

NOTICE
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2014 IL App (5th) 130363-U

NO. 5-13-0363

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

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

THE CITY OF BELLEVILLE,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	St. Clair County.
)	
v.)	No. 13-MR-65
)	
BETHANY PLACE,)	Honorable
)	Robert B. Haida,
Defendant-Appellant.)	Judge, presiding.

JUSTICE SCHWARM delivered the judgment of the court.
Presiding Justice Welch and Justice Spomer concurred in the judgment.

ORDER

¶ 1 *Held:* The circuit court's granting of plaintiff's motion for judgment on the pleadings is affirmed because defendant's needle exchange program was not a permitted use or a special use, and the defendant's use variance did not permit the program.

¶ 2 **FACTS**

¶ 3 Sometime prior to June 1998, Bethany Place, a care center for those infected with HIV/AIDS, sought to expand its services to include a residence center as transitional housing for persons infected by HIV/AIDS. Bethany Place applied for a use variance from the City of Belleville in order to operate this residence center at 821 West A Street in Belleville, in an area zoned as a D-1 light industry district. On June 4, 1998, then-

mayor of Belleville Mark Kern wrote a letter (the Letter) to the director of Bethany Place "in support of Bethany Place's plan to develop and operate transitional housing for men living with HIV/AIDS." Kern stressed that "[t]he absence of readily available, appropriate housing results in extended homelessness which is medically, psychologically, and socially debilitating for affected persons and ultimately very expensive for the AIDS service system." On June 15, 1998, the city council of Belleville granted Bethany Place "a use variance to operate a small community residence with 5 beds and office space at 821 West 'A' Street, Belleville, Illinois" (the Variance).

¶ 4 In 2009, Bethany Place began operating a needle exchange program at the 821 West A Street facility (the Facility). Belleville filed a complaint in the circuit court of St. Clair County on February 6, 2013, claiming that the needle exchange program at the Facility was neither a permitted use nor an approved special use under the City of Belleville Zoning Code (the City Zoning Code) and therefore was barred. Bethany Place filed its answer to the complaint on March 12, 2013. On April 1, 2013, Belleville filed a motion for judgment on the pleadings. On April 8, 2013, the circuit court held a hearing on Belleville's motion, and on April 11, 2013, the circuit court granted the motion, finding that the needle exchange program was neither a permitted use nor a special use and therefore not permitted. On May 7, 2013, Bethany Place filed a motion to reconsider the court's grant of judgment on the pleadings. On June 25, 2013, the circuit court denied Bethany Place's motion after hearing. Bethany Place timely filed for appeal thereafter.

¶ 5

ANALYSIS

¶ 6 "A motion for judgment on the pleadings is, like a motion for summary judgment,

limited to the pleadings." *Pekin Insurance Co. v. Wilson*, 237 Ill. 2d 446, 455 (2010). "A trial court properly grants a judgment on the pleadings when the pleadings disclose no genuine issue of material fact and the movant is entitled to judgment as a matter of law." *State Building Venture v. O'Donnell*, 239 Ill. 2d 151, 157-58 (2010). "In ruling on a motion for judgment on the pleadings, the court must consider only those facts apparent from the face of the pleadings, matters subject to judicial notice, and judicial admissions in the record." *Parkway Bank & Trust Co. v. Meseljevic*, 406 Ill. App. 3d 435, 442 (2010). In making a determination on a motion for judgment on the pleadings, all well-pleaded facts in the pleadings, and all reasonable inferences that may be drawn from those facts, are taken as true, and all allegations in the pleadings are construed in a light most favorable to the nonmoving party. *Bennett v. Chicago Title & Trust Co.*, 404 Ill. App. 3d 1088, 1094 (2010). In reviewing an order granting judgment on the pleadings, this court may affirm on any basis found in the record. *Lofthouse v. Suburban Trust & Savings Bank of Oak Park*, 185 Ill. App. 3d 889, 892 (1989). The standard of review for a grant of judgment on the pleadings is *de novo*. *Pekin Insurance Co.*, 237 Ill. 2d at 455.

¶ 7 Bethany Place argues first that the needle exchange program is a permitted use under the City Zoning Code for light industry districts and thus is permitted. In the alternative, Bethany Place claims that the needle exchange program is a special use and that the Variance permits the program. Bethany Place lastly argues that, due to the Letter, Belleville is now estopped from prohibiting the needle exchange program. Belleville argues against all three of these points and further claims that all of Bethany Place's arguments are waived on appeal for failure to raise them before Bethany Place's

motion to reconsider. Since waiver could prevent this court from hearing Bethany Place's arguments, we address it first.

¶ 8 Belleville argues that Bethany Place failed to raise any of its arguments on appeal until its motion to reconsider and, therefore, has waived all of these arguments. We disagree.

¶ 9 Arguments raised for the first time in a motion to reconsider are waived on appeal. *Bank of America, N.A. v. Ebro Foods, Inc.*, 409 Ill. App. 3d 704, 709 (2011). Bethany Place asserts that its arguments were raised prior to its motion to reconsider. In its answer to the complaint, Bethany Place asserted that the Variance and "all of the application materials and advisory reports and memoranda relied upon" by Belleville in granting the Variance authorized the needle exchange program. This response apparently did put Belleville on notice regarding Bethany Place's defenses. Belleville's former counsel acknowledged, in the hearing on its motion for judgment on the pleadings, that Bethany Place maintained the defense of "whether or not the activity of having a needle exchange program was actually authorized by the granting of a special use permit, or that it might be allowed under the City's zoning ordinance." Further, in that same hearing, Bethany Place asserted that, because of the Letter, it had operated "under the assumption that the use variance gave them the right" to operate a needle exchange program.

¶ 10 Thus, Bethany Place's arguments had in fact been raised at the hearing on Belleville's motion for judgment on the pleadings and are not waived. We now consider Bethany Place's arguments in turn.

¶ 11 Bethany Place argues that its needle exchange program is a permitted use for D-1

light industrial districts under Belleville's City Zoning Code. We disagree.

¶ 12 Under Belleville's City Zoning Code 60-6-73, permitted uses within light industry districts include "[m]anufacture, compounding, processing, packing or treatment of such products as *** pharmaceuticals." City of Belleville Zoning Code § 60-6-73. The City Zoning Code does not provide a definition for "pharmaceuticals," but it does provide that "terms not defined in [the City Zoning Code] shall have their standard English dictionary meanings." City of Belleville Zoning Code § 60-2-1(A). Bethany Place argues that its needle exchange program involves the processing and packing of pharmaceuticals as per the standard English dictionary meaning and that, therefore, the program is a permitted use.

¶ 13 What is not clear from the record or from any of the pleadings, however, is exactly what packing Bethany Place does. Bethany Place has best described the needle exchange program as "tak[ing] pharmaceutical supplies that are provided by the state" and "put[ting] them in a package for distribution for those individuals who come and ask for it." By contrast, Belleville describes the program as "obtaining syringes from the state and distributing them." Both Bethany Place and Belleville agree that Bethany Place took pharmaceutical supplies from the state and distributed them, but only Bethany Place alleges that it packed the materials in any way. Under the City Zoning Code, Bethany Place must have packed the pharmaceuticals in some way in order to claim the needle exchange program is a permitted use. Bethany Place fails to provide any factual allegations regarding how, if at all, it packed the supplies. Bethany Place merely states a conclusion that it did pack the materials. In deciding a motion for judgment on the

pleadings, a court must disregard all conclusory allegations. *Parkway Bank & Trust Co.*, 406 Ill. App. 3d at 442. To the extent that the lack of facts regarding how Bethany Place may have packed the pharmaceuticals is due to the sparse nature of the record, we note "[t]he burden rests upon the appellant to provide a sufficient record to support a claim of error." *Richco Plastic Co. v. IMS Co.*, 288 Ill. App. 3d 782, 785 (1997).

¶ 14 Since Bethany Place has failed to allege any specific facts or point to any basis in the record as to how it packed the pharmaceuticals, its allegations that the materials were packed are conclusory and thus disregarded. Bethany Place therefore cannot show that its needle exchange program is a permitted use for D-1 light industry districts under Belleville's City Zoning Code.

¶ 15 Bethany Place also claims that the Variance implicitly authorizes the needle exchange program. We disagree.

¶ 16 Belleville argues that the needle exchange program is not a special use authorized in light industry districts and, thus, is prohibited. A special use allows the use of property in ways expressly listed in the zoning ordinance. *County of Cook v. Monat*, 365 Ill. App. 3d 167, 174-75 (2006). The Variance granted Bethany Place "a use variance to operate a small community residence with 5 beds and office space at 821 West 'A' Street, Belleville, Illinois." Section 60-6-74 of the Belleville City Zoning Code lists the special uses approved for light industry districts. Belleville City Zoning Code § 60-6-74. While needle exchange programs are not listed, "small community residences" are considered a special use. "Community residence" is defined in section 60-2-2 of the code as "a group home or specialized residential care home serving unrelated persons with handicaps

which is licensed, certified or accredited by appropriate local, state or national bodies." Belleville City Zoning Code § 60-2-2. Thus, while the operation of the community residence is a special use under the Belleville City Zoning Code, the needle exchange program is not.

¶ 17 Because the city council of Belleville labeled the Variance a "use variance," Bethany Place may have received a use variance and not a special use. "Special uses must be clearly distinguished from use variances. [A] variance is authority extended to a property owner to use his property in a manner forbidden by the zoning enactment, generally upon a showing of hardship." (Internal quotation marks omitted.) *City of Chicago Heights v. Living Word Outreach Full Gospel Church & Ministries, Inc.*, 196 Ill. 2d 1, 17 (2001). The end result would be unchanged even if this court held that the Variance is a use variance and not a special use. The language of the Variance refers only to the small community residence and its office space. Nothing in the Variance offers express permission for a needle exchange program. Bethany Place contends that the implied understanding of Bethany Place's mission, specifically the notion that the Belleville city council knew of Bethany Place's work in helping HIV/AIDS patients, extends the scope of the Variance beyond its express terms. However, Bethany Place has not offered, nor has this court found, any authority that supports this contention.

¶ 18 The needle exchange program therefore is neither a special use approved of by the City Zoning Code nor a use variance authorized by the Variance. Bethany Place cannot rely upon the Variance itself as authority for the needle exchange program.

¶ 19 Bethany Place lastly argues that, even if the needle exchange program is neither a

permitted use nor authorized by the Variance, Belleville is now estopped from taking action to enforce the City Zoning Code because of the Letter. In order to claim estoppel against a municipal entity, a party must show "(1) an affirmative act of the municipality induced justifiable reliance on the part of the claimant, (2) the claimant acted on the basis of that reliance, and (3) the claimant substantially changed its position as a result of its reliance." *County of Du Page v. K-Five Construction Corp.*, 267 Ill. App. 3d 266, 273 (1994). Equitable estoppel's use against municipalities is not favored, and so if it is invoked against a governmental entity exercising governmental functions, it will lie only in extraordinary or compelling circumstances. *Id.* Because Bethany Place cannot show an affirmative act by Belleville justifying reliance, we disagree.

¶ 20 Bethany Place relies upon *County of Du Page v. K-Five Construction Corp.*, 267 Ill. App. 3d 266 (1994). In that case, a construction company reestablished an asphalt plant after having no asphalt plant on its property for 10 years. *Id.* at 268. The company also sold asphalt produced at the plant directly to the county for three years. *Id.* During that time, the director of the county's building department sent two letters to county residents concluding that the plant was a lawful nonconforming use. *Id.* at 268-69. The company then spent \$600,000 in improvements on the plant. *Id.* at 269. Only after this expenditure did the county file suit alleging that the plant violated the county's zoning ordinance. *Id.* The appellate court, affirming the trial court's decision, held that the county was equitably estopped from enforcing its zoning ordinance because the two letters were an affirmative act justifying the company's reliance. *Id.* at 273-75. Further, the county's purchase of the asphalt from the company when the company was operating

the plant without a permit also constituted an affirmative act. *Id.* at 275. Thus, because the company had relied upon these acts by operating and improving the plant, the county was estopped from enforcing its zoning ordinance. *Id.*

¶ 21 Unlike the company in *County of Du Page*, Bethany Place has not shown any affirmative act by Belleville that justified the establishment of the needle exchange program. Bethany Place asserts that the Letter is such an affirmative act. Specifically, it asserts that then-mayor Mark Kern had authority to write the Letter, and thus to speak on behalf of Belleville, under section 3.1-35-5 of the Illinois Municipal Code (65 ILCS 5/3.1-35-5 (West 2010)). Even assuming that Kern may have had authority to act and bind the municipality, it remains unclear why Bethany Place would rely on the Letter rather than the Variance. Bethany Place asserts that the Letter "indicat[es Kern's] official opinion that the activities of Bethany Place complied with the City's ordinances." But the Letter was written on June 4, 1998. The Variance was granted on June 15, 1998. Given that the Letter predates the Variance, the Letter likely was not an opinion on whether Bethany Place's activities complied with Belleville's ordinances but rather Kern's opinion that the city council should grant the Variance to Bethany Place.

¶ 22 Even a cursory reading of the Letter shows that Kern was not offering an opinion on whether Bethany Place's needle exchange program complied with Belleville's ordinances. In the Letter, Kern avers that he supports the "plan to develop and operate transitional housing for men living with HIV/AIDS" because Belleville has "a definite need for transitional housing designed to meet the specific needs of HIV/AIDS." At the time of the Letter, Kern states "there is no transitional housing in St. Clair County which

is designated for single men infected with HIV/AIDS." Noting that "Bethany Place is this community's most comprehensive AIDS service organization," Kern "support[s] the location of this facility within the city limits of Belleville, Illinois and the mission of this project." At no point does Kern mention a needle exchange program or his support of its existence at the Facility. Even if Kern did support moving all aspects of Bethany Place's mission to the Facility, he could not have expressed support for the needle exchange program itself. The Letter and Variance occurred in June 1998. Bethany Place did not operate a needle exchange program until sometime in 2009. Kern did not support the needle exchange program in the Letter because he could not have foreseen a program 11 years in the future. The text of the Letter only shows Kern's approval of the transitional housing at the Facility. To the extent it could approve other parts of Bethany Place's mission, it could not reasonably be considered an affirmative act approving of a future program's conformance with the City Zoning Code.

¶ 23 The Letter's timing and content show that it is not an affirmative act upon which Bethany Place can rely as support for its needle exchange program. Because the content of the Letter does not offer grounds for estoppel, we need not address whether Kern had authority to act and bind the municipality. Belleville thus is not estopped from enforcing its zoning ordinances.

¶ 24 **CONCLUSION**

¶ 25 Bethany Place's needle exchange program is not a permitted use or a special use for a D-1 light industry district under Belleville's City Zoning Code. Nor is the program approved by the Variance granted to Bethany Place to operate a small community

residence. The Letter by Belleville's former mayor does not now estop Belleville from enforcing its zoning ordinances. We note that this ruling does not prevent Bethany Place from following the advice of Belleville's counsel and seeking a use variance for its needle exchange program. Without such a use variance, Bethany Place must follow the trial court's order and cease operation of the needle exchange program.

¶ 26 Affirmed.