IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

ELIAS SANCHEZ, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	**20 CH 2206**
	)	
BICKERDIKE REDEVELOPMENT CORP., et al.,	)	
	)	
	)	
Defendants.	)	

MEMORANDUM AND ORDER

Defendants Bickerdike Redevelopment Corporation and Rockwell Community Development, Inc. have filed a Motion to Dismiss pursuant to 735 ILCS 5/2-619.1.

Defendant City of Chicago has also filed a Motion to Dismiss pursuant to 735 ILCS 5/2-619.1.

I. Background

On November 20, 2019, the City Council of the City of Chicago ("the City") approved a zoning change, Ordinance No. O2019-9419 ("PD Ordinance"), for property located at 2602-38 North Emmett Street, Chicago, Illinois ("the Subject Property"). (Compl. ¶24). The Subject Property is currently a parking lot adjacent to the CTA's Logan Square blue line station. (Id. at ¶¶4, 37). The PD Ordinance created a new planned development ("PD") allowing for construction of a seven-story, 100-unit residential rental building on the Subject Property. (Id. at ¶¶24, 46, Ex. B).

On January 15, 2020, the City Council passed an ordinance declaring its intent to potentially issue up to $22,500,000 in tax-exempt bonds ("Bond Intent Ordinance"). (Id. at ¶25 and Ex. A). If bonds are issued in the future, the Bond Intent Ordinance allows the City to lend all, or a portion, of the proceeds of the bonds to the developer of the PD to finance redevelopment of the Property with a residential rental building with 100% of its units being designated as affordable. (Id. at Ex. A). The Bond Intent Ordinance states that there is a shortage of affordable housing in the City of Chicago and that this shortage harms the health and welfare of the City's residents. (Id.).

On February 21, 2020, Plaintiffs filed a Complaint against Defendants Bickerdike Redevelopment Corporation ("Bickerdike"), Rockwell Community Development, Inc. ("Rockwell") and the City of Chicago. Plaintiffs are individuals and businesses owning real property in the area surrounding the Subject Property. Bickerdike is a non-profit corporation that

owns the Subject Property and is about to commence construction of 100 units of affordable housing on the Subject Property.

Plaintiffs allege, on information and belief, that Rockwell might serve as the general partner of the entity developing the Subject Property, but do not allege any facts supporting this conclusion. (Compl., ¶14). Nor do Plaintiffs allege any other facts supporting naming Rockwell as a defendant in this action.

Plaintiffs contend that the development of the Subject Property will harm them because it is out of character with the surrounding area and "inappropriate" for the area. (Compl., ¶58). Plaintiffs further contend that the development will eliminate public parking which will harm the businesses in the area and "jeopardize" "hundreds of jobs." (Id.). Plaintiffs further assert that allowing the development will reduce the value of their properties and other properties in the area. (Id.). Plaintiffs further allege that the development does not promote the health, safety or general welfare of the public, but caters to the private party Defendants. (Id.).

Count I of the Complaint seeks a declaration that the rezoning provided for by the PD Ordinance is null and void as a violation of Plaintiffs' substantive due process rights. Count I further seeks to enjoin the City from enforcing the PD Ordinance.

Count II seeks a declaration that the Bond Intent Ordinance violates Plaintiffs' substantive due process rights as guaranteed by Art. I, §2 and Art. VIII, §1 of the Illinois Constitution. Count II further seeks a declaration that the Bond Intent Ordinance is null and void and injunctive relief barring further implementation of the Bond Intent Ordinance.

II. Motions to Dismiss

The City is moving to dismiss the Complaint pursuant to 735 ILCS 5/2-619.1. Bickerdike and Rockwell are also moving to the dismiss the Complaint pursuant to 735 ILCS 5/2-619.1. As Defendants raise many of the same arguments, the motions will be addressed together.

"A section 2-615 motion to dismiss challenges the legal sufficiency of the complaint. Yoon Ja Kim v. Jh Song, 2016 IL App (1st) 150614-B, ¶41. "Such a motion does not raise affirmative factual defenses but alleges only defects on the face of the complaint." Id. "All well-pleaded facts and all reasonable inferences from those facts are taken as true. Where unsupported by allegations of fact, legal and factual conclusions may be disregarded." Kagan v. Waldheim Cemetery Co., 2016 IL App (1st) 131274, ¶29. "In determining whether the allegations of the complaint are sufficient to state a cause of action, the court views the allegations of the complaint in the light most favorable to the plaintiff. Unless it is clearly apparent that the plaintiff could prove no set of facts that would entitle him to relief, a complaint should not be dismissed." Id.

A §2-619 motion to dismiss "admits the legal sufficiency of the complaint and affirms all well-pled facts and their reasonable inferences, but raises defects or other matters either internal or external from the complaint that would defeat the cause of action." Cohen v. Compact Powers

Sys., LLC, 382 Ill. App. 3d 104, 107 (1st Dist. 2008). A dismissal under §2-619 permits "the disposal of issues of law or easily proved facts early in the litigation process." Id. Section 2-619(a)(9) authorizes dismissal where "the claim asserted against defendant is barred by other affirmative matter avoiding the legal effect of or defeating the claim." 735 ILCS 5/2-619(a)(9).

A. *Pre-Suit Notice Requirements of 65 ILCS 5/11-13-8 (§2-619)*

Count I of the Complaint seeks a finding that the PD Ordinance is unconstitutional. Defendants contend that Plaintiffs were required to provide pre-suit notice pursuant to 65 ILCS 5/11-138 which states:

> In municipalities of 500,000 or more population, when any zoning ordinance, rule or regulation is sought to be declared invalid by means of a declaratory judgment proceeding, not more than 30 days before filing suit for a declaratory judgment the person filing such suit shall serve written notice in the form and manner and to all property owners as is required of applicants for variation in Section 11-13-7 [65 ILCS 5/11-13-7], and shall furnish to the clerk of the court in which the declaratory judgment suit is filed, and at the time of filing such suit, the list of property owners, the written certificate and such other information as is required in Section 11-13-7 to be furnished to the board of appeals by an applicant for variation. * * *

65 ILCS 5/11-13-8. Section 11-13-7 requires the service of:

> written notice, either in person or by registered mail, return receipt requested, on the owners, as recorded in the office of the recorder of deeds or the registrar of titles of the county in which the property is located and as appears from the authentic tax records of such county, of all property within 250 feet in each direction of the location for which the variation or special use is requested; provided, the number of feet occupied by all public roads, streets, alleys and other public ways shall be excluded in computing the 250 feet requirement. * * *

65 ILCS 5/11-13-7.

The purpose of pre-suit notice is to alert the surrounding neighbors to the zoning classification challenge and allow them to support or oppose the challenge. Scott v. City of Chicago, 2015 IL App (1st) 140570, ¶ 20.

1. Whether Count I Seeks Declaratory Judgment

Plaintiffs contend that they were not required to provide pre-suit notice under §11-13-8 because Count I does not seek declaratory judgment. This court emphatically disagrees.

Count I seeks a finding that the PD Ordinance is unconstitutional and, therefore, null and void. This clearly seeks a declaratory judgment. That Plaintiffs do not use the word "declare" in Count I or label Count I as a cause of action for declaratory judgment is irrelevant. It is the factual allegations of a complaint – not the label, or lack thereof, assigned to it by the plaintiff –

that define the cause of action asserted. Childs v. Pinnacle Health Care, L.L.C, 399 Ill. App. 3d 167, 181 (2d Dist. 2010).

The court additionally notes that if Count I does not state a cause of action for declaratory judgment, which it does, then it states no cause of action at all. Injunctive relief is a remedy for an underlying cause of action, not an independent cause of action. People ex rel. Madigan v. J.T. Einoder, Inc., 2013 IL App (1st) 113498, ¶66. Therefore, Count I cannot constitute a cause of action for injunctive relief as suggested by Plaintiffs.[1]

Furthermore, while Count I alleges that it is being brought "in accord with 65 ILCS 5/11-13-25," (Compl. ¶2), that section does not provide for any independent, private cause of action. Conaghan v. City of Howard, 2016 IL App (2d) 151034; Figel v. Chicago Plan Comm'n, 408 Ill. App. 3d 223 (1st Dist. 2011). Section 11-13-25 merely allows for *de novo* judicial review of zoning decisions. Therefore, Count I does not state any cause of action pursuant to §11-13-25.

Plaintiffs cannot escape the requirements of §11-13-8 by attempting to characterize Count I as something other than what it is – a cause of action for declaratory judgment. Section 11-13-8 expressly requires pre-suit notice for declaratory proceedings seeking to declare a zoning ordinance invalid. Count I seeks to declare the PD Ordinance invalid. Therefore, Plaintiffs were required to give pre-suit notice in accordance with the requirements of §11-13-8 and §11-13-7. It is undisputed that Plaintiffs did not provide such notice.

2. Plaintiffs' Request to Cure Notice Failure

Plaintiffs assert that this court should allow them to cure their failure to provide the required pre-suit notice. Plaintiffs cite to Hanna v. City of Chicago, 331 Ill. App. 3d 295, 310 (1st Dist. 2002), overruled in part on other grounds, Napleton v. Vill. of Hinsdale, 229 Ill. 2d 296 (2008), in support of this request. However, the First District has held that Hanna does not allow this court to excuse Plaintiffs' failure to comply with §11-13-8.

In Scott v. City of Chicago, 2015 IL App (1st) 140570, ¶32, the plaintiffs attempted to comply with the pre-suit notice requirements of §11-13-8 and §11-13-7, but made multiple errors. The First District found that these multiple errors could not be excused or attributed to the defendants and, therefore, their complaint must be dismissed with prejudice. Id.

The plaintiffs argued that their "imperfect but sincere" efforts to provide the required pre-suit notice should not result in the dismissal of their action, citing to Hanna. Id. at ¶33. The plaintiffs asserted that Hanna stands for the proposition that the notice requirement of §11-13-8 should be construed "leniently" and plaintiffs should be allowed "make-up notice." Id. In rejecting this argument, the First District explained:

> Hanna is distinguishable on the facts and the opinion does not suggest in any way that the notice requirement should be relaxed. That case involved the rezoning of an entire 40–

[1] Plaintiffs' citation to Kupsik v. City of Chicago, 25 Ill. 2d 595 (1992), is unavailing as that case involved an equitable action to remove a cloud on the title to the plaintiffs' property created by the zoning ordinance at issue. Plaintiffs here state no cause of action other than one for declaratory judgment.

> block neighborhood. The plaintiff challenged the rezoning of his own property, unlike the current plaintiffs who challenged the rezoning of a nearby property. The plaintiff's presuit notice was apparently perfect as to all property owners within 250 feet of his own property. However, in a case of first impression, we determined that he would be required to also give notice to all property owners within 250 feet of the rezoned neighborhood, despite his contention that this was a burden that could not have been intended by the legislature. In contrast, here, we have plaintiffs who failed to attempt to notify numerous property owners who were plainly entitled to notice because they were within 250 feet of the affected property. Hanna does not excuse their noncompliance with the statute at issue. The opinion does not state or imply that plaintiffs may be lax in giving presuit notice and that Illinois courts will be "lenient" in enforcing the notice standard. The plaintiffs' failure to strictly comply with the plainly worded notice requirement is fatal to their lawsuit . . . concerning the Lake Park development.

Id. at ¶ 36 (internal citations omitted).

Here, Plaintiffs were required to provide pre-suit notice under §11-13-8. Unlike Hanna, this case does not involve any question of first impression which would excuse the failure to provide the required notice.

Plaintiffs do not dispute that they did not provide the required notice. Scott is clear that Hanna does not hold that Illinois courts will be lenient in enforcing this requirement. Rather, even where some effort is made to provide the required notice, failure to strictly comply will be fatal to the plaintiff's claim. Scott, 2015 IL App (1st) 140570, ¶36. Therefore, Plaintiffs' failure to provide notice is fatal to Count I of the Complaint.

Count I is dismissed with prejudice pursuant to §2-619.

B. *Due Process Claims Against Bickerdike and Rockwell (§2-615)*

Bickerdike and Rockwell contend that Plaintiffs' entire Complaint is premised upon alleged violations of the Illinois Constitution and that as private entities, they cannot be sued for violation of Plaintiffs' constitutional rights.

Count I seeks a declaration that the PD Ordinance is a violation of Plaintiffs' substantive due process rights. Count II seeks a declaration that the Bond Intent Ordinance is a violation of Plaintiffs' substantive due process rights as guaranteed under Article I, §2 and Article VIII, §1 of the Illinois Constitution.

"To assert a violation of the Illinois due process clause, a plaintiff must allege that a state action deprived him of a protected right, privilege or immunity." Hill v. PS Illinois Trust, 368 Ill. App. 3d 310, 313 (1st Dist. 2006). "The Illinois due process clause stands 'as a prohibition against governmental action, not action by private individuals.'" Id., quoting, Methodist Med. Ctr. of Ill. v. Taylor, 140 Ill. App. 3d 713, 717 (3rd Dist. 1986).

"Case law is clear that for an action to rise to the level of 'State action' triggering constitutional protection, there must be a sufficiently close nexus between the State and the action, that the action may fairly be treated as that of the State." In re Marriage of Braundmeier, 201 Ill. App 3d 14, 17 (5th Dist. 1990), citing, Blum v. Yaretsky, 457 U.S. 991 (1982); Jackson v. Metropolitan Edison, Co., 419 U.S. 345 (1974); Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972).

The due process violations asserted by the Complaint are the passage of the PD Ordinance and the Bond Intent Ordinance. While Bickerdike will benefit from the PD Ordinance, and may benefit from the Bond Intent Ordinance, the Complaint does not identify any action taken by Bickerdike constituting state action.[2] Therefore, Plaintiffs cannot assert any claim based upon a violation of their due rights against Bickerdike.

C. *Whether Plaintiffs Possess Any Constitutionally Protected Interest (§2-615)*

Defendants contend that Plaintiffs have no viable claim for violation of their substantive due process rights because they possess no constitutionally protected interest impacted by the Ordinances.

The threshold issue for any due process claim is whether the plaintiff has a protectable interest in the form of life, liberty or property. Chicago Teachers Union Local No.1 v. Board of Educ., 2012 IL 112566, ¶12; Balmoral Racing Club, Inc. v. Illinois Racing Bd., 151 Ill. 2d 367, 405 (1992); Jackson v. City of Chicago, 2012 IL App (1st) 111044. If there is no protectable interest, there is no due process claim. Id.

"[A] property interest is involved only if 'a person clearly [has] more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it.'" Petersen v. Chicago Plan Comm'n v. City of Chicago, 302 Ill. App. 3d 461, 467 (1st Dist. 1998), quoting, Board of Regents v. Roth, 408 U.S. 564, 577 (1972).

Plaintiffs allege that they are owners of properties surrounding the Subject Property. Plaintiffs do not allege that they possess any legal interest in the Subject Property. Rather, Plaintiffs contend that the planned development will harm the neighborhood because: (1) the loss of parking will result in traffic nightmares to the detriment of neighborhood businesses; (2) the planned structure does not fit the character of the neighborhood and the materials to be used create "aesthetic concerns"; and (3) the use, enjoyment and value of the surrounding properties, including Plaintiffs' properties, will be adversely affected.

In Wells v. Village of Libertyville, 153 Ill. App. 3d 361 (2d Dist. 1987), the village rezoned property from residential to commercial at the request of its owners. The plaintiffs, adjoining landowners, asserted that they had been deprived of due process because they had not received mailed notice of the proposed zoning change, but only notice by publication. Id. at 366. In finding that the plaintiffs were not entitled to mailed notice, the court found the plaintiffs were not the owners of the property directly affected by the zoning ordinance and, therefore, had no

[2] The Complaint does not allege any facts as to Rockwell.

legally protected interest in that property. The plaintiffs were "merely adjoining landowners." Id. at 368.

In Residences at Riverbend Condo. Ass'n v. City of Chicago, 5 F. Supp. 3d 982, 986 (N.D. Ill. 2013), the plaintiffs challenged a zoning ordinance providing for a planned development of vacant property 250 feet away from a building owned by the plaintiffs. The plaintiffs argued that allowing the development would impose further stress on the area's infrastructure and create additional traffic hazards. Id. at 985.

Citing to Roth, Chicago Teachers Union Local No. 1, Wells and Petersen, the court found that as adjoining landowners, and not the owners of the subject property, the plaintiffs had no protectable property interest which would support the plaintiff's claim for violation of their procedural and substantive due process rights. Id. at 986-87. The court expressly noted that the plaintiffs had no protectable interest in their property values citing to Groenings v. City of St. Charles, 209 Ill. App. 3d 96 (2d Dist. 1991). Because the adjoining landowner plaintiffs had no protectable property interest, their due process claims failed as a matter of law. Id. at 988.

In Petersen, the Museum of Science and Industry submitted an application to the City of Chicago Planning Commission seeking to expand its facilities into a portion of Jackson Park. 302 Ill. App. 3d at 462. Following a public hearing, the Commission granted the Museum's application. Id. The plaintiffs, concerned citizens, filed suit challenging the approval of the application. The plaintiffs argued, in part, that their due process rights had been violated because they had not been allowed to cross-examine witnesses at the public hearing. Id. at 465-66.

The Petersen court found that the plaintiffs had no protectable property interest entitling them to due process. Id. at 467. While the plaintiffs had standing to sue due to an interest in the recreational and aesthetic availability of Jackson Park, the plaintiffs had no property interest in Jackson Park and, therefore, no basis for a due process claim. Id. at 467.

Plaintiffs here are adjoining landowners. They do not allege, and do not contend, that they possess any direct interest in the Subject Property. The case law discussed above is clear that because Plaintiffs possess no direct interest in the Subject Property, they have no protectable property interest to support a due process claim.

Count I is dismissed because it is based upon alleged due process violations and Plaintiffs have no protectable property interest entitling them to due process.

D. *Whether the PD Ordinance Rationally Furthers a Legitimate Governmental Interest (§2-615)*

Defendants contend that even if Plaintiffs' possess a protectable property interest, the PD Ordinance rationally furthers a legitimate governmental interest defeating any claim based on a violation of Plaintiff's substantive due process rights.

1. Whether Plaintiffs' Due Process Challenge is Facial or "As Applied"

The standard of review for the PD Ordinance is dependent upon whether Plaintiffs' challenge to the PD Ordinance is a facial challenge or an "as applied" challenge. Defendants contend that Plaintiffs' challenge is a facial one. Plaintiffs contend that their challenge should be considered under the "as applied" standard.

> A facial challenge to the constitutionality of a legislative enactment is the most difficult challenge to mount successfully, because an enactment is facially invalid only if no set of circumstances exists under which it would be valid. The fact that the enactment could be found unconstitutional under some set of circumstances does not establish its facial invalidity. In contrast, in an "as-applied" challenge a plaintiff's protest against how an enactment was applied in the particular context in which the plaintiff acted or proposed to act, and the facts surrounding the plaintiff's particular circumstances become relevant. If a plaintiff prevails in an as-applied claim, he may enjoin the objectionable enforcement of the enactment only against himself, while a successful facial attack voids the enactment in its entirety and in all applications.

Napleton v. Village of Hinsdale, 229 Ill. 2d 296, 305-06 (2008) (internal citations omitted).

Count I of the Complaint seeks a declaration that the PD Ordinance is null and void in its entirety. Count I does not seek to invalidate or enjoin enforcement of the PD Ordinance only as to Plaintiffs. Therefore, Count I constitutes a facial challenge to the PD Ordinance, not an "as applied" challenge. See, Napleton, 229 Ill. 2d at 305-06; Condo. Ass'n of Commonwealth Plaza, 399 Ill. App. 3d 32, 46 n. 2 (1st Dist. 2010).

Because Plaintiffs' challenge to the PD Ordinance is a facial challenge, Plaintiffs' reliance on La Salle National Bank of Chicago v. Cook County, 12 Ill. 2d 40 (1957), and Sinclair Pipe Line Co. v. Village of Richton Park, 19 Ill. 2d 370 (1960), is misplaced. While Plaintiffs contend that Illinois courts have applied the La Salle eight-factor test where owners of nearby properties have challenged the zoning of a particular property, the cases cited by Plaintiffs involved special use permits. See, Paul v. County of Ogle, 2018 IL App (2d) 170696, ¶30 (noting that Napleton endorsed the use of the La Salle factors as appropriate for special use cases precisely because they focus upon the parties' particular circumstances); Whipple v. Village of North Utica, 2017 IL App (3d) 150547 (special use case); Robrock v. County of Piatt, 2012 IL App (4th) 110590 (special use case).

Napleton and Condo. Association are clear that Plaintiffs' challenge to the PD ordinance is a facial challenge. The La Salle eight-factor test applies only to "as applied" challenges, not to facial challenges. Napleton, 229 Ill. 2d at 318-19. Therefore, the issue before this court is whether the PD Ordinance is facially invalid.

2. Whether the PD Ordinance Lacks a Rational Basis

Legislative enactments are presumed to be constitutional and a court should uphold their validity if reasonably possible. Wade v. City of North Chicago Police Pension Bd., 226 Ill. 2d 485, 510 (2007). The standard used to determine whether a statute or ordinance violates substantive due process is the same standard used to determine whether a statute or ordinance violates equal protection. People ex rel. Lumpkin v. Cassidy, 184 Ill. 2d 117, 123-24 (1998). "Economic and social welfare legislation not affecting a suspect class or fundamental right is subject to [the] rational basis test." Jacobson v. Dept. of Public Aid, 171 Ill. 2d 314, 323 (1996).

The PD Ordinance does not affect any suspect class or fundamental right. Therefore, the PD Ordinance is subject to the rational basis standard. Under the rational basis standard, "[t]he court simply inquires whether the means the statute employs to achieve its purpose are rationally related to that purpose." Waconda Fire Prot. Dist. v. Stonewall Orchards, LLP, 214 Ill. 2d 417, 434 (2005). "As long as the statute is rationally related to a legitimate state interest, it will be upheld." Lumpkin, 184 Ill. 2d at 124. Whether a rational basis exists is a question of law. Jacobson, 171 Ill. 2d at 323.

Judgments made by a legislative body in passing an ordinance are not subject to courtroom fact finding. Lumpkin, 184 Ill. 2d at 124. If any set of facts, real or hypothesized, can be reasonably conceived to uphold the legislation, it must be upheld. Wauconda, 214 Ill. 2d at 434; Lumpkin, 184 Ill. 2d at 124; Jacobson, 171 Ill. 2d at 324.

While the Complaint contains a litany of reasons why Plaintiffs think the planned development will be detrimental, these allegations are irrelevant to a rational basis analysis. The only question is whether this court can reasonably conceive of any set of facts showing that the PD Ordinance is rationally related to a legitimate governmental interest. This court can easily do so.

The provision of affordable housing for low and moderate income residents of the City is a legitimate governmental interest. The planned development is rationally related to that legitimate governmental interest. Increasing access to public transportation and encouraging public transportation use for people of all incomes is also a legitimate governmental interest. Building 100 affordable housing units near the CTA's Logan Square blue line station is rationally related to these legitimate governmental interests. Because this court can conceive of a rational basis for the PD Ordinance, the PD Ordinance must be upheld.

Plaintiffs cannot maintain any action against Defendants based upon a violation of their due process rights as a matter of law. Therefore, Count I is also dismissed with prejudice pursuant to §2-615.

E. *Plaintiffs' Challenge to the Bond Intent Ordinance and the Bond Authorization Ordinance*

Count II of the Complaint seeks a declaration that the Bond Intent Ordinance violates Plaintiffs' substantive due process rights as guaranteed by Art. I, §2 and Art. VIII, §1 of the Illinois Constitution and is therefore null and void. Count II also seeks injunctive relief barring the enforcement of the Bond Intent Ordinance.

In their Response, Plaintiffs seek leave to amend to challenge the constitutionality of a new ordinance, No. O2020-2364, (the "Bond Authorization Ordinance") enacted on May 20, 2020.

1. Lack of Standing (§2-619)

Defendants argue that Plaintiffs lack standing to challenge the Bond Intent Ordinance. Plaintiffs contend that they have standing to challenge the Bond Intent Ordinance.

Plaintiffs rely upon taxpayer standing to challenge the Bond Intent Ordinance.[3] "'Taxpayer standing is a narrow doctrine permitting a taxpayer the ability to challenge the misappropriation of public funds.'" Marshall v. County of Cook, 2016 IL App (1st) 142864, ¶15, quoting, Illinois Ass'n of Realtors v. Stermer, 2014 IL App (4th) 130079, ¶29. "'It has long been the rule in Illinois that citizens and taxpayers have a right to enjoin the misuse of public funds, and that this right is based upon the taxpayers' ownership of such funds and their liability to replenish the public treasury for the deficiency caused by such misappropriation.'" Id., quoting, Barco Manufacturing Co. v. Wright, 10 Ill. 2d 157, 160 (1956). "But . . . taxpayer standing requires a specific showing that the plaintiff will be liable to replenish public revenues depleted by the misuse of those funds." Id. at ¶16.

To assert taxpayer standing, Plaintiffs must allege facts showing that they, personally, will be required to replenish funds spent by the Bond Intent Ordinance through increased taxes. Plaintiffs, however, allege no such facts. The Complaint offers nothing more than conclusory allegations made upon information and belief. (Compl. ¶2). Illinois is a fact-pleading jurisdiction. Simpkins v. Csx Transp., 2012 IL 110662, ¶26. "A plaintiff may not rely on conclusions of law or fact unsupported by specific factual allegations." Id.

Furthermore, Plaintiffs cannot allege facts showing they will be liable to replenish public revenues depleted by the Bond Intent Ordinance as a matter of law. The Bond Intent Ordinance does nothing more than permit the City to potentially issue bonds in the future. The Bond Intent Ordinance does not require the City to issue bonds and does not, by itself, authorize the City to issue any bonds. Therefore, the Bond Intent Ordinance cannot be used to deplete any City funds.

While Plaintiffs seek leave, in the alternative, to amend Count II to instead challenge the Bond Authorization Ordinance, such leave would not cure Plaintiffs' lack of standing. First, the

[3] Plaintiffs admit that Plaintiff Logan Square Neighbors for Responsible Development is not a taxpayer. Therefore, this Plaintiff has no standing to maintain Count II.

Bond Authorization Ordinance, like the Bond Intent Ordinance, does not actually provide for the issuance of any bonds. The Bond Authorization Ordinance is clear that bonds will only be issued in the event lending forms and other required documents are executed. (Ex. to Plaintiffs' Response).

Second, and more importantly, the Bond Authorization Ordinance does not authorize the use of any taxpayer funds. Rather, the Bond Authorization Ordinance provides in relevant part as follows:

> **Section 4. Security for the Funding Loan Agreement and Notes.** The obligations of the City under the Funding Loan Agreement and the Notes shall be limited obligations of the City, payable solely from and/or secured by a pledge of certain revenues and property described in the Funding Loan Agreement. * * *
>
> * * *
>
> **Section 7. Limited Obligations**. The Notes, when issued and outstanding, will be limited obligations of the City, payable solely as provided in the Funding Loan Agreement. The Notes and the interest thereon shall never constitute a debt or general obligation or a pledge of the faith, the credit or the taxing power of the City within the meaning of any Constitutional or statutory provision of the State of Illinois. The Notes shall be payable solely from the funds pledged therefor pursuant to the terms of Funding Loan Agreement herein described.

(Ex. to Plaintiffs' Response).

The Form of Funding Loan Agreement, which is incorporated into the Bond Authorization Ordinance and is an exhibit thereof, provides in relevant part:

> **Section 5.1. Source of Payment of Governmental Lender Notes and Other Obligations; Disclaimer of General Liability.**
>
> Each Governmental Lender Note, together with premium, if any, and interest thereon, are special, limited obligations of the Governmental Lender payable solely from the security pledged hereunder. Each Governmental Lender Note is not a general obligation of the Governmental Lender or a charge against its general credit or the general credit taxing powers of the State, the Governmental Lender, or any other political subdivision thereof, and shall never give rise to any pecuniary liability of the Governmental Lender, and neither the Governmental Lender, the State nor any other political subdivision thereof shall be liable for the payments of principal of, and premium, if any, and interest on the Governmental Lender Notes, and each Governmental Lender Note is payable from no other source, but is a special, limited obligation of the Governmental Lender payable solely out of the security pledged hereunder and receipts of the Governmental Lender derived pursuant to this Funding Loan Agreement. No holder of the Governmental Lender Notes or any interest therein has the right to compel any exercise of the taxing

power of the State, the Governmental Lender or any political subdivision thereof to pay the Governmental Lender Notes or the interest or the premium, if any, thereon.

(Reply, Ex. 1).

The same rules of construction apply to ordinances and statutes. Szewczwk v. Board of Fire & Police Commissioners of the Village of Richmond, 381 Ill. App. 3d 159, 164 (2d Dist. 2008); Chicago Title & Trust, Co. v. Village of Inverness, 315 Ill. App. 3d 1100, 1105 (1st Dist. 2000). "[T]he primary objective . . . in construing the meaning of a statute is to ascertain and give effect to the intention of the legislature." In re Detention of Lieberman, 201 Ill. 2d 300, 307 (2002). "All other rules of statutory construction are subordinate to this cardinal principle. Id. "When the language of a statute is clear and unambiguous, a court must give effect to the plain and ordinary meaning of the language without resort to other tools of statutory construction." Raintree Homes, Inc. v. Village of Long Grove, 209 Ill. 2d 248, 255 (2004).

The clear and unambiguous language of the Bond Authorization Ordinance establishes that no taxpayer funds will be used to repay the bonds. Rather, any bonds issued under the Bond Authorization Ordinance will be repaid solely from the security pledged under the Funding Loan Agreement and the receipts the City derives from that Agreement. The Bond Authorization Ordinance and the incorporated Funding Loan Agreement are clear that no tax money will be used to repay any issued bonds and that no holder of issued bonds can compel the City to use its taxing power to pay any amount, whether principal, premium or interest, on any bonds issued.

Because the Bond Authorization Ordinance does not allow for any use of taxpayer monies to repay any issued bonds, Plaintiffs cannot establish the existence of taxpayer standing as a matter of law. Therefore, Plaintiffs' request to amend Count II is denied, as the offered amendment will not cure their lack of standing.

2. Whether the Bond Intent Ordinance or the Bond Authorization Ordinance Violate the Public Funds Clause or Plaintiffs' Due Process Rights (§2-615)

Count II alleges that the Bond Intent Ordinance violates Plaintiffs' substantive due process rights and violates Article VIII, §1 of the Illinois Constitution which provides that "[p]ublic funds, property or credit shall be used only for public purposes." Illinois Const. Art. VIII, §1(a) ("Public Funds Clause").

Initially, the Bond Intent Ordinance and the Bond Authorization Ordinance do not violate Plaintiffs' due process rights. The purpose of the Bond Intent Ordinance and the Bond Authorization Ordinance is to pave the way for the financing of the planned development approved by the PD Ordinance.

As explained above, the provision of affordable housing for low and moderate income for City residents and the encouragement of public transit use, and increasing access to such use, are legitimate governmental interests and the planned development is rationally related to those legitimate governmental interests. The Bond Intent Ordinance and the Bond Authorization

Ordinance enable the financing of the planned development and, therefore, are rationally related to a legitimate governmental interest.

While the court can easily conceive of a legitimate rational basis for the Bond Ordinances, the ordinances themselves expressly set forth a rational basis. The Bond Intent Ordinance expressly finds that **"there exists within the City a serious shortage of decent, safe and sanitary rental housing available for persons of low and moderate income,"** and that "the City has determined that **the continuance of a shortage of affordable rental housing is harmful to the health, prosperity, economic stability and general welfare of the City."** (Exhibit to Plaintiffs' Complaint) (emphasis added). Similarly, the Bond Authorization Ordinance expressly finds that "the City has determined that the continuance of a shortage of affordable rental housing is harmful to the health, prosperity, economic stability and general welfare of the City. . . ." (Exhibit to Plaintiffs' Response). The Bond Authorization Ordinance further finds that it is in the City's interest to enact the Bond Authorization Ordinance to enable Bickerdike to construct affordable housing units. (Id.).

Plaintiffs cannot establish the lack of a rational basis for the Bond Ordinances as a matter of law. Therefore, their due process claim in Count II fails and cannot be cured by amendment.

Nor do the Bond Ordinances violate the Public Funds Clause. To establish unconstitutionality under the Public Funds Clause, a plaintiff must allege facts "indicating that governmental action has been taken which directly benefits a private interest without a corresponding public benefit." Wirtz v. Quinn, 2011 IL 111903, ¶78 (internal citations omitted). Where an ordinance expressly finds that the funding provided for in the ordinance is in the interests of the City and its residents, the court must defer to those findings unless facts are alleged showing that "the findings are evasive" and that the ordinance "directly benefits a private interest without corresponding public benefit." Independent Voters of Ill. Indep. Precinct Org. v. Ahmad, 2014 IL App (1st) 123629, ¶41. The Illinois Supreme Court "has recognized that '[t]he execution of a public purpose which involves the expenditure of money is usually attended with private benefits.'" Wirtz v. Quinn, 2011 IL 111903, ¶79 (internal citation omitted). Such a private benefit will not defeat the enactment if its primary purpose is public. Id.

Plaintiffs do not allege any specific facts showing the City's findings are evasive and that the Bond Intent Ordinance directly benefits Bickerdike without any corresponding public benefit. Nor could Plaintiffs ever allege such facts. The PD Ordinance and the Bond Intent Ordinance clearly show a public benefit to the City's residents in the form of providing for the construction of new affordable housing. The provision of affordable public housing has long been held to constitute a proper purpose for the expenditure of public funds. See, e.g., Cremer v. Public Hous. Auth., 399 Ill. 579, 589 (1948).[4] Any argument to the contrary fails as a matter of law.

[4] Plaintiffs seem to suggest that this court should ignore the actual provisions of the ordinances being challenged by Plaintiffs and instead accept Plaintiffs' conclusory allegations as true. Illinois law is clear, however, that exhibits are part of a complaint and control over contradictory allegations of the complaint. McCready v. Illinois Sec. of State, 382 Ill. App. 3d 789, 794 (3d Dist. 2008).

Furthermore, allowing Plaintiffs leave to amend to challenge the Bond Authorization Ordinance will not cure the defects of Count II. Like the Bond Intent Ordinance, the Bond Authorization Ordinance provides for the public benefit of enabling the construction of affordable housing. That Bickerdike will also obtain a benefit does not erase the benefit to the public or render the Bond Authorization Ordinance unconstitutional under the Public Funds Clause.

Plaintiffs cannot establish that the Bond Intent Ordinance or the Bond Authorization Ordinance violate the Public Funds Clause. Therefore, Count II is dismissed with prejudice.

III. Conclusion

Defendants' Motions to Dismiss is granted. Count I of the Complaint is dismissed with prejudice pursuant to §2-619 and §2-615. Count II of the Complaint is dismissed with prejudice pursuant to §2-619 and §2-615. This order is final and appealable.

The status date of June 26, 2020 is stricken.

Enter: 6-16-20

Judge Neil H. Cohen