lake Forest Code of Ordinances § 155.01 *et seq.* (adopted Feb. 6, 2012) (Code of Ordinances)) was unconstitutional as applied to the subject property (count II), and a petition for a common-law writ of *certiorari* seeking to invalidate the City's actions granting Ferris the necessary certificates and permits regarding the subject property (count III). Along the way, the trial court dismissed with prejudice the second count seeking to invalidate the Historic Preservation Ordinance. On July 24, 2014, the trial court

quashed the writ of *certiorari* sought in count III, and on January 22, 2015, the trial court granted summary judgment on count I in favor of Ferris and against plaintiffs. Plaintiffs sought attorney fees pursuant to the section 11-13-15 of the Municipal Code and this was denied by the trial court in a nonfinal order. Plaintiffs appealed, and we dismissed the appeal for lack of jurisdiction. *Moore v. Ferris*, 2016 IL App (2d) 150190-U (*Moore II*).

¶ 4 Upon return to the trial court, plaintiffs once again sought attorney fees pursuant to the Municipal Code and the trial court once again denied plaintiffs' request, this time in a final order. Plaintiffs then brought the instant appeal before this court.

¶ 5 On appeal, plaintiffs argue that the trial court erred in rendering its decisions regarding their 5th amended complaint. Specifically, plaintiffs contend that the trial court erred in quashing the writ of *certiorari* against the City, the trial court erred in granting summary judgment in favor of Ferris and against them, and the trial court erred in denying their petition for attorney fees. We affirm.

¶ 6 I. BACKGROUND

¶ 7 We summarize the pertinent facts appearing in the record. Ferris's home is located in an area the City designated as a historic district. Plaintiffs own homes adjacent to the subject property. In 2004, Andrew Ferris began to investigate the process he would need to undertake in order to renovate and make improvements to the subject property. In particular, Ferris's proposed improvements contemplated increasing the bulk of the subject property and converting the attic space into living space by adding dormers to the home. Ferris contacted the City to learn the necessary steps he needed to take to implement his planned improvements. City staff

instructed Ferris to file an application with the Historic Preservation Commission (Commission) because, according to the staff, the Commission had jurisdiction over all buildings within the City's designated historic districts and had the authority to approve the requested improvements to the subject property.

¶ 8 Ferris followed the City's instructions, ultimately filing an application with the Commission. In 2005, the Commission held a hearing on Ferris's application and granted a certificate of appropriateness approving of the proposed improvements. Ferris then obtained the various permits necessary to begin his construction. As the construction progressed, staff from the City inspected and approved the various field changes that were made in the construction to handle unforeseen issues that arose during the construction.

¶ 9 On February 17, 2006, plaintiffs filed suit against Susan Ferris, the then-owner of the subject property, pursuant to section 11-13-15 of the Municipal Code. In this first suit, plaintiffs sought to enforce various provisions of the City's zoning code, building code, and Historic Preservation Ordinance. Plaintiffs specifically alleged that the height of the dormers as built violated the City's zoning and building codes, the installation of a basement violated the setback requirements of the zoning code and building codes, and no valid variances had been issued to Ferris. The matter advanced to a bench trial. Catherine Czerniak, who was at that time the City's director of community development, testified that the City's Building Review Board (Board) and the Commission were each separate entities, and that, at that time, there was no overlap between the members of the Board or the Commission. Czerniak testified that landowners residing in one of the City's historic preservation districts were instructed to seek

approval for variances from City ordinances from the Commission while landowners residing outside of the historic preservation districts were instructed to seek approval for variances from the Board. Czerniak specifically recalled that Susan Ferris filed for a certificate of appropriateness from the Commission because the subject property was located within one of the historic preservation districts; Czerniak also recalled that Susan Ferris was issued a certificate of appropriateness. According to Czerniak, who oversaw the applicable staff work, the Commission considered the same standards set forth in the building code that the Board considered. Czerniak testified that plaintiffs appealed the Commission's decision to the city council, and the city council denied the appeal. After the denial of the appeal, the City issued Susan Ferris a building permit. On the building permit, a staff member had authorized that the building permit was consistent with the certificate of approval granted by the Commission. Czerniak testified that the City had not issued to Susan Ferris any variances from its building code or zoning code. Czerniak also noted that the final construction varied from the conditions and requirements of the certificate of appropriateness, which had never been formally amended. Czerniak further noted that members of the Commission's staff (rather than the Commission itself) had authorized the deviations as issues arose during the construction.[1]

[1] The height of the dormers had to be raised because, as planned, the roof could not support the dormers in the position planned, so they were raised to the same height as the ridge line of the roof. To comply with the specification of the certificate of approval, Ferris added a witch's cap to the ridge line so the dormer would be below the ridge line of the roof; when that was deemed unsatisfactory, the witch's cap was removed and the dormer was allowed to be the

¶ 10 At the close of plaintiffs' case, Ferris moved for a directed finding. The trial court granted the directed finding in favor of Ferris holding that the lawsuit constituted an improper collateral attack on the City's decisions approving the variances on the subject property by issuing the certificate of appropriateness and later issuing the certificate of occupancy. The trial court also held that, even if the suit were proper, none of the City's ordinances had been violated because the Commission approved Ferris's plans by applying the same standards as would have the Board, because the basement did not affect the setback requirement, and because the discrepancies between the certificate of appropriateness and the actual construction were approved by the staff of the Commission or had been otherwise resolved through a fine.

¶ 11 Plaintiffs appealed. On appeal, we held that the Commission was not authorized to issue variances to the building code. *Moore I*, slip op. at 8-9. Instead, the City's ordinances required a landowner within a historic preservation district to receive approvals from both the Board and the Commission if the landowner sought a variance from the building code. *Id.* We therefore concluded that, because Ferris obtained only approval from the Commission, and not from the Board, the construction violated the building code. *Id.* at 9. As to the issue of whether the basement violated the setback requirement, we held that there remained an open evidentiary question that could be settled upon remand. *Id.* at 10. Regarding the dormers, we held that, as additions are required to fully conform to all applicable regulations, the fact that the dormers

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same height as the ridge line of the roof. Ferris also destroyed a mature tree during the construction. Ferris was fined approximately $23,000 for the destruction and was required to complete additional landscaping to account for the tree's absence.

exceeded the height requirement meant that the trial court erred in concluding that the dormer additions did not constitute a zoning violation. *Id.* at 11. Finally, regarding the discrepancies between the actual construction and the certificate of appropriateness issued by the Commission, we held that staff was not able to approve the changes, only the Commission itself; the trial court's determination that the purported staff approval of the field changes was acceptable constituted error. *Id.* at 12-13. Thus, our disposition in *Moore I* was limited and did not actually consider the merits of the claims raised in the appeal because the trial court had issued a directed finding at the close of plaintiffs' case. Indeed, we cautioned the parties to present and resolve their issues before the appropriate City entities and in the trial court. *Id.* at 13.

¶ 12 After the cause was remanded, the City, apparently in response to our discussion, amended its Historic Preservation Ordinance. In July 2009, the City amended section 51-3(B)(4) of the Historic Preservation Ordinance (Lake Forest City Code § 51-3(B)(4) (adopted July 9, 2009), now codified with further amendments at City of Lake Forest Code of Ordinances § 155.03(B)(4) (adopted Feb. 6, 2012)) to bestow upon the Commission the power to grant variances to the building code. The amendments not only empowered the Commission to grant variances in regard to the bulk of the structure under consideration, but also to the height of the structure under consideration.

¶ 13 In November 2009, after the amendment to the Historic Preservation Ordinance were adopted, Ferris submitted an application to the Commission, seeking that the Commission reaffirm, confirm, and reapprove the original 2005 certificate of appropriateness as modified by the changes that City staff approved during the construction. The Commission considered

Ferris's application by reviewing the original materials submitted in 2005 along with submissions made after the approval of the original 2005 certificate of appropriateness, including Ferris's as-built plans and photographs of the subject property. On November 24, 2009, the Commission unanimously agreed to "confirm, ratify and re-approve" the original 2005 certificate of appropriateness as modified, and it issued a second, 2009 certificate of appropriateness. The Commission expressly stated that its issuance of the 2009 certificate was "intended to relate back to the original Certificate of Appropriateness.

¶ 14 The 2009 certificate of appropriateness purported to approve the dormers of the subject property as constructed. Section (a)(i) of the 2009 certificate referenced a February 20, 2007, letter from City staff to Ferris requiring that two changes be made to the then-proposed construction. In a second letter dated September 7, 2007, City staff informed Ferris that the modifications were acceptable. The 2009 certificate also purported to accept the changes that were required when the tree was destroyed. Finally, the 2009 certificate purported to accept the variances for building height and bulk related to the renovation project as described in the 2005 certificate of appropriateness. This approval of the variance to building height purports to cover the fact that the dormers, as constructed, exceed the height requirements for the zoning district in which the subject property resides.

¶ 15 After the grant of the 2009 certificate of appropriateness, plaintiffs appealed that decision to the city council. The city council unanimously rejected plaintiffs' appeal of the grant of the 2009 certificate. In rendering this decision, the city council held that "the decision of the [Commission] was well-founded based on the written and oral record and the standards of the

Historic Preservation Ordinance."

¶ 16 Following this defeat, plaintiffs returned to court. In what ultimately became the fifth amended complaint, plaintiffs challenged the 2009 certificate by means of a petition for a writ of *certiorari* (count III). In count I of the fifth amended complaint, plaintiffs alleged violations of the City's ordinances pursuant to section 11-13-15 of the Act. Count II alleged that the 2009 amendments to the Historic Preservation Ordinance and other ordinances were unconstitutional. Early on in this process, the City moved to dismiss count II and, on September 20, 2012, the trial court dismissed with prejudice count II, in part because plaintiffs had not presented the constitutional issue to the Commission, the Board, or the City.

¶ 17 The trial court next turned to count III, plaintiffs' petition for a writ of *certiorari*. On July 24, 2014, the trial court issued a lengthy memorandum order quashing the writ. Plaintiffs had advanced five arguments in support of the writ. The trial court first held that plaintiffs forfeited their contention that the amendment creating the 2009 Historic Preservation Ordinance was an unconstitutional delegation of legislative authority and was also unconstitutionally vague because this contention had not been raised before the administrative agency, namely, the Commission. Second, the trial court held that the Commission, by virtue of the delegation of broad authority from the city council to the Commission, ratified the 2005 certificate of appropriateness, including the modifications that occurred during the construction. Third the trial court held that the Commission's approval of the 2005 certificate of approval was the functional equivalent of and considered the same standards that would have been considered for a request for a variance under the building code, and the ratification served to adopt the

underlying findings, all of which were sufficient to support the grant of a variance. Fourth, the trial court rejected plaintiffs' contention that the 2009 certificate could not affect the fact that the height of the dormers exceeded that allowable in the zoning district for an addition, holding that the City, as a home rule municipality, could grant a waiver from that provision. Last, the trial court held that "plaintiffs' appeal before the City Council was not rendered inadequate by the fact that the City Council received advice from the City Attorney concerning the subject of the appeal."

¶ 18 On October 20, 2014, Ferris moved for summary judgment on the remaining count I. In count I, plaintiffs alleged that the house, as constructed, violated the City's ordinances. Specifically, plaintiffs asserted that the height of the dormers did not comply with the City's zoning code, and that Ferris's construction of a basement under the detached garage violated the setback requirement.

¶ 19 On January 22, 2015, the trial court granted summary judgment in favor of Ferris and against plaintiffs on count I. Regarding the issue of the height of the dormers, the trial court held that its determination on count III controlled because plaintiffs offered no new arguments. Specifically, the court noted that the 2009 certificate of appropriateness approved the dormers as constructed and the Commission and City both had the authority to approve a variation to the height of the dormers. Because the dormers were compliant with the 2009 certificate of appropriateness, there was no violation of city ordinances.

¶ 20 Regarding the alleged encroachment of the garage basement into the setback, the trial court again held that the Commission approved the necessary variance, if one was needed,

through the 2009 certificate of appropriateness. The court also determined that the garage was an allowed accessory use, the garage's basement was also an accessory use, and it was located beyond the required setback for such an accessory use in the R-1 zoning district. The court concluded that, because the garage basement complied with the setback requirement, no variance was necessary, and, because it complied there was no violation of the City's ordinances.

¶ 21 On February 18, 2015, plaintiffs filed a petition for attorney fees pursuant to section 11-13-15 of the Act. On June 18, 2015, the trial court denied plaintiffs' petition "without prejudice." Plaintiffs appealed. In *Moore II*, 2016 IL App (2d) 15-0190-U, we dismissed the appeal for lack of jurisdiction because the petition for attorney fees was an outstanding claim that remained unresolved due to the nonfinal nature of the dismissal without prejudice.

¶ 22 On November 17, 2016, plaintiffs filed an amended petition for attorney fees pursuant to section 11-13-15 of the Act. On January 12, 2017, the trial court denied the amended petition, thus resolving the last outstanding claim. Plaintiffs timely appeal.

¶ 23 II. ANALYSIS

¶ 24 On appeal, plaintiffs purport to denominate 16 issues for review, but they can be distilled into three broad categories: (1) that the trial court erred in quashing the writ of *certiorari*, (2) the trial court erred in granting summary judgment in favor of Ferris and against plaintiffs, and (3) the trial court erred in denying their petition for attorney fees pursuant to section 11-13-15 of the Act. We will consider each area in turn.

¶ 25 A. Count III: Writ of *Certiorari*

¶ 26 Plaintiffs contend that the trial court erred in quashing the writ of *certiorari*. Although this case comes before us on a writ of *certiorari* and not under the Administrative Review Law, the standards of review are the same as those under the Administrative Review Law. *Cook County Sheriff's Office v. Cook County Comm'n on Human Rights*, 2016 IL App (1st) 150718, ¶ 27. We review the decision of the administrative agency, and our review depends on the type of issue presented. *Id.* ¶¶ 27-28. If a question of fact is presented, the agency's determination is deemed *prima facie* true and correct and will be disturbed only if it is against the manifest weight of the evidence. *Id.* ¶ 28. In reviewing such an issue, we do not weigh the evidence or substitute our judgment for that of the agency; a factual determination is against the manifest weight of the evidence only if the opposite conclusion is clearly apparent. *Id.* If a legal question is presented, we give the agency's determination no deference, and our review is *de novo*. *Id.* If a mixed question of law and fact is presented, we review it under the clearly erroneous standard. *Id.* A mixed question of law and fact is one in which the historical facts are admitted or established, the legal rule is undisputed, and the question is whether the facts satisfy the legal rule, or, in other words, whether the legal rule as applied to the established facts is or is not violated. *Id.* Under the clearly erroneous standard, we disturb the agency's determination only where we are left with a firm and definite conviction that a mistake has been made. *Id.* With these general standards in mind, we turn to the multitude of specific issues presented by plaintiffs.

¶ 27 1. Necessary Parties

¶ 28 As a preliminary matter, we note that the City argues that plaintiffs failed to name the Commission as a party defendant. The City contends that, as a result of this failure, plaintiffs

have failed to name all necessary parties and that omission is fatal to the *certiorari* petition. Plaintiffs respond that the City has waived the necessary-parties contention. We agree with plaintiffs.

¶ 29 When plaintiffs filed their second amended complaint, the City moved to dismiss count III seeking administrative review of the City's decision on the ground that the Commission, as a necessary party, had not been joined as a party defendant. The trial court dismissed count III of the second amended with prejudice.

¶ 30 Eventually, plaintiffs filed their fifth amended complaint in which count III (similarly to count III of the second amended complaint) sought a writ of *certiorari* to review the City's administrative decision. At no time while the fifth amended complaint was pending did the City seek to dismiss it on the grounds that not all necessary parties had been named in the complaint; likewise, the City did not argue to the trial court at any time while the fifth amended complaint was pending that not all necessary parties had been named in the complaint. It is clear, based on the City's argument against the similar count III from the second amended complaint, that it was very much aware that it could raise the failure to name all necessary parties defendant as a ground to attempt to dismiss the count. The voluntary relinquishment of a known right is a waiver of that right. *State Farm Mutual Automobile Insurance Co. v. Burke*, 2016 IL App (2d) 150462, ¶ 73. Here, the City was obviously aware of the necessary-parties argument, but it did not raise that argument below, thereby relinquishing a known right. Therefore, the City has waived this argument. *Harris v. Adame*, 2015 IL App (1st) 123306, ¶ 51 (respondent waived the

contention that the petitioner did not name all necessary parties in the complaint where the argument was not presented to the trial court and was raised for the first time on appeal).

¶ 31 2. Constitutionality of 2009 Amendment

¶ 32 Plaintiffs argue that the 2009 amendment to Historic Preservation Ordinance is an unconstitutional delegation of authority to the Commission because the amendment did not provide intelligible standards to guide the Commission in exercising its newfound authority. Before we can address this contention, we must first resolve whether the issue of constitutionality is preserved for our review. Before addressing forfeiture, however, we address two somewhat tangential issues.

¶ 33 First, we note that many of plaintiffs' arguments relating to the writ of *certiorari* are couched in terms the trial court's error. As noted above, a writ of *certiorari* is akin to administrative review, and our review is of the agency's action, not the trial court's decision. *Cook County Sheriff's Office*, 2016 IL App (1st) 150718, ¶ 27-28. Strictly speaking, then, plaintiffs' arguments against the trial court's judgment are misplaced. With that said, however, it is clear that plaintiffs are disputing the City's actions and we will treat misspoken arguments against the trial court's judgment as properly made against the City's (and Commission's) actions.

¶ 34 Second, we note that plaintiffs' argument regarding the constitutionality of the 2009 amendment seems to be cut-and-pasted from its brief in support of the writ of *certiorari* below. We do not denigrate this practice as it is efficient and may conserve plaintiffs' resources. We do note, unfortunately, that neither the brief in the trial court nor the corresponding section of the

brief in this court appears to have been adequately proofread. We surmise that counsel originally used a voice-recognition program to generate the citations to authority, but without adequate proofreading, unfortunate errors resulted. For example, counsel supported an argument with a citation to *Waterfront Estates Development, Inc. v. City of Palos Hills*, 232 Ill. App. 3d 367 (1992). However, counsel wrote: "*Waterfront Estates Development Inc. v. City of Pacos* [*sic*] *Hills*, 232 Asleep.3d 367, 597 N.E.2d 641, 173 Altaic. 667 (1st Dist., 2009)." While this may be a Freudian slip commenting on the subject matter and style of the appellate court's opinion, we understand that, rather than "Asleep.3d," counsel intended to write, "Ill. App. 3d." Likewise, rather than "Altaic.", counsel intended to write, "Ill. Dec." We also note that, throughout most of the brief, counsel did not include pinpoint citations which are required by rule and are helpful to the court in reviewing the party's contentions. Ill. S. Ct. R. 6 (eff. July 1, 2011). We admonish plaintiffs' counsel to follow the applicable Supreme Court Rules and we urge counsel to proofread its submissions to this court more carefully.

¶ 35 Returning to the issue at hand, plaintiffs contend that the 2009 amendment to the Historic Preservation Ordinance is unconstitutional. The City contends that, because plaintiffs did not raise their challenges to the constitutionality of the amendments before the Commission, they have waived our review of those challenges. We agree with the City.

¶ 36 As a general matter, issues not raised before the administrative agency will not be considered on administrative review or on review of a petition for a writ of *certiorari*. *Texaco-Cities Service Pipeline Co. v. McGaw*, 182 Ill. 2d 262, 278 (1998). The issue of constitutionality is subject to waiver. See *Lehmann v. Department of Children & Family Services*, 342 Ill. App.

3d 1069, 1078 (2003) (failure to raise an issue before the administrative agency, even a constitutional question, waives the issue for review). Even though an administrative agency lacks the authority to invalidate a statute on constitutional grounds, or even to question its validity, it is advisable to assert a constitutional challenge on the record before the administrative agency, because administrative review (or review of a petition for writ of *certiorari*) is confined to the proof offered before the agency. *Texaco-Cities*, 182 Ill. 2d at 278-79. The raising of the issue before the agency allows the parties to fully present evidence bearing on the constitutional challenge. *Id.* at 279. Here, plaintiffs did not raise the issue of the constitutionality of the 2009 amendments the City's ordinances before the Commission or the City council. Accordingly, we hold plaintiffs have waived this issue for our review.

¶ 37 Plaintiffs argue that they did in fact raise the issue of the constitutionality of the 2009 amendments in a November 19, 2009, letter plaintiffs sent to Czerniak. The letter stated, pertinently:

> "I understand that recently Lake Forest revised the its [*sic*] Historic Preservation Ordinance purporting to give the [Commission] the authority to grant bulk variances. However, the Preservation of Historical and Other Special Areas Act (65 ILCS 5/11-48.2[-1 *et seq.* (West 2008)]) does not grant municipalities the authority to authorize historical commission to grant variances from provisions of the Zoning or Building Codes. Therefore, the amendment to the Historic Preservation Ordinance constitutes an impermissible transfer of legislative authority from the City Council to the [Commission]. If the [Commission] does reaffirm or ratify anything regarding the bulk,

> my clients have instructed me to name the City as an additional party in the lawsuit and contest the validity of the amendment to the Historic Preservation Ordinance."

Plaintiffs argue that this passage from the November 19, 2009, letter was sufficient to raise their constitutional arguments before the Commission and to preserve them for our review because the letter was contained in the administrative record reviewed by the trial court. We disagree.

¶ 38 If, in the first instance, we accept that the quoted passage does in fact raise a constitutional issue, plaintiffs are still required to present the issue to the Commission. The record is wholly devoid of any indication that plaintiffs ever raised before the Commission or the City a challenge to the constitutionality of the 2009 amendments to the City's ordinances and particularly to the Historic Preservation Ordinance. Even though plaintiffs contend that the November 19, 2009, letter identifies the constitutional issue they now wish to present on appeal, it appears that plaintiffs did not actually argue the issue before the Commission. Identifying a potential issue is not the same as presenting and arguing that issue in a manner that is sufficient to preserve it for judicial review. We conclude that, by only identifying a potential constitutional issue in the November 19, 2009, letter and not actually raising it before the Commission, plaintiffs have deliberately relinquished the issue. As noted above, the voluntary relinquishment of a known right constitutes a waiver. *Burke*, 2016 IL App (2d) 150462, ¶ 73.

¶ 39 If, for argument's sake, we accept that the November 19, 2009, letter identified a constitutional issue, we still conclude that plaintiffs waived the issue. As of at least November 19, 2009, plaintiffs were aware of the issue concerning the constitutionality of the 2009 amendments. Plaintiffs did not proceed to raise the issue before the Commission. Plaintiffs

similarly did not raise the issue of the constitutionality of the 2009 amendments in their appeal before the City. Instead, plaintiffs expressly raised the issue of the constitutionality 2009 amendments in a legally cognizable form for the first time before the trial court in their petition for writ of *certiorari*. Thus, plaintiffs were aware of the existence of the issue before any administrative proceedings occurred. Plaintiffs did not raise the issue before the relevant administrative bodies. Thus, if we accept that the November 19, 2009, letter raised the issue of constitutionality, plaintiffs subsequent actions convincingly demonstrate that they waived the issue of the constitutionality of the 2009 amendments.

¶ 40 However, it is not clear to us that the quoted passage of the November 19, 2009, letter actually raises an issue of the constitutionality of the 2009 amendments. A straightforward reading of the passage reveals only the assertion that the Preservation of Historical and Other Special Areas Act did "not grant municipalities the authority to authorize historical commissions to grant variances from provision of the Zoning or Building Codes." From this assertion, plaintiffs conclude that the 2009 amendments "constitute[d] an impermissible transfer of legislative authority from the City Council to the [Commission]." In our view, the passage represents a claim that the City exceeded its permissible statutory authority under the Preservation of Historical and Other Special Areas Act (which may or may not be viable given the City's home rule status). Thus, the passage that plaintiffs believe raises the existence of a constitutional issue in fact only accuses the City of a violation of its statutory authority. Thus, even if we concluded that the November 19, 2009, letter were sufficient to preserve the issues it purports to raise, we hold that it does not raise an issue of constitutional dimension. We also

emphasize that the letter is also insufficient to raise and preserve any constitutional issue resulting in the waiver of that purported issue.

¶ 41 Plaintiffs argue that the November 19, 2009, letter apprised the City of plaintiffs' desire to "contest the validity of the amendment to the Historic Preservation Ordinance." "Contesting" the validity of the 2009 amendments is a neutral statement: the amendment could be attacked on any sort of ground, from statutory, to procedural, to constitutional. We note that the record is devoid of any indication that a constitutional challenge to the 2009 amendments was actually mounted before the Commission. Even if we were to glean from the letter's language that plaintiffs wished to attack the constitutionality of the 2009 amendments, the record demonstrates that plaintiffs actually waived any constitutional challenge they claim they wished to raise. We reject plaintiffs' argument.

¶ 42 Plaintiffs cite *Hanna v. City of Chicago*, 388 Ill. App. 3d 909, 920 (2009), for the proposition that, in making a challenge to the improper delegation of legislative authority from the City to the Commission, the City should have understood this to be a constitutional challenge to the 2009 amendments. Plaintiffs are correct that *Hanna* held that, because count III of the complaint in that case alleged that the provision in question was a facially unconstitutional delegation of legislative authority, the plaintiff in *Hanna* had stated a cause of action sufficient to withstand the defendant's motion to dismiss pursuant to section 2-615 of the Code of Civil Procedure (735 ILCS 5/2-615 (West 2006)). We note that, in *Hanna*, the plaintiff expressly alleged in the complaint that the ordinance in question was unconstitutional. Here, by contrast, plaintiffs failed to raise the issue of constitutionality of the 2009 amendments in a timely fashion

despite their clear awareness (at least according to plaintiffs' interpretation of the November 19, 2009, letter) that a potential constitutional issue existed in the 2009 amendments. *Hanna* did not deal with any issue of the timeliness of the assertion of the constitutionality of the provision at issue; likewise, it did not deal with any issue of preserving the constitutionality issue because the posture of *Hanna* was not the review of an administrative agency's actions. Accordingly, *Hanna* is factually and procedurally distinct and provides us with no guidance regarding the handling of plaintiffs' untimely asserted and unpreserved claim.

¶ 43 Plaintiffs attempt to skirt the issue of waiver by noting that the rule regarding waiver is an admonition to litigants and not a limitation to the reviewing court. See *American Federation of State, County & Municipal Employees, Council 31, AFL-CIO v. County of Cook*, 145 Ill. 2d 475, 480 (1991) ("the waiver rule is an admonition to litigants, not a limitation upon the jurisdiction of a reviewing court"). Plaintiffs correctly cite *American Federation*, and we acknowledge that we possess the authority to review a claim that has not been preserved for appellate review. However, the circumstances here, namely, plaintiffs' knowing relinquishment of their constitutional claim by failing to raise it before the Commission despite their awareness of the existence of the claim in advance of any hearing before the Commission or the City, strongly militate in favor of observing the procedural default. Accordingly, we decline to address the waived constitutionality issue.

¶ 44 Because we conclude that plaintiffs waived their arguments regarding the constitutionality of the 2009 amendments, we do not address plaintiffs' remaining arguments. We now turn to plaintiffs' contentions regarding the 2009 certificate of appropriateness.

¶ 45 3. 2009 Certificate of Appropriateness

¶ 46 Plaintiffs next contend that the 2009 certificate of appropriateness was invalidly granted. Specifically, plaintiffs contend that the Commission did not have the authority to confirm, ratify, or reapprove the certificate of appropriateness and the trial court erred in holding that the Commission properly ratified the 2009 certificate of appropriateness. Next, plaintiffs argue that the authority to modify a certificate of appropriateness lapsed one year after it was issued, so the Commission was without authority to ratify the certificate "as modified." Plaintiffs further contend that the trial court erred in holding that the 2009 certificate of appropriateness related back to the 2005 certificate of appropriateness. Plaintiffs then contend that the Commission did not apply the proper standards to grant Ferris a bulk variance. Finally, plaintiffs contend that the renovation of the subject property did not conform to the requirements of the zoning district in which it was located, rendering the 2009 certificate of appropriateness invalid. We will address each contention in turn.

¶ 47 a. Ratification of the 2009 Certificate of Appropriateness

¶ 48 Plaintiffs argue that the 2009 amendment to the Historic Preservation Ordinance did not grant the Commission the power to confirm, ratify, or reapprove a prior certificate of appropriateness. According to plaintiffs, the Historic Preservation Ordinance, as amended, did not include language giving the Commission the authority to confirm, ratify, or reapprove a previously issued certificate and it also lacked language giving authority to determine a certificate of approval related back to a previously issued certificate.

¶ 49 We begin by reviewing the pertinent language of the amended Historic Preservation Ordinance. Among the powers conferred by the amended Historic Preservation Ordinance was the authority:

> "[t]o grant exceptions to the maximum floor area (building scale) requirements set forth in Section 9-87C of the City Code [(now codified City of Lake Forest Code of Ordinances § 150.148(C) (adopted Feb. 6, 2012))], for a new residence or an addition to an existing residence that is a Landmark or structure within a District, if the Standards set forth in this Section 9-87D of the City Code [(now codified City of Lake Forest Code of Ordinances § 150.148(D) (adopted Feb. 6, 2012))] are met." Lake Forest City Code § 51-3(B)(4) (adopted July 9, 2009) (now codified with additional amendments City of Lake Forest Code of Ordinances § 155.03(B)(4) (adopted Feb. 6, 2012)).

¶ 50 We interpret a municipal ordinance as we would a statute: the goal of such interpretation is to ascertain and give effect to the intent of the drafters. *Sloper v. City of Chicago, Department of Administrative Hearings*, 2014 IL App (1st) 140712, ¶ 16. The best indication of the drafter's intent is the language of the ordinance itself, given its plain and ordinary meaning. *Id.*

¶ 51 Here, the amendment to the Historic Preservation Ordinance expressly gives the Commission the power to approve variations ("grant exceptions") to the building scale requirements elsewhere described in the City's city code. Lake Forest City Code § 51-3(B)(4) (adopted July 9, 2009). Inherent within the concept of "approve" is the concept of ratification. *In re Marriage of Walker*, 386 Ill. App. 3d 1034, 1049 (2008); Black's Law Dictionary 94 (5th ed. 1979) ("to confirm, ratify, sanction, or consent to some act or thing done by another"). Thus,

because the 2009 amendment authorized the Commission to approve variations to the building scale requirements contained in the City's building code, the 2009 amendment necessarily conferred the power to ratify.

¶ 52 In turn, the doctrine of ratification fully applies to municipal and other public bodies. *Athanas v. City of Lake Forest*, 276 Ill. App. 3d 48, 56 (1995). "Where an agent has acted outside the scope of his or her authority, a principal may ratify the unauthorized act and the ratification is equivalent to original authority confirming that which was originally unauthorized. *Id.* Ratification, which may be express or implied, occurs when the principal, with knowledge of the material facts of the unauthorized action, takes a position inconsistent with nonaffirmation of the action. *Id.* Stated another way, a principal (including a city) can ratify the actions of the agent by not repudiating the agent's actions once it has knowledge of the actions, or by accepting the benefits of the actions. *Id.* at 57.

¶ 53 In this case, the City's agent, the Commission, granted the 2009 certificate of appropriateness to Ferris. Specifically:

> "The Commission voted unanimously to confirm, ratify and re-approve:
>
> a) the Certificate of Appropriateness for [the subject property] dated August 10, 2005, attached as Exhibit A, as modified by:
>
> i) the letter from Senior Planner Peter Coutant dated February 20, 2007;
>
> ii) field adjustments regarding Condition 8 of the Certificate of Appropriateness relating to the construction methods and the oak tree that had been located at the rear of the addition; and

> iii) the building scale variances for building height and floor area relating to the addition to the building on the property, as reflected in the August 10, 2005, Certificate of Appropriateness
>
> Which confirmation, ratification and re-approval acknowledges that (1) the construction work as completed is consistent with the [2005] Certificate of Appropriateness as modified, and (2) this action is intended to relate back to the original [2005] Certificate of Appropriateness and the modifications and adjustments thereto. This confirmation, ratification and re-approval applies to the property, regardless of ownership."

The Commission, therefore, expressly stated that it had ratified its earlier, unauthorized action in granting the building scale variance associated with the 2005 certificate of approval.

¶ 54 Generally, however, an agent may not ratify its own unauthorized action. The trial court stated, persuasively, that, in the 2009 amendment, the City delegated such broad authority to the Commission that it was empowered to approve certificates of appropriateness. Because of this broad delegation of authority, the Commission had the power to approve certificates of appropriateness on the City's behalf, and this power extended to the ratification of a previously unauthorized act, such as the 2005 grant of a building scale variance embodied in the 2005 certificate of appropriateness. While we agree with the trial court's general reasoning, the suggestion that the agent may also ratify a previously unauthorized action is unsupported by authority in the trial court's memorandum order.

¶ 55 We need not, however, decide whether the City's delegation of authority to the Commission was sufficient to allow the Commission to ratify its own previously unauthorized

actions. Plaintiffs appealed the Commission's approval of the 2009 certificate of appropriateness directly to the City. After hearing the appeal, the City denied plaintiffs' appeal of the Commission's approval of the 2009 certificate of appropriateness:

> "On Monday, January 4, 2010, the City Council heard an appeal filed by [plaintiffs] of the [Commission's] decision on November 24, 2009, to issue a Certificate of Appropriateness to reaffirm, confirm and re-approve a Certificate of Appropriateness originally issued on August 10, 2005, for the [subject property]. The City Council, having heard arguments and comments from a representative of [plaintiffs], a representative of the owners of [the subject property] and the City staff, and having been presented with written materials from the interested parties and the complete written record considered by the [Commission], made the following determinations:
>
> A. The decision of the [Commission] was well-founded based on the written and oral record and the standards of the Historic Preservation Ordinance; and
>
> B. The appeal is rejected by a 8-0 vote, and the Certificate of Appropriateness for [the subject property] as approved by the [Commission] remains in force."

¶ 56 The City expressly rejected plaintiffs' attack on the 2009 certificate of appropriateness. In other words, the City, with knowledge of the material facts of the unauthorized action, took a position inconsistent with nonaffirmation of the action. *Athanas*, 276 Ill. App. 3d at 56. We hold, then, that the City ratified the Commission's previous actions by not repudiating them once the City had been fully apprised of the Commission's previous actions. *Id.* at 57. Accordingly, we hold that City properly ratified the Commission's previous actions.

¶ 57 Plaintiffs contest the applicability of *Athanas*, arguing that *Athanas* stands for nothing more than a principal who is defending an action may ratify the action of an agent only if it initiates a cross-appeal to enforce the agent's actions. This is a too-narrow reading of *Athanas*. Moreover, *Athanas* expressly stated that, in order to ratify the actions of the agent, the principal need only take a position inconsistent with the nonaffirmation of the action, or, stated another way, the principal need only not repudiate the agent's action. Here, the City not only did not repudiate the Commission's purported ratification, it expressly ratified the Commission's action. Thus, the need for a cross-appeal is unnecessary, especially where the City prevailed below.

¶ 58 Plaintiffs contend that the 2009 amendments did not include the authority to ratify the previous actions. Plaintiffs urge that the trial court's judgment on the ratification issue is the result of the trial court's injection of a ratification term into the 2009 amendments. We disagree. As noted above, "approve" necessarily incorporates the concept of ratification. By grounding our decision on ratification, we are not injecting a new term into the 2009 amendments, but instead, we are giving full meaning to the 2009 amendments' authorization of the Commission to approve building scale variances for homes within a historic preservation district.

¶ 59 Plaintiffs argue that to accept the City's argument on this point is tantamount to allowing City to dictate how the judiciary will construe the City's legislative enactment. In support, plaintiffs cite *Moore I*. The citation to *Moore I* is misplaced. In *Moore I*, Ferris argued that the City interpreted the Building Code to allow the Commission to grant a variance to the Building Code even though the terms of the Building Code entrusted only the Building Review Board with the power to grant a variance. *Moore I*, slip op. at 4-7. Thus, the circumstances are

different from *Moore I* to this case: in *Moore I*, there was no support in the ordinance for the City's interpretation, which meant that our acceptance there would have allowed the City to dictate our interpretation of the ordinance; here, by contrast, the Commission is expressly given the power to grant a variance by the 2009 amendment, so the City is no longer dictating our interpretation—our interpretation flows directly from the language of the amended ordinance itself. Accordingly, plaintiffs' reliance on *Moore I* is misplaced. As a result, we reject plaintiffs' contention.

¶ 60 Plaintiffs make essentially the same argument with respect to the contention that the City itself ratified the Commission's issuance of the 2009 certificate of appropriateness. Plaintiffs argue that the City could not have legitimately ratified the certificate of appropriateness because the argument for ratification is "similar to the finding that the trial court made prior to the first appeal in granting defendant's motion for a directed finding in which the trial court held that the City decided to approve the variances on the subject property by denying [plaintiffs'] appeal," and which this court reversed in *Moore I*. Plaintiffs' contention fails because the passage relied on from *Moore I* deals with the City's interpretation of its ordinances, whereas the ratification power arises from the grant to the Commission of the authority to approve variances. Thus, the passage from *Moore I* is commenting on a completely different situation than is presented here, and it does not apply. *Moore I*, slip op. at 4-9.

¶ 61 In *Moore I*, the legislative body construed the then-Historic Preservation Ordinance in a fashion that did not jibe with its actual language. Specifically, the City believed that the Commission was empowered under the version of the Historic Preservation Ordinance then in

effect to grant variances under the Building Code. As a result, we held, in *Moore I* that "a legislative body, including a local governmental entity interpreting its ordinances, 'is without power to say how the judiciary shall construe a legislative enactment.' " *Moore I*, slip op. at 5 (quoting *Palella v. Leyden Family Service & Medical Health Center*, 79 Ill. 2d 493, 499 (1980)). Here by contrast, we are not presented with a legislative interpretation conflicting with the actual language of the ordinance, but an amendment to that ordinance and a request to interpret the ordinance ourselves. Accordingly, *Moore I*, and the authority on which it relied, *Palella*, is inapposite.

¶ 62 Relatedly, plaintiffs contend that the trial court erred in holding that the 2009 certificate of appropriateness must stand or fall as an act of ratification. Plaintiffs argue that, in ratifying the 2005 certificate of appropriateness, the certificate was purportedly modified, and the trial court erroneously accepted the 2009 certificate of appropriateness as a ratification of the previous certificate. As we noted above, the trial court's judgment is not at issue here; rather, the City's and the Commission's actions are before us for review. While the trial court's judgment may be illuminating and persuasive, attacking it as erroneous is, under the posture of the current appeal, without actual legal effect. Also as we noted above, we will interpret plaintiffs' contention as directed against the administrative bodies and not the trial court. Seen in this light, plaintiffs are reiterating their argument about ratification.

¶ 63 In this reiteration, plaintiffs focus more attention on *Palella* (as well as the above-analyzed portion of *Moore I*) along with *Peet v. Bouie Construction, Inc.*, 268 Ill. App. 3d 18 (1994). Plaintiffs' point, however, remains the same: the municipality cannot dictate to the court

how it must construe an ordinance. Here, we have reviewed the Historic Preservation Ordinance as amended, and we have concluded that the power to ratify is included within the grant of authority to the Commission to approve variances from the building code. See *Marriage of Walker*, 386 Ill. App. 3d at 1049 (ratification is included within the power to approve). Thus, unlike in *Palella* and *Peet*, there is no question here that the municipal body's interpretation of its own ordinance forecloses a differing interpretation by this court. Instead, we are interpreting the effect of amendments to the relevant ordinances. We reject plaintiffs' contention.

¶ 64 Plaintiffs also argue that the ratification argument is foreclosed by *Moore I*. We disagree. In *Moore I*, we were asked to resolve whether the Commission had the power to grant variances under the Building Code in effect at that time. Following the 2009 amendments, the Commission was expressly granted that power. The Commission, acting under the broad authority delegated by the City, did just that: it ratified its earlier improper grant of a variance. *Moore I* did not foreclose the City's ratification theory.

¶ 65 Plaintiffs argue that "ratification cannot be used to make legal those things that would otherwise be illegal for a public body." The contention seems to presuppose that the 2009 amendments are ineffective. Otherwise, the timeline of this case refutes the contention: the purported 2005 grant of the variance is overturned by this court; the City amends its ordinances to expressly allow the Commission to grant a variance; the Commission considers its earlier unauthorized action and ratifies it, and the City further ratifies the Commission's act by denying plaintiffs' appeal of the 2009 certificate of appropriateness. While there may be room to quibble that the Commission was not empowered to ratify its own action, the City's denial of the appeal

plainly ratified the Commission's purported ratification. Accordingly, plaintiffs' contention fails.

¶ 66 Last, plaintiffs seem to change their argument, concluding that any ratification is ineffective because the City did not have the authority to grant a building scale variance. The City, however, enacted the ordinance authorizing the Commission to grant the variance at issue here, along with all of its other zoning ordinances and building codes. Additionally, it is well established that a municipality has the authority to grant variances from its zoning ordinances, and this power arises from its power to establish those same zoning ordinances. See *Downey v. Grimshaw*, 410 Ill. 21, 30 (1951) (the power to define zoning districts and to change them implies that the body also has the power to grant variances to those zoning ordinances). Accordingly, we reject plaintiffs' contention.

¶ 67 b. Time Limit to Modify the 2009 Certificate of Appropriateness

¶ 68 Plaintiffs argue that the modification of the 2005 certificate of appropriateness codified in the 2009 certificate of appropriateness was invalid because it occurred more than one year from the issuance of the 2005 certificate. Plaintiffs point to section 51-6(C)(2)(b)(i) of the Historic Preservation Ordinance (both the 2009 amended version and the version in effect in 2005), which states that a certificate of appropriateness "shall be valid for a period of one (1) year from the date of the issuance by the Commission." According to plaintiffs, this passage means that any modification to the certificate must be accomplished within that one year of its validity. Because the modifications to the 2005 certificate occurred when the 2009 certificate ratified the 2005 certificate, this was beyond the one-year limitations period and thus, the 2009 certificate,

because it differed from the 2005 certificate, could not operate to validly modify the 2005 certificate.

¶ 69 If we look at the reasons a certificate of appropriateness is necessary, we see that it must be procured when changing a landmark structure located in a preservation district. Lake Forest City Code § 51-6(A) (adopted July 9, 2009). Further, the certificate is necessary to allow the party to then apply for any permits needed to modify the structure. *Id.* Thus, in our view, the time limitation in section 51-6(C)(2)(b)(i) is not a limitations period for the viability of the certificate, but is a limitation on its effectiveness to allow the owner of the property to obtain any necessary permits to carry out the planned modifications. Plaintiffs, therefore, misconceive the purpose of the limitation as well as its effect. We reject plaintiffs' contention and hold that the City was able to validly modify the 2005 certificate as reflected in the 2009 certificate of appropriateness.

¶ 70 Plaintiffs cite *Bessler v. Board of Education of Chartered School District No. 150 of Peoria County*, 11 Ill. App. 3d 210 (1973), for the proposition that ratification is not applicable where the required action was not performed within the limitations period. *Bessler* involved the purported dismissal of a teacher. The teacher was informed by the school district's personnel director, six days before the deadline imposed by statute, that she would not be reemployed for the next school year. *Id.* at 212. A week after the deadline, the school board took the action of officially terminating her employment for the next school year. *Id.* The teacher claimed that the official action had been taken after the statutory deadline had lapsed, so she remained employed for the next school year; the school board claimed that its action following the timely notification

by the personnel director constituted substantial compliance with the statutory requirements, including the requirement of action before the deadline. *Id.*

¶ 71 The court began its analysis by noting that, in the circumstances presented, the termination power could not be delegated; only the school board had the authority to perform the action of terminating the teacher. *Id.* at 212-13. With that said, the court noted that the personnel director could notify the teacher of the board's action, but the facts showed that the personnel director had conveyed the notification before the board acted. *Id.* at 213. The school board then argued that the after-the-fact, after-the-deadline termination of the teacher constituted a ratification of the personnel director's action of terminating the teacher. *Id.* The court held that ratification was not applicable because the school board was required to act before the deadline and the evidence showed that the board did not terminate the teacher until a week after the statutory deadline for action. *Id.* Thus, the court concluded that, where the school board had not acted within the time set by statute, the personnel director's dismissal of the teacher was without legal effect. *Id.*

¶ 72 *Bessler* is readily distinguishable. As we have discussed above, the certificate of appropriateness relates to the property owner's ability to obtain the necessary permits from the City to complete the work approved in the certificate. The actor in this case, therefore, is the property owner, not the Commission or the City. In *Bessler*, by contrast, the actor was the school board, which was required to complete its action before a date certain. When the date certain passed and the school board had not taken the required action, the school board was barred from further action. Here, when the one-year period elapses, the property owner may not

obtain permits from the City necessary to complete the work approved in the certificate. Thus, *Bessler* does not apply.

¶ 73 This is further seen by considering the nature of the certificate of appropriateness. The certificate specifies the work to be performed on the particular property. When the one-year period of the certificate's validity elapses, the work specified in the certificate has been completed, but it does not now become somehow illegitimate. Rather, the certificate continues to approve of the work even after the one-year period has elapsed, otherwise we would have the absurd result of the modifications becoming illegitimate after the one-year period and the owner being required to restore his property to the condition it was in before the certificate was issued. We interpret legislative provisions in a manner that does not lead to an absurd result. *Sycamore Community Unit School District No. 427 v. Illinois Property Tax Appeal Board*, 2014 IL App (2d) 130055, ¶ 28. To accept plaintiffs' view leads to the absurd result of actually preventing any owner in a historic preservation district from effectively renovating his or her property, because, under plaintiffs' view, the renovations would become invalid after a year and would need to be removed.

¶ 74 c. Relation Back of the 2009 Certificate of Appropriateness

¶ 75 Plaintiffs contend that the trial court erred in holding that the 2009 certificate of appropriateness could relate back to the 2005 certificate. Technically, we are not reviewing the trial court's judgment, but the action of the Commission and the City, so plaintiffs' argument is irrelevant. Instead, we view the argument as directed against the Commission's grant of the 2009 certificate of appropriateness, in which the Commission stated that the grant of the

certificate was "intended to relate back to the original [2005] Certificate of Appropriateness and the modifications and adjustments thereto." Even viewed in this light, however, we need not address plaintiffs' contention, because we have held both that the Commission and City properly ratified the original grant of the 2005 certificate of appropriateness and the Commission and City had the power to modify the original certificate at any time. Thus, whether the 2009 certificate "relates back" in the legal sense to the 2005 certificate is irrelevant in light of our determinations that the 2009 certificate ratified the earlier action and the 2005 certificate remained modifiable by the City and Commission at any time.

¶ 76 d. Application of Standards for Bulk Variance

¶ 77 Plaintiffs contend that the Commission did not properly grant the necessary bulk variance to allow the modifications contemplated by Ferris. Specifically, plaintiffs contend that the Commission did not apply the standards for a bulk variance enumerated in the building code, but only applied the standards from the Historic Preservation Ordinance in effect in 2005. Plaintiffs further contend that, in 2009, the Commission did not conduct an independent evaluation of the requested bulk variance, but only adopted the findings from the 2005 certificate of appropriateness. Plaintiffs conclude that, even if the Commission were empowered, in 2005, to grant a variance, it did not consider the proper factors in granting the 2005 certificate of appropriateness.

¶ 78 Plaintiffs' argument fails because the City ratified the Commission's action. Thus, the City granted Ferris the bulk variance. The City is a home rule unit of government. Home rule units of government derive zoning power from the Illinois Constitution of 1970, and it may

exercise any power and perform any function pertaining to its government and affairs, and this includes the power to regulate for the protection of the public health, safety, and welfare. Ill. Const. 1970, art. VII, § 6(a). Zoning has consistently been held to be a matter within the authority of home rule units. *Dunlap v. Village of Schaumburg*, 394 Ill. App. 3d 629, 644 (2009). Indeed, home rule units of government have plenary power over zoning decisions, like the grant of a variance. *Id.* at 645. The limitation to this power is that the exercise of the power may not contravene constitutional (Illinois or federal) limits. *Id*. In other words, in enacting a zoning provision like a variance, a court may not disturb the home rule unit's enactment unless it arbitrary and unreasonable because a zoning decision is reviewed as a legislative act. *Id.* at 640, 646.

¶ 79 Here, at the very least, the City ratified the Commission's grant of a variance. In effect, then, the City enacted the variance. Plaintiffs do not contend that the variance was arbitrary or unreasonable or that it violated some constitutional or statutory principle. Thus, the ratification was effective to grant the bulk variance sought by Ferris.

¶ 80 Even placing the ratification to the side, we note that the standards enumerated in the Historic Preservation Ordinance are functionally equivalent to those contained in the building code. The record demonstrates that the Commission properly considered the necessary standards before issuing the certificate of approval and approving the bulk variance. Plaintiffs do not discuss in detail the way in which the Commission's review was supposed to be faulty. Based on our review of the appropriate sections of the City's ordinances, we conclude that the

Commission did consider the appropriate factors when it considered Ferris's request for a bulk variance.

¶ 81 Plaintiffs argue that we foreclosed the Commission's grant of a bulk variance in *Moore I*. Plaintiffs misconstrue our holding. We held that the facts that the building code standards overlapped with those of the Historic Preservation Ordinance and the same staff conducted the review under either provision were irrelevant, because, according to the ordinances that were in effect in 2005, an owner seeking a variance for a home in a historic preservation district was required to seek approvals from both the Commission and the Building Review Board. *Moore I*, slip op. at 8-9. Plaintiffs ignore that we were not passing on the similarity or overlap of the provisions, but were determining whether Ferris had followed the proper procedure in obtaining his variance in *Moore I*.

¶ 82 Plaintiffs argue that a home rule unit lacks the power to violate its own ordinances. In *Beneficial Development Corp. v. City of Highland Park*, 161 Ill. 2d 321, 329 (1994), our supreme court remarked, "A municipality is without power to violate its own ordinances." However, the court went on to note that the municipality need not enact an ordinance in order to exercise its home-rule powers. *Id.* at 330. In fact, the municipality in *Beneficial Development* did not violate its ordinances. *Id.* Here, the City ratified the Commission's grant of a variance, and plaintiffs do not assail that decision as arbitrary and unreasonable. *Beneficial Development* does not support plaintiffs' contention.

¶ 83 e. The 2009 Certificate of Appropriateness and the Zoning Code

¶ 84 In their final argument directed against the City, plaintiffs contend that the City's zoning code, with its 30-foot height limit for all structures, forbids the 2009 certificate of appropriateness because the height of the dormers exceeded the 30-foot height limit for structures within R-1 zoning districts. Plaintiffs further contend that we determined in *Moore I* that the height of the dormers violated the constraints of the zoning code, and that decision should foreclose any reconsideration of either the requirements of the zoning code regarding the dormers or the effect of the violation of the zoning code regarding the propriety of the 2009 certificate of appropriateness.

¶ 85 As an initial matter, we note that *Moore I* interpreted the zoning code, and the relevant provisions of the ordinance do not appear to have substantially changed from 2005 to 2009, when the 2009 certificate was granted. However, the circumstances surrounding the 2009 certificate of appropriateness are sufficiently different from those under consideration in *Moore I* that we are not foreclosed from once again considering the issue.

¶ 86 In the 2009 certificate of appropriateness, the Commission expressly approved "the building scale variances for building height and floor area relating to the addition" to the subject property. We interpret this statement as expressly granting a variance to the requirements of building height for the dormers. With this understanding, we next turn to the City's action ratifying the 2009 certificate.

¶ 87 On January 9, 2010, the City, "having heard arguments and comments from a representative of [plaintiffs], a representative of [Ferris] and the City staff, and having been presented with written materials from interested parties and the complete written record,"

rejected plaintiffs' appeal and ratified the Commission's decision and grant of the 2009 certificate of appropriateness. Necessarily, then, the City ratified the grant of the variance integral to the 2009 certificate concerning the height of the dormers. As noted above, the City, as a home rule unit of government, was not bound by its existing ordinances when considering a request for a variance or other zoning relief. *Dunlap*, 394 Ill. App. 3d at 645. Because the issue of a building-height variance is integral to the 2009 certificate, and because the City was obviously considering that issue along with the general validity of the 2009 certificate, we hold that the City properly ratified the building-height variance for the height of the dormers when it rejected plaintiffs' administrative appeal and ratified the 2009 certificate.

¶ 88 Plaintiffs argue that there was never a request from the appropriate sub-entity of the City, so the City did not properly have the building-height variance before it for consideration during plaintiffs' appeal of the grant of the 2009 certificate of appropriateness. According to plaintiffs, only the Building Review Board or the Zoning Board of Appeals was empowered (presumably in 2005, because plaintiffs are hazy about the timeframe they are considering) to grant a variance from the building code or the zoning code. Plaintiffs further note that the building-height requirement is a part of both the zoning and building codes, requiring Ferris to have sought a variance for the height of the dormers from the Building Review Board and the Zoning Board of Appeals. Because no variance was sought from either board, the City could not have granted a variance for the height of the dormers when it ratified the 2009 certificate.

¶ 89 Plaintiffs overlook that the amended Historic Preservation Ordinance specifically allowed the Commission to "grant exceptions [(*i.e.*, variances)] to the maximum floor area (building

scale) requirements set forth in Section 9-87C of the City Code." Lake Forest City Code § 51-3(B)(4) (adopted July 9, 2009). Section 9-87C referred to in the amended Historic Preservation Ordinance involves issues of maximum building size, lot area, and building height. Lake Forest City Code § 9-87C (adopted Sept. 8, 2003). Thus, the Commission was expressly empowered to grant variance to the topics covered in section 9-87C: maximum building size, lot area and building scale calculations, and building height. Lake Forest City Code § 51-3(B)(4) (adopted July 9, 2009). Because the Commission had the power to grant a building-height variance, the City could properly consider it when it considered the 2009 certificate of appropriateness and its express and integral acknowledgment of the Commission's grant of a building-height variance during plaintiffs' appeal. Thus, Ferris was not required to have sought, before the 2005 certificate of appropriateness, a building-height variance from the Building Review Board or the Zoning Board of Appeals, because, in 2009, the Commission was empowered to grant such a variance, did grant the building-height variance, and the City then ratified the Commission's grant of a building-height variance.

¶ 90 Plaintiffs attack *Dunlap*, arguing that it is factually distinguishable and does not support the idea that the City ratified the Commission's grant of the building-height variance in the 2009 certificate of appropriateness. Specifically, plaintiffs note that here, unlike in *Dunlap*, "the City did not vote to grant any variance." Plaintiffs conclude that the "denial of the appeal from the [Commission] by the City and the issuance of a building and occupancy permit by the City [does not] somehow constitute[] an adoption of a variance." We disagree. As we noted above, the City's rejection of plaintiffs' administrative appeal from the Commission's grant of the 2009

certificate of appropriateness constituted a ratification of the Commission's actions in granting that 2009 certificate. Inherent within the 2009 certificate is the grant of a building-height variance. See *supra* ¶ 86 (the Commission expressly approved "the building scale variances for building height and floor area relating to the addition" to the subject property). Thus, the City ratified the Commission's grant of a building-height variance, notwithstanding that, in 2005, the Commission did not have the power to grant such a variance.

¶ 91 We also note that the amendment of the Historic Preservation Ordinance and the City's ratification serve to distinguish the circumstances present in this appeal from those present when we considered *Moore I*. Thus, our determination that the height of the dormers violated the relevant provisions in the City's ordinances in *Moore I* no longer applies to this case, because of the significant change in the circumstances.

¶ 92 Based on all of the foregoing, we conclude that the writ of *certiorari* was correctly quashed.

¶ 93 B. Grant of Summary Judgment on Count I

¶ 94 Plaintiffs next contend that the trial court erred in granting summary judgment in favor of Ferris and against plaintiffs on count I of the fifth amended complaint. Summary judgment is appropriate where the pleadings, depositions, admissions, and affidavits on file show that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. 735, ILCS 2-1005(c) (West 2016). We review *de novo* the trial court's judgment on a motion for summary judgment. *Garlick v. Naperville Township*, 2017 IL App (2d) 170025, ¶ 44. Plaintiffs contend that: (1) the height of the dormers violated the height restrictions of the zoning code; (2)

the garage basement violated the side-yard setback requirement; and (3) no valid variances had been granted to Ferris. We consider each contention in turn.

¶ 95 1. Height of the Dormers

¶ 96 Plaintiffs once again challenge the dormer height. All the reasons expressed above regarding the height of the dormers apply to this contention. To the extent that plaintiffs repeat their arguments, we continue to reject them, and we need not further address the repeated contentions. Plaintiffs also contend that the height requirements expressed in section 9-87C(3) of the building code is not encompassed within the amended Historic Preservation Ordinance's grant of power to the Commission to grant variances to the requirements of section 9-87C. Plaintiffs reason that, because the height requirement does not affect the maximum floor area (building scale) calculation, the Commission is bereft of power to grant a height variance.

¶ 97 Even if we accepted plaintiffs' reasoning, the City ratified the Commission's grant of a building-height variance specifically for the dormer height of the addition to the subject property. Because the City ratified the Commission's action, plaintiffs' argument necessarily fails.

¶ 98 In any event, we reject plaintiffs' construction of the Historic Preservation Ordinance. The 2009 version of the ordinance empowers the Commission to grant variances to the "maximum floor area (building scale) requirements set forth in Section 9-87C of the City Code." Lake Forest City Code § 51-3(B)(4) (adopted July 9, 2009). In our view, the reference to section 9-87C gave the Commission the authority to grant variances to the requirements of section 9-87C which, as a whole, dealt with the building-scale requirements. The terms, "maximum floor area" and "building scale," are descriptive of the contents and subject matter of the particular section

specified. In addition, section 51-6(A)(1)(g) specifically requires that a certificate of appropriateness must be sought when there is any "request for a variance from the Building Scale Ordinance of the City of Lake Forest." Lake Forest City Code § 51-6(A)(1)(g) (adopted July 9, 2009). Likewise, section 51-7(C) empowered the Commission to grant relief (variances) "from the building scale limitations of the City Code, but only in accordance with the standards for variances from the building scale regulations as set forth in the City Code." Lake Forest City Code § 51-7(C) (adopted July 9, 2009). When read, as we are required to do, in conjunction, the amended Historic Preservation Ordinance contemplates and grants the Commission the authority to grant variances to all of the building scale limitations in the building code. Thus, ratification notwithstanding, we reject plaintiffs' construction.

¶ 99 2. Garage Basement Setback

¶ 100 Plaintiffs argue that the basement under the garage violates the 10-foot side yard setback for R-1 zoning districts. Plaintiffs argue that we held, in *Moore I*, that there was a dispute whether the basement was partially above ground or wholly beneath the ground, which plaintiffs interpret to mean that this court defined "basement" to mean a structure that is wholly below the ground. Plaintiffs argue that plaintiff Christopher Moore averred that a portion of the new basement under the garage is above the ground. From this, plaintiffs conclude that the basement encroaches into the required side-yard setback.

¶ 101 Ferris argues that the trial court properly concluded that there was no encroachment because the basement belongs to the garage, which is a permitted accessory structure, and accessory structures require only a 5-foot setback. We agree with Ferris.

¶ 102 The trial court held that a basement was not excluded from the accessory uses listed in the zoning code. The trial court further held that the basement, as defined in the zoning code, is part of the structure above it, so if the structure above the basement was an accessory building, then its basement is a portion of that accessory building. We believe that the trial court's analysis is persuasive.

¶ 103 The zoning code defines "accessory building or use" as:

"A building or use which:

1. Is located on the same zoning lot as the principal building or use served, except as may be specifically provided elsewhere in this chapter. (See Appendix D.)

2. Is incidental to and subordinate in purpose to the principal building or use;

3. Is operated and maintained solely for the comfort, convenience, necessity or benefit of the occupants, employees, customers or visitors of or to the principal building or use; and

4. May, but need not, be limited to one or more of the following:

a. Garden house, private greenhouse or a children's playhouse;

b. A garage, carport, shed or other storage building;

c. The storage of merchandise or material normally carried in stock on the same zoning lot with any business or service; and

d. Public utility facilities." Now codified Lake Forest Illinois Code of Ordinances § 159.002(B)(2) (adopted May 6, 2013).

"Basement" is defined as: "The portion of a structure which may have part, but not more than one-half, of its height above grade." *Id.* There is no issue that these provisions were in force at the relevant times in this case.

¶ 104 As to the definition of "accessory building or use," it is clear that the examples of the types of buildings or uses do not constitute an exclusive list. *People v. Perry*, 224 Ill. 2d 312, 330 (2007) (the phrase, "including but not limited to," or similar phrases, indicates that the following list is meant to be illustrative rather than exhaustive). Thus, a "basement" may be an accessory use if it meets the elements of the definition in the ordinance. We need not definitively determine whether the basement meets fulfills those elements, because the definition of "basement" in the ordinance establishes that it belongs to the garage itself.

¶ 105 The ordinance defines "basement" as a portion of a structure which may have part but not more than one-half of its height above grade. Stated another, equivalent, way, a basement is the portion of a structure that is more than one-half of its height below grade. This implies that a "basement" belongs to the structure above it. The garage is above the basement, so the basement belongs to the garage. Because a garage is expressly listed as an accessory building or use, its basement is also part of that accessory building or use. The setback for an accessory building is five feet, and there is no issue that the garage is more than five feet from the relevant lot line. Thus, because the basement is part of the accessory structure, and the accessory structure does not encroach, no variance was required for the basement.

¶ 106 Plaintiffs argue that the basement cannot be an accessory use because it links with the basement under the house itself. In other words, there is a basement under the garage, a

basement under the house, and the two basements are linked by some, apparently, partially subterranean structure. According to plaintiffs, this linking basement (perhaps, a tunnel) defeats the status of the garage basement as a basement, and causes the garage basement to be noncompliant with the side-yard setback requirement. Plaintiffs do not contend that the linking basement encroaches into the side-yard setback, only that the basement under the garage encroaches into the 10-foot setback for a permitted building or use. If we look at the definition of accessory building or use, the linking basement is clearly "incidental to and subordinate in purpose to the principal building or use," being used to connect the basement and the garage, albeit underground. Now codified Lake Forest Illinois Code of Ordinances § 159.002(B)(2) (adopted May 6, 2013). It is also located on the same zoning lot as the principal building served. *Id.* Finally, it appears to be operated and maintained for the convenience, comfort, and benefit of the occupants of the principal building. *Id.* Thus, the linking basement would appear to qualify as an accessory building in its own right, even if it is not judged to be either a part of the main structure or the garage. There is no issue raised of whether the linking basement is within the five-foot setback for an accessory building, so no variance would have been required for the linking basement. Accordingly, we hold that the trial court correctly determined that the garage basement (and the linking basement) was compliant with the setback requirements.

¶ 107 3. Validity of Variances

¶ 108 Plaintiffs argue that the trial court erred in holding that there was no violation of the zoning code because all necessary variances have been ratified by the City. Regarding the side-yard setback, we have demonstrated that no variance was necessary, because the basement

structure complied with the requirements of the zoning code. Regarding the height of the dormers, plaintiffs continue to advance the same argument to no avail. We have repeatedly held that the City ratified the variance regarding the height of the dormers, and reiterate that holding here.

¶ 109 This time, plaintiffs argue that Ferris did not request a variance, and the City did not mention a variance to the zoning code specifically as it rejected plaintiffs' administrative appeal of the Commission's grant of the 2009 certificate of appropriateness to Ferris. We reiterate that the 2009 certificate expressly provided a building-height variance for the dormers as they were constructed. When the City ratified the 2009 certificate, it also ratified the express building-height variance. We reject this contention.

¶ 110 C. Attorney Fees

¶ 111 In their final contention on appeal, plaintiffs contend that they are entitled to attorney fees and costs pursuant to section 11-13-15 of the Municipal Code. Plaintiffs argue that *Moore I* held that Ferris's construction of the additions to the subject property violated the building code and zoning provisions, and that the actions of Ferris and the City along with the proceedings occurring after *Moore I* did nothing to remedy or correct the violations. As a result, plaintiffs conclude that they are entitled to their attorney fees and costs.

¶ 112 In *Palella*, our supreme court held that the allowance of attorney fees was mandatory to a plaintiff who had successfully undertaken an action under section 11-13-15, where there was a finding that the defendant had engaged in a prohibited activity. *Palella*, 79 Ill. 2d at 501. The court further held that the defendant's good-faith compliance with the municipality's ordinances

and directions would not obviate the mandatory award of attorney fees should the plaintiff prevail in the action. *Id.* at 502.

¶ 113 While plaintiffs are undoubtedly correct in asserting that a successful action under section 11-13-15 mandates the award of attorney fees, there must first be a successful action. Here, the trial court correctly determined that the City ratified the building-height variance and the garage basement and connecting basement did not require variances. Thus, the trial court correctly determined that there was no prohibited activity proved under section 11-13-15, and it correctly declined plaintiffs' demand for their attorney fees under that section. As there was no successful action prosecuted under section 11-13-15, we hold that the plaintiffs were not entitled to attorney fees and costs.

¶ 114 Plaintiffs appear to suggest that we held that there was a violation in *Moore I*. *Moore I*, we note, was effectively interlocutory. When the action was litigated to completion, the result was a determination that there had not been any zoning violations sufficient to trigger the award of attorney fees under section 11-13-15. Additionally, our holding in *Moore I* was that the Commission, at that time, did not have the authority to grant a variance. The City amended its ordinances following *Moore I*, thereby changing the circumstances sufficiently to diminish or remove any precedential or preclusive effect our holdings in *Moore I* would have enjoyed in this proceeding. Accordingly, we reject this contention. The trial court properly denied plaintiffs the award of attorney fees under section 11-13-15.

¶ 115 III. CONCLUSION

¶ 116 For the foregoing reasons, the judgment of the circuit court of Lake County is affirmed.

¶ 117 Affirmed.