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IN THE  
APPELLATE COURT OF ILLINOIS  
SECOND DISTRICT

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THE VILLAGE OF EAST DUNDEE,	)	Appeal from the Circuit Court
	)	of Kane County.
Plaintiff-Appellant,	)	
	)	
v.	)	No. 13-CH-230
	)	
THE VILLAGE OF CARPENTERSVILLE	)	
and WAL-MART STORES, INC.,	)	Honorable
	)	David R. Akemann,
Defendants-Appellees.	)	Judge, Presiding.

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

**ORDER**

- ¶ 1 *Held:* The trial court properly dismissed East Dundee's amended complaint because it did not present an actual controversy that was ripe for review; the well-pleaded factual allegations of the amended complaint presented only speculation that defendants might in the future fail to comply with section 11-74.4-3(q)(13) of the Tax Increment Allocation Redevelopment Act; under the facts alleged, it was equally plausible that defendants would comply with the Act.
- ¶ 2 Plaintiff, the Village of East Dundee, filed an action against defendants, the Village of Carpentersville and Wal-Mart Stores, Inc., alleging that section 11-74.4-3(q)(13) of the Tax Increment Allocation Redevelopment Act (Act) (65 ILCS 5/11-74.4-3(q)(13) (West 2012))

applied to Wal-Mart's decision to close its East Dundee retail store and open a Wal-Mart Supercenter less than 10 miles away within Carpentersville's Route 25 redevelopment project area. East Dundee sought a declaratory judgment that Carpentersville was required to make certain findings pursuant to section 11-74.4-3(q)(13) of the Act, based on documentation submitted by Wal-Mart, before it could fund any redevelopment project costs directly related to Wal-Mart's planned relocation. East Dundee also sought a writ of prohibition, a writ of *mandamus*, and an injunction. The trial court granted Carpentersville's motion to dismiss East Dundee's amended complaint pursuant to section 2-615 of the Illinois Code of Civil Procedure (Code) (735 ILCS 5/2-615 (West 2012)) and Wal-Mart's motion to dismiss the amended complaint pursuant to section 2-619(a)(9) of the Code (735 ILCS 5/2-619(a)(9) (West 2012)), concluding that the amended complaint failed to present an actual controversy that was ripe for adjudication. East Dundee appeals. For the following reasons, we affirm.

¶ 3

#### I. BACKGROUND

¶ 4 The Act provides a mechanism for municipalities to eliminate blighted conditions by adopting tax increment allocation financing to fund the redevelopment of designated project areas. Once a municipality approves a redevelopment plan and designates a redevelopment project area, the municipality can use increased property tax revenues generated by redevelopment of the project area to pay redevelopment project costs and obligations incurred in the payment of such costs. 65 ILCS 5/11-74.4-8 (b) (West 2012). Pertinent to this appeal, section 11-74.4-3(q)(13) of the Act provides that redevelopment project costs may not include costs that would "provide direct financial support to a retail entity initiating operations in the redevelopment project area while terminating operations at another Illinois location within 10 miles of the redevelopment project area but outside the boundaries of the redevelopment project

area municipality.” 65 ILCS 5/11-74.4-3(q)(13) (West 2012). “Termination,” for purposes of section 11-74.4-3(q)(13) of the Act, does not include the “closing [of] an operation for reasons beyond the control of the retail entity, as documented by the retail entity, subject to a reasonable finding by the municipality that the current location contained inadequate space, had become economically obsolete, or was no longer a viable location for the retailer.” 65 ILCS 5/11-74.4-3(q)(13) (West 2012).

¶ 5 On March 22, 2013, East Dundee filed its amended complaint against Carpentersville and Wal-Mart, alleging the following. On May 1, 2012, Carpentersville passed an ordinance designating an area of land along Route 25 in Carpentersville as a redevelopment project area. Carpentersville also passed ordinances approving a redevelopment plan and declaring that tax increment financing would be used to fund redevelopment project costs in the project area. Wal-Mart submitted to Carpentersville’s planning and zoning commission its concept plan for a new Wal-Mart Supercenter in the Route 25 redevelopment project area. Wal-Mart also signed a letter of intent to purchase property within the project area.

¶ 6 The amended complaint further alleged that Wal-Mart has operated a retail store in East Dundee since 1989. On August 16, 2012, Wal-Mart advised East Dundee of its intention to close its current location and relocate to Carpentersville’s Route 25 redevelopment project area, which is less than 3 miles from the East Dundee Wal-Mart store. East Dundee subsequently advised Wal-Mart of its willingness to offer financial assistance related to the construction of a Wal-Mart Supercenter at its current location, including approving curb cuts, paying for a new stoplight, assisting with any necessary property acquisition, and assisting with building renovations and site redesign. According to the amended complaint, “Walmart has declared to

Carpentersville that it is closing its store in East Dundee in order to relocate its Walmart within Carpentersville's Route 25 [redevelopment project area] and to use tax increment funding."

¶ 7 The amended complaint alleged that, on January 2, 2013, Carpentersville "adopted a resolution which confirmed that it already was reviewing a pending tax increment financing application pertaining to Wal-Mart." Carpentersville retained S.B. Friedman & Co., a real estate and development advisory firm, to conduct an analysis of what redevelopment project costs incurred in connection with the opening of the Wal-Mart Supercenter would be eligible for funding. In addition, "Carpentersville has used TIF funds for the location and building of a Walmart store within Carpentersville's Route 25 [redevelopment project area]."

¶ 8 East Dundee alleged that Wal-Mart has not documented that its decision to close its current location is due to reasons beyond its control in accordance with section 11-74.4-3(q)(13) of the Act. Further, according to the amended complaint, Carpentersville has not made any finding that Wal-Mart's current location contains inadequate space, has become economically obsolete, or is no longer a viable location for the retailer.

¶ 9 In count I of its amended complaint, East Dundee sought a declaratory judgment (1) that section 11-74.4-3(q)(13) of the Act applied to Wal-Mart's decision to close its East Dundee location and relocate to Carpentersville's Route 25 redevelopment project area; (2) that Wal-Mart must document that the closure of its East Dundee location is for reasons beyond its control before any further action is taken with respect to Wal-Mart's relocation to the redevelopment project area; and (3) that Carpentersville must make a reasonable finding that the East Dundee Wal-Mart contained inadequate space, had become economically obsolete, or was no longer a viable location for the retailer before any tax increment financing funds are spent or allocated in connection with Wal-Mart's relocation to the redevelopment project area.

¶ 10 In count II, East Dundee sought a writ of prohibition barring Carpentersville from utilizing or committing any tax increment financing funds from the Route 25 redevelopment project area for any matter related to Wal-Mart's relocation until Wal-Mart and Carpentersville complied with section 11-74.4-3(q)(13) of the Act. In count III, East Dundee sought a writ of *mandamus* ordering Carpentersville to comply with section 11-74.4-3(q)(13) of the Act. In count IV, East Dundee sought an injunction ordering Wal-Mart and Carpentersville to comply with section 11-74.4-3(q)(13) of the Act.

¶ 11 Wal-Mart filed a motion to dismiss East Dundee's amended complaint pursuant to section 2-619(a)(9) of the Code. It argued that East Dundee's claims were not ripe for adjudication, because there was no actual controversy between the parties. Wal-Mart supported its motion with the affidavit of Bruce Goodman, an attorney retained by Wal-Mart to assist it in negotiations with Carpentersville regarding Wal-Mart's interest in opening a new retail store in the Route 25 redevelopment project area. In his affidavit, Goodman attested that Wal-Mart had "not filed a TIF Project Application with The Village of Carpentersville for the opening of a new store in Carpentersville's Route 25 Redevelopment Project Area." Wal-Mart also argued in its motion to dismiss that East Dundee lacked standing to challenge Carpentersville's use of tax increment financing funds, since East Dundee was neither a taxing body entitled to tax revenue from the redevelopment project area nor a Carpentersville taxpayer.

¶ 12 Carpentersville filed a motion to dismiss East Dundee's amended complaint pursuant to section 2-615 of the Code. Carpentersville argued that there was no ripe, actual controversy between the parties, because the parties agreed that Wal-Mart and Carpentersville were required to comply with section 11-74.4-3(q)(13) of the Act before using tax increment financing funds to pay redevelopment project costs directly related to Wal-Mart's relocation. According to

Carpentersville, what East Dundee sought in its amended complaint essentially was protection against the possibility that Carpentersville might attempt to provide Wal-Mart with tax increment financing funds without first satisfying section 11-74.4-3(q)(13) of the Act. Carpentersville argued that a complaint merely seeking protection from “speculative fears” does not state a cause of action upon which relief could be granted.

¶ 13 At a hearing on the motions to dismiss, East Dundee requested leave to conduct limited discovery before responding to the motions. The trial court allowed East Dundee to issue written discovery to Carpentersville addressing its January 2013 resolution referencing a “pending” application from Wal-Mart for tax increment financing funds.

¶ 14 After the limited discovery was completed, East Dundee responded to the motions to dismiss. In its response to Wal-Mart’s motion, East Dundee argued that Goodman’s affidavit was not an appropriate “affirmative matter” under section 2-619(a)(9), because it merely contradicted the amended complaint’s allegation that Wal-Mart had submitted an application for tax increment financing funds to Carpentersville. East Dundee also attached to its response three exhibits that Carpentersville produced in discovery. First, East Dundee attached Carpentersville’s resolution No. R13-03, dated January 2, 2013, which acknowledged that “the Village has a development and Tax Increment Financing Application pending from Wal-Mart Stores, Inc.”<sup>1</sup> Second, East Dundee attached Carpentersville’s interrogatory answers, in which Carpentersville disclosed that Wal-Mart, through its real estate broker, had communicated to Carpentersville its intention to seek \$4.2 million in benefits in connection with the Route 25 redevelopment project area. Third, East Dundee attached the Concept Plan Approval

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<sup>1</sup> The resolution approved a contract with S.B. Friedman to conduct an analysis of Wal-Mart’s “pending” tax increment financing application.

Application, dated September 28, 2012, that Wal-Mart submitted to Carpentersville concerning the development of 25.7 acres within the redevelopment project area.

¶ 15 In response to Carpentersville's motion, East Dundee argued that the well-pleaded facts in the amended complaint alleged an actual controversy that was ripe for review. East Dundee emphasized its allegations that Wal-Mart was closing its East Dundee location to relocate within 10 miles to the Route 25 redevelopment project area, that Carpentersville had a pending application from Wal-Mart for tax increment financing, and that neither Wal-Mart nor Carpentersville had complied with section 11-74.4-3(q)(13) of the Act.

¶ 16 On August 30, 2013, the trial court granted Carpentersville's section 2-615 motion to dismiss and Wal-Mart's section 2-619(a)(9) motion to dismiss. In its written order, the court determined that "[t]he Amended Complaint is not ripe for consideration by this Court and presents no actual justiciable controversy that would allow this Court to provide the Plaintiff with any of the remedies it seeks." The order further stated that "[t]he Amended Complaint is dismissed subject to being re-filed in the event that the Village of Carpentersville does not make a reasonable finding as to the basis for Wal-Mart's closure of its East Dundee store based upon documentation submitted by Wal-Mart and approves payment of TIF funds directly to Walmart."

¶ 17 East Dundee filed a timely appeal.

¶ 18 **II. ANALYSIS**

¶ 19 On appeal, East Dundee argues that the trial court erred in granting the motions to dismiss, because its amended complaint presented an actual controversy that was ripe for adjudication. East Dundee contends that the matter became ripe for adjudication on August 16, 2012, when Wal-Mart informed East Dundee of its decision to close its current location and relocate to Carpentersville's Route 25 redevelopment project area. Alternatively, East Dundee

argues that matter became ripe on January 2, 2013, when Carpentersville acknowledged in its resolution No. R13-03 that it had a “development and Tax Increment Financing Application pending from Wal-Mart Stores, Inc.” According to East Dundee, the trial court erroneously concluded that no actual controversy would arise unless and until Carpentersville granted the application and provided Wal-Mart with tax increment financing funds without obtaining the documentation or making the findings that section 11-74.4-3(q)(13) requires.

¶ 20

A. Jurisdiction

¶ 21 Before reaching the merits of the appeal, we must address Wal-Mart’s argument that this court lacks jurisdiction. According to Wal-Mart, the trial court’s August 30, 2013, order was not final and appealable because it indicated that East Dundee’s amended complaint was “dismissed subject to being re-filed.” Wal-Mart cites the rule from *Cole v. Hoogendoorn, Talbot, Davits, Godfrey & Milligan*, 325 Ill. App. 3d 1152 (2001), that an order dismissing a complaint is not final and appealable unless the order also indicates that the litigation is terminated and that the plaintiff will not be permitted to plead over. *Cole*, 325 Ill. App. 3d at 1153.

¶ 22 East Dundee responds that an order’s finality is determined by its substance as opposed to its form. According to East Dundee, the trial court’s reference to re-filing did not pertain to the filing of an amended complaint but, rather, contemplated the filing of an action in the future should an actual controversy arise. Thus, according to East Dundee, the dismissal was a final and appealable order.

¶ 23 In *Schal Bovis, Inc. v. Casualty Insurance Co.*, 314 Ill. App. 3d 562 (1999), the trial court dismissed “without prejudice” a complaint against four insurance companies that alleged wrongful refusal to defend and indemnify the plaintiffs in an underlying tort action. *Schal Bovis*, 314 Ill. App. 3d at 564, 566. On appeal, the defendants argued that the appellate court lacked



jurisdiction because the dismissal “without prejudice” was not a final order. *Schal Bovis*, 314 Ill. App. 3d at 567. The appellate court disagreed, noting that the trial court’s decision to dismiss the complaint “without prejudice” “resulted solely from its determination that [the plaintiffs] could not allege that they had suffered any legally cognizable damages, in that they had also alleged that their excess [insurance policy] carrier \*\*\* had fully paid the judgment against them.” *Schal Bovis*, 314 Ill. App. 3d at 567. The court further noted that the trial court made the dismissal “without prejudice” only after the plaintiffs pointed out that the excess insurance policy limitation might be exhausted in the future, in which case the plaintiffs would suffer damages. *Schal Bovis*, 314 Ill. App. 3d at 567. The appellate court reasoned:

“Because the effect of a dismissal order is determined by its substance, and not by the incantation of any particular magic words, a trial court’s description of a final judgment as being ‘without prejudice’ is of no greater logical effect than a trial court’s statement that a non-final dismissal judgment is ‘with prejudice.’ \*\*\* [I]f the dismissal is because of a deficiency which could be cured by simple technical amendment, the order is not the subject of appeal. On the other hand, if the dismissal is because, as here, of a perceived substantive legal deficiency (*e.g.* that the plaintiffs have not sustained damages as a matter of law and, therefore, lack standing to sue), the dismissal order is final.” *Schal Bovis*, 314 Ill. App. 3d at 568.

The court concluded that it had jurisdiction over the appeal. *Schal Bovis*, 314 Ill. App. 3d at 568.

¶ 24 We agree with East Dundee that the trial court’s dismissal of its amended complaint was not the result of a deficiency that could be cured by simple technical amendment. Rather, the dismissal was the result of a perceived substantive legal deficiency—that the matter was not ripe and that no actual controversy existed. Just as the dismissal of the plaintiffs’ complaint was final

in *Schal Bovis* where the trial court determined that the plaintiffs had not sustained damages as a matter of law, the dismissal of East Dundee's amended complaint was final here, where the trial court determined that no actual controversy existed. The dismissal order's reference to the action "being re-filed in the event that the Village of Carpentersville does not make a reasonable finding as to the basis for Wal-Mart's closure of its East Dundee store" did not alter the finality of the order. Instead, just as the trial court in *Schal Bovis* made its dismissal "without prejudice" after considering that the plaintiffs might incur damages in the future, the court in this case merely contemplated that the facts might someday ripen into an actual controversy. Because the dismissal order was final, this court has jurisdiction over the appeal.

¶ 25 B. Carpentersville's Section 2-615 Motion to Dismiss

¶ 26 A complaint is subject to dismissal pursuant to section 2-615 of the Code if it fails to state a cause of action upon which relief may be granted. *Reynolds v. Jimmy John's Enterprises, LLC*, 2013 IL App (4th) 120139, ¶ 25. A motion to dismiss pursuant to section 2-615 tests the legal sufficiency of the complaint based on defects apparent on its face. *Reynolds*, 2013 IL App (4th) 120139, ¶ 25. When ruling on a section 2-615 dismissal motion, a court must accept as true all well-pleaded facts and reasonable inferences drawn therefrom, and view the complaint in the light most favorable to the plaintiff. *Reynolds*, 2013 IL App (4th) 120139, ¶ 25. A court should dismiss a cause of action pursuant to section 2-615 only if it is apparent that the plaintiff can prove no set of facts that would entitle the plaintiff to recover. *Simpkins v. CSX Transportation, Inc.*, 2012 IL 110662, ¶ 13. Our review of a section 2-615 dismissal is *de novo*. *Simpkins*, 2012 IL 110662, ¶ 13.

¶ 27 We first address the dismissal of count I of East Dundee's amended complaint, which sought a declaratory judgment. The declaratory judgment statute authorizes a trial court to make

binding declarations of rights “in cases of actual controversy” at the request of “anyone interested in the controversy.” 735 ILCS 5/2-701(a) (West 2012). A court is authorized to render declaratory judgments “whether or not any consequential relief is or could be claimed.” 735 ILCS 5/2-701(a) (West 2012). “An ‘actual controversy’ exists if there is a legitimate dispute admitting of an immediate and definite determination of the parties’ rights, the resolution of which would help terminate all or part of the dispute.” *First of America Bank, Rockford, N.A. v. Netsch*, 166 Ill. 2d 165, 173 (1995). “The declaratory judgment process exists so that the court may address a controversy after a dispute has arisen but before steps are taken that would give rise to a claim for damages or other relief.” *Adkins Energy, LLC v. Delta-T Corp.*, 347 Ill. App. 3d 373, 376 (2004). “[A]n actual controversy may be found ‘where the mere existence of a claim, assertion or challenge to the plaintiff’s legal interests portends the ripening seeds of litigation.’ ” *Netsch*, 166 Ill. 2d at 174 (quoting *Stone v. Omnicom Cable Television of Illinois, Inc.*, 131 Ill. App. 3d 210, 214 (1985)).

¶ 28 Although declaratory judgment is meant to resolve a dispute “before steps are taken that would give rise to a claim for damages or other relief” (*Adkins Energy, LLC*, 347 Ill. App. 3d at 376), a controversy nevertheless must be ripe before declaratory judgment is available. *Smart Growth Sugar Grove, LLC v. The Village of Sugar Grove*, 375 Ill. App. 3d 780, 789 (2007). Courts may not pass judgment on abstract propositions of law, render advisory opinions, or give legal advice concerning future events. *Smart Growth Sugar Grove*, 375 Ill. App. 3d at 789. “If the question of whether plaintiffs will suffer any infringement of their rights is speculative, *i.e.* if their interests would be adversely affected only in the event some future possibility does or does not occur, the action for a declaratory judgment should be dismissed.” *Shipp v. County of Kankakee*, 345 Ill. App. 3d 250, 255 (2003). In other words, “if a plaintiff’s interests would be

adversely affected only in the event of some future occurrence or non-occurrence,” the controversy is not ripe. *SBL Associates v. Village of Elk Grove*, 247 Ill. App. 3d 25, 29 (1993).

¶ 29 In *Smart Growth Sugar Grove*, a landowner filed a declaratory judgment action against the Village of Sugar Grove, challenging, among other things, the village’s comprehensive plan recommending that the village acquire a right-of-way across the plaintiff’s property for the construction of a highway interchange. *Smart Growth Sugar Grove*, 375 Ill. App. 3d at 780. The trial court dismissed the complaint, and the plaintiff appealed. *Smart Growth Sugar Grove*, 375 Ill. App. 3d at 781. On appeal, the court held that the plaintiff’s declaratory judgment action was not ripe, because the village’s comprehensive plan was advisory and did not have the force of law. *Smart Growth Sugar Grove*, 375 Ill. App. 3d at 789. The court reasoned that deciding whether the proposed highway interchange would violate the plaintiff’s rights would be to render an advisory opinion about future events that may never occur. *Smart Growth Sugar Grove*, 375 Ill. App. 3d at 789. In other words, according to the appellate court, the plaintiff’s injury was speculative and contingent and, therefore, not actionable. *Smart Growth Sugar Grove*, 375 Ill. App. 3d at 789-90; see also *Shipp*, 345 Ill. App. 3d at 255 (holding that the plaintiffs’ declaratory judgment action alleging that the defendant village wrongfully denied their application for sewer service was not ripe, where the plaintiffs had not filed an application for sewer service with the village); *SBL Associates*, 247 Ill. App. 3d at 29-30 (holding that the plaintiff’s action for declaratory judgment on a recapture provision was not ripe, because the recapture provision would not become operative unless and until the defendant village annexed certain property).

¶ 30 East Dundee contends that its declaratory judgment action is ripe because, according to the well-pleaded facts of its amended complaint: (1) Wal-Mart has already decided to close its East Dundee store and relocate to Carpentersville’s Route 25 redevelopment project area; (2)

Wal-Mart has signed a letter of intent to purchase land in the redevelopment project area; (3) Wal-Mart has submitted a Concept Plan Approval Application to Carpentersville concerning the development of 25.7 acres within the Route 25 redevelopment project area; (4) Carpentersville has a pending application for tax increment financing funds from Wal-Mart; and (5) neither Wal-Mart nor Carpentersville has complied with any of the requirements of section 11-74.4-3(q)(13) of the Act. According to East Dundee, these allegations “portend the ripening seeds of litigation” and, therefore, establish the existence of an actual controversy ripe for adjudication.

¶ 31 The problem with East Dundee’s argument is that the allegations of its amended complaint can in no way predict whether Wal-Mart and Carpentersville will violate section 11-74.4-3(q)(13) of the Act. Nor do the amended complaint’s allegations suggest that either Wal-Mart or Carpentersville disagrees with East Dundee’s statement of the requirements of section 11-74.4-3(q)(13). The section’s plain language prohibits a municipality from using tax increment financing to fund redevelopment project costs that provide direct financial support to a retail entity initiating operations in a redevelopment project area while terminating operations at another location within 10 miles of the redevelopment project area but outside the boundaries of the redevelopment project area municipality. 65 ILCS 5/11-74.4-3(q)(13) (West 2012). However, the Act does not prohibit the funding of such redevelopment project costs if the retailer documents that the closure of its current location is for reasons beyond its control and if the municipality makes a reasonable finding that the current location contained inadequate space, had become economically obsolete, or was no longer a viable location for the retailer. 65 ILCS 5/11-74.4-3(q)(13) (West 2012). A retailer’s plans to relocate to a redevelopment project area, or its submission of an application for tax increment financing funds to a municipality, is in no way indicative of the retailer’s or the municipality’s compliance or non-compliance with section

11-74.4-3(q)(13) of the Act. As both Carpentersville and Wal-Mart point out, a municipality that receives an application for tax increment financing funds from a retailer in Wal-Mart's position could deny the application or make the necessary findings prior to granting it, neither of which would violate the Act. Because East Dundee's "interests would be adversely affected only in the event some future possibility does or does not occur" (*Shipp*, 345 Ill. App. 3d at 255)—*i.e.*, the possibility that Wal-Mart and Carpentersville might violate section 11-74.4-3(q)(13) of the Act in the future—its declaratory judgment action is not ripe. The trial court did not err in dismissing count I of the amended complaint.

¶ 32 In its brief, East Dundee makes passing reference to its allegation in its amended complaint that "Carpentersville has used TIF funds for the location and building of a Walmart store within Carpentersville's Route 25 [redevelopment project area]." Not only is this allegation too conclusory and nonspecific to be taken as true for purposes of a section 2-615 motion to dismiss, but also it is contradicted by the amended complaint's well-pleaded facts. See *Provenzale v. Forister*, 318 Ill. App. 3d 869, 878 (2001) (noting that a 2-615 motion does not admit the truth of "factual conclusions that are unsupported by allegations of specific facts"). The amended complaint's well-pleaded, specific allegations, taken as true, establish that Wal-Mart has submitted an application for tax increment financing funds to Carpentersville, that Carpentersville has begun reviewing the application, and that Wal-Mart plans to close its East Dundee location and relocate to the Route 25 redevelopment project area. The amended complaint contains no specific allegations indicating that Carpentersville has granted Wal-Mart's application or has used tax increment financing to fund redevelopment project costs that provide direct financial support to Wal-Mart.

¶ 33 Because East Dundee’s declaratory judgment count is not ripe for review, dismissal of the remaining three counts of the amended complaint was proper as well, as the remaining counts are dependent on the same alleged controversy as the declaratory judgment count. See *Belleville Toyota, Inc. v. Toyota Motor Sales, U.S.A., Inc.*, 199 Ill. 2d 325, 335 (2002) (holding that trial courts have jurisdiction over “justiciable matters,” which are controversies that are “definite and concrete, as opposed to hypothetical or moot, touching upon the legal relations of parties having adverse legal interests”).

¶ 34 C. Wal-Mart’s Section 2-619(a)(9) Motion to Dismiss

¶ 35 A motion to dismiss pursuant to section 2-619(a)(9) of the Code admits the legal sufficiency of the complaint but asserts that the plaintiff’s claim “is barred by other affirmative matter avoiding the legal effect of or defeating the claim.” 735 ILCS 5/2-619(a)(9) (West 2012); *Reynolds*, 2013 IL App (4th) 120139, ¶¶ 30-31. “ ‘[A]ffirmative matter,’ in a section 2-619(a)(9) motion, is something in the nature of a defense which negates the cause of action completely or refutes crucial conclusions of law or conclusions of material fact contained in or inferred from the complaint.” *Illinois Graphics Company v. Nickum*, 159 Ill. 2d 469, 486 (1994). If the grounds giving rise to a section 2-619(a)(9) motion do not appear on the face of the complaint, the motion must be supported by affidavit. 735 ILCS 5/2-619(a) (West 2012). Our review of a section 2-619(a)(9) dismissal is *de novo*. *Alvarez v. Pappas*, 229 Ill. 2d 217, 220 (2008).

¶ 36 East Dundee contends that Wal-Mart’s section 2-619(a)(9) motion to dismiss was procedurally improper. East Dundee argues that Goodman’s affidavit attached to Wal-Mart’s motion to dismiss, rather than being offered in support of an affirmative matter that defeated East Dundee’s claims, merely negated the amended complaint’s allegation that Wal-Mart had submitted an application for tax increment financing funds to Carpentersville.

¶ 37 We need not resolve East Dundee’s challenge to Goodman’s affidavit. Wal-Mart acknowledges on appeal that whether it has filed an application for tax increment financing funds with Carpentersville “has no legal significance in this case.” As we discussed above, the mere filing of an application for tax increment financing funds is not indicative of a municipality’s compliance or non-compliance with section 11-74.4-3(q)(13) of the Act. As we explained, a municipality that receives an application for tax increment financing funds from a retailer in Wal-Mart’s position could deny the application or could make the necessary findings prior to granting it, neither of which would violate section 11-74.4-3(q)(13).

¶ 38 Although Wal-Mart raised the lack of ripeness as an affirmative matter in a section 2-619(a)(9) motion to dismiss, its arguments were essentially the same as those Carpentersville made in its section 2-615 motion to dismiss. Like Carpentersville, Wal-Mart argued that East Dundee’s amended complaint was speculative and premature. The lack of ripeness was apparent from the face of East Dundee’s amended complaint, and Wal-Mart did not need to submit Goodman’s affidavit to establish it. Although Wal-Mart’s motion may have been more appropriately brought under section 2-615 of the Code, East Dundee was not prejudiced by any improper designation, because Carpentersville’s and Wal-Mart’s motions made essentially the same arguments. Moreover, there is “some degree of overlap” between motions brought pursuant to sections 2-615 and 2-619 (*Illinois Graphics Company*, 159 Ill. 2d at 485), and, as a matter of practice, litigants sometimes treat lack of ripeness as an affirmative defense. See *Lebron v. Gottlieb Memorial Hospital*, 237 Ill. 2d 217, 253 (2010) (discussing a defendant’s affirmative defense of lack of ripeness). Therefore, for the same reasons that we affirmed the trial court’s decision to grant Carpentersville’s section 2-615 motion to dismiss, we affirm the trial court’s decision to grant Wal-Mart’s motion. See *Borowiec v. Gateway 2000, Inc.*, 209 Ill.



2d 376, 383 (2004) (considering a motion to dismiss that was brought under the wrong section of the Code, where the improper designation did not prejudice the plaintiff).

¶ 39 D. Wal-Mart's Other Arguments

¶ 40 On appeal, Wal-Mart offers two alternative bases for affirming the trial court's dismissal of East Dundee's amended complaint. It argues that East Dundee lacks standing to challenge Carpentersville's use of tax increment financing funds, because East Dundee is neither a taxing body entitled to tax revenue from the redevelopment project area nor a Carpentersville taxpayer. It also argues that section 11-74.4(q)(13) of the Act does not give rise to a private right of action to enforce its provisions. Because we affirm the trial court's dismissal order on the basis of ripeness, we need not address Wal-Mart's alternative arguments. Furthermore, because the suit is premature, it would also be premature to determine if standing exists.

¶ 41 III. CONCLUSION

¶ 42 For the reasons stated, we affirm the judgment of the circuit court of Kane County.

¶ 43 Affirmed.