2014 IL App (4th) 140017-U

NO. 4-14-0017

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED
November 4, 2014
Carla Bender
4th District Appellate
Court, IL

RENEE NORD,	)	Appeal from
Plaintiff-Appellant,	)	Circuit Court of
v.	)	McLean County
THE VILLAGE OF SAYBROOK, a Municipal Corporation; PATRICK LEWIS, Village President of Saybrook; and GENE TALLEY, Individually,	)	No. 10CH175
Defendants-Appellees.	)	Honorable
	)	Rebecca Simmons Foley,
	)	Judge Presiding.

JUSTICE HOLDER WHITE delivered the judgment of the court.
Justices Harris and Steigmann concurred in the judgment.

ORDER

¶ 1 *Held*: The appellate court affirmed, concluding the trial court (1) properly dismissed plaintiff's complaint where the alleged violation of the Open Meetings Act was not related to the relief sought by plaintiff, (2) correctly determined a neighbor cannot challenge the validity of a special-use permit in a private-enforcement action seeking to enjoin an ordinance violation, and (3) properly concluded plaintiff was not entitled to attorney fees.

¶ 2 In July 2010, plaintiff, Renee Nord, filed an amended complaint in which she sought a declaratory judgment against the Village of Saybrook (Village), the president of the Village Board (Board), Patrick Lewis, and Gene Talley. In September 2010, the trial court granted the Village and Lewis's motion to dismiss the amended complaint with prejudice.

¶ 3 In April 2011, Nord filed her third amended complaint, in which she sought a declaratory judgment against Talley. In May 2013, on the parties' cross-motions for summary judgment, the trial court granted summary judgment in favor of Talley.

¶ 4 Nord appealed, contending the trial court erred (1) by dismissing her complaint with prejudice as it related to the Village and Lewis, (2) in concluding she could not challenge the validity of a special-use permit as part of her private cause of action against Talley, (3) by granting Talley's motion for summary judgment, and (4) by denying her motion for summary judgment. We affirm.

¶ 5 I. BACKGROUND

¶ 6 A. The Underlying Facts

¶ 7 The Village is located in McLean County and is not a home rule unit. Nord resides at 413 East Grand Street. Talley owns the lot at 414 East Grand Street (Talley property), which is located directly across the street from Nord's residence, but does not reside there. The parties agree the Talley property is located within the Village's R-1 residential district and Nord's residence is located within 1,200 feet of the Talley property.

¶ 8 In July 2009, Talley acted as the Village's zoning officer. While he was acting as the zoning officer, Talley issued a building permit to himself for the construction of a 42-foot by 72-foot storage structure (shed) on the Talley property and waived the applicable fee. In December 2009, after he had laid the concrete floor of the shed, Talley received a letter from the Village's attorney directing him to cease construction of the building until he established a principal use on the Talley property or applied for a conditional-use permit. The Village's attorney further advised Talley the Village was in the process of amending its zoning ordinance.

¶ 9 On January 25, 2010, the Village adopted ordinance No. 1785, which amended the Village's zoning ordinance to reestablish a zoning board of appeals to consider special-use applications. On February 8, 2010, the Board called a regularly scheduled meeting, at which it would discuss the nominees for the newly created zoning board of appeals. During this meeting,

Lewis presented the nominees for the seven positions on the zoning board of appeals, all of whom were approved by the Board.

¶ 10 On February 24, 2010, Talley submitted an application for a special-use permit. Talley's application requested that he be allowed to establish and construct the shed as the "principal structure" on the Talley property. Talley attached a description of the shed to his application—it would stand 42 feet wide, 72 feet long, and 22 feet high.

¶ 11 Thereafter, on April 1, 2010, the village clerk caused notice of an April 28, 2010, hearing before the Village's zoning board of appeals concerning Talley's application for a special-use permit to be published in the Ridgeview Review, a local newspaper. On April 28, 2010, the Village's zoning board of appeals held a public hearing on Talley's application. Nord did not appear at the hearing, but her father was present and represented by counsel. Following the hearing, the zoning board of appeals recommended the Village grant Talley's application for a special-use permit.

¶ 12 On May 17, 2010, the Board adopted ordinance No. 1788. Ordinance No. 1788 approved Talley's application for a special-use permit to allow an accessory use on the Talley property as set forth in his application. The ordinance directed the "administrative officer" to issue Talley a special-use permit and zoning certificate allowing the use.

¶ 13 B. Procedural History

¶ 14 1. *Nord's Original Complaint*

¶ 15 On April 27, 2010, plaintiff filed a complaint against the Village, the Board, its trustees, Lewis, and Talley, seeking relief for the Village's violation of the Open Meetings Act (5 ILCS 120/1 to 7.5 (West 2010)) (count I) and "equitable relief" (count II). Count I sought, based on alleged violations of the Open Meetings Act, a declaration that (1) all the actions taken by the

defendants, as set forth in the body of the complaint, were void; (2) no zoning board of appeals existed within the Village; (3) all actions taken in violation of the Open Meetings Act were void; and (4) Larry Sosaman, a Board member, could not participate in any future consideration of Talley's application for a special-use permit due to a conflict of interest. Count II sought a "preliminary injunction" barring the enforcement, use, or benefit of "the purported [s]pecial [u]se [p]ermit granted March 8, 2010."

¶ 16 In May 2010, the Village, the Board, and its trustees filed a motion to dismiss Nord's complaint pursuant to section 2-615 of the Code of Civil Procedure (Procedure Code) (735 ILCS 5/2-615 (West 2010)). In June 2010, Nord filed a motion for leave to file her first amended complaint. In July 2010, by agreement of the parties, the trial court granted Nord's motion.

¶ 17 2. *Nord's Amended Complaint*

¶ 18 In July 2010, Nord filed a four-count amended complaint against the Village, Lewis, and Talley. In her complaint, Nord alleged, in August 1999, the Board adopted ordinance No. 1717, which eliminated the Village's zoning board of appeals. In September 2009, the Village purported to conduct a zoning-board-of-appeals meeting, following which Lewis informed Talley he could construct the shed. (This meeting appears to be a hearing on Nord's third-party appeal from the building permit Talley had previously granted himself in July 2009, while he was acting as the Village's zoning officer. The Board denied Nord's appeal.) Prior to this meeting, Nord submitted a letter to the Village that questioned "the legality of the [zoning-board-of-appeals] meeting as being held in violation of the [Open Meetings Act]." In October 2010, Nord submitted letters to the McLean County State's Attorney and the Attorney General's office regarding the September 2009 meeting's failure to comply with the Open Meetings Act.

¶ 19 Nord further alleged, on December 10, 2009, Talley received a letter from the Village's attorney directing him to cease and desist the construction at the Talley property, as it did not comply with the Village's current zoning ordinance. On December 16, 2009, the Attorney General's office directed the Village to respond to Nord's allegations concerning its failure to comply with the Open Meetings Act.

¶ 20 Nord alleged, on December 21, 2009, the Board convened a "special call meeting." At this meeting, the Board discussed the letter it received from the Attorney General's office and the possible adoption of an amendment to the zoning ordinance reestablishing a zoning board of appeals. The Board also considered a motion to designate itself as the public body before which the hearing on the zoning-board-of-appeals amendment would be held. Nord asserted, following this discussion, the Board "illegally" designated itself as the body before which the hearing would be held.

¶ 21 Nord alleged, on January 4, 2010, the village clerk issued notice of a public hearing regarding the proposed amendment that would take place on January 25, 2010. The notice stated the Board would consider a "proposed Amendment to the Zoning Ordinance of the [Village] which would reestablish a Zoning Board of Appeals and update the Zoning Ordinance to be consistent with Illinois law." The notice invited interested persons to attend the meeting and make comments.

¶ 22 Nord alleged, on January 25, 2010, the Board adopted the proposed amendment to the zoning ordinance by adopting ordinance No. 1785. Prior to this date, however, no zoning board of appeals existed. Therefore, Nord asserted, the zoning board of appeals "could not have reviewed or considered the proposed amendments in Ordinance 1785 on January 25, 2010." See 65 ILCS 5/11-13-3.1 (West 2010); Saybrook Zoning Ordinance § 16.8 (as amended by Saybrook

ordinance No. 1785, adopted January 25, 2010) (requiring the zoning board of appeals to first consider any proposed amendment to the Saybrook Zoning Ordinance).

¶ 23 Nord alleged, on February 8, 2010, the Board considered nominees for the "non-existent" zoning board of appeals. On February 24, 2010, Talley submitted his application for a special-use permit. On March 8, 2010, the Board called a regularly scheduled meeting. One of the items on the agenda, under the heading "New Business," was a "Zoning Application for Special Use." (The minutes taken during this meeting indicated the Board granted Talley's "permit application," which sought approval to build "a structure at *** [the Talley property] *** to be considered as the primary use structure.")

¶ 24 According to Nord, the Board subsequently called meetings on March 9 and March 10, 2010. At the March 9, 2010, meeting, the Village announced it would allow any interested party 45 days in which to appeal its March 8, 2010, approval of Talley's application. According to Nord, on March 10, 2010, the Village's zoning board of appeals met in "a secret and non-published meeting as defined in [the Open Meetings Act]."

¶ 25 Nord alleged, on April 1, 2010, the Village published notice of a public hearing to be held before the Village's zoning board of appeals on April 28, 2010. However, Nord asserted no "duly authorized and constituted" zoning board of appeals existed in the Village, and as a result, any purported action taken after August 1999, when the zoning board of appeals was eliminated, was void.

¶ 26 Nord directed count I against the Village and sought a declaratory judgment based on various violations of the Open Meetings Act, holding, (1) the actions taken by Lewis in his capacity as village president were void; (2) no zoning board of appeals presently existed in the Village; (3) all actions taken after March 1, 2010, in violation of the Open Meetings Act were

void; and (4) the "continuing actions of the [Board] as alleged herein *** are in violation of [Nord's] right to procedural due process." Count II was directed against Talley and sought, based on alleged violations of the Saybrook Zoning Ordinance, "spot zoning," and "contract zoning," a preliminary injunction barring (1) any construction on the Talley property, other than a "principal residence," pending the disposition of her complaint; and (2) Talley from using or benefiting from "the purported [s]pecial [u]se [p]ermit granted March 8, 2010." Count III was directed against all defendants and sought a preliminary injunction prohibiting the "enforcement, use, or benefit of the purported [s]pecial [u]se [p]ermit granted May 17, 2010, by each defendant acting individually and collectively." Count IV was directed against the Village and sought a declaratory judgment, finding (1) defendants' actions, collectively and individually, were in violation of ordinance No. 1785; (2) ordinance No. 1785 was void in whole or in part; and (3) ordinance No. 1788 was void in whole or in part.

¶ 27 3. *The Dismissal of the Village and Lewis*

¶ 28 In August 2010, the Village and Lewis filed a motion to dismiss Nord's amended complaint. Therein, the Village and Lewis asserted Nord verified her original complaint but failed to verify her amended complaint. As a consequence, the Village and Lewis asserted, Nord's amended complaint should be dismissed. Additionally, the Village and Lewis contended Nord's amended complaint failed "to identify any specific, actionable violation of the Open Meetings Act." Specifically, the Village and Lewis argued Nord failed to (1) identify any specific violations of the Open Meetings Act; (2) assert her right of action within 60 days of the alleged violations of the Open Meetings Act; and (3) allege any deficiency in the Village's conduct with respect to ordinance No. 1788.

¶ 29 In September 2010, Nord filed a memorandum in opposition to the Village and Lewis's motion to dismiss. Therein, Nord sought leave to file her verification of the amended complaint. Nord asserted her complaint alleged ongoing and continuous violations of the Open Meetings Act. Further, Nord asserted she had alleged "discreet [*sic*] violations occurring March 10, 2010, April 1, 2010, and April 28, 2010," and filed her original complaint on April 27, 2010, well within the Open Meeting Act's 60-day limitation period.

¶ 30 Later that month, the trial court granted the Village and Lewis's motion to dismiss plaintiff's amended complaint with prejudice. The court found the Village and Lewis's contention regarding Nord's failure to verify her amended complaint was moot, as it had granted Nord leave to file a verifying affidavit. The court found, however, Nord's complaint was "substantially insufficient in law" and she had "failed to allege any actionable violation of the Open Meetings Act." Further, the court denied Nord's motion for leave to replead, finding she failed to offer a proposed amendment that would state a viable cause of action.

¶ 31 In November 2010, Nord filed a motion to reconsider the trial court's order dismissing the Village and Lewis from the lawsuit, which the court denied following a December 2010 hearing.

¶ 32 4. *Nord's Second Amended Complaint*

¶ 33 Following the dismissal of the Village and Lewis, the trial court allowed Nord leave to file a second amended complaint directed against Talley. In December 2010, Nord filed her second amended complaint. Later that month, Talley filed a motion to dismiss the complaint pursuant to section 2-619.1 of the Procedure Code (735 ILCS 5/2-619.1 (West 2010)).

¶ 34 In March 2011, the trial court allowed in part and denied in part Talley's motion, finding count I of Nord's second amended complaint was facially deficient. The court then allowed plaintiff leave to amend her complaint.

¶ 35 5. *Nord's Third Amended Complaint*

¶ 36 In April 2011, Nord filed a three-count third amended complaint seeking declaratory and equitable relief against Talley. Therein, Nord sought a declaration that (1) Talley's actions violated the Village's zoning ordinance, as the special-use permit Talley obtained was void in that it was arbitrary, capricious, unreasonable, and bore no substantial relationship to the public health, safety, morals, comfort, or general welfare of the Village and its residents (count I); (2) Talley's actions violated the Village's zoning ordinance because ordinance No. 1788, which granted Talley his special-use permit, constituted "illegal spot zoning" (count II); and (3) Nord was entitled to recover her reasonable attorney fees incurred as a result of her private-enforcement action (count III).

¶ 37 In addition to the allegations regarding Talley's special-use permit and the shed, Nord's third amended complaint set forth additional alleged violations of the Village's zoning ordinance. Nord alleged Talley had "constructed a concrete slab and erected 'pup' tents in which [Talley] is storing commercial machinery" on the Talley property, which was a violation of the Village's zoning ordinance.

¶ 38 6. *The Parties' Cross-Motions for Summary Judgment*

¶ 39 In October 2012, Talley filed a motion for summary judgment. In relation to count I of Nord's third amended complaint, Talley argued he was entitled to summary judgment because section 11-13-15 of the Illinois Municipal Code (Municipal Code) (65 ILCS 5/11-13-15 (West 2012)) allows a private citizen to enforce zoning violations but not challenge the validity

of a zoning regulation. Further, even if plaintiff could challenge the validity of the special-use permit through section 11-13-15, plaintiff failed to establish any facts that could invalidate the ordinance that granted the permit. In relation to count II, Talley argued because the authority to zone is vested in a municipality and not individuals, an action for "spot zoning" could not be sustained against private citizens. With respect to count III, Talley asserted Nord's claim for attorney fees was predicated upon the success of the cause of action she set forth in count I and, further, to the extent she could recover attorney fees, Nord could only recover those attorney fees related to her private-enforcement action.

¶ 40 In November 2012, Nord filed a cross-motion for summary judgment. In relation to count I, Nord contended (1) ordinance No. 1788 attempted to vary the application of the Village's zoning ordinance to the Talley property, which exceeded the Village's lawful authority as a non-home-rule municipality; (2) ordinance No. 1788 must be found invalid as a whole, "because the illegal part of the [o]rdinance cannot be extracted from the legal portion of the [o]rdinance"; (3) even if ordinance No. 1788 was valid, Talley could not build the shed he seeks to construct because it would otherwise be in violation of the Village's zoning ordinance; and (4) the shed notwithstanding, Talley violated the Village's zoning ordinance by having "illegal temporary buildings on his property." Nord failed to set forth any argument as to why she was entitled to judgment on count II. With respect to count III, Nord asserted an award of attorney fees was mandatory if she were to succeed on count I and that, to the extent the attorney fees are limited, additional proceedings should be held to determine that issue.

¶ 41 7. *The Trial Court's Summary-Judgment Order*

¶ 42 In May 2013, the trial court entered a written order granting summary judgment in favor of Talley. The court first addressed count II and entered judgment in favor of Talley for

the reasons set forth in his motion for summary judgment. The court next addressed count I and found section 11-13-15 of the Municipal Code did not allow a plaintiff to challenge the validity of an ordinance. The court noted the purpose of section 11-13-15 was to permit neighbors to bring suit regarding zoning violations where the municipality is slow or lax to take action. Additionally, the court found Nord's sole avenue of relief was administrative review pursuant to the Administrative Review Law (735 ILCS 5/3-101 to 3-113 (West 2012)), citing *222 East Chestnut Street Corp. v. Lakefront Realty Corp.*, 256 F.2d 513, 516-17 (7th Cir. 1958). Because Nord did not seek administrative review of the ordinance, the court found in favor of Talley. With respect to count III, the court found in favor of Talley because Nord's request for attorney fees was contingent upon her success on count I.

¶ 43 In June 2013, Nord filed a motion to vacate judgment, which the trial court treated as a motion to reconsider. In December 2013, the court denied Nord's motion.

¶ 44 This appeal followed.

¶ 45 II. ANALYSIS

¶ 46 On appeal, Nord argues the trial court erred (1) by dismissing her amended complaint as it related to the Village and Lewis, (2) in concluding she could not challenge the validity of the special-use permit as part of her private cause of action against Talley, (3) by granting Talley's motion for summary judgment, and (4) by denying her motion for summary judgment. We address Nord's contentions in turn.

¶ 47 A. The Village and Lewis's Motion To Dismiss

¶ 48 Nord contends the trial court erred in dismissing her amended complaint as it related to the Village and Lewis. We begin by addressing the applicable standard of review.

¶ 49 1. *Standard of Review*

¶ 50 The Village and Lewis filed their motion to dismiss pursuant to section 2-619.1 of the Procedure Code (735 ILCS 5/2-619.1 (West 2010)). The record shows the trial court granted the Village and Lewis's motion to dismiss under section 2-615, as evidenced by the court's findings that Nord's complaint was "substantially insufficient in law" and "failed to allege any actionable violation of the Open Meetings Act."

¶ 51 A motion to dismiss filed pursuant to section 2-615 of the Procedure Code (735 ILCS 5/2-615 (West 2010)) attacks the legal sufficiency of the complaint. *Beahringer v. Page*, 204 Ill. 2d 363, 369, 789 N.E.2d 1216, 1221 (2003). "The question presented by a section 2-615 motion to dismiss is whether the allegations of the complaint, when viewed in a light most favorable to the plaintiff, are sufficient to state a cause of action upon which relief can be granted." *Id*. Dismissal pursuant to section 2-615 is warranted only where it is clear no set of facts can be proved that will entitle the plaintiff to recover. *Id*. We review *de novo* a dismissal under section 2-615. *Id*. We may affirm on any basis supported by the record, regardless of whether the trial court relied on the same basis. *Turner-El v. West*, 349 Ill. App. 3d 475, 479, 811 N.E.2d 728, 733 (2004). With this standard in mind, we turn to the merits of Nord's claim that the Village and Lewis violated the Open Meetings Act, thus invalidating ordinance No. 1788, which granted Talley his special-use permit.

¶ 52 2. *The Open Meetings Act*

¶ 53 The Open Meetings Act declares its purpose is "to ensure that the actions of public bodies be taken openly and that their deliberations be conducted openly." 5 ILCS 120/1 (West 2010). Further, "[i]t is the intent of this Act to protect the citizen's right to know." *Id*. To this end, all meetings of public bodies are to be open to the public unless they fall within one of thirty listed exceptions to the openness requirement. 5 ILCS 120/2(a) (West 2010). Each public

body is required to give a schedule of its regular meetings at the beginning of each calendar or fiscal year. 5 ILCS 120/2.02(a) (West 2010). In the case of special meetings, public notice must be given at least 48 hours in advance of the meeting. *Id*. Public notice of all meetings, whether open or closed, must be posted at the principal office of the body holding the meeting and on the public body's website. 5 ILCS 120/2.02(b) (West 2010). Further, the public body is required to post an agenda for each meeting at the location where it is held at least 48 hours before the meeting is scheduled to begin. 5 ILCS 120/2.02(a) (West 2010). "The notice requirements of [the Open Meetings Act] are in addition to, and not in substitution of, any other notice required by law." 5 ILCS 120/2.04 (West 2010).

¶ 54 Section 3 of the Open Meetings Act allows *any person*, including the State's Attorney of the county in which the alleged noncompliance occurred, to bring a civil action in the circuit court for the judicial circuit in which the alleged noncompliance has occurred or is about to occur. 5 ILCS 120/3(a) (West 2010). The action must be brought "prior to or within 60 days of the meeting alleged to be in violation of this Act or, if facts concerning the meeting are not discovered within the 60-day period, within 60 days of the discovery of a violation by the State's Attorney." *Id*. Section 3 further provides relief is discretionary under the Open Meetings Act. The court may (1) grant *mandamus* relief requiring the meeting be open to the public, (2) enjoin future violations of the Open Meetings Act, (3) order a public body to make the minutes of an improper closed meeting available to the public for inspection, or (4) declare null and void any final action taken in violation of the Open Meetings Act. 5 ILCS 120/3(c) (West 2010).

¶ 55 3. *The Trial Court Properly Dismissed the Village and Lewis*

¶ 56 Nord contends her amended complaint alleges the Village's zoning board of appeals, on March 10, 2010, held a "secret, non-published meeting" in violation of the Open

Meetings Act. Because she filed her original complaint on April 27, 2010, she asserts, based on the principle of relation back, her amended complaint against the Village was brought within 60 days of the alleged violation and stated a cause of action as it relates to the March 10, 2010, meeting.

¶ 57 The Village and Lewis argue the March 10, 2010, meeting of which Nord complains is a "red herring, as [it] has nothing to do with [Nord's] Amended Complaint." The Village and Lewis contend the focus of Nord's amended complaint was the alleged invalidity of the special-use permit issued by the Village to Talley and his attempt to build the shed. Nord, however, failed to allege any deficiency, under the Open Meetings Act, with regard to the issuance of the special-use permit, which the Board granted on May 17, 2010, following a recommendation from the zoning board of appeals. We agree with the Village and Lewis.

¶ 58 Plaintiff filed her complaint for declaratory relief, based on violations of the Open Meetings Act, to have the special-use permit granted to Talley in ordinance No. 1788 deemed invalid and void and to prevent Talley from benefiting from the permit. Paragraph 43 of Nord's amended complaint sets forth a claim under the Open Meetings Act—it alleges, on March 10, 2010, the zoning board of appeals held a "secret and non-published meeting in violation of [the Open Meetings Act]." However, the Village's subsequent actions show Talley's special-use permit was not issued in violation of the Open Meetings Act.

¶ 59 "[I]t is well established that where there has been a prior violation of the Open Meetings Act [citation], a board is not prevented from calling a subsequent meeting, noticed in full compliance with the requirements of the Act, and there taking the identical action [citation]." *Argo High School Council of Local 571, IFT, AFT, AFL-CIO v. Argo Community High School District 217*, 163 Ill. App. 3d 578, 583, 516 N.E.2d 834, 837 (1987). In this case, on April 1,

2010, the village clerk published notice of the April 28, 2010, hearing before the Village's zoning board of appeals concerning Talley's application for a special-use permit in the Ridgeview Review, a local newspaper. See Saybrook Zoning Ordinance § 16.8C (as amended by ordinance No. 1785, effective January 25, 2010). On April 28, 2010, the Village's zoning board of appeals held a public hearing, after which it recommended approval of Talley's special-use application. See Saybrook Zoning Ordinance § 16.8D (as amended by ordinance No. 1785, effective January 25, 2010); 65 ILCS 5/11-13-1.1 (West 2012). On May 17, 2010, the Village adopted ordinance No. 1788, which granted Talley his special-use permit to build the shed as the principal structure on the Talley property. See Saybrook Zoning Ordinance § 16.8E (as amended by ordinance No. 1785, effective January 25, 2010). These actions were taken in compliance with the Open Meetings Act and the Village's zoning ordinance and remedied the prior alleged violation.

¶ 60 Nevertheless, Nord argues the March 10, 2010, violation of the Open Meetings Act "occurred when the Village was reestablishing its [z]oning [b]oard of [a]ppeals," which was done "ostensibly to proceed on Talley's request for a special use permit." Because this meeting "was one of the steps which led to the passage of [o]rdinance No. 1788," Nord asserts, the trial court erred in granting the Village and Lewis's motion to dismiss. We disagree.

¶ 61 Nord's argument is rebutted by the record, which shows the zoning board of appeals was reestablished by ordinance No. 1785, adopted on January 25, 2010, and its members were approved by the board at its regular meeting held on February 8, 2010. We fail to see how the March 10, 2010, alleged violation of the Open Meetings Act occurred when the Village was in the process of reestablishing its zoning board of appeals—that act was completed on February 8, 2010, when the Board approved the zoning-board-of-appeals members. In any event, neither Nord's amended complaint nor her argument on appeal demonstrate how the March 10, 2010,

nonpublished, secret meeting was "one of the steps" leading to the passage of ordinance No. 1788, which granted Talley permission to build the shed as the principal structure on the Talley property.

¶ 62 B. Nord's Claims Against Talley

¶ 63 Nord next argues the trial court erred by granting summary judgment in favor of Talley. Specifically, Nord contends the court erred by concluding Nord could not contest the validity of the special-use permit through her private-enforcement action under section 11-13-15 of the Municipal Code (65 ILCS 5/11-13-15 (West 2012)). Further, Nord asserts, even if she could not attack the validity of the special-use permit through her private-enforcement action, Talley violated the Village's zoning ordinance "in ways wholly separate and apart from his special use permit." We begin by addressing the applicable standard of review.

¶ 64 1. *Standard of Review*

¶ 65 In this case, the parties filed cross-motions for summary judgment. Summary judgment is proper when "the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." 735 ILCS 5/2-1005(c) (West 2012). Where the parties file cross-motions for summary judgment, they agree only a question of law is involved and invite the court to decide the issues based on the record. *Illinois County Treasurers' Ass'n v. Hamer*, 2014 IL App (4th) 130286, ¶ 11, 9 N.E.3d 1141. We review *de novo* an order granting summary judgment. *Pielet v. Pielet*, 2012 IL 112064, ¶ 30, 978 N.E.2d 1000. *De novo* review is also appropriate to the extent this case turns on our interpretation of section 11-13-15 of the Municipal Code (65 ILCS 5/11-13-15 (West 2012)). See *Pielet*, 2012 IL 112064, ¶ 30, 978 N.E.2d 1000.

¶ 66 2. *The Special-Use Permit and Shed*

¶ 67 Nord, relying primarily on *Dunlap v. Village of Schaumburg*, 394 Ill. App. 3d 629, 915 N.E.2d 890 (2009), contends the validity of a special-use permit "falls necessarily within the purview of a [c]ourt's review in a [s]ection 11-13-15 action." Specifically, Nord argues because a special-use permit allows the use of property in a manner that would otherwise violate a zoning ordinance, "the validity of a special use permit has direct bearing on whether a property owner is violating the zoning ordinance."

¶ 68 Section 11-13-15 of the Municipal Code states, in pertinent part:

> "In case any building or structure *** is constructed *** or any building or structure *** or land is used in violation of an ordinance or ordinances adopted under Division 13, 31 or 31.1 of the Illinois Municipal Code, *** any owner or tenant of real property, within 1200 feet in any direction of the property on which the building or structure in question is located who shows that his property or person will be substantially affected by the alleged violation, in addition to other remedies, may institute any appropriate action or proceeding (1) to prevent the unlawful construction *** or use, (2) to prevent the occupancy of the building, structure or land, (3) to prevent any illegal act, conduct, business, or use in or about the premises, or (4) to restrain, correct, or abate the violation." 65 ILCS 5/11-13-15 (West 2012).

¶ 69 The purpose of section 11-13-15 is "to permit neighbors to bring suit regarding building code violations where the municipality is slow or lax to take action." *Greer v. Illinois*

Housing Development Authority, 150 Ill. App. 3d 357, 392, 501 N.E.2d 723, 745 (1986). It is well established a private landowner cannot maintain an action against a municipality pursuant to section 11-13-15. See, *e.g.*, *Dunlap*, 394 Ill. App. 3d at 639, 915 N.E.2d at 898; *Heerey v. Berke*, 179 Ill. App. 3d 927, 934, 534 N.E.2d 1277, 1281 (1989) ("[T]he language of the statute does not provide a cause of action against the city by a landowner."). The issue before this court, however, is whether a private landowner may challenge the validity of a special-use permit in an action brought pursuant to that section.

¶ 70 Section 11-13-15 is silent as to whether a party may do so. Nord relies on the following statement in *Dunlap* to support her argument that a private landowner may challenge the validity of a zoning decision in a private-enforcement action:

> "It would seem that if the variance were invalid, it would not extend any protection to the [property owners] against suit by a neighbor under section 11-13-15, even though that neighbor could not use that section to challenge the variance through a direct suit against the Village." *Dunlap*, 394 Ill. App. 3d at 643, 915 N.E.2d at 901-02.

¶ 71 We conclude section 11-13-15 does not permit a person to challenge the validity of the special-use permit through an action against a private violator of the Village's zoning ordinance. The statement in *Dunlap* upon which Nord relies is *dicta*—the appellate court made no direct finding on the issue of whether the validity of a special-use permit may be challenged through a private-enforcement action.

¶ 72 Instead, we hold a person challenging the validity of a special-use permit must do so through an action against the municipality seeking to invalidate the grant of the permit. "A

legislative decision such as the enactment of [an ordinance granting a variance application] is reviewable through a declaratory judgment proceeding challenging the validity of the ordinance." *Young v. City of Belleville*, 115 Ill. App. 3d 960, 961, 451 N.E.2d 913, 914 (1983). To have an ordinance declared invalid, the complaint "must allege that it is 'arbitrary, capricious and unreasonable' and bears 'no substantial relation to the public health, safety or general welfare' [citation], or in some other way violates the plaintiffs' constitutional rights." *Id*. at 961-62, 451 N.E.2d at 914 (quoting *Jeisy v. City of Taylorville*, 81 Ill. App. 3d 442, 449, 401 N.E.2d 627, 632 (1980)).

¶ 73 In this case, Nord filed an action against the Village seeking to invalidate Talley's special-use permit—she based her challenge on the Open Meetings Act. Nord did not allege the Village, in granting the special-use permit, acted arbitrarily, capriciously, or unreasonably, or that the special-use permit bore no rational relationship to the health, safety, welfare, and morals of the public. See *id.* at 962, 451 N.E.2d at 915. When the trial court granted the Village and Lewis's motion to dismiss, Nord was given the opportunity to offer an amendment to her pleadings to save her cause of action against the Village. She did not do so. Nord's attempt to assert these allegations against Talley in her third amended complaint amounts to a second "bite at the apple" against the Village and cannot succeed.

¶ 74 Because Nord failed to appropriately challenge Talley's special-use permit, Talley's intended use of the Talley property is not in violation of the Village's zoning ordinance. The special-use permit allows Talley to use the property in a way that would otherwise violate the underlying ordinance—it allows him to establish an accessory structure that is 72 feet long, 42 feet wide, and 22 feet high as the primary structure on the Talley property. Accordingly, the trial court properly granted summary judgment in favor of Talley on count I.

¶ 75 3. *Alleged Violations of the Saybrook Zoning Ordinance Not Related to the Special-Use Permit*

¶ 76 Alternatively, Nord argues the trial court erred in granting summary judgment in favor of Talley, as he "has engaged in other violations of the Zoning Ordinance of the [Village] which are separate and apart from the proposed shed." Specifically, Nord contends the court overlooked the allegations regarding the "pup" tents and the "concrete slab." We find there are multiple reasons to affirm the court's decision in this area.

¶ 77 The appellant must present "a sufficiently complete record of the proceedings at trial to support a claim of error, and in the absence of such a record on appeal, it will be presumed that the order entered by the trial court was in conformity with law and had a sufficient factual basis." *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391-92, 459 N.E.2d 958, 959 (1984). Any doubts arising from the incompleteness of the record will be resolved against the appellant. *Id.* at 392, 459 N.E.2d at 959.

¶ 78 In this case, the trial court's written order granting Talley's motion for summary judgment, entered following a February 2013 hearing, is silent as to Talley's alleged violations of the Village's zoning ordinance separate and apart from the special-use permit. The record contains no transcript or bystander's report as to what occurred during this February 2013 hearing. We presume the court had a proper reason for not addressing this issue in its May 2013 order granting summary judgment in favor of Talley.

¶ 79 Additionally, Nord filed a motion to reconsider but failed to point out to the trial court the absence of a ruling on this issue. Nord did not otherwise seek clarification of the court's order. By failing to direct the court's attention to this purported error, Nord deprived the court of an opportunity to correct its mistake. See *Cambridge Engineering, Inc. v. Mercury Partners 90 BI, Inc.*, 378 Ill. App. 3d 437, 453, 879 N.E.2d 512, 527 (2007) (The purpose of the

principle of forfeiture is to preserve finite judicial resources by creating an incentive for litigants to bring alleged errors to the court's attention, thereby giving the court an opportunity to correct its mistake.). Accordingly, we find Nord has forfeited review of this issue.

¶ 80 Finally, we also find Nord failed to comply with the notice requirement contained in section 11-13-15 of the Municipal Code. Talley contends Nord failed to give notice to the Village as required by the statute because the chief executive officer, Lewis, was not served with a copy of the second and third amended complaints after he and the Village had been dismissed from the lawsuit. Nord responds she was only required to serve the chief executive officer "at the time suit [was] begun." See 65 ILCS 5/11-13-15 (West 2012). Because Lewis and the Village were served with a copy of the original complaint, Nord contends, she complied with the notice requirement contained in section 11-13-15.

¶ 81 Section 11-13-15 requires the landowner bringing a private-enforcement action to provide notice to the municipality at the time the action is commenced. 65 ILCS 5/11-13-15 (West 2012). This task is accomplished by serving a copy of the complaint on the chief executive officer of the municipality. *Id.* Section 11-13-15 further provides "no such action may be maintained until such notice has been given." *Id.*

¶ 82 In this case, Nord did not raise the additional violations of the Village's zoning ordinance—the "pup tents" and "concrete slab"—until she filed her second amended complaint. Thus, her action to enjoin these purported violations under section 11-13-15 was not commenced until she filed her second amended complaint. Accordingly, to comply with section 11-13-15's notice requirement, Nord was required to serve a copy of the second and third amended complaints on the Village's chief executive officer, Lewis.

¶ 83 Attached to both the second and third amended complaints is a "certificate of service," which shows Nord mailed a copy of each complaint to the Village and Lewis's attorney, Jeffrey Krumpe. Additionally, the record shows Krumpe was present at the March 2011 hearing on Talley's motion to dismiss the second amended complaint. (It appears Krumpe stopped attending the proceedings following this hearing.) However, the record contains no proof of service showing Lewis was personally served with a copy of the complaint as required by the plain language of the statute. Accordingly, we find the trial court properly granted summary judgment in favor of Talley.

¶ 84 4. *Attorney Fees*

¶ 85 Because the trial court properly granted summary judgment in favor of Talley on count I of Nord's third amended complaint, the court correctly entered judgment in favor of Talley on count III, which sought attorney fees pursuant to section 11-13-15 of the Municipal Code.

¶ 86 Section 11-13-15 provides, in pertinent part:

> "If an owner or tenant files suit hereunder and the court finds that the defendant has engaged in any of the foregoing prohibited activities, then the court shall allow the plaintiff a reasonable sum of money for the services of the plaintiff's attorney." 65 ILCS 5/11-13-15 (West 2012).

It is well established "[t]he award of attorney fees under section 11-13-15 is mandatory and not discretionary, based on a finding that the defendant has engaged in prohibited activity." *People ex rel. Klaeren v. Village of Lisle*, 352 Ill. App. 3d 831, 845, 817 N.E.2d 147, 159 (2004);

Palella v. Leyden Family Service & Mental Health Center, 79 Ill. 2d 493, 501, 404 N.E.2d 228, 232 (1980).

¶ 87 Pursuant to the plain language of the statute, Nord's claim for attorney fees depended on the success of her private-enforcement action against Talley. Because Nord's private-enforcement action has failed, the trial court properly entered judgment in favor of Talley on count III of Nord's third amended complaint.

¶ 88 III. CONCLUSION

¶ 89 For the reasons stated, we affirm the trial court's judgment.

¶ 90 Affirmed.