IN THE CIRCUIT COURT OF THE TWELFTH JUDICIAL CIRCUIT
WILL COUNTY, ILLINOIS

STOP NORTHPOINT, LLC, *et al,*	)	
	)	
Plaintiffs,	)	
	)	
v.	)	No. 20 CH 739
	)	
CITY OF JOLIET, *et al.*,	)	
	)	
Defendants.	)	

PLAINTIFFS' RESPONSE IN OPPOSITION TO DEFENDANTS' JOINT MOTION TO DISMISS SECOND AMENDED COMPLAINT

Plaintiffs, by their attorneys, submit the following response in opposition to Defendants' joint motion to dismiss Plaintiffs' Second Amended Complaint ("SAC").

I. NATURE OF THE ACTION

This action seeks to stop and enjoin the construction of a massive Trucking Terminal and in that way prevent catastrophic personal and environmental consequences to the named Plaintiffs and the community. The proposed Development is gargantuan in size, approximately 4.5 times the size of Midway Airport, and is expected to generate truck traffic of more than 10,000 semi-tractor trailers a day.

II. FACTS

The Plaintiffs

There are 57 named Plaintiffs. Plaintiff Stop Northpoint, LLC was formed as a grass roots movement to preserve and protect Will County area residents and neighbors from the catastrophic consequences of allowing the Development proposed by Defendants (SAC, ¶ 1). Many of the other Plaintiffs are decorated military members who have loved ones interred in the Abraham Lincoln National Cemetery (*Id*., ¶¶ 2, 7, 11, 12, 15-20, 22-23, 27, 31, 38, 40-49). For example, Plaintiff Attilio Micci is a World War II veteran who survived 25 missions on a B-17 Flying Fortress and

is a member of the Joliet Stone City Veterans of Foreign Wars Post 2199 (*Id*., ¶ 7). Mr. Micci's wife is interred in the Abraham Lincoln National Cemetery which he regularly visits to pray, meditate, and commune with his wife. Plaintiff Micci avers that the Development "will interfere with the dignity serenity and quiet that are expected while paying our respects to our loved ones." (*Id*). Plaintiffs include local veteran organizations who strongly oppose Northpoint's colossal proposed Trucking Terminal that will forever change the landscape of this and surrounding communities.

The Plaintiffs include residents who own property adjacent to the Development. For example, Kathleen Kirby owns property in Jackson Township and has owned a business in Manhattan for over 25-years (*Id*., ¶ 25). Ms. Kirby's property is in the watershed of Jackson Creek, which will be adjacent to the footprint of the Development (*Id*). The SAC sets forth in detail how each of the Plaintiffs will be directly impacted by the Development (*Id*., ¶¶ 2-50). For example, Kathleen Kirby alleges:

> This property will be impacted by the overflow truck traffic caused by the proposed industrial park. Plaintiff Kathleen A. Kirby will be injured, *inter alia*, by the construction of the industrial park in that there will be a substantial and considerable increase in semi-tractor trailer truck traffic, a substantial and considerable increase in non-semi-tractor trailer truck traffic including automobiles and other trucks, a concurrent increase in environmental noise, vibration and environmental pollution, in the form of smoke, fumes, soot and light, a decrease in the value of her property, an increase in traffic congestion by semi-tractor trailer truck traffic, an increase of safety hazards caused by the increased semi-tractor trailer truck traffic. This impact will not only hurt her personal property, but also impact her ability to drive to her business along impacted roads and will impact her business in Manhattan.

(*Id*.).

Plaintiffs Robert Hauert and Angel Hauert own property that is contiguous to the Development (*Id*., ¶ 5). They allege how they and their teenage children will be directly and adversely impacted by the Trucking Terminal (*Id*).

The Development

On December 15, 2020, the City of Joliet approved an annexation and development agreement ("Agreement") with Defendant EastGate Logistics Park Chicago, LLC ("EastGate") for the approval of the annexation of 1,257 acres of unincorporated land into the City of Joliet ("Subject Property"). (SAC, ¶ 57). EastGate intends to construct and operate an industrial park/freight terminal with warehouses on the Subject Property ("Trucking Terminal" or "Development"). (*Id*. ¶ 58).

The Trucking Terminal is huge in size and scope (*Id*. ¶ 70). If permitted to proceed, the Trucking Terminal will be one of the largest of its kind, approximately 4.5 times the size of Midway Airport (*Id*). A 2020 traffic impact study from Strand Associates commissioned by the Village of Manhattan indicates that at full build-out, the development will generate an additional 10,370 trucks per day (*Id*. ¶ 82). Semi-tractor trailer truck traffic on Walter Strawn Drive is expected to increase by at least 3,000 to 5,000 semi-trailer trucks per day as a result of the development (*Id*). The development is also expected to result in an increase of thousands of non-semi-trailer truck traffic per day as a result of the development further adding to the current traffic woes and congestion in the region (*Id*).

The Development is to be located between the Villages of Elwood and Manhattan spanning from approximately Route 53 in Elwood east to Cherry Hill Road in Manhattan and from Breen Road south to Hoff Road (*Id*. ¶ 71). At Hoff Road, the Development would adjoin Midewin National Tallgrass Prairie, a National Prairie reserve with a fragile ecosystem (*Id*. ¶ 72). The Development would consist primarily of warehouses where trucks would move goods to and from the distribution center to their destination (*Id*. ¶ 73). The Trucking Terminal would have no on-site railroad access; it would obtain rail access by transporting goods, via truck, from the warehousing development to the CenterPoint Intermodal Center ("CenterPoint"), a 6,400-acre

intermodal complex adjacent to the I-55/I-80 interchange (*Id.* ¶¶ 73, 75). In order for trucks to move goods from the Development to CenterPoint, the plans call for the construction of a bridge over Route 53 on Walter Strawn Drive (*Id*. ¶ 76).

The Agreement specifically requires that EastGate construct a bridge over Route 53 at Walter Strawn Drive (*Id*. ¶ 77, Exhibit 1, § 3(A)). NorthPoint has repeatedly and falsely represented that the bridge will reduce current traffic congestion (*Id*.). NorthPoint has not received permission from the Illinois Commerce Commission to construct this bridge and Elwood opposes its construction (*Id*.). The Interstate Highways that would be feeding truck traffic to the proposed development are Interstates 57, 80 and 55 (*Id*. ¶ 78). None of these interstates are near the proposed development site (*Id*.). There are no closed traffic loops connecting these interstate highways with the proposed development (*Id*).

Trucks exiting off of I-80 and I-55 would be required to travel approximately nine (9) miles to reach the Trucking Terminal using Elwood's and Manhattan's local roads (*Id*. ¶ 79). The Development would result in increased traffic congestion and backups on these already overly congested roads that were never designed to handle the weight and volume of truck traffic that would be caused by the development (*Id*.). Truck traffic traveling to and from the Trucking Terminal will have to traverse roads that are not built to support heavy weight trucks (*Id*. ¶ 80). The heavy increased volume of semi-truck and other traffic would severely damage local roadways and burden taxpayers with increased maintenance and road repair costs (*Id*.).

In order to handle the increased volume of semi-trucks along with increased traffic from employees and visitors to the site, local roads would have to be widened at taxpayer expense (*Id*. ¶ 81). Traffic control signals and other intersection improvements would also have to be constructed and installed at taxpayer expense (*Id*.).

The proposed bridge on Walter Strawn Drive is immediately adjacent to the Abraham Lincoln National Cemetery ("Cemetery"). (*Id*. ¶ 83). The Cemetery serves over 412,000 Veterans and family members (*Id*). From 1999 to present, it has become the resting place for over 58,000 Veterans and their family members (*Id*). On August 27, 2020, the Department of Veterans Affairs, National Cemetery Administration, sent a letter to the Village of Elwood outlining the Department's concerns about the planned bridge (*Id*. ¶ 84; SAC, Exhibit 2). The National Cemetery Administration "is highly concerned" that the planned bridge will have substantial adverse impacts to the National Cemetery and its customers, including:

> a. The daily 3,000 to 5,000 increase in the East-West semi-trailer truck traffic on Walter Strawn Drive will substantially increase the daily risk of trucks that try to illegally come through the Cemetery's back gate entrance at Walter Strawn Drive and Diagonal Road intersection. Based on past experience and data, the VA is concerned that truck drivers will view the cemetery gates as a shortcut in back of Route 53.
>
> b. The bridge will create confusion to truckers trying to reach the business park to drive through the Cemetery on Hoff and Diagonal Roads. This situation already occurs on a regular basis.
>
> c. The Cemetery is in the design phase of a major expansion project that includes a secondary cemetery exit onto Walter Strawn Drive. The 3,000-5,000 plus trucks daily could result in substantially increased traffic safety risks for the many elderly visitors exiting westbound onto Walter Strawn Drive.
>
> d. The proposed truck turnaround on VA-owned property along Hoff Road near the front entrance of the Cemetery substantially increasing unwanted truck interactions with daily Cemetery visitor vehicle traffic and further exacerbate unwanted traffic congestion and safety issues between Cemetery visitor vehicles and trucks; and,
>
> e. The 3,000 to 5,000 plus daily increase of trucks on Walter Strawn Drive will substantially increase environmental background truck traffic noise within the Cemetery thereby adversely impacting the visitor experience and the ability for visitors to partake in peaceful reflection within the solemn grounds of the national shrine facility.

(*Id*.).

The Department of Veteran's Affairs, National Cemetery Administration objects to the construction of the turnaround on National Cemetery land (*Id*., ¶ 85). Trucks have not only illegally traveled over Cemetery land, they have run over graves and toppled cemetery headstones and markers, in utter disrespect for the heroes interred therein (*Id*., ¶ 86). Attached to the SAC are police reports and photos showing some of the impact, disruption, and damage that trucks have caused to the National Cemetery (*Id*.).

The increased truck traffic will also have a severe and deleterious effect on the transportation of children to school, either by bus or by car (*Id*., ¶ 87). The Agreement and the resulting annexation will require the expenditure of public funds including, *inter alia*, monies for police, fire, water, sewer, roads, maintenance, public works, etc. (*Id*., ¶ 88). The 3,000 to 5,000 daily increase in truck traffic on Walter Strawn Drive will substantially increase environmental noise, environmental pollution in the form of smoke, fumes, and soot (*Id*., ¶¶ 89-90). The increase in truck traffic on Walter Strawn Drive is not conducive to the peaceful reflection that Plaintiffs expect when they visit their deceased loved ones at the National Cemetery (*Id*., ¶ 91).

The Agreement, specifically the proposed rezoning of the annexed land and the granting of special use permit to EastGate, will substantially, directly, and adversely affect Plaintiffs in that it will increase their property and local taxes; decrease property values; increase traffic congestion by semi-truck traffic; increase safety hazards caused by increased semi-truck traffic; substantially increase sound levels; cause substantial vibrations; substantially increase light pollution through the use of directional lighting and other lighting devices; cause dust, smoke, vibration and noise produced by the thousands of additional trucks each day; and, substantially increase environmental pollution, in the form of smoke, fumes and soot (*Id*., ¶ 92(a)-(i)).

Because of the Development, the communities and municipalities surrounding Joliet will have to expend public funds to provide water and sewer infrastructure for the Development. (*Id*., ¶ 93). Joliet and surrounding communities are already facing water shortage issues, and the Development will add to these issues and concerns and place the burden on taxpayers (*Id*.). Further, due to its location, it will be impossible or extremely expensive for Joliet to pay for the infrastructure to provide water and sewer to the Development. As a result, the Defendants would place this burden on Elwood, Manhattan and surrounding communities by default. This is not right.

The Development will also have a negative and potentially devasting impact on Midewin National Tallgrass Prairie (*Id*., ¶¶ 168-171). Midewin is a 19,000-acre tallgrass prairie reserve and United States National Grassland located between the towns of Elwood, Manhattan, and Wilmington (*Id*., ¶ 168). It is one of only three national green spaces in Illinois and the only national grassland east of the Mississippi River (*Id*.). Midewin is the largest conservation site in the Chicago Wilderness region, the largest public land in the Chicago area, and includes diverse habitats, including some types that are imperiled globally, required by numerous sensitive or endangered species, particularly those that require wide open spaces (*Id*., ¶ 169). Midewin grasslands, while widely known for hosting a reintroduced herd of American bison, also supports one of the largest populations of upland sandpiper in Illinois and provide refuge for other grassland bird species whose numbers are in perilous decline across the Midwest (*Id*., ¶ 170). Within the northwestern corner of Midewin is the Drummond Dolomite Prairie, a rare occurrence of thin soils over a bedrock, rich in magnesium, which supports a wide range of species and is considered some of the most ecologically important land in the world, with only hundreds of acres of such land known to exist (*Id*).

The proposed development, if permitted to proceed, will have a negative and potentially devastating impact on Midewin.

III. COUNTS I AND II STATE COGNIZABLE PRIVATE AND PUBLIC NUISANCE CLAIMS

Defendants disregard the standards for a motion to dismiss under Section 2-615 and the well pled facts alleged in the SAC in arguing for the dismissal of Plaintiffs' public and private nuisance claims (Motion, pp. 3-7). A Section 2-615 motion to dismiss challenges the legal sufficiency of a complaint based on defects appearing on the face of the complaint. *Wakulich v. Mraz,* 203 Ill.2d 223, 228 (2003). It presents the question of whether the facts alleged in the complaint, viewed in the light most favorable to the plaintiff, and all reasonable inferences that may be drawn as true, are sufficient to state a cause of action upon which relief can be granted. *Jane Doe-3 v. McLean Cty. Unit Dist. No. 5 Bd. of Directors*, 2012 IL 112479, ¶ 16; *Reynolds v. Jimmy John's Enterprises, LLC,* 2013 IL App (4th) 120139, ¶ 25; *Marshall* v. *Burger King Corporation*, 222 Ill.2d 422, 429 (2006); *Douglas Theatre Co. v. Chicago Title & Trust Co.*, 288 Ill.App.3d 880, 882 (1st Dist. 1997); *Vernon v. Schuster*, 179 Ill.2d 338, 344 (1997).

A court must not dismiss a complaint pursuant to section 2–615 unless no set of facts can be proved which would entitle the plaintiff to recovery. *Jane Doe-3*, 2012 IL 112479, at ¶ 16. A complaint is sufficient if the allegations contained therein "reasonably inform the defendants by factually setting forth the elements necessary to state a cause of action." *People ex rel. Scott v. College Hills Corp.*, 91 Ill.2d 138, 145 (1982). A plaintiff need not set out its evidence in the complaint. *Landers-Scelfo v. Corp. Office Systems, Inc.*, 356 Ill.App.3d 1060, 1065 (2nd Dist. 2005). Only the ultimate facts to be proved should be alleged and not the evidentiary facts tending to prove such ultimate facts. *People ex rel. Fahner v. Carriage Way W., Inc.*, 88 Ill.2d 300, 308 (1981).

Whether the complained-of activity constitutes a nuisance is generally a question of fact. *Dobbs v. Wiggins*, 401 Ill.App.3d 367, 376 (5th Dist. 2010); *Pasulka v. Koob*, 170 Ill.App.3d 191, 209 (3rd Dist. 1988). A sufficient pleading in a public nuisance cause of action will allege a right common to the general public, the transgression of that right by the defendant, and resulting injury. *City of Chicago v. Beretta U.S.A. Corp.*, 213 Ill. 2d 351, 369 (2004). The elements of a public nuisance claim are the existence of a public right, a substantial and unreasonable interference with that right by the defendant, proximate cause, and injury. *Id*. A public nuisance includes the doing of or the failure to do something that injuriously affects the safety, health or morals of the public, or works some substantial annoyance, inconvenience or injury to the public. *Beretta*, 213 Ill.2d at 370; *Village of Wilsonville v. SCA Services, Inc.*, 86 Ill.2d 1, 21–22 (1981).

A private nuisance is a substantial invasion of another's interest in the use and enjoyment of his or her land. *Dobbs v. Wiggins*, 401 Ill.App.3d 367, 375 (5th Dist. 2010). In determining whether particular conduct constitutes a nuisance, the standard is the conduct's effect on a reasonable person. *In re Chicago Flood Litigation,* 176 Ill.2d 179, 204 (1997). The nuisance must be physically offensive to the senses to the extent that it makes life uncomfortable. *In re Chicago Flood Litigation*, 176 Ill.2d at 205; *Dobbs*, 401 Ill.App.3d at 375-76. An invasion constituting a nuisance can include noise, smoke, vibration, dust, fumes, and odors produced on the defendant's land and impairing the use and enjoyment of neighboring land. *Id*.

The SAC contains compelling facts to support public and private nuisance claims. Defendants' argument that some degree of inconvenience or unpleasantness is inevitable in an industrialized society misses the point. First, asking the Court to weigh this question of fact removes the issue from a 2-615 motion. The Defendants could not prevail on this, even at summary judgment, as it is a disputed question of material fact. Second, this case represents much more than

mere inconvenience or unpleasantness. The Development represents a substantial and unreasonable interference with rights common to the general public. The Trucking Terminal is injurious to the health, safety and welfare of area residents. The Development represents a substantial invasion of Plaintiffs' interest in the use and enjoyment of their land. In a 24-hour day, 10,000 additional tractor trailer trucks equate to 417 trucks per hour; 7 trucks per minute; one truck every nine seconds.

Plaintiffs detail the negative consequences this Development will have on the Community including constant noise and vibrations from the thousands of trucks; significant risks of accidents endangering the safety, welfare and lives of pedestrians, bicyclists and drivers, air and water pollution, damage to roads, threats to the region's water supply, decrease in property values, damage to the ecosystem and damage and interference to the Abraham Lincoln National Cemetery. Under Section 2-615, the Court and the Defendants must accept these facts as true. Based on the facts pled in the SAC this is no ordinary development as the Defendants would like this Court to believe.

Gribben v. Interstate Motor Freight System Co., 18 Ill.App.2d 96 (1st Dist. 1958) is on-point and requires the denial of Defendants' motion to dismiss. There, the Appellate Court reversed the trial court's grant of summary judgment holding that the allegations of the complaint to enjoin the construction of trucking terminal stated a nuisance claim and raised genuine issues of material fact precluding summary judgment. (*Id*. at 104-05).

Like the Plaintiffs in this case, the plaintiffs in *Gribben* alleged that a trucking terminal would alter the character of the neighborhood, endanger the lives of residents and their children, encumber the community with a constant procession of semitrucks, physically deteriorate and destroy the property owned by plaintiffs, cause constant noise and vibrations, render the occupancy

of plaintiffs' homes unbearable, unhealthy and untenable, and that the exhaust fumes from the trucks using the terminal would pollute the atmosphere with noxious fumes. The court found these allegations sufficient to sustain a nuisance claim (*Id*. at 104).

The allegations in *Gribben* are closely analogous to this case. Here, Plaintiffs allege that the Trucking Terminal would forever alter and change the character and landscape of the neighborhood and region (SAC, ¶ 173). In order to enter and exit the Trucking Terminal, trucks will have to traverse streets including residential areas bringing with it excessive traffic, congestion, noise, vibration and pollution (*Id*.).

Plaintiffs' nuisance claims are also supported by *Woods v. Khan,* 95 Ill.App.3d 1087 (5th Dist. 1981), where the plaintiffs brought a private nuisance claim to enjoin the defendants' poultry business. The neighborhood was zoned agricultural, and many of the plaintiffs raised livestock on their own property (*Id*. at 1088). The plaintiffs complained that the poultry facility resulted in bad odors and swarms of flies (*Id*. at 1089). The Appellate Court held "that the trial court properly determined that the odors and flies were sufficiently bothersome to justify injunctive relief." (*Id*., at 1090).

Similarly, *In re Bloomingdale Partners,* 160 B.R. 101 (Bankr. N.D. Ill. 1993), townhouse neighbors successfully brought a cognizable private nuisance claim by alleging that air conditioning units, generators, fans, and swimming pool dehumidifier located at an apartment complex emitted excessive noise. The court reiterated that mere noise can constitute a "substantial invasion" to support a private nuisance claim (*Id*. at 108). The court explained that Illinois follows the lenient definition of "intent" set forth in the Restatement (Second of Torts) namely that the offending landowner need not engage in the conduct for the purpose of creating the consequences; rather, it is enough that the offending landowner have knowledge that the invasion of another's

interest in use and enjoyment of land is resulting or is substantially certain to result (*Id*. at 108-09); *see also, Dobbs v. Wiggins*, 401 Ill. App. 3d 367, 377 (5th Dist. 2010) ("An intentional invasion occurs when the defendant knows that an invasion of another's interest in the use or enjoyment of his or her land is resulting or is substantially certain to result).

Counts I and II sufficiently allege public and private nuisance claims. Only by ignoring the specific factual allegations of the SAC can the Defendants advocate dismissal of these claims. Plaintiffs have the right to proceed to discovery on these claims and there is no basis for Defendants' motion to dismiss. Accordingly, the Court must deny the Defendants' motions to dismiss as to these Counts.

IV. COUNT III SUFFICIENTLY ALLEGES THAT THE ANNEXATION AGREEMENT IS NULL AND VOID, AND UNENFORCEABLE BASED ON VAGUENESS

The Annexation Agreement ("Agreement") between Joliet and EastGate is so uncertain and indefinite, that no contract was ever formed. While parties may intend to make a contract, if the content of the agreement is unduly uncertain and indefinite, no contract is formed. *Acad. Chicago Publishers v. Cheever*, 144 Ill.2d 24, 29 (1991). If the essential terms are so uncertain that there is no basis for deciding whether the agreement has been kept or broken, there is no contract (*Id*. at 30). "A contract must be definite and certain in its conditions and courts will not supply missing terms so as to infuse a contract with the requisite certainty." *McCutcheon v. Chicago Principals Ass'n*, 159 Ill.App.3d 955, 959 (1st Dist. 1987).

Plaintiffs allege and demonstrate that the Annexation Agreement is unduly uncertain and indefinite such that no contract was ever formed (SAC, ¶ 209). The SAC lays out in detail why the Agreement is unduly uncertain and indefinite (SAC, ¶¶ 208-234). The proposed bridge over the Union Pacific Railroad and Route 53 is an integral and essential part of the Agreement (SAC, ¶¶ 210-211). The Agreement provides:

> Developer shall construct a bridge over the Union Pacific Railroad and Illinois Route 53 in the location of Walter Strawn Drive and Ira Morgan Street, including all necessary improvements and modifications (the "Bridge") to provide safe and restricted access for tractor-trailer traffic to and from the Property without allowing any use of Illinois Route 53 by such tractor-trailers. ***If the approvals necessary to construct the Bridge are not secured in a reasonable timeframe the Parties shall mutually agree to an alternate location for tractor-trailer traffic to access the Property.*** Any mutually agreed upon location would require a bridge over Illinois Route 53 to provide safe and restricted access for tractor-trailer traffic to the Property without allowing any use of Illinois Route 53 by such tractor-trailers.

(SAC, ¶ 210; Agreement, SAC Exhibit 1, § 3(A)).

The Agreement provides that "development of the business park… is specifically designed to provide access to the intermodal facilities and to keep truck traffic off Route 53 and other local roads." (SAC, ¶ 211; Annexation Agreement, p. 1). Without the bridge over Route 53, it would be impossible to provide access to the intermodal facilities and to keep truck traffic off of Route 53 and other local roads (SAC, ¶ 211). Northpoint's so-called "closed loop truck network" is not possible without the bridge over Route 53 (*Id*. ¶ 212). Northpoint is currently prohibited from constructing the bridge at Walter Strawn Drive based on the Village of Elwood's opposition to the bridge (*Id*. ¶ 213). The existing prohibitions make fulfilment of the contract terms impossible and make the contract unenforceable (*Id*).

The provision that "[i]f the approvals necessary … are not secured in a ***reasonable timeframe*** the Parties shall mutually agree to an ***alternate location***…" is vague and indefinite thereby making it impossible to determine whether the agreement has been kept or broken (*Id*., ¶ 214). "A reasonable timeframe" is not defined under the Agreement nor are any "alternate locations" set forth in the Annexation Agreement (*Id*.). At the "public" hearings, Northpoint refused to disclose any alternate locations for the bridge (*Id*.).

The fact that there are no alternate locations provided for in the Agreement, itself, makes the Agreement unenforceable. The public has no clue where this alternate location might lie for it

is at the whim of Joliet and Eastgate, provided they can agree on a location. The community has no idea if this alternate location is next to a school, church, or a residential area. It is unknown what local roads will be utilized or whether such roads can even support heavy semitrucks. Not knowing where this location lies makes it impossible to evaluate the environmental impact the Development will have and the impact the Trucking Terminal will have on the health, safety and welfare of area residents, as well the impact on traffic.

Some of the most troublesome provisions are found in § 9(A) and § 9(B) where, because of the vague and indefinite terms, it is impossible to assess the impact to taxpayers. These provisions provide:

> The Developer ***may also be required*** to provide easements and/or dedicated property ***in mutually agreeable locations where future infrastructure may be needed or where the City of Joliet needs to construct infrastructure***, subject to the limitations of acreage referred to elsewhere in this Agreement.
>
> ***If the City requires*** that Developer construct additional amounts or increased capacities of streets, culverts, bridges, sewers, lift stations, water towers, wells, water treatment facilities, or water mains than would otherwise be required to serve the Property then Developer and the City ***shall enter into appropriate recapture agreements***.

(SAC, ¶ 215, ¶ 217; Agreement, §§ 9(A) and 9(B).

The Agreement contemplates future costs and expenditures associated with "future infrastructure" and the construction of "additional amounts" or "increased capacities" of streets, culverts, bridges, sewers, lift stations, water towers, wells, water treatment facilities and water mains. Pure guesswork is required to determine the potential costs for these items which could total billions of dollars. Bridges, water treatment facilities, wells, water mains and streets are not cheap, and there is nothing in the Agreement to ensure that taxpayers are not left holding the bag for these costs. The issuance of bonds and higher taxes are on the horizon. §§ 9(A) and 9(B) are as vague as vague can be.

Section 12(C) of the Agreement reads: "Traffic Signal locations within the Property shall be determined by the Traffic Impact Study and shall be the responsibility of the Developer." (SAC, ¶ 221). A "Traffic Impact Study" is not attached to the Agreement and no meaningful traffic impact study can be performed without knowing the location of the bridge and Eastgate's proposed closed loop. All that is known about this phantom "Traffic Impact Study" is that it is to be prepared and submitted by Eastgate and reviewed and approved by the City (*Id*.). To make matters even more confusing, the Agreement provides that the "initial Traffic Impact Study and all updates to the Traffic Impact Study shall be considered the Traffic Impact Study for purposes of this Agreement." (*Id*.). It unknown from the Agreement whether a Traffic Impact Study even exists. Joliet failed to produce a copy pursuant to Freedom of Information requests (*Id*.).

These are just some of the vague and indefinite provisions that make the Agreement unenforceable. It would be impossible for a court to determine whether any party is in breach of the Agreement or for a court to enforce the terms of the Agreement. Defendants offer no basis for the Court to dismiss Count III.

Finally, the Court must reject Defendants' standing argument under section 2-619 contending that only a party to an agreement can claim that an agreement is unenforceable (MTD, pp. 8, 20-21). Taxpayers have an equitable right to sue to protect their interests in public funds. *Feen v. Ray*, 109 Ill.2d 339, 344 (1985); *Egidi v. Town of Libertyville*, 218 Ill.App.3d 596, 601 (2nd Dist. 1991). Relief in taxpayers' suits is generally injunctive or prospective in nature, which is what is being sought in this case. *Egidi*, 218 Ill.App.3d at 606.

Under the "public trust doctrine", taxpayers have an equitable interest in public property and therefore have standing to bring a common-law action when public property is allegedly being disposed of illegally. *Paepcke v. Public Building Comm'n of Chicago*, 46 Ill.2d 330, 341 (1970);

see also, Martini v. Netsch, 272 Ill.App.3d 693, 696 (1st Dist. 1995) ("Taxpayers are allowed to maintain suits to enjoin the misappropriation of public money on the theory that their property rights in the public treasury would be violated by the unlawful expenditure of public funds.").

In this case, numerous Plaintiffs are Joliet taxpayers including Plaintiffs Micci, Orlando, Hoechbauer, Vallrugo, Vanek, Evans, Sheridan and Cocielko (SAC, ¶¶ 7, 9, 11, 22, 26, 28, 29, 41). This lawsuit seeks *inter alia* to enjoin the improper expenditure of public funds related to this Development. If the Trucking Terminal is permitted to proceed, public funds will be expended including monies for police, fire, roads, sewers, water, traffic signals and other infrastructure. The Plaintiffs are not suing just for their own personal gain but also for the benefit of taxpayers and the community at large. Plaintiffs clearly have standing to challenge the enforceability of the Agreement on behalf of taxpayers.

Defendants' reliance on *White Hen Pantry, Inc. v. Cha*, 214 Ill.App.3d 627 (1st Dist. 1991) is misguided and lends no support to their standing argument. *Cha* involved a private dispute and did not involve a public body or the expenditure of public funds. Even so, the case lends support to the Plaintiffs. The Appellate Court noted that a plaintiff must typically allege a direct injury to his/her rights (*Id*., at 635). The Court also noted that a third-party beneficiary may sue on a contract for his/her benefit (*Id*.). Here, the Plaintiffs have alleged directed injuries to their rights.

Lack of standing is an affirmative defense, and the burden of proving the defense rests on the party asserting it. *Lebron v. Gottlieb Mem. Hosp.*, 237 Ill.2d 217, 252 (2010). Defendants have not sustained their burden. In addition to the public trust doctrine, which confers standing, Plaintiffs have standing in that they allege direct injuries to their rights, and they have standing as third party beneficiaries. Without exposing itself to charges of corruption, Joliet cannot maintain that it entered into the Agreement for the benefit of Eastgate/Northpoint. We trust that Joliet

officials will not claim that they entered into the Agreement for their own personal gain. It follows that Joliet entered into the Agreement for the benefit of local residents. Thus, the Court must deny Defendants' motion to dismiss Count III.

V. COUNT IV SUFFICIENTLY ALLEGES A LACK OF CONTIGUITY MAKING THE ANNEXATION UNENFORCEABLE AND UNLAWFUL

The Complaint shows that contiguity between the northern and southern portions of the land sought to be annexed is, as a *prima facie* matter, are not legally contiguous. Defendants admit the lack of contiguity but dismiss its relevance and importance. The Agreement which was approved by Joliet describes a 1,360 acre parcel of land for annexation and zoning to special use purposes. The southern portion, however, is illusory and is included only to confuse and distract. With regard to annexation and zoning, the context and extent are crucial to any meaningful consideration of such legislative action. By knowingly including a significant portion of property that could not be annexed, and was therefore illusory, Joliet confused and misled the public regarding the Agreement.

The purpose and motives of the illusion have not yet fully manifested. It appears, however, that the southern portion was included to provide the illusion that a traffic loop and a bridge would in fact be built, while in reality the plan is to reroute traffic within the contiguous northern portion of the annexed property when the bridge is abandoned. Importantly, the illusion undermines the enforceability of the Agreement because the essential terms (i.e. a traffic loop requiring a bridge) of the Agreement are impossible to perform and was used to mislead the public as to what was really being planned and approved.

Only property that is contiguous at the time of the filing of the petition may be annexed. *People ex rel. St. Clair Cty. v. City of Belleville*, 84 Ill.2d 1, 11 (1981). The purpose of this requirement is to permit the natural and gradual extension of municipal boundaries to areas

which "adjoin one another in a reasonably substantial physical sense." (*Id*. at 12). "Contiguous" has been interpreted as "adjacent to and parallel to the existing municipal limits (*Id*. at 13). The contiguous requirement makes the delivery of services more convenient for the municipality and more efficient for their citizens (*Id*. at 12). Sewer lines, and fire, police and other services should not have to pass under or over lands not within municipal boundaries (*Id*).

Defendants offer no valid grounds for dismissal of Count IV and Plaintiffs are entitled to conduct discovery on whether the vast amount of land to be annexed is contiguous. The SAC alleges:

> At the center of the Property sought to be annexed, there is insufficient contact to satisfy the contiguity requirement under Illinois law. Specifically, that point can be described as the contact point between PIN 10-11-22-200-004 and PIN 10-11-14-300-001. Both parcels are rectangular and only touch at one corner. This is akin to a checkerboard where the black squares only touch another black square at the corner. The lots can also be described as "kitty corner" parcels.

(SAC, ¶ 237).

Such minimal contact is insufficient under Illinois law since practical considerations relating to the interconnection of public utilities, gas, electric, water and sewer systems cannot be accomplished with such minimal contact and that it is a physical impossibility to join such systems through such a minimal point of contact (*Id*. ¶ 238). Eastgate and Joliet are aware of the lack of contiguity having sought to resolve this contiguity problem by trying, unsuccessfully, to obtain permission and authority to include what is commonly referred to as the FAA property into the annexation (*Id*. ¶ 239). This makes performance by the parties to the Annexation Agreement impossible as a matter of law for any changes to the Agreement that would permit compliance (i.e. by adding land parcels to satisfy contiguity) would be deemed a new annexation agreement that would be subject to all rules and regulations and notices that governed the original agreement (*Id*. ¶ 241).

Defendants admit that "contiguity is essential for annexation" but argue that contiguity is not essential for an annexation agreement (Motion, p. 10). This lawsuit not only seeks to invalidate the Agreement, but it seeks a declaratory judgment that the Annexation of the Property is unlawful and invalid and an injunction enjoining the Defendants from proceeding with the Development. *See*, SAC, pp. 49, 52, 58, 59, 60, 61, 62, 65, 67 and 69.

Further, Defendants do not dispute that Eastgate's failure to acquire the FAA property means that there is a lack of contiguity (MTD, pp. 10-11). In fact, Defendants state that "[they] do not contend that the southern section is currently contiguous, which is why that part has not yet been annexed." (*Id*., p. 10). They contend that the "the only thing that matters is that it is contiguous at the time that it is annexed." (*Id*.).

Defendants' argument is a non-sequitur for it is acknowledged that the property must be contiguous before it can be annexed and that the Development fails without the annexation. It is the Defendants, not the Plaintiffs, who are putting the cart before the horse. Joliet held public hearings for the annexation of property that currently cannot be annexed. The Court must deny Defendants' motion to dismiss Count IV.

VI. COUNT V STATES A CAUSE OF ACTION BASED ON DEFICIENT NOTICE

At a minimum, questions of fact exist as to whether Joliet substantially complied with the notice requirements for its December 3rd, 10th, 15th and 16th public hearings. There is no merit to Defendants' argument that Joliet "substantially complied" with the notice requirements because the contradictory notices "correctly identified the place, time and location of the City Council meeting and identified Ordinances related to the Annexation Agreement." (Motion to Dismiss, p. 12). The numerous notice deficiencies set forth in the SAC do not evidence substantial compliance. The purported notices are at best confusing and fail to provide meaningful notice.

Defendants ignore the well pled allegations of the SAC and Joliet's contradictory notices. All well pleaded facts are accepted as true and the Court may not consider facts outside the four-corners of the complaint. *Advocate Health and Hosp. Corp. v. Bank One, N.A.*, 348 Ill.App.3d 755, 758 (1st Dist. 2004). The SAC sets forth in excruciating detail the gross deficiencies and inaccuracies with the notices. The Agreement states that a public hearing on zoning was held before the Joliet Plan Commission on December 3, 2020 and that a public hearing on the petitions for variation and the granting a special use permit was held before the Zoning Board of Appeals on December 10, 2020 (SAC, ¶¶ 95-96).

The Agreement falsely states that proper legal notice for the public hearings was published and that a hearing was held that in all manners conformed with law (*Id*., ¶ 97). The facts show otherwise. Joliet published a notice in the *Labor Record* dated November 12, 2020 ("November 12 Notice"), which was distributed on November 13, 2020, of a "Special Joint Public Hearing before the Joliet Zoning Board of Appeals and the JolietPlan *[sic]* Commission," on December 3, 2020 (*Id*., ¶ 98). While the November 12th Notice advised of a joint meeting of the Plan Commission and the Joliet Zoning Board of Appeals, a separate meeting of the Zoning Board of Appeals was scheduled for December 10, 2020, and no Zoning Board of Appeals meeting took place on December 3rd along with the Plan Commission meeting as originally noticed (*Id*., ¶ 99).

On November 13, 2020, Joliet published, in a different periodical, *Farmer's Weekly*, a different version of the November 12th Notice that advised of not one joint hearing but two separate hearings before Joliet's Plan Commission and the Zoning Board of Appeals, on different dates (*Id*., ¶ 100). Joliet published a third and a fourth public notice in yet another different periodical, the *Herald News* (*Id*., ¶ 101). On November 18, 2020, the third notice advised that a public hearing on items including the Agreement, proposed annexation, and rezoning would be held before the

Joliet Plan Commission in the City Council Chambers on December 3, 2020 (*Id*., ¶ 102). On November 19, 2020, the fourth notice advised that a public hearing before the Zoning Board of Appeals would occur on December 15, 2020 in the City Hall chambers to consider special use permits and variations related to this matter (*Id*., ¶ 103).

Joliet's intent in publishing notices in a variety of different periodicals cannot be justified. Logic and transparency of government dictate that if a notice is to be revised it should at least be published in the same periodicals wherein the original notice was published. The failure to do so leads to confusion of the public and undermines the statutory purposes for requiring such notices.

This is not substantial compliance. Joliet never published a retraction of the first version of the November 12th notice or otherwise disseminated any widespread notice of what was either a cancellation and rescheduling, or an error in the original notice (*Id*., ¶ 104). Joliet compounded the contradictory newspaper notices with confusing and conflicting signage (*Id*., ¶ 105). Initially, Joliet only posted signs for one hearing on December 3rd (*Id*.). Subsequently, Joliet posted signs for the December 10th Zoning Board of Appeals hearing, but only at some locations, adjacent to signs for the December 3rd hearing before the Joliet's Plan Commission (*Id*).

Joliet did not notice the December 10th Zoning Board of Appeals hearing at all on its website until after the December 3rd Plan Commission hearing (*Id*., ¶ 106). Although the largest item referenced in the November 12th Notice was the Agreement, which on information and belief was already in Joliet's possession, the 39-page purported Agreement (including 14 pages of exhibits) was never included in any newspaper or mailed notice (*Id*., ¶ 107). Nor was the Agreement published on the City of Joliet's website on November 12, 2020 or November 13, 2020 (*Id*.). Prior to the Hearings, upon information and belief, without legal authority, Joliet refused Freedom of Information Requests to produce a copy of the Agreement even though the Agreement

was previously referenced in prior public notices (*Id*., ¶ 108). The Agreement was not released until it was included as an attachment to a City of Joliet staff report for the Plan Commission on the City of Joliet's website in the late afternoon of November 25, 2020, the day before Thanksgiving, and only four business days before the December 3, 2020 hearing (*Id*., ¶ 109). The petition for annexation was neither included in the initial newspaper notice of City Council proceedings, nor was it published contemporaneously on the Joliet website (*Id*., ¶ 110).

Similarly, the petitions for zoning change were not included in the initial notice of the proceedings (*Id*., ¶ 111). The public notices were replete with omissions and deficient information on details essential to understanding the scope of the Project and its impact on people, traffic, and public resources (*Id*., ¶ 112). For example, the notices omitted where facilities would be located, how they would be operated, and what could be stored there (*Id*., ¶ 113). Eastgate did not provide in its petition, neither did Joliet supply, any traffic study or environmental study for the public to evaluate, nor was a water infrastructure study supplied, linked to, or even mentioned, though, upon information and belief one had been commissioned, and the study work completed (*Id*).

Compounding matters, as the hearing approached, the agenda for the December 3rd Plan Commission meeting changed (*Id*., ¶ 116). The agenda changed during the notice period from a version published on November 25th to another version published on November 30th (*Id*.). Leading up to the hearing, Joliet published self-contradictory information about the hearing format, further hampering residents and other interested parties in preparation (*Id*., ¶ 117). The Plan Commission agenda stated in one place that comment would be limited to "a maximum of 4 minutes" which would not be "a question and answer period and staff and the Plan Commission do not generally respond to public comments." (*Id*). The notice and agenda published for the December 3, 2020 Plan Commission hearing also deleted a pre-existing checkbox option for a participant to indicate

that they needed access to a means to present audio-visually, e.g., through PowerPoint or similar slide presentation software or hardware (*Id.*, ¶ 119). As of the eve of the hearing, would-be participants did not know whether they would be able to submit such information — again, unfairly hampering and interfering with preparation (*Id.*).

On November 26, 2020, the City of Joliet published a notice in the Labor Record stating that on December 15, 2020, at 6:30 p.m., the City Council would consider, "Ordinances Regarding the Annexation and Zoning of Certain Parcels, in Partial Fulfillment of the Annexation and Development Agreement with EastGate Logistics Park Chicago, LLC." (*Id.*, ¶ 120). Joliet never published a public notice stating that a public hearing would be held on the Agreement (*Id.*, ¶ 121). On December 3, 2020, the Joliet Plan Commission held a public hearing inside Joliet's City Council Chambers with respect to the Agreement, and rezoning classification of approximately 1,360 acres from residential zoning to light industrial zoning (*Id.*, ¶ 122).

Moreover, the public hearing was held at the height of the Covid-19 global pandemic and in violation of the Executive Order issued by Governor Pritzker, and in violation of the Open Meetings Act (*Id.*, ¶ 123). Face coverings were neither required nor were other aspects of the Governor's Executive Order adhered to (*Id.*, ¶¶ 124-27).

A fundamental requirement of due process is notice and the opportunity to be heard "at a meaningful time and in a meaningful manner." *Armstrong v. Manzo,* 380 U.S. 545, 552 (1965); *Bartlow v. Shannon*, 399 Ill.App.3d 560, 571 (5th Dist. 2010). When an annexation is accomplished in such a manner as to deprive potential objectors of notice of the annexation proceeding, it will be considered void on the basis of fraud and abuse of the court's process. *People ex rel. Nelson v. Village of Long Grove,* 169 Ill.App.3d 866, 873 (2nd Dist. 1988). Joliet's lack of transparency is

insulting to its residents and the surrounding community and raises the concern of what its officials are trying to hide. The Court must deny Defendants' motion to dismiss Count V.

VIII. COUNT VI STATES A CAUSE OF ACTION FOR VIOLATIONS OF § 11-15.1-3 OF THE MUNICIPAL CODE--NOTICE

Defendants fail to address Plaintiffs' claims that Joliet violated 65 ILCS 5/11-15.1-3 of the Municipal Code regarding notice. Thus, Defendants have waived any challenge to Count VI.

Regardless of waiver, Plaintiffs allege Municipal Code violations for Joliet's failure to provide notice that it would be holding a hearing on the Annexation Agreement on December 15, 2020 (SAC, ¶¶ 252-55). On December 15th, Joliet held a public hearing on the Agreement (SAC, ¶ 252). The only public notice Joliet published for the December 15th hearing stated that it would consider ordinances in partial fulfillment of the Agreement.

The statute provides:

> Any such agreement executed after July 31, 1963 and all amendments of annexation agreements, shall be entered into in the following manner. The corporate authorities shall fix a time for and hold a public hearing upon the proposed annexation agreement or amendment, ***and shall give notice of the proposed agreement or amendment not more than 30 nor less than 15 days before the date fixed for the hearing.*** This notice shall be published at least once in one or more newspapers published in the municipality, or, if no newspaper is published therein, then in one or more newspapers with a general circulation within the annexing municipality. After such hearing the agreement or amendment may be modified before execution thereof. The annexation agreement or amendment shall be executed by the mayor or president and attested by the clerk of the municipality only after such hearing and upon the adoption of a resolution or ordinance directing such execution, which resolution or ordinance must be passed by a vote of two-thirds of the corporate authorities then holding office.
>
> (65 ILCS 5/11-15.1-3) (emphasis added).

Joliet violated the Municipal Code by its failure to give notice that it was holding a public hearing on the Agreement. Joliet's notice that that "it would consider ordinances in partial fulfillment of the Annexation and Development Agreement" is not sufficient under § 11-15.1-3. Joliet must not be allowed to run roughshod over the statutory notice requirements.

IX. COUNT VII STATES A CAUSE OF ACTION FOR VIOLATIONS OF § 11-15.1-3 OF THE MUNICIPAL CODE—AMENDMENT

As discussed *supra*, the entire Development is premised on a bridge being built over Walter Strawn Drive at Illinois Route 53 to accommodate Eastgate's so-called "Closed Loop Truck Network." Defendants do not contest that Eastgate is currently legally prohibited from constructing the bridge given Elwood's opposition to the bridge. Knowing this, Eastgate and Joliet added the provision that "[i]f the approvals necessary … are not secured in a reasonable timeframe, the Parties shall mutually agree to an alternate location…" (Agreement, § 3(A)).

Hence, in all likelihood a bridge will not be able to be built over Walter Strawn Drive. Yet, Eastgate's entire presentation at the public hearings assumed that the bridge would be constructed for its "Closed Loop Truck Network." The fact that this contemplated bridge cannot be built represents a material change to the nature of the Agreement. Therefore, the contingent alternative bridge location amounts to an amendment to the Agreement (SAC, ¶ 259). Pursuant to Section 11-15-1.3 of the Municipal Code, such an amendment cannot be made without a public hearing that is properly noticed (*Id.*, ¶ 260).

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 (2nd Dist. 2004). Plaintiffs are entitled to a declaration that the alternate bridge location would constitute an amendment to the Agreement thereby nullifying the prior actions/hearings taken and making the Agreement unenforceable. In the event that the Court finds that this Count of the SAC is not ripe, any dismissal should be without prejudice.

IX. COUNT VIII ALLEGES COGNIZABLE DUE PROCESS CLAIMS FOR THE DENIAL/LIMITATION OF CROSS EXAMINATION AT THE DECEMBER 15TH AND 16TH CITY COUNCIL HEARINGS

In Count VIII, Plaintiffs allege viable due process violations based on the inability to cross examine representatives of Northpoint and Joliet officials (SAC, ¶¶ 262-72). At the December 15th and 16th, 2020 City Council hearings, Northpoint representatives testified in favor of the Development (*Id*., ¶ 263). Yet, members of the public were not allowed to question these representatives (*Id*).

In *Klaeren v. Village of Lisle*, 202 Ill.2d 164 (2002), the Supreme Court held that it would be a denial of due process not to afford interested parties the right to cross-examine adverse witnesses at joint hearing involving a special use request. Defendant Meijer, Inc., a grocery store operator, entered into a contract to purchase a 60-acre parcel to be annexed to the Village of Lisle. Meijer then applied for rezoning of the property from residential to commercial and for a special use permit for a gasoline station. A joint one-day public hearing of the village board, the plan commission, and the zoning board of appeals was held on the application. Meijer was opposed by the plaintiffs who alleged that the increased traffic, noise, and lighting around the store would diminish their quality of life and property values. *Klaeren*, 202 Ill.2d at 167-68. The village denied plaintiffs the opportunity to cross-examine witnesses at the joint public hearing.

The appellate court held that the complete denial of the right of interested parties to cross-examine witnesses at the village's joint public hearing was improper. *Klaeren*, 316 Ill.App.3d 770. The Supreme Court agreed and held that because the joint hearing included a special use petition, due process required that interested parties be afforded the right to cross-examine witnesses (202 Ill.2d at 167.

Defendants in this case argue that the December 15th and 16th hearings were not zoning hearings and that the right of cross-examination required by *Klaeren* does not apply to an annexation agreement hearing (Motion, p. 15). Plaintiffs submit that *Klaeren* applies to the hearings. The Agreement specifically provides for rezoning and the granting of special use permit (SAC, ¶ 92). Representatives of Eastgate were permitted to testify at the December 15th and 16th hearings unchallenged (*Id*., ¶ 263).

Due process is not a technical concept with a fixed content unrelated to time, place, and circumstances. *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976); *In re Bernice B.*, 352 Ill.App.3d 167, 174 (1ST Dist. 2004). Rather, "due process is flexible and calls for such procedural protections as the particular situation demands." *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972); *In re Bernice B.*, 352 Ill.App.3d at 174. Moreover, due process requires fundamental fairness, and a court must consider the specific facts of each particular situation in assessing the competing interests. *In re Bernice B.*, 352 Ill.App.3d at 174-75.

In this case, fundamental fairness required that interested parties at the December 15th and 16th hearings be given the opportunity to cross examine witnesses. All four hearings, including the December 3rd and December 10th public hearings before the Plan Commission and the Plan Commission and the Joliet Zoning Board of Appeals, where special use permits and zoning variances were sought, are so interconnected that it would be improper to exempt the December 15th and 16th hearings from the right to cross-examine. Accordingly, the Court must deny the motion to dismiss Count XVIII.

X. COUNT IX ALLEGES VIOLATIONS OF THE ILLINOIS OPEN MEETINGS ACT

Count IX states cognizable claims under the Illinois Open Meetings Act (5 ILCS 120/1.01, *et seq*.) ("Act"). Plaintiffs allege that the City Council hearings held on December 3rd, 10th, 15th, and 16th, 2020 violated the Act (SAC, ¶¶ 273-86).

The public hearings were held at the height of the Covid-19 global pandemic and in violation of the Executive Order issued by Governor Pritzker (SAC, ¶ 123). On November 18, 2020, the Governor issued Executive Order 2020-73 (*Id*.; and Exhibit 4 to SAC). The Governor ordered the following limits and restrictions:

> ● Indoor gatherings of more than one household are prohibited by this Executive Order, unless exempted by this Executive Order… Because in person contact presents the greatest risk of transmission of COVID-19, Illinoisans are encouraged to strictly limit in-person contact with others (Exec. Order, p. 4).
>
> ● ***Indoor venues and meeting spaces such as meeting rooms… are prohibited from hosting gatherings of any size*** (Exec. Order, p. 6) (emphasis added).
>
> ● Any individual who is over age two and able to medically tolerate a face covering … **shall** be required to cover their nose and mouth with a face covering when in a public place and unable to maintain a six-foot social distance (Order, p. 4) (emphasis added).
>
> ● People at high risk of severe illness from COVID-19, including elderly people and those with a health condition that may make them vulnerable, are urged to stay in their residence and minimize in-person contact with others to the extent possible (Order, p. 4).
>
> ● **Enforcement**. This Executive Order may be enforced by State and local law enforcement… (Order, p. 9).

(SAC, ¶ 124).

Joliet's November 19, 2020 notice to owners within 600 feet of the subject site stated: "***it is recommended that any individual appearing in-person wear a face-covering to cover their nose and mouth"*** in violation of the Executive Order which mandated face coverings for such an

event (*Id*., ¶ 125). Joliet's Public Participation Rules of Procedure also violated the Executive Order by not mandating face coverings and impermissibly allowing in-person attendance (*Id*). The public was forced to risk their personal well-being, as well as the well-being of loved ones, in order to meaningfully participate at the "public" hearings (*Id*., ¶¶ 125-26). This stymied public attendance and participation at the Hearings (*Id*. ¶ 127). Joliet's rules, procedures and space limitations inside City Hall made it impossible to maintain safe social distancing at the December 2020 City Council hearings (*Id*., ¶ 128).

According to the Will County's Health Department, the County had a 17.4% positivity rate at or near the time of the hearings. Silver Cross Hospital had 114 COVID patients with 19 in intensive care and 14 on ventilators (*Id*., ¶ 280). The Illinois Department of Public Health showed that the region only had 30 out of 162 ICU hospital beds available and 61 out of 136 ventilators available (*Id*).

Less than 50 individuals personally attended the Hearings inside City Hall (*Id*., ¶ 282). The vast majority, if not all, of the individuals who attended and commented remotely voiced their opposition to the project (*Id*). Based on prior attendance, hundreds were expected to attend and participate at the hearings (*Id*., ¶ 283). Joliet succeeded in dissuading the Plaintiffs and members of the general public from participating at the hearing (*Id*., ¶ 282).

The purpose of the Act is to ensure that deliberations and actions of public bodies are conducted in an open and public session. 5 ILCS 120/1 (West 2010); *Lawrence v. Williams*, 2013 IL App (1st) 130757, ¶ 20. An open meeting held in an inconvenient place violates the Act. 5 ILCS 120/2.01; *Gerwin v. Livingston County Bd.*, 345 Ill.App.3d 352, 359 (4th Dist. 2003). The *Gerwin* Court explained:

> 'Convenient' means 'suited to personal comfort or to easy performance' or 'affording accommodation or advantage.' Merriam–Webster's Collegiate

> Dictionary 252 (10th ed.2000). A meeting can be open in the sense that no one is prohibited from attending it, but it can be held in such an ill-suited, unaccommodating, advantageous place that members of the public, as a practical matter, would be deterred from attending it.

(*Gerwin*, 345 Ill.App.3d at 361).

It is difficult to envision a situation that could be more "inconvenient" than the "public" hearings held in this case. The SAC contains ample and compelling facts to support a violation of the Act and the denial of Defendants' motion to dismiss Count IX.

Defendants do not contest that the City Council hearings are subject to the Illinois Open Meetings Act (Motion, pp. 17-19). Instead, they argue that the hearings were not subject to the Governor's Executive Order because the Executive Order applies to businesses, nonprofits, and other organizations--and not to local governments (*Id*., p. 17). There is no support for such a contention and Defendants' position cannot be reconciled with the plain language of the Order. The Executive Order contains no exemptions for public hearings before governmental bodies.

The Court must deny the defendants' motion to dismiss Count IX.

WHEREFORE, Plaintiffs request that this Honorable Court deny Defendants' joint motion to dismiss Plaintiffs' Second Amended Complaint and grant them any other relief the Court deems appropriate.

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