No. 128770

In the

Supreme Court of Illinois

PML DEVELOPMENT LLC, an Illinois limited liability company,

Plaintiff-Appellant,

v.

VILLAGE OF HAWTHORN WOODS, a municipal corporation,

Defendant-Appellee.

On Leave to Appeal from the Appellate Court,
Second Judicial District, No. 2-20-0779.
There Heard on Appeal from the Circuit Court of the Nineteenth Judicial Circuit,
Lake County, Illinois, No. 15 CH 848.
The Honorable **Luis A. Berrones**, Judge Presiding.

BRIEF AND APPENDIX OF PLAINTIFF-APPELLANT

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INTRODUCTORY PARAGRAPH

This is a breach of contract action involving claims and counterclaims. The trial court, following a bench trial, entered judgment in favor of PML Development LLC ("PML"), the plaintiff and appellant in this Court, and against the Village of Hawthorn Woods ("the Village"), the counter plaintiff and appellee. No questions are raised on the pleadings.

STATEMENT OF ISSUES

The case centers around a 2012 property development contract between PML and the Village. PML sued for breach of contract. Following a bench trial, the trial court found breaches of contract by both parties. It determined, however, that the Village materially breached before PML breached, excused PML of further obligations, and awarded PML approximately $5.3 million in damages. (A40.) The appellate court reversed. It did so on the theory that, even though the Village first breached, PML's court filings indicated its "election" to continue with the contract, and PML's later breaches of contract negated its right to recover damages. (A14-18.) The appellate court concluded that both parties were barred from recovering damages. (A18 ¶ 61.)

The issues on appeal are as follows:

(a) Election of Remedies: Does interim relief sought and obtained by a party during the course of litigation to address ongoing irreparable harm, constitute an election of remedies such as to bar the party's remedy for breach of contract at the conclusion of the case?

(b) Dual Breaches of Contract: If each party to a contract is found to be in partial breach of the contract but each elects to continue the contract, is each party barred from recovering damages from the other?

STATEMENT OF JURISDICTION

PML brought this appeal from a judgment by the Second District Appellate Court pursuant to Illinois Supreme Court Rule 315. The appellate court entered its judgment on June 29, 2022. (A1-18.) PML filed its Petition for Leave to Appeal within 35 days, on August 2, 2022. This Court granted that Petition by order dated September 28, 2022.

STATEMENT OF FACTS

This appeal involves remedies for breach of contract. PML sued the Village for breach, and the Village counterclaimed. The trial court found breaches on both sides. The appellate court held that neither side could recover damages. Although the record is extensive, the legal issues are narrow.

A. The Development Agreement

The parties entered into a Development Agreement ("Agreement") in October of 2012 concerning a 62-acre property within the Village that PML sought to develop as a fill site. (A2-3, ¶¶ 4-7; A41-48 (E16-22).) PML was to add fill – mostly dirt – to the property for which it would charge a fee to its customers; properly grade the property pursuant to the approved grading plan; and then donate the property to the Village by the end of 2015 via warranty deed. (A3 ¶¶ 7-8; *see also* A43 ¶ 3.) The Agreement thus made provision for the Village's issuance of a grading permit upon PML's submission of code compliant plans. (*See* A43 ¶ 3, A46 ¶ 1.2.) It also contained other provisions such as for the payment of real estate taxes by PML; improvements to Krueger Road, which ran adjacent to the property; the funding of a Draw Down Deposit Agreement to fund inspections; and other terms. (A43 ¶ 3, A44 ¶¶ 7-8, A47 ¶ 3.1.)

B. Non-Issuance of Grading Permit

By January of 2013, as the trial court found, PML had submitted all the documentation necessary for issuance of the grading permits, including a grading plan. (A26-27 ¶¶ 16B, 16D, 16H.) The documentation was subject to review by the Village engineer, and the evidence is undisputed that he found no violations. (A26-27 ¶¶ 16B, 16I.) According to the trial court, the Village should therefore have issued the initial grading permit to PML for a two-year period by February of 2013, as provided for in the Agreement. (A27 ¶¶ 16I, 16K.) Nonetheless the Village declined to issue the permit because it wanted to develop its own concept plan, *i.e.*, its plan for later development of the property, before doing so. (A26-28 ¶¶ 16E, 16F, 16G and 17; R. 1035 p. 100:7-23.) The Agreement, which was drafted by the Village (A2 ¶ 5; A31 ¶ 29), makes no mention of a concept plan.

The Village did issue what it referred to as "earth change approvals" on a temporary basis, which forced PML to pursue its fill business in limited areas. (A28 ¶ 18; R. 1054-55 pp. 119:24-120:4.)[1] The areas were those the Village believed, based on its uncompleted concept plan, would not have any buildings, roads, parking areas, or bike paths. (A28 ¶ 18; *see e.g.*, E190.) The areas designated, however, kept changing; were illogical and mandated without regard to PML's already-approved grading plan; and caused problems that later resulted in the Village issuing stop work orders. (A24 ¶ 12F; A28 ¶ 19; A19 ¶ 23; R. 1440 p. 62:1-7.) The latter included a 40-foot high pile of fill accumulating at the entrance to the property, causing unsafe conditions. (A29 ¶ 23; A35-

[1] The Village mayor himself later acknowledged that he had never heard of an "earth moving permit" and understood PML was to have been issued a grading permit from the outset based on the grading plan. (E229.)

36 ¶ 38A.) Plainly, the sequencing of work as demanded by the Village caused delays and additional labor costs for PML. (A29-30 ¶¶ 23, 23A, 24.)

The Village improperly restricted the location of PML's fill operations on the site for about two years. (R. 362-63 pp. 32:2-23; *see* E290 (Village email commenting on earth change permit restrictions).) Thus, it did not issue its first actual grading permit until December of 2014, more than two years after the Agreement was signed. (A27 ¶ 16J.) But even then, the permit was issued for only nine months and not the two-year period called for by the Agreement. (A27 ¶ 16K; *see also* E18 ¶ 8.)

As of February of 2018, the Village still had not finalized its concept plan. (Trial A24 ¶ 12G.)

C. Extracontractual Work

The Village also forced PML to make concessions and do extra work to be able to continue its operations. (A28 ¶ 18B.)

For example, it made compaction of the soil and compaction testing a requirement for the issuance of a grading permit and wanted PML to pay for compaction testing to measure how much air had been squeezed out of the deposited fill. (A25-26 ¶ 14B; E265 (Village attorney October 2014 letter imposing compaction requirement (¶ 5)); E654 (referencing compaction testing).) The Village acknowledged it required compaction because in February 2013 an engineer recommended compaction to support the Village's concept plan, and the Village wanted to pass the "considerable costs" of testing to PML. (A27 ¶ 16F; R1038-41 pp. 103:22-106:10 (regarding passing costs along to PML); E270 (February 2013 email discussing compaction and related requirements).) Compaction testing became a condition to the grading permit. (E339 (October 2014 email stating that

compaction is a condition to the grading permit).) The Agreement, however, did not mention compaction or testing for it. (A25-26 ¶ 14B.)

In addition, the Village ordered PML to move the top 15 feet of a mountain of fill, which was the size of four football fields, to another part of the property, forcing PML to incur increased labor costs to perform unnecessary re-work. (A29 ¶ 23A.) The trial court found that "[n]one of the work that had to be redone was due to . . . statutory or code violations." (A30 ¶ 26B.) It further found that the provision of the Agreement relied on by the Village (§ 1.1) did not in fact "impose on PML the risk and expense of having to modify or re-do work to conform the Property to the Village's changing . . . concept plan." (A30 ¶ 26A.)

D. Improper Issuance of Stop Work Orders and Police Interference

The Village issued six stop-work orders between December of 2012 – a time when PML was not even performing work – and November of 2014. (A35-36 ¶¶ 37-41.) The trial court held that each was pretextual and without cause, summarizing its findings as follows:

> [T]he driving force behind the Village's refusal to approve PML's grading plan and the reason for issuing the Stop Work Orders was the Village's need to add the details it ***failed to negotiate*** for in the Development Agreement and to force PML to conform its grading on the Property to what the Village would need in order to construct its municipal campus . . .

(A37 ¶ 44 (emphasis added).) In other words, the Village's refusal to approve a grading plan and its issuance of stop work orders had a common cause, namely, deficiencies Village officials perceived in the Agreement that they drafted. The stop work orders, moreover, were issued to address problems caused, not by PML, but by the Village itself. As the trial court further observed, "[t]he Village's practice of only issuing earth change approvals and dictating the areas where the fill could be deposited" actually "***caused*** the issues and

problems that later arose for which the Village issued stop work orders." (A28 ¶ 19 (emphasis added); *see also* A35-37 ¶¶ 37-42.) The stop work orders had a substantial impact on the project. For example, the September and November 2014 orders halted work for a combined total of two months but delayed work by seven months because winter conditions had arrived by the time the Village lifted them. (R. 2073-4, pp. 116:17-117:18.)

The Village also engaged in a campaign of heightened police activity to deter PML's customers, which campaign was successful. (R. 1815-16 pp. 15:5-16:5.) The Village police chief admitted to targeting and ticketing PML's customers, subjecting them to selective enforcement, and directing her officers to write up as many as possible on state charges. (R. 1811-14 pp. 11:24-14:15; R. 1822-26 pp. 22:9-26:21; E771.) She also admitted to ticketing PML "at the direction of other Village staff" and for violations that neither she nor her officers saw. (R. 1831 p. 31:8-16.) Both the police chief and a PML customer testified that the police presence at the property deterred trucks from entering the site. (R. 1094-96 pp. 17:9-19:14; R. 1815-16 pp. 15:5-16:5.)

E. Other Forms of Interference

The Village interfered with PML's work and contract rights in at least three other ways.

One was the Village's action in preventing PML from building a "haul road" as provided for on PML's approved grading plan during the period the earth change approvals were in effect. (A30 ¶¶ 25, 25A, 25B.) A haul road helps keep trucks' tires clean, facilitates their movement around a construction site, and does not require a road permit. (*Id.*) Without the haul road, customers were forced to drive through mud that damaged trucks' axles; they ended up diverting fill to other sites; and PML incurred extra expense in having to constantly replenish the three-inch stone located at the fill site's entrance that

was designed to dislodge the mud from the trucks' tires before they returned to the roads. (A30 ¶¶ 25, 25A, 25B; R.1092-94 pp. 15:8-17:12.) The trial court found the Village's refusal "unreasonable" and impinging on PML's control of the site. (A30 ¶ 25B.)

The Village also prohibited PML from selling clay from the site, which the trial court found was "considered part of the developer's means and methods and such activity is not prohibited by the Development Agreement." (A31 ¶ 28.)

In addition, on completion of the project, the Agreement required PML to reconstruct Kruger Road adjacent to the development and to make a $200,000 contribution toward the work. (A44 ¶ 7.) The Village acknowledged, however, that the total cost of the reconstruction roadwork would be $831,600. (R. 1774-76 pp. 119:22-121:1.) Although PML stood ready to perform, the Village did not provide the additional funding, it did not provide engineering plans for the work, and it did not provide a permit. (R. 753-55 pp. 108:14-110:2; *see also* A33 ¶ 33C.)

F. Grading Work Completion

The Village's conduct delayed completion of the project until December of 2018, at which time the undisputed expert testimony established that PML's work "substantially complied" with the approved grading plan. (A37 ¶ 43; R. 2047 p. 90:11-13; R. 2160-62 pp. 22:3-24:17.)

G. Commencement of Litigation

Prior to completion, in May of 2015, PML filed suit against the Village. (C47.) Subsections A through E above summarize the evidence that led to the filing of the Complaint. The Complaint itself contained three counts.

In Count I of its Complaint, PML sought declaratory relief regarding various aspects of the parties' relationship and also a finding that it be entitled to complete its work

in substantial compliance with the Agreement. Count II was entitled "Mandamus," set forth the Village's issuance of stop work orders, alleged other breaches by the Village such as its refusal to issue an unconditional grading permit, and sought an injunctive order allowing PML to complete development of the property. Count III requested damages for breach of contract and a determination that PML's further performance be excused.

H. Village's Counterclaim and Evidence

The Village answered PML's Complaint and filed a six-count counterclaim in July of 2015. (C265.) Five of the Counterclaim counts alleged breaches of the Agreement for such things as the quality of fill being transported to the property (Count I), storage tanks on the property (Count II), stormwater management and erosion control issues (Count III), failure to pay property taxes (Count IV), and PML's failure to fund the drawdown account (Count V). Count VI concerned "special taxes" the Village alleged PML had an obligation to pay.

The Village's evidence at trial focused on PML's alleged failure to comply with various regulations, PML's nonpayment of property taxes, and the lack of conveyance of the property to the Village.

With respect to conveyance of the property, the Village's Counterclaim did not complain about the lack of conveyance or ask for specific performance or damages (*see* C322), and the Village never amended to add such a claim. Evidence introduced at trial, moreover, showed that PML offered to convey the property several times, although not by warranty deed. (A34 ¶ 14F; *see also* R. 738-39 pp. 93:7-94:7; R. 748 p. 103:7-23.) The offer was made instead by deed in lieu of foreclosure, which, by statute, would have allowed the Village to obtain the property free and clear of any encumbrance. *See* 35 ILCS 200/21-95. The Village, however, declined. (R. 1690-91 pp. 35:22-36:5.) Despite

declining, the Village still never made a claim for damages, nor did it submit evidence of damages arising from the non-conveyance.

The Village also did not plead damages, or offer evidence of damages, regarding PML's failure to pay property taxes as pleaded in Count IV of the Counterclaim. The evidence, in fact, showed that PML paid the taxes owing through calendar year 2015. (R. 842-46 pp. 51:17-55:18; R. 849-52 pp. 58:3-61:4; E3150-54.) The trial court found that PML did not pay the taxes owing in subsequent years because it did not believe it was responsible under the Agreement for taxes after December 31, 2015. (A34 ¶ 34E.)

As for the Village's other claims, it abandoned two of them, namely, Counts II (storage tanks) and VI (special taxes) and introduced no damage evidence. The trial court found against the Village on Count I (clean dirt). (A34-35 ¶¶ 35, 35E.) It found against the Village at least in part on Count III (erosion controls), where it determined the Village's reliance on the supposed violation as the basis for a stop-work order was not warranted. (A36 ¶ 39.) The trial court agreed with the Village on Count V that the Draw Down Deposit contained a deficit, but disagreed with the Village on the amount owed. (A32 ¶ 31E; A37 ¶ 45.)

According to the Village's post-trial brief, the Village suffered and proved just two kinds of damages. (*See* C5381, Village's opening post-trial brief section entitled "The Village Proved Its Damages".) One was as alleged in Count V, the draw down account payments. Relating to that count, the trial court found that PML owed $53,103.25 for the account as of June of 2015. (A32 ¶ 31E). The other was PML's contribution toward the Kruger Road improvements. The Kruger Road claim was not alleged in the Counterclaim, but the trial court found that PML had not made the $200,000 payment toward road improvements on conclusion of the project. (A33 ¶ 33D.)

I. Issuance of Restraining Orders

In November of 2015, a few months after the filing of suit and with the Village's interference with the project continuing, PML filed a motion for a mandamus and/or a temporary restraining order. (C383.) The trial court granted that motion in January of 2016, with an order requiring the Village to issue a grading permit expiring at the end of the year. (C821.) Since the work had been delayed and was far from complete, PML filed a second such motion in November of 2016 (C1095), resulting in a second order this time requiring the extension of the permit for a full two-year period in accordance with the terms of the Agreement. (C2034.)

J. Trial and Post-Judgment Briefing

Following discovery, the trial court conducted a bench trial for ten days beginning in June of 2019 and ending in January of 2020. (*See* C. 5722 (first day of trial).) The parties then submitted post-trial briefs. (*See* C5334 (Village's initial brief); C5391 (PML's initial brief).) As part of the briefing, PML requested damages for the Village's breaches and contended that the Village was not entitled to enforce the contract against PML due in part to the Village's earlier breaches. (*See* C5467-68, C5476.) The Village argued against PML's damages. It did not, however, raise an argument – as the appellate court later held (*see* subsection L below) – that PML's damages and other relief it sought were barred by the injunctive relief it obtained during the course of the litigation.

K. Trial Court's Findings of Contract Breaches

The trial court issued its decision in November of 2020.

Regarding PML's claims, the court found the Village materially breached the Agreement and otherwise hindered PML's performance by (a) refusing to issue a compliant grading permit and forcing PML to conform its grading to a concept plan that kept

changing; (b) imposing extracontractual compaction and fill relocation requirements; (c) issuing pretextual stop work orders and causing police interference; (d) refusing a haul road, the sale of clay, and cooperation in regard to Kruger Road repairs, and (e) otherwise improperly controlling PML's means and methods of construction. The latter included directing where and when PML worked, and requiring "illogical" sequencing that resulted in "unnecessary" re-work, years of delay, "unsafe conditions," and substantially higher costs. (A24 ¶12F; A25 ¶ 14B; A27 ¶¶ 16I-M; A27-28 ¶¶ 17-19; A29-30 ¶¶ 23-25; A32 ¶ 30A; A35-37 ¶¶ 37-42A.) The Village's breaches began at least as early as February of 2013 and continued thereafter. (*See* A27 ¶ 16I.)

As to the Village's Counterclaim, the trial court found PML also in breach of the Agreement, although any breaches by PML occurred well after the Village's began. According to the court, PML's breaches consisted of (a) its failure to pay real estate taxes on the property and convey it to the Village free and clear by December 31, 2015; (b) the failure to fully fund the draw down deposit account; and (c) the failure to contribute $200,000 to the Kruger Road reconstruction. (A37 ¶ 45.)

Notwithstanding its finding of breaches by PML, the trial court agreed with PML that the Village was the first to breach, and that its prior breaches excused PML from further obligations under the Agreement. (A38 ¶ 46A.) The court also found that the Village's breaches entitled PML to damages. (A38 ¶ 46(A), A40.) Although PML had sought $7,294,414 in damages (C5476), the court ultimately awarded it just $5,349,677.70, plus attorneys fees as provided for in the Agreement. (*Id*.)

The Village appealed to the Second District, and PML cross appealed on the damage award. (A49, A52.)

L. The Second District Appellate Court's Reversal

On appeal, the Second District found the evidence "compelling" that the Village interfered with PML's development of the property and materially breached the Agreement in several ways. (A11-13 ¶¶ 43-48.) It nonetheless reversed the judgment for PML against the Village. It did so on an election-of-remedies theory. It held that, upon breach by one party, the nonbreaching party must elect between abandoning the contract and seeking damages, or continuing the contract and seeking damages, but if it chooses the latter, then the nonbreaching party is bound by its obligations. (A14 ¶ 50.) Here, the appellate court said that by seeking mandamus relief, PML elected to continue the contract, such that PML's breaches were not excused. (A14 ¶ 51.) Because both parties were in breach, the court relied on a passage from *Illinois Law and Practice* citing to *Chicago Washed Coal Co. v. Whitsett*, 278 Ill. 623 (1917), to hold that neither party could recover damages. (A17-18 ¶¶ 59-61.)

To reflect its holdings formally, the court affirmed the judgment in favor of PML on the Village's Counterclaim, reversed the judgment in favor of PML on its contract claims against the Village, and vacated the damage award in favor of PML. (A18 ¶ 64.)

PML subsequently petitioned for leave to appeal to this Court, which the Court allowed by order dated September 28, 2022.

ARGUMENT

The appeal to this Court involves two basic legal issues. One is whether a party who obtains injunctive relief to prevent ongoing contract breaches by the other party may be said to have "elected" a remedy that has the effect of forfeiting that party's right to the benefit of the first-to-breach principle. That issue is addressed in Part I below. The other issue, taken up in Part II, assumes a situation where both parties have committed a contract

breach but both continue the contract. The question is whether one party's breach bars it from recovery of damages from the other party.

A de novo standard of review applies to the legal questions. *People v. Stapinski*, 2015 IL 118278 ¶ 35. Any fact issues following a bench trial are subject to a manifest weight of the evidence standard, with due weight given to the trial court's credibility determinations. *Eychaner v. Gross*, 202 Ill. 2d 228, 251 (2002).

II. THE SECOND DISTRICT APPELLATE COURT ERRED IN REJECTING THE FIRST-TO-BREACH PRINCIPLE BASED ON AN ELECTION-OF-REMEDIES REQUIREMENT

The trial court awarded PML damages and excused it from its contract obligations based on the first-to-breach principle. The appellate court did not quarrel with the validity of that principle, but held it inapplicable because, according to the appellate court, PML had elected a different remedy. The appellate court, however, erred by failing to analyze the limited circumstances under which an election-of-remedies requirement applies.

A. The Trial Court Applied the First-to-Breach Principle, Which Remains the Law of Illinois

The Second District's decision fully recognized the seriousness of the breaches of contract for which the Village was responsible. In addition to acknowledging the "compelling" evidence of the Village's interference, the appellate court expressly rejected "the Village's argument that it did not have to defer to PML's means and methods of using the Property." (A12 ¶ 44.) The court went a step further and found that "the trial court did not err in finding that the Village materially breached the Agreement when it hindered PML's ability to use the property via the customary means and methods." (A13 ¶ 48.) It even agreed that the Village's conduct "did violate the Village's obligation to act fairly and

in good faith." (A12-13 ¶ 45.) In other words, the appellate court found the Village acted in bad faith.

The appellate court also did not dispute the correctness of the first-to-breach legal principle pursuant to which the trial court excused PML's further obligations under the Agreement. According to that principle, one party's breach may excuse performance of the contract by the second party, even if the second party commits a subsequent breach. *See, e.g., Mohanty v. St. John Heart Clinic, S.C.*, 225 Ill. 2d 52, 70 (2006) ("Under general contract principles, a material breach of a contract provision by one party may be grounds for releasing the other party from his contractual obligations"); *Finch v. Illinois Community College Board*, 315 Ill. App. 3d 831, 836 (5th Dist. 2000) ("if the breach is material, a nonbreaching party may be excused from its duty of counterperformance"); *Goldstein v. Lustig*, 154 Ill. App. 3d 595, 599 (1st Dist. 1987) ("A party who materially breaches a contract cannot take advantage of the terms of the contract which benefit him, nor can he recover damages from the other party to the contract"); *Daniggelis v. Pivan*, 159 Ill. App. 3d 1097, 1103 (1st Dist. 1987) ("a party to a contract who commits the first breach of its terms cannot maintain an action for a subsequent breach by the other party" (quoting case)).

In addition, the Second District did not take issue with the trial court's finding that the Village was, in fact, the first to breach with its failure to issue the initial grading permit in February of 2013. (A27 ¶ 16I; A38 ¶ 46A.) The appellate court's acknowledgment that the Village interfered with PML's contract rights fully supports the trial court's finding that the Village caused PML to incur substantial damages. (*See* A32 ¶ A30B.)

It was the first-to-breach principle, moreover, that PML sought to invoke by filing suit in May of 2015 and seeking to be excused from further contractual obligations. Short of pursuing an extra-legal remedy, such as unilaterally ceasing to perform, PML had no

options for invoking that principle other than by bringing and vigorously pursuing litigation. The appellate court nonetheless rejected the first-to-breach principle and disallowed PML an award of damages caused by the Village. It did so by reasoning that by seeking mandamus or injunctive relief early in the litigation, PML "elected to proceed with the Agreement" and therefore was bound by its obligations under the Agreement. (A14 ¶ 51.)

B. The Second District Relied on the Election-of-Remedies Doctrine, which Has Limited Application

In its Response to PML's Petition for Leave to Appeal, the Village argued that "[t]his case did not involve an election of remedies, and the appellate court's decision does not even mention that term." (Village Response to PLA 12.) While the appellate court did not use the term "election of remedies," that court did talk about an "election" to be made between abandoning and continuing a contract, and stated further that PML "elected to proceed" with the contract. (A14 ¶¶ 50, 51.) The Village itself argued the "election" point in the appellate court where it quoted from *Emerald Investments Ltd. Partnership v. Allmerica Financial Life Insurance & Annuity Co.*, 516 F.3d 612 (7th Cir. 2008), which made explicit reference to the "election of remedies." (Village 8/9/21 2d Dist. Br. pp. 23-24.) No question should therefore exist that the appellate court rejected the first-to-breach principle based on the election-of-remedies doctrine.

That doctrine, however, is subject to numerous restrictions. As an initial matter, it can only apply "where a party has elected inconsistent remedies for the same injury or cause of action." *Hanson-Suminski v. Rohrman Midwest Motors, Inc.,* 386 Ill. App. 3d 585, 596-97 (1st Dist. 2008) (quoting case). Even then, the courts have recognized further

limitations on its application. In addition to the base requirement of inconsistency, the courts have observed:

> In Illinois, the formal doctrine of election of remedies is confined to cases where (1) double compensation is threatened, (2) defendant has actually been misled by plaintiff's conduct, or (3) *res judicata* can be applied.

Kenny Construction Co. v. Hinsdale Sanitary District, 111 Ill. App. 3d 690, 698 (1st Dist. 1982). *See also Quality Components Corp. v. Kel-Keef Enterprises, Inc*., 316 Ill. App. 3d 998, 1008 (1st Dist. 2000) (same); *Hopkins v. Holt*, 194 Ill. App. 3d 788, 797 (1st Dist. 1990) (applying similar standards).

The doctrine also has no role to play with respect to pleading:

> [W]hen a party knows the facts but cannot be sure of the legal effect of those facts, he may plead inconsistent theories of recovery of defense, and the proof at trial will determine which theory, if any, entitles him to a favorable verdict.

Daehler v. Oggoian, 72 Ill. App. 3d 360, 370 (1st Dist. 1979). *See also* 735 ILCS 5/2-613(b) (permitting the pleading of alternative counts or defenses). Thus, merely pleading alternative remedies in a complaint does not constitute an election of remedies. *Premier Electrical Construction Co. v. La Salle National Bank*, 132 Ill. App. 3d 485, 495 (1st Dist. 1984) ("The doctrine of election of remedies does not apply when inconsistent or alternative remedies are joined in the same pleading").

Consistent with the quoted language, a plaintiff may await the outcome of evidence at trial before deciding which of two inconsistent theories it intends to pursue. In *Quality Components*, for example, the court observed that the non-breaching party was only "required to elect which remedy it wished to pursue before final judgment was entered. . . ." 316 Ill. App. 3d at 1011. *See also Pinelli v. Alpine Development Corp.*, 70 Ill. App. 3d 980, 1005 (1st Dist. 1979) (holding that for an election of remedies to apply, a "party must

be aware of the true facts of a situation" and that in the case before the court, the plaintiffs did not become aware "until the close of proofs").

Hence, while the election-of-remedies doctrine is an important one that may limit a party's choice of remedies, the courts apply it narrowly so as not to prevent a party from obtaining a contract remedy necessary for the party to be made whole. As one commentator observed, "[t]he purpose of all supposed rules as to election of remedies is never to deny a remedy to an injured party; such rules are for the purpose of preventing a double recovery for a single injury and to prevent multiple and vexatious litigation." 12 *Corbin on Contracts* § 66.6 (Matthew Bender 2022).

C. The Second District Incorrectly Applied the Election-of-Remedies Doctrine to the Facts of This Case

In finding that PML was foreclosed from exercising the first-to-breach principle because of its election to continue the contract, the Second District gave no consideration to the restrictions on the election-of-remedies doctrine. In fact, the relief granted PML *pendente lite* did not constitute a binding election of remedies for several reasons.

1. The Remedies Sought by PML Were Not Inconsistent

The injunctive relief sought by PML during the course of the litigation was preliminary in nature and designed to alleviate ongoing and future irreparable harm that otherwise may not have been remedied through an award of damages. The irreparable harm is demonstrated by PML's motions that combined its request for mandamus relief with a request for a preliminary injunction. (*See* C383, C1095.) The irreparable harm included PML's exposure to liability for breach of its fill deposit agreements with others, the future loss of fill customers, damage to its good will and reputation, and overall viability of its business. (*See* C391-93, C1106-08.) The relief PML obtained *pendente lite*,

moreover, addressed solely grading permits issued by the Village going forward. (*See* C821, C2034.) It did not address the delays already having occurred or the Village's other breaches found by the trial court, such as imposing obligations on PML not bargained for, and its failure to allow PML to dictate the means and methods of developing the property. (A32 ¶ 30(A).)

Equitable relief designed to alleviate continuing or ***future*** conditions giving rise to irreparable harm is not inconsistent with the legal relief ultimately awarded by the trial court – including PML's excused performance – for the damage ***already*** done. *See, e.g., ICD Publications, Inc. v. Gittlitz*, 2014 IL App (1st) 133277 ¶ 80 (upholding the trial court's award of both damages and specific performance because the two remedies "stem[med] from different breaches that were not barred by the election of remedies doctrine"). The two forms of relief thus addressed different wrongs committed by the Village.

Equally important, the issuance of grading permits required by the injunctive orders facilitated PML's ability to meet its current obligations to its customers, and therefore to help reduce or mitigate its future damages. PML had a legal duty to mitigate to the extent reasonably possible, and the injunctive relief it sought should be viewed in that light as well. *Boyer v. Buol Properties*, 2014 IL App (1st) 132780 ¶ 67 ("a plaintiff in a breach of contract suit cannot recover losses that could have been reasonably avoided"); *Gray v. Mundelein College*, 296 Ill. App. 3d 795, 809 (1st Dist. 1998) ("A plaintiff has a duty to mitigate damages"). The Village has cited no authority establishing that fulfilling a duty to mitigate can be construed as an election to continue a contract.

Hence, the "inconsistency" requirement of *Hanson-Suminski* was never met.

2. Even if the Remedies Were Inconsistent, No Double Compensation Was Threatened, the Village Was Never Misled, and Res Judicata Was Never an Issue

Even if the remedies allowed by the trial court were viewed as inconsistent, the Village never demonstrated, nor even argued, that PML received or could have received a double compensation benefit, or that the Village was somehow misled, or that any claims raised were barred by res judicata.

With respect to double compensation, the equitable relief ordered by the trial court involved the issuance grading permits. While the Village had a contractual obligation to issue the permits, they did not constitute any form of compensation to PML, nor did their issuance cause any financial detriment to the Village. PML's reasons for seeking the permits, moreover, were straightforward. They included the avoidance of irreparable harm as set forth in its motion papers. (*See* C391-93, C1106-08.) At no time was the Village deceived about PML's motives or about what actions PML would take once the permits were issued. Nor did the Village otherwise make a detrimental change in position, or contend it made such a change, in reliance on action by PML that might have made the relief awarded by the trial court inequitable.

Under these circumstances, case law squarely establishes that the election-of-remedies doctrine is inapplicable, even in the face of inconsistent remedies. In *Hopkins v. Holt*, 194 Ill. App. 3d 788 (1st Dist. 1990), for example, the court observed:

> The [election-of-remedies] doctrine ***is inapplicable*** where no threat of double recovery exists, defendant is not misled and has not changed his position in reliance on the plaintiff's conduct, and there is nothing about the action that would serve to bar the instant remedy because of res judicata.

Id. at 797 (emphasis added). *See also Finke v. Woodard*, 122 Ill. App. 3d 911, 919 (4th Dist. 1984) (stating that the doctrine "does not prevent a party from seeking relief ***on***

inconsistent remedies unless a party has formerly manifested an intent to seek one remedy and the defendant makes a substantial change of position in reliance upon that intention or a possibility of double recovery exists" (emphasis added)); *Casati v. Aero Marine Management Co.*, 90 Ill. App. 3d 530, 536-37 (1st Dist. 1980) ("That doctrine is inapplicable, ***despite a history of inconsistency*** in requested remedies, where no threat of double recovery exists, the defendant is not misled [*etc.*]" (emphasis added)).

With the long-established conditions for application of the election-of-remedies doctrine not having been met, the Second District committed obvious error by reversing the trial court's contract remedy of excusing PML from further performance.

3. PML Did Not Otherwise Manifest an Intent to Make a Binding Election Prior to the Conclusion of the Case

As noted earlier, PML's Complaint sought mandamus/injunctive relief for issuance of a grading permit based on the Agreement, contract damages for breach, and a determination that it would be excused from further performance. (*See* C80 ¶¶ 183, (i), (iii).)

At the conclusion of the trial and as part of the post-trial briefing, PML elected a remedy based on an evaluation of the nature of the Village's breaches. At that point PML requested damages for the Village's breaches, and also argued, in response to the Village's counterclaims asserting a breach by PML, that the Village was not entitled to enforce the contract against PML due in part to the Village's earlier breaches. (*See* C5476 (prayer contained in post-trial brief); C5467-68).) That election properly came after five years of litigation in a case involving broad and complicated evidence and a trial stretched out over six months. The trial court ultimately agreed with PML, awarded it damages, and excused it from further obligations under the Agreement. (A38 ¶ 46(A), A40.)

Even apart from the other limitations on the election-of-remedies doctrine, the appellate court committed error by construing PML's requests for interim injunctive relief early in the case as an election that foreclosed later relief. Any election by PML prior to the close of evidence would have been premature. Nothing in the law, moreover, required that PML manifest its election by the self-help remedy of announcing a contract termination and stopping performance, rather than waiting until the close of trial to make its election based on all the evidence presented. *See* 12 *Corbin on Contracts* § 66.3 ("The typical practice is to require the plaintiff to elect a remedy before the jury is charged, or after the jury returns a verdict. The plaintiff . . . cannot be compelled to elect during the course of trial"). PML's Complaint raised the prospect of PML being excused of its obligations under the Agreement, and the pleading preserved that option pending the evidence. The appellate court failed to take into account the realities of litigation when pegging PML's claimed election to the seeking of injunctive relief.

The Village itself, moreover, never argued in the trial court that PML's pursuit of interim injunctive relief somehow limited PML's options at the close of the evidence. The Village's arguments on appeal to that effect should therefore have been regarded as waived. *Lemke v. Kenilworth Insurance Co.*, 109 Ill. 2d 350, 354-55 (1985) ("Issues concerning alleged error not raised in the trial court are waived"); *Board of Managers of Eleventh Street Loftominium Association v. Wabash Loftominium, LLC*, 376 Ill. App. 3d 185, 189 (1st Dist. 2007) (same). The Village's failure to raise the issue in the trial court helps to substantiate the validity of the relief awarded by the trial court.

In sum, the Second District's analysis of the election-of-remedies doctrine was faulty because the court failed to analyze and apply the doctrine under any of the well-established criteria limiting the circumstances for its application. As a result, this Court

should reverse the Second District and reinstate the trial court decision, including the relief permitted by the first-to-breach principle.

III. EVEN IF THE SECOND DISTRICT CORRECTLY APPLIED THE ELECTION-OF-REMEDIES DOCTRINE, IT ERRED IN DISALLOWING PML'S RECOVERY OF DAMAGES

The Second District held that the trial court erred in finding the Village's first breach excused performance by PML because, it said, PML elected to proceed with the Agreement after the breach. As a result, PML was bound to perform its obligations, and PML breached one or more of those obligations. (A14-17 ¶¶ 51-60.) Since both PML and the Village were in breach of the Agreement, moreover, the court said that *Chicago Washed Coal Co. v. Whitsett*, 278 Ill. 623 (1917), applied, and neither party could recover damages from the other. (A17-18 ¶¶ 59-61.)

The Second District, however, failed to apply the rule of "partial breach" developed in the 100(+) years since the *Chicago Washed Coal* decision.

A. If the Second District Is Correct that PML Elected to Proceed with the Contract, Then Both Parties Must Be Found to Have Proceeded With the Contract

As an initial matter, the Second District did not consider that, if PML elected to proceed with the Agreement, then both sides so elected. Indeed, the Village itself took the position on appeal before the Second District that both it and PML elected to proceed with the Agreement, notwithstanding breaches by both sides. The Village's brief on appeal explicitly stated as follows:

> This case presents a situation in which both parties are alleged to have breached the Development Agreement, and ***both parties elected to proceed*** thereunder. In such cases Illinois courts have sometimes permitted both parties to proceed on their claims.

(Village 8/9/21 2d Dist. Br. p. 29 (emphasis added).) The Village even cited a case in support of its argument that, since both parties proceeded, "both parties" may be entitled to damages. *Insureone Independent Insurance Agency, LLC v. American Agencies General Agency, Inc.*, 2012 IL App (1st) 092385 ¶ 33 ("a partial breach by one party *** does not justify the other party's subsequent failure to perform; both parties may be guilty of breaches, each having a right to damages"). The trial court briefing confirmed the Village's election in favor of continued performance. (*See* C5340, C5382.)

The Second District attached no significance to both parties having elected to proceed with the Agreement. Nor did it consider the *Insureone Independent Insurance Agency* case and potential for damages notwithstanding the finding of dual breaches. Instead, the court halted its analysis upon finding that both sides breached and concluded that those breaches barred recovery of damages by both parties. Had the court analyzed the issue more thoroughly and applied the reasoning of the authority the court itself ultimately cited, it would have reached a different result.

B. Illinois Law Establishes the Right of Damage Recovery for a "Partial Breach" Where a Party Declines to Terminate the Contract Following Another's Breach, Material or Otherwise

The appellate court held that both PML and the Village were barred from recovering damages because both had breached the Agreement and neither therefore could establish material compliance necessary for recovery under *Chicago Washed Coal* (App A16-18 ¶¶ 58-61). The court's reasoning falters because the court also found that the contract continued in effect following breach.

1. The Second District Overlooked Case Law Cited by the Court Itself

The flaw in the Second District's reasoning is best demonstrated by its failure to follow the teaching of federal case law the court itself cited in support of its opinion. The court cited the federal cases in the following excerpt:

> "***If a party to a contract breaks it, the other party can abandon the contract *** and sue for damages, or it can continue with the contract and sue for damages. But if it makes the latter election, it is bound to the obligations that the contract imposes on it***." *Evergreen Square of Cudahy v. Wisconsin Housing & Economic Development Authority*, 848 F.3d 822, 832-33 (7th Cir. 2017) (citing *Emerald Investments Ltd. Partnership v. Allmerica Financial Life Insurance & Annuity Co.*, 516 F.3d 612, 618 (7th Cir. 2008)); see also 14 Samuel Williston & Richard A. Lord, A Treatise on the Law of Contracts § 43:15 (4th ed. 2008) ("[T]he general rule that one party's uncured, material failure of performance will suspend or discharge the other party's duty to perform does not apply where the latter party *** insists that the defaulting party continue to render future performance.").

(A14 ¶ 50 (emphasis added).) The bolded language in this excerpt makes two points. The first is that, upon a breach by one party, *e.g.*, the Village, the nonbreaching party, *e.g.*, PML, can either abandon the contract and sue for damages or continue the contract and sue for damages. Either way, the nonbreaching party is entitled to recover for damages.

The second point is that if the nonbreaching party continues the contract and does not terminate its obligations, that party may become "bound to the obligations" placed upon the party under the contract. As the cases discussed below indicate, being "bound to the obligations" means just one thing, namely, that if the party deciding to continue the contract itself ends up not performing, it can be sued for damages by the earlier breaching party. Neither party, however, forfeits its right to recover for the other's breach, contrary to the Second District's holding

One of the Seventh Circuit cases the Second District cited, *Emerald Investments*, aptly illustrates the point that a breaching party may still enforce a continuing contract. In

that case, the purchaser of annuities for investment purposes claimed that the seller could not enforce conditions to the handling of the annuities because the seller had earlier breached the parties' contract by limiting transfers. 516 F.3d at 618. Citing to the "doctrine of 'partial breach,'" the court rejected the argument stating:

> When [the defendant seller] . . . broke its contract with [the plaintiff buyer] by refusing to permit it more than one transfer a month, [the plaintiff] could have terminated the contract. But it did not, and so [the defendant] was entitled to enforce the obligations that the contract put on [the plaintiff].

Id. The court thus held that a breaching party (the seller) did not forfeit its right to sue for damages based on another party's (the buyer's) breach where the contract is continuing. That holding directly contradicts the Second District's ruling to the contrary.

2. The Partial Breach Rule Permits PML to Recover

As *Emerald Investments* teaches, the concept that allows one breaching party to recover damages against another breaching party, where each has opted to continue the contract, is that of "partial breach." "A ***partial breach*** by one party * * * does not justify the other party's subsequent failure to perform; ***both parties may be guilty of breaches, each having a right to damages***." *Devon Bank v. Schlinder*, 72 Ill. App. 3d 147, 154 (1st Dist. 1979) (quoting *Corbin on Contracts*, emphasis added). *All EMS, Inc. v. 7-Eleven, Inc.*, 181 Fed. Appx. 551 (7th Cir. 2006), articulates the underpinnings of the doctrine as follows:

> [A] non-breaching party who fails to terminate the contractual relationship upon the other party's material breach will be said to treat that breach as "partial" instead of as material. In such a case, the non-breaching party may sue for damages, but must continue performing its own obligations under the contract.

Id. at 557-58 (construing Illinois law and relying in part on *Farnsworth on Contracts* § 8.15 (2d ed. 2001)). Thus, a material breach is treated as a "partial breach" if the victimized

party does not terminate the contact, and the contract continues subject to the right of the victimized party to sue for damages. *See also* Williston & Lord, *supra*, § 43:15 ("While the acceptance of the defective performance operates to waive the right to declare that the material breach discharged the obligor from further performance, it does not waive the right to obtain damages for the breach"). If both parties commit a "partial breach" so that each is a victim, and each elects to continue the contract, it follows that "each [has] a right to damages" from the other, as stated in *Devon Bank*.

The partial breach rule was applied by the Fourth District in *Dustman v. Advocate Aurora Health, Inc.*, 2021 IL App (4th) 210157. The court there held that a materially breaching defendant could enforce a contract clause against the other party that had not sought to terminate the contract, observing: "If the injured party chooses to keep the contract alive by treating the breach as 'partial' . . . the injured party has to stick to that choice and act accordingly." *Id*. at ¶ 38.

Similarly, *Insureone Independent Insurance Agency,* cited by the Village in the appellate court (Village's Opening Br. 29), applied the partial breach rule to find that plaintiffs were entitled to recover damages from the defendant notwithstanding contract breaches by the plaintiffs. 2012 IL App (1st) 092385 ¶ 45. The court observed that the concept that a party cannot recover for breach of contract unless that party proves "his own literal or strict performance of the terms of the contract ***has long been repudiated by our courts***." *Id*. ¶¶ 32-33 (emphasis added). The strict performance concept has been replaced by the substantial performance or "partial breach" rule. *Id*. *See also Israel ex rel. Dundee-Landwehr Ltd. Partnership v. National Canada Corp.*, 276 Ill. App. 3d 454, 460-61 (1st Dist. 1995) (following *Devon Bank* and holding that a "partial breach" by a bank did not prevent it from obtaining equitable relief of rescission against debtor).

The rule again was applied in *All EMS*, where the court effectively allowed both breaching parties to recover. In that case a franchisor sought damages from a franchisee that had breached the franchise agreement. 181 Fed. Appx. at 556-58. The franchisor, however, did not terminate the agreement, and the court found the franchisor itself committed breaches by damaging the franchisee. *Id*. Applying the partial breach doctrine, the Seventh Circuit agreed with the district court that the franchisor's damages against the franchisee would be reduced by the amount of damage caused by the franchisor. *Id*. *See also Restatement (2d) Contracts* § 246 comment b illustration 2 (Am. Law Inst. 1979) (providing the example of a seller who materially breached the contract by delivering a product late, being allowed to recover against the buyer who accepted delivery but refused to pay purchase price, subject, however, to the buyer's claim for late delivery damages).

Hence, the outdated principle relied on by the Second District that no recovery is permitted for a party in default where the contract is continuing (A16-18 ¶¶ 59-61), does not represent the law of Illinois.[2]

Nor should it. The Illinois Constitution itself recognizes the sanctity of contracts when stating that "no law impairing the obligation of contracts . . . shall be passed." Ill. Constitution Art. I § 16. Based on the importance of contracting recognized by the Constitution, this Court as a matter of public policy should promote contract performance over termination by allowing a party to a continuing contract to recover the damages shown to be caused by the other, even in the face of mutual breaches. To the extent *Chicago Washed Coal* states otherwise, this Court should either overrule it or limit it to its facts.

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[2] The case cited by the Second District in support of its decision at ¶ 61 of its opinion, *Gonzalzles v. American Express Credit Corp.*, 315 Ill. App. 3d 199 (1st Dist. 2000), did not involve a continuing contract or claims of dual breach. It therefore lacks relevance.

C. PML's Damages Far Exceeded Those of the Village, and Provide Further Justification for Allowing PML an Award of Damages

The significant disparity shown by the evidence regarding the parties' respective damages further demonstrates the inequitable and unsatisfactory nature of the Second District's neither-party-entitled-to-damages approach.

As noted earlier, PML sought $7,294,414 in damages (C5476), but the court awarded it just $5,349.677.70, plus attorneys fees as provided for in the Agreement. (*See* A40.) The reduced award led to PML's cross appeal of the damage award. (A52.) Even the damages actually awarded PML by the trial court, however, far exceeded those proved by the Village.

Of course, PML does not believe the Village is entitled any damages. The reasons are many and include the Village's breaches and bad faith interference described at pages 13-14, *supra*, and the first-to-breach analysis set forth in Part I of the Argument section of this brief.[3] But putting those reasons aside for the moment, the only damages the Village even arguably proved up at trial were for funding the draw down account and the Kruger Road improvements. (*See* p. 9, *supra*.) Those two claims together amounted to less than $300,000. (*See* A32 ¶ 31E, A33 ¶ 33D.)

With its ruling that neither party is entitled to damages, the Second District unfairly left the parties in a position of gross disparity. Just using the numbers reflected above, PML suffered a loss of over $5.3 million versus the Village's loss of under $300,000. The whole purpose of a damage award in a contract action is to compensate the injured party for its loss caused by the other party's failure of performance. *See Restatement (2d)*

[3] PML does not waive its argument regarding the Village's lack of entitlement to any damages. *See, e.g.*, Brief of Plaintiff-Appellee/Cross-Appellant PML Development LLC, pp. 47-48, filed in the appellate court on November 12, 2021.

Contracts § 347. This case, moreover, does not involve an illegal contract where a court might be justified in leaving the parties "where it finds them." *Ransburg v. Haase*, 224 Ill. App. 3d 681, 687 (3d Dist. 1992) (recognizing such treatment for illegal contracts, but nonetheless allowing recovery under the circumstances present). The contract here was perfectly viable as recognized by both the trial and appellate courts. Accordingly, no justice is served by leaving PML with a loss position more than 17 times greater than the losses purportedly suffered by the Village.

For all of these reasons, this Court should reverse the Second District's denial of damages and find that the partial breach doctrine should apply to allow PML recovery.

CONCLUSION

The Second District Appellate Court erred in applying the election-of-remedies doctrine to reject the trial court's application of the first-to-breach principle. The appellate court did so without any consideration of the limitations on the election-of-remedies doctrine. Given those limitations, the appellate court should have found that PML properly elected at the conclusion of the trial to be excused from its contractual obligations due to the Village's early material breaches of contract. PML therefore asks this Court to (a) reverse the appellate court judgment and affirm the trial court judgment on PML's breach-of-contract claims against the Village, (b) find that the trial court properly applied the first-to-breach principle, (c) affirm the appellate court judgment in favor of PML on the Village's counterclaim for breach of contract, and (d) remand the case back to the appellate court for consideration of the extent of PML's damages.

Even if this Court were to find that the appellate court justifiably rejected the first-to-breach principle, the Court should find further that the appellate court erred in in its determination that PML should not recover damages against the Village. The appellate

court made its determination based on 100+ year-old case law holding that any breach of contract by a party bars that party from recovery of contract damages. That approach, however, fails to take into account the development of case law allowing an award of damages pursuant to the "partial breach" doctrine of recovery now followed in Illinois. The case, *Chicago Washed Coal*, should either be overruled or limited to its facts. Accordingly, if the first-to-breach principle is found not to apply, PML asks this Court to (a) reverse the appellate court judgment and affirm the trial court judgment on PML's breach-of-contract claim against the Village, (b) find that PML is entitled to recover damages proved against the Village, (c) affirm the appellate court judgment in favor of PML on the Village's counterclaim for breach of contract, and (d) remand the case back to the appellate court for consideration of the extent of PML's damages.

Dated: December 1, 2022

Respectfully Submitted By

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CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b) and Rule 315(h). The length of this brief, excluding the pages contained in the Rule 341(d) cover, the Rule 341(h)(1) table of contents and statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), contains 30 pages.

/s/Don R. Sampen
Don R. Sampen

APPENDIX

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2022 IL App (2d) 200779
No. 2-20-0779
Opinion filed June 29, 2022

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

PML DEVELOPMENT LLC, Plaintiff and Counterdefendant-Appellee and Cross-Appellant, v. THE VILLAGE OF HAWTHORN WOODS, Defendant and Counterplaintiff-Appellant and Cross-Appellee.	)	Appeal from the Circuit Court of Lake County. No. 15-CH-848 Honorable Luis A. Berrones, Judge, Presiding.

JUSTICE SCHOSTOK delivered the judgment of the court, with opinion.
Justices McLaren and Jorgensen concurred in the judgment and opinion.

OPINION

¶ 1 This case stems from a 2012 development agreement (Agreement) between the plaintiff and counterdefendant, PML Development LLC (PML), and the defendant and counterplaintiff, the Village of Hawthorn Woods (Village). The Agreement authorized PML to import fill and grade a 62-acre property (Property) it owned in the Village. The Agreement required that PML was to pay the property taxes on the Property and, after PML completed the fill and grading project, it would donate the land to the Village. Shortly after entering into the Agreement, the parties disagreed as to the meaning of certain provisions of the Agreement. In 2015, PML filed a complaint against the Village, sounding in breach of contract. The Village thereafter filed a counterclaim against PML.

Following a bench trial, the circuit court of Lake County found in favor of PML and awarded it damages, although not all the damages that PML sought. Both parties appeal from that order. For the reasons that follow, we affirm in part, reverse in part, and vacate the trial court's award of damages.

¶ 2 I. BACKGROUND

¶ 3 Dan Powell is a business owner who does fill and grading projects. In 2012, he and Mitch Maneval were co-owners of DA Development LLC (DA Development). At that time, DA Development had two active fill sites in the Village, which operated under agreements with the Village. DA Development made money on those sites in two different ways: (1) it removed topsoil and clay from those sites and sold those materials to developers and, (2) in exchange for a fee, it allowed third parties to dispose of fill at those sites. DA Development paid the Village certain fees in connection with its operations at those sites.

¶ 4 In the summer of 2012, Powell became interested in purchasing the Property. Before purchasing the Property, Powell did his due diligence and retained wetland specialist Hay & Associates, surveyors R.E. Allen & Associates, and civil engineers Pearson Brown & Associates. In June and July 2012, Pearson Brown & Associates prepared a full set of grading plans that could be submitted to the Village for approval. Powell submitted those grading plans to the Village before purchasing the Property, in order to obtain preapproval of the plans. The Village, through Donna Lobaito, the Village's chief administration officer and Village clerk, advised Powell that the plans "looked good." On September 7, 2012, PML purchased the Property.

¶ 5 Pam Newton, the Village's chief operating officer, drafted the Agreement, and Lobaito revised the Agreement so that it would comply with the terms discussed by the parties. On October

11, 2012, PML entered into the Agreement with the Village. The Agreement included the following provisions that are relevant to this appeal.

¶ 6 The preamble to the Agreement described it as a "Development Agreement" and "an agreement related to the 62 acre property *** fill and grading project on Krueger Road, bounded by Fairfield and Midlothian Roads." The Agreement further included recitals, points, and sections.

¶ 7 Recital A set forth that PML was to "provide additional fill to this property to grade a building pad for future municipal use." Recital B stated that the amount of fill that PML could bring on to the property could not exceed 1.2 million cubic yards. Recital F indicated that the Village required a draw down deposit to be executed prior to work commencing.

¶ 8 Point 3 explained:

> "In lieu of a community development cash donation by [PML], the Parties agree that upon completion of the grading project, but no later than December 31, 2015, the entire 62 (+/-) acre parcel *** will be donated to the Village for the total sum of $1.00 (One dollar) by warranty deed free and clear of all liens, encumbrances and SSA assessments as of the date of conveyance. [PML] agrees to pay all taxes *** while the Subject Property is in their possession. Upon ownership entitlement to the Village by warranty deed, the Village will assume ownership of the property and will assume responsibility for all property taxes and future assessments after the date of conveyance."

¶ 9 Point 7 provided that the Property would be accessed via Krueger Road. At the end of the project, PML would bring Krueger Road up to current Village standards. PML would also donate $200,000 toward the reconstruction of Krueger Road.

¶ 10 Point 8 provided that the parties agreed that the grading permit would be valid for two years from the date of issuance and that, if work was not completed within two years, a permit extension would be granted for an additional two years.

¶ 11 Section 1.3 provided that, prior to commencing any work, PML was required to present to the Village engineer all plans, studies, reports, surveys, and other materials that might be necessary under the applicable Village codes and ordinances or that might reasonably be requested by the Village engineer. Upon the Village engineer determining that such submittals satisfied all the applicable Village codes and ordinances, the Village engineer "shall approve the final plans."

¶ 12 Powell testified that, as indicated in the Agreement, PML planned to access the Property from Krueger Road. It also planned to build a berm along the northern property line to screen the residential subdivision there from the sights and sounds of construction and to begin grading on the east side of the Property and work its way out toward the construction entrance from the north to the south end of the Property. This sequencing had a number of advantages: trucks importing fill would drive on virgin ground and not over open dirt, which is safer and more efficient for customers and reduces sediment track-out; PML could put each load of material in its final resting place, avoiding the expense of double and triple handling fill; PML could stabilize each area as it came to final grade and then never touch it again; PML's labor and time would be reduced; erosion control would be easier; less acreage would be disturbed at any one time; and neighbors would be facing a grassy hill rather than an open construction site.

¶ 13 By January 11, 2013, PML had submitted to the Village (1) the final engineering plan for the Property; (2) copies of the signed watershed development permit application; (3) copies of the December 18, 2012, drain tile investigation plan; (4) copies of the May 10, 2012, wetland delineation report; and (5) copies of the completed Illinois Environmental Protection Agency

notice of intent. Neither the Village nor the Village engineers told PML that the grading plans it had submitted violated any specific code or other regulatory provision.

¶ 14 The Village engineers faced a problem, however, because, when the parties entered into the Agreement, the Village did not have a concept plan for how it would eventually use the Property. The Village engineers expressed concern about how much fill the Village had agreed to accept, and they advised the Village that it would not be in the Village's best interest to issue a grading permit until the Village knew how it wanted to develop the Property.

¶ 15 As a result of the concerns expressed by the Village's engineers, in early 2013, the Village allowed PML to begin working on only a small area directly in front of the Property's construction entrance. This was designated as "Phase 1." The Village limited the amount of area in which PML could work so that PML would not work in any area where a future building, roadway, or parking lot might be placed pursuant to the Village's eventual concept plan.

¶ 16 Since PML was allowed to work on only a small portion of the Property, this caused several problems: poor site conditions and sediment being dragged offsite because trucks were forced to drive over fill they had just dumped with nowhere else to turn around, long lines of trucks waiting to enter the Property on Krueger Road because the mountain of fill created a bottleneck where trucks could access the site only one at a time, safety issues for customers because it was difficult for trucks to traverse a hill of open dirt, customers refusing to use the Property due to poor conditions, difficult and expensive maintenance of the construction entrance at Krueger Road, and additional machines and employees being needed to push fill up a hill.

¶ 17 At this same time, the Village refused to allow PML to install an internal reinforced haul road. A haul road is built out of asphalt grindings or recycled brick in order to keep mud, dirt, and dust down on the site and prevent vehicles from tracking sediment off site. A haul road does not

require a separate permit or plan, but the Village demanded one anyway. When PML submitted a plan for the haul road, the Village refused to authorize it unless PML paid it additional money and provided it a road bond. Due to the lack of a haul road, PML struggled constantly with mud and constantly had to interrupt operations to address dirt on the adjoining roads, which increased labor, fuel, and machinery costs.

¶ 18 By August 2013, PML was running out of room in Phase 1A and was again asking the Village to issue the full permit that it had been seeking for seven months. PML explained that it was "out of room for the slope and [was] now piling dirt instead of spreading" it, which required PML to move the dirt twice.

¶ 19 In September 2013, the Village hired Rolf Campbell to begin working on a concept plan for the Property. This was 13 months after the Village had signed the Agreement and 7 months after PML had begun working on the project.

¶ 20 On October 8, 2013, the Village allowed PML to begin Phase 1B since Campbell had not recommended placing a building pad in that area.

¶ 21 In May 2014, after considering Campbell's preliminary concept plan, the Village imposed more requirements on PML, such as reducing the elevation of the fill by 10 feet across the Property, while simultaneously reducing the amount of fill that it would allow PML to import. PML was now allowed to import only about 600,000 cubic yards of clean fill.

¶ 22 On August 8, 2014, the Village approved an earth change permit area for Phase 2A. This area was more than 1000 feet away from the stockpile of fill, which PML claimed made it cost prohibitive to move. The Village still had not given PML permission to work on the entire property, wishing to first determine its end use for the Property.

¶ 23 On September 4, 2014, the Village issued a "stop work order," in part because the Village wanted PML to reduce the size of the stockpile of fill on the Property. The only work that PML was allowed to do on the Property was to lower the height of the fill.

¶ 24 Six weeks later, the Village prohibited PML from removing any clay from the Property, even though the Agreement was silent regarding any clay removal.

¶ 25 On October 31, 2014, the Village rescinded the stop work order, but it then reimposed it three weeks later. When PML objected, the Village again rescinded the stop work order and instead imposed over $60,000 in fines, fees, and penalties.

¶ 26 On December 15, 2014, the Village issued PML a grading permit to work on the entire property. However, it was only for nine months, not for the two-year duration that was set forth in the Agreement. Further, as the permit was entered in the winter, the 2014 construction season had already concluded.

¶ 27 In May 2015, PML filed against the Village a complaint alleging that the Village had interfered with its work and caused it to incur additional costs. PML sought to enforce the provision of the Agreement that gave it the right to bring 1.2 million cubic yards of fill onto the property. PML also sought a declaration that the Village was required to issue a two-year permit. PML additionally sought *mandamus* relief to compel the Village to rescind all stop work orders and issue a two-year permit. Moreover, PML sought damages, an injunction barring the Village from interfering with its work, and a declaration that PML was no longer required to convey the Property to the Village.

¶ 28 In July 2015, the Village filed a counterclaim in which it alleged PML had breached the Agreement by (1) failing to comply with various ordinances, (2) failing to pay taxes for the Property, and (3) failing to fund the draw down account.

¶ 29 On January 15, 2016, the trial court granted the *mandamus* petition and ordered the Village to issue a permit through December 31, 2016 (*i.e.*, two years after the Village issued the final grading permit in December 2014).

¶ 30 In October 2016, the Village filed (1) a motion to require PML to complete its work by December 31, 2016, (2) a motion for summary judgment, and (3) a motion to appoint a receiver. The Village argued that PML's failure to pay taxes for the Property had caused the taxes to be sold at a tax auction, which would make it impossible (unless redeemed) for PML to convey the Property to the Village. The Village sought to compel specific performance or the appointment of a receiver for PML to redeem those taxes.

¶ 31 On December 9, 2016, the trial court extended its prior *mandamus* order and gave PML until December 31, 2018, to complete its work. The trial court denied the Village's motion for summary judgment.

¶ 32 In August 2017, PML submitted a plan that increased the total fill volume back to the 1.2 million cubic yards. The plan was substantially the same as the July 2012 plan. The Village approved this plan.

¶ 33 Also in August 2017, the Village renewed its motion for summary judgment, based on PML's continued nonpayment of property taxes. On October 13, 2017, the trial court partially granted the Village's summary judgment motion. The trial court found that PML had breached the Agreement because it could not convey the Property "free and clear," as the unpaid taxes on the Property were $436,021. However, the trial court declined to enter a money judgment against PML, observing that the Village may have caused PML's inability to pay the taxes.

¶ 34 On November 20, 2020, following a 10-day bench trial, the trial court entered judgment on PML's complaint and the Village's counterclaim. The trial court found that both parties were in

material breach of the Agreement. The trial court found that the Village had breached the Agreement by (1) refusing to approve PML's grading plans and issue the appropriate grading permit, (2) imposing obligations on PML that were not bargained for and were not part of the Agreement, and (3) failing to allow PML to dictate the means and methods of developing the Property. The trial court found that there was nothing wrong with the grading plans that PML submitted. Rather, the Village would not approve them because it wanted to create a concept plan for the Property first. The trial court noted that as of February 2018 the Village had still not finalized its concept plan.

¶ 35 The trial court further found that the Village had forced PML to make concessions to be able to work on the Property. The trial court explained that the Agreement did not indicate that the parties would continue to negotiate major terms that would change the essence of the Agreement.

¶ 36 The trial court also explained that, under applicable industry standards, the determination of means and methods for developing a parcel of property was the developer's responsibility and was under his control. Nothing in the Agreement authorized the Village to dictate to PML the means and methods for depositing fill on property. Nonetheless, the Village took this role for itself. This resulted in the illogical sequencing of events, as it required PML to start depositing fill in the area located in front of the Property entrance, which led to unsafe conditions, such as a 40-foot-high pile of fill. The trial court found Powell's testimony credible that he wanted to start the project at the back of the property. The trial court further found that the Village unreasonably impinged on PML's means and methods by not allowing it to build a haul road when it wanted to, which would have controlled the amount of mud and dirt leaving the site. The Village also prevented PML from removing and selling clay, which was not prohibited by the Agreement.

¶ 37 The trial court found that PML had materially breached the Agreement by (1) failing to redeem the real estate taxes and convey the Property to the Village by warranty deed free and clear of all liens and taxes,[1] (2) failing to fully fund the draw down deposit account, and (3) failing to contribute $200,000 toward the reconstruction of Krueger Road. Nonetheless, the trial court found that PML's breach was excused because the Village had breached the Agreement first. The trial court then awarded PML over $5.3 million in damages plus costs and attorney fees.

¶ 38 On April 7, 2021, the Village filed a timely notice of appeal. On April 13, 2021, PML filed a timely cross-appeal, arguing that the trial court's damages award was insufficient.

¶ 39 II. ANALYSIS

¶ 40 On appeal, the Village argues that, because the trial court found that PML had materially breached the parties' agreement, the trial court should have awarded the Village judgment on its counterclaims. The Village argues that the trial court wrongly found that it had materially breached the agreement and then compounded its error by finding that the Village's breach excused PML's obligations under the Agreement. Additionally, the Village insists that, because PML materially breached the Agreement, the trial court should not have awarded it any damages.

¶ 41 The elements of a breach-of-contract cause of action include the existence of a valid and enforceable contract, performance by the plaintiff, breach of the contract by the defendant, and resultant damages or injury to the plaintiff. *Gonzalzles v. American Express Credit Corp.*, 315 Ill. App. 3d 199, 206 (2000). Generally, a breach-of-contract plaintiff must plead that he or she

[1]At the time of trial, the amount to redeem the taxes was $756,000. After the trial, but before judgment, the parties stipulated that one of the three parcels that made up the Property had been conveyed to a third-party tax scavenger. Thus, it was impossible for the Village to obtain title to that parcel via turnover.

performed all of his or her obligations under the contract. *Talbert v. Home Savings of America, F.A.*, 265 Ill. App. 3d 376, 379 (1994). Only a material breach of a contract provision will justify nonperformance by the other party. *Israel v. National Canada Corp.*, 276 Ill. App. 3d 454, 461 (1995). "The test of whether a breach is material is whether it is so substantial and fundamental as to defeat the objects of the parties in making the agreement, or whether the failure to perform renders performance of the rest of the contract different in substance from the original agreement." (Internal quotation marks omitted.) *Radiant Star Enterprises, L.L.C. v. Metropolis Condominium Ass'n*, 2018 IL App (1st) 171844, ¶ 56. "The breach must be so material and important to justify the injured party in regarding the whole transaction at an end." (Internal quotation marks omitted.) *Id.* The issue of whether a material breach of contract has been committed is a question of fact, and the trial court's judgment will not be disturbed unless it is against the manifest weight of the evidence. *Mohanty v. St. John Heart Clinic, S.C.*, 225 Ill. 2d 52, 72 (2006).

¶ 42 Here, the trial court found that the Village could not recover under the Agreement because it had materially breached the Agreement in three different ways: (1) refusing to approve PML's grading plans and issue the appropriate grading permit, (2) imposing obligations on PML that were not bargained for, and (3) failing to allow PML to use its owns means and methods of developing the Property.

¶ 43 The evidence that the Village interfered with PML's development of the Property is compelling. The trial court found that the Village impinged upon PML's means and methods of developing the property, which the Village's experts acknowledged at trial are normally left to the developer's discretion. Although PML wanted to begin in the back of the property when it began work on the project, the Village authorized it to work in only a small area in the middle. This forced PML to repeatedly move fill that was being delivered to the property, which increased its

costs. It also increased congestion on Krueger Road, which led to more truck traffic and more mud on that road. Additionally, the Village interfered with PML's ability to build a haul road. It also refused to allow PML to remove and sell clay from the property. Both the selling of clay and the building of a haul road were considered regular parts of the means and methods of one in the business of doing fill and grading projects. Accordingly, the trial court's finding that the Village materially breached the Agreement by interfering with PML's use of the Property was not against the manifest weight of the evidence. *Id.*

¶ 44 In so ruling, we reject the Village's argument that it did not have to defer to PML's means and methods of using the Property, because that was not part of the Agreement. We note that every contract implies good faith and fair dealing. *First National Bank of Cicero v. Sylvester*, 196 Ill. App. 3d 902, 910 (1990). Generally, problems involving the duty of good faith and fair dealing arise where one party to a contract is given broad discretion in performance. The doctrine of good faith then requires the party vested with contractual discretion to exercise that discretion reasonably and with proper motive, not arbitrarily, capriciously, or in a manner inconsistent with the reasonable expectations of the parties. *Id.* at 910-11.

¶ 45 In this case, the Village had substantial discretion in overseeing the parties' agreement. If not for the implied obligation to act in good faith, the Village could have prevented PML from doing any work on the property and then demanded that PML donate the Property to it by December 31, 2015, as the Agreement required. The trial court essentially found that the Village was acting with an improper motive when it tried to delay PML's work on the project until it finalized its concept plan for the Property. The trial court found that the Village should have had this plan before it entered the Agreement. The trial court also determined that the Village acted unreasonably when it usurped PML's ability to use the property in a way that was consistent with

industry practices. Thus, interfering with PML's means and methods did violate the Village's obligation to act fairly and in good faith.

¶ 46 The Village also insists that it did not unreasonably interfere with PML's use of the property, because PML always wanted to start in the middle of the Property. However, the trial court found Powell's testimony at trial credible that he wanted PML to start at the back of the Property. We will defer to the trial court's credibility determinations. *Bazydlo v. Volant*, 164 Ill. 2d 207, 214-15 (1995).

¶ 47 Further, the Village asserts that it did not interfere with PML's ability to put in a haul road, as PML did not even request one until it had been working on the property for over two years. However, as PML points out, that was because the Village had unreasonably restricted them to a small area to work in and there was no place to install a haul road. Once PML did indicate a desire to put in a haul road, the Village then insisted that it pay for a permit to do so and provide other consideration to the Village, even though it was not customary in the industry to do so.

¶ 48 Thus, despite the Village's protests to the contrary, the trial court did not err in finding that the Village materially breached the Agreement when it hindered PML's ability to use the property via the customary means and methods. As one material breach is sufficient to prevent the Village from recovering under the Agreement (see *Talbert*, 265 Ill. App. 3d at 379), we need not address the other ways that the trial court also found that the Village had materially breached the Agreement.

¶ 49 We next turn to the Village's argument that, because the trial court also found that PML had materially breached the Agreement, it erred in allowing PML to still recover damages under the Agreement. The trial court explained that, because the Village had "breached first," PML was excused from its obligations under the Agreement.

¶ 50 We agree with the Village that its breach did not automatically alleviate PML of PML's contractual obligations. "If a party to a contract breaks it, the other party can abandon the contract *** and sue for damages, or it can continue with the contract and sue for damages. But if it makes the latter election, it is bound to the obligations that the contract imposes on it." *Evergreen Square of Cudahy v. Wisconsin Housing & Economic Development Authority*, 848 F.3d 822, 832-33 (7th Cir. 2017) (citing *Emerald Investments Ltd. Partnership v. Allmerica Financial Life Insurance & Annuity Co.*, 516 F.3d 612, 618 (7th Cir. 2008)); see also 14 Samuel Williston & Richard A. Lord, A Treatise on the Law of Contracts § 43:15 (4th ed. 2008) ("[T]he general rule that one party's uncured, material failure of performance will suspend or discharge the other party's duty to perform does not apply where the latter party *** insists that the defaulting party continue to render future performance.").

¶ 51 Here, PML filed a complaint in 2015 alleging that the Village had breached the Agreement. PML sought and received a writ of *mandamus* to compel the Village to adhere to the terms of the Agreement. PML was able to complete its work on the Property by December 2018. As PML elected to proceed with the Agreement after the Village's alleged breach of that Agreement, PML was bound to the obligations that the Agreement imposed upon it. See *Evergreen Square*, 848 F.3d at 832-33. The trial court therefore erred in finding that the Village's first breach excused PML from its obligations under the contract.

¶ 52 In so ruling, we are unpersuaded by PML's reliance on *Finch v. Illinois Community College Board*, 315 Ill. App. 3d 831, 836 (2000) and *Anderson v. Long Grove Country Club Estates, Inc.*, 111 Ill. App. 2d 127, 137 (1969). Neither case involves a party who sued for breach of contract and demanded that the other party comply with its obligations under the parties' contract. See *Finch*, 315 Ill. App. 3d at 836 (order of summary judgment reversed because question

of fact existed whether employee first breached contract, which would excuse employer from its obligations of paying employee); *Anderson*, 111 Ill. App. 2d at 138 (buyer's material breach justified an award of damages and excused the nonbreaching seller's remaining performance under the contract).

¶ 53 We also reject PML's argument that its obligations under the contract should be excused because the Village prevented its performance of those obligations. Specifically, PML argues that it offered the Village a deed for the property in lieu of foreclosure, but the Village refused to accept it. PML insists that, if the Village had accepted the deed, it would have achieved its objective under the Agreement of obtaining the Property.

¶ 54 We first note that the parties' Agreement required PML to provide the Village with a warranty deed. A warranty deed is not the same as a deed in lieu of foreclosure. A warranty deed is a stipulation by the grantor in which he or she guarantees to the grantee that title to the property at issue will be good and that the grantor's possession is undisturbed. *Midfirst Bank v. Abney*, 365 Ill. App. 3d 636, 644 (2006). Section 21-95 of the Property Tax Code provides that if a municipality acquires property through

> "acceptance of a deed of conveyance in lieu of foreclosing any lien against the property, *** [then] all due or unpaid property taxes and existing liens for unpaid property taxes imposed or pending under any law or ordinance of this State or any of its political subdivisions shall become null and void." 35 ILCS 200/21-95 (West 2016).

¶ 55 The Village contends that, if it were to accept a deed in lieu of foreclosure, it would then be required to file a separate lawsuit to declare null and void all the tax liens of other taxing bodies. See *id.* In the event it prevailed on its lawsuit, that would mean the other taxing bodies would be

deprived of their tax revenue. The Village insists that it was not required to go along with PML's scheme that would benefit only PML.

¶ 56 The Agreement clearly set forth that PML was to deliver a warranty deed to the Village and that it was to pay all the taxes on the Property until it transferred possession. If the Village were to accept a deed in lieu of foreclosure, it would be at the expense of its fellow taxing bodies. PML points to no public policy that would be advanced by the Village accepting this substantial modification to the Agreement. As such, the Village's decision not to accept a deed in lieu of foreclosure is not a basis for determining that the Village prevented PML from adhering to its obligations under the contract.

¶ 57 PML next asserts that "allowing the Village's refusal of the Property to defeat PML's recovery for the Village's misconduct that cost PML over $5 million would be unjust." In order to invoke this equitable doctrine of unjust enrichment, PML must be able to demonstrate that it had "clean hands" and did not engage in any misconduct. See *Toushin v. First Merit Bank*, 2021 IL App (1st) 192171, ¶ 70 (the equitable doctrine of unclean hands bars relief when the party seeking that relief is guilty of misconduct in connection with the subject matter of the litigation). PML's failure to pay hundreds of thousands of dollars in property taxes, which caused the property to be lost at a tax sale, prevents it from invoking this remedy. See *id.*

¶ 58 Because PML breached the contract by not paying taxes on the Property and allowing it to be lost at a tax sale, PML cannot maintain its action. See *W. W. Vincent & Co. v. First Colony Life Insurance Co.*, 351 Ill. App. 3d 752, 759 (2004) (breach of contract plaintiff must establish that it substantially performed under the contract at issue). As stated earlier, as one material breach is sufficient to prevent a party from recovering under a contract (see *Talbert*, 265 Ill. App. 3d at 379),

we need not address the other ways that the trial court also found that PML had materially breached the Agreement.

¶ 59 Based on the above determination, we conclude that the trial court erred in awarding PML any damages. The concept that neither party should receive damages is supported by volume 12A, section 231, of Illinois Law and Practice (ILP) on Contracts (12A Ill. L. and Prac. *Contracts* § 231 (2022)). Section 231, titled "Necessity of performance of contract by party seeking recovery," states:

> "Generally, where the acts to be performed by the parties to a contract are mutual and dependent, a party seeking to recover for a breach of contract must show their own compliance with all the material terms of the contract, or a bona fide offer to perform, or a sufficient excuse for failure to perform.
>
> A party, in order to obtain the benefit of a provision of a contract advantageous to such party, must conform to other provisions not in their favor, and *if both parties are in default there can be no recovery on the contract by either against the other."* (Emphasis added). *Id.*

¶ 60 In support of the emphasized language above, the ILP cites the Illinois Supreme Court case of *Chicago Washed Coal Co. v. Whitsett*, 278 Ill. 623 (1917). In that case, the plaintiff failed to pay for a coal delivery and the defendant failed to deliver the coal. The supreme court stated that "the most that can be said for appellant's case is that its proofs show that both parties were in default. In this condition of the record there could be no recovery by either against the other on the contract." *Id.* at 627. In support of this determination, the supreme court relied on *W.H. Purcell Co. v. Sage*, 200 Ill. 342, 347 (1902) which stated:

> "The appellant was not entitled to recoup damages for a breach of the contract, unless it had performed its part of the contract, or was ready and willing to do so at the time required; but by refusing to make payment, when demanded on March 10, 1896, it failed to perform its part of the contract. Before appellant could recoup for a breach of contract, it was required to prove that it had performed the essential requirements of the contract ***."

¶ 61 Even though *Chicago Washed Coal Co.* is over 100 years old, it remains good authority and is consistent with more modern jurisprudence. See *Gonzalzles*, 315 Ill. App. 3d at 206 (one of the elements of a breach-of-contract case is performance by the party seeking damages). Accordingly, we follow *Chicago Washed Coal Co.* and determine that neither the Village nor PML is entitled to any damages.

¶ 62 Finally, based on the above determination, we need not address PML's cross-appeal requesting that its damages award be increased.

¶ 63 III. CONCLUSION

¶ 64 For the foregoing reasons, the judgment of the circuit court of Lake County in favor of PML on the Village's counterclaim for breach of contract is affirmed, the judgment of the circuit court in favor of PML on its breach-of-contract claim is reversed, and the circuit court's judgment awarding PML damages is vacated.

¶ 65 Affirmed in part, reversed in part, and vacated in part.

2022 IL App (2d) 200779

Decision Under Review:	Appeal from the Circuit Court of Lake County, No. 15-CH-848; the Hon. Luis A. Berrones, Judge, presiding.
Attorneys for Appellant:	Timothy D. Elliott, of Rathje Woodward LLC, of Wheaton, and Patrick T. Brankin, Michael E. Kujawa, and Nicholas D. Standiford, of Schain Banks Kenny & Schwartz Ltd., of Chicago, for appellant.
Attorneys for Appellee:	Joseph L. Cohen, Jeffrey L. Widman, and Laura E. Caplin, of Fox Rothschild LLP, of Chicago, and Henry C. Tonigan III, of Kelleher Holland, LLC, of North Barrington, for appellee

IN THE CIRCUIT COURT OF THE NINETEENTH JUICIAL CIRCUIT
LAKE COUNTY, ILLINOIS

PML Development LLC, an Illinois limited liability company, Plaintiff,	)	
v.	)	No. 15CH848
Village of Hawthorn Woods, a municipal corporation, Defendant.	)	

MEMORANDUM ORDER

This case is before the Court for ruling following a bench trial regarding plaintiff PML Development LLC's request for a declaratory judgment and breach of contract claim against defendant Village of Hawthorn Woods,[1] and the Village of Hawthorn Woods' counterclaim for breach of contract and foreclosure for taxes against PML Development LLC.

I. SUMMARY OF THE CASE

PML and the Village entered into a Development Agreement relating to the development of a 62-acre parcel (the Property) bounded by Fairfield Road to the west, Midlothian Road to the east, Krueger Road to the south and the Legend Knoll Subdivision to the north in Hawthorn Woods, Illinois. Signing the Development Agreement did not create a cooperative business relationship between the parties as PML and the Village almost immediately disagreed as to the meaning of certain provisions and the rights and obligations each party had under the Development Agreement. Each party accused the other party of materially breaching the Development Agreement, but neither party stopped the development of the Property from proceeding even after PML filed its lawsuit against the Village in 2015.

PML claims that the Village materially breached the Development Agreement when the Village: a) Refused to approve PML's grading plan and issue a grading permit on a timely basis because the Village had not finalized its municipal campus concept plan for the Property. b)

[1] PML's complaint also alleged a count for mandamus. The Court granted PML's request for mandamus on January 16, 2016 and on December 9, 2016 thereby, resolving PML's mandamus claim prior to trial.

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Only issued earth change approvals thereby imposing work phases on PML and dictating PML's means and methods for doing the work. c) Used stop work orders to force concessions and plan changes from PML so that the Village could shift the cost of preparing the Property to accommodate the Village's future use of the Property. and d) Charged PML for costs and expenses not covered by the Draw Down Deposit Agreement. PML seeks damages in the amount of $7,294,414.00, plus costs and attorneys' fees.

The Village claims that PML materially breached the Development Agreement because PML: a) Failed to comply with Recital A when PML refused to grade and compact the Property in accordance with the Village's concept design criteria for a municipal campus. b) Failed to limit the type of material brought onto the Property to clean dirt. c) Failed to properly fund the Draw Down account so that the Village could be reimbursed for the cost of the time the professionals and staff spent on the project. d) Failed to obtain the proper permits or approvals from other regulatory agencies. e) Failed to pay the property taxes that were incurred while PML possessed the Property. f) Failed to restore Krueger Road once the project was completed. and g) Failed to convey the Property by warranty deed to the Village. The Village also claims that: a) The Village did not materially breach the Development Agreement. b) PML agreed that all work and modifications were to be performed at PML's risk and expense. and c) PML's damages are speculative. The Village requests that PML: a) Be denied all of its requested relief. b) Be ordered to resolve and satisfy any outstanding liens, judgments, and taxes against the Property. c) Be ordered to convey the Property to the Village by warranty deed. d) Pay the Village the amounts PML owes under the Draw Down Deposit Agreement. e) Restore Krueger Road to Village standards. and f) Pay the Village its attorneys' fees.

The parties presented testimony and had hundreds of exhibits admitted into evidence over the course of a lengthy bench trial. The parties agree that they entered into a valid Development Agreement but disagree as to what each party was required to do under the Development Agreement. The parties are now before the Court requesting that the Court determine what each party contracted to do and whether each party substantially complied with the terms of the Development Agreement.

The Court's analysis has considered the evidence presented at trial, the parties' closing

briefs, the relevant case law and weighed the credibility of the witnesses in favor of PML's witnesses and hereby makes the following findings of fact and conclusions of law.

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. PML is in the business of land development and was initially formed in September of 2012 to develop the Property in Hawthorn Woods.

2. The owners of PML also own another company named DA Development and these companies share office space, office equipment, vendors, construction equipment and employees. The companies' shared employees were used by PML to work on the Property.

3. Before PML purchased the Property it performed its due diligence and retained: a) wetland specialist Hay and Associates; b) surveyors R.E. Allen & Associates; and c) civil engineers Pearson Brown & Associates.

4. Pearson Brown & Associates prepared a full set of grading plans in June/July 2012 to submit to the Village for approval. (Ex. PX 100)

5. PML submitted the grading plans to the Village before it purchased the Property to obtain pre-approval of the plans.

6. The Village through Donna Lobaito, the Village's Chief Administration Officer and Village Clerk, advised PML that the plans looked good.

7. PML entered into a contract to purchase the Property for $620,000.00 on June 14, 2012. The Seller accepted PML's offer on September 7, 2012. (Ex. PX 369) The closing for the Property occurred on September 27, 2012 and a Special Warranty Deed was issued to PML. (Ex. PX 368)

8. The Development Agreement was signed by the Village on August 20, 2012 and by PML on October 11, 2012.

9. Pam Newton, the Village's Chief Operating Officer, drafted the Development Agreement and Donna Lobaito revised the agreement so that it would comply with the terms discussed by the parties.

10. The Development Agreement is brief and consists of seven pages and three Exhibits. Two attachments to the Development Agreement, the Grading Plans identified as Exhibit A and the Tree Preservation Plan identified as Exhibit C, are not attached to the

Development Agreement.[2]

11. The Development Agreement is, at times, vague or incomplete as to what each party was required to do. When construing an agreement, the court is to give effect to the parties' intent at the time that they entered into the agreement. *First Bank and Trust Co. of Il. v. Village of Orland Hills*, 338 Ill. App.3d 35, 40, 787 N.E.2d 300, 304 (1st Dist. 2003). If an ambiguity exists in a specific term of a contract, the ambiguity is resolved against the drafter of the disputed provision. *Dowd & Dowd v. Gleason,* 181 Ill.2d 460, 479, 639 N.E.2d 358, 368 (1998). In construing the parties' contract, the Court must not alter the contract or make a new one for the parties. *Northwest Racing Ass'n v. Hunt,* 20 Ill. App.2d 393, 398, 156 N.E.2d 285, 288 (2d Dist. 1959) In applying these principles to the Development Agreement, it is clear that the parties entered into an agreement and the bargained for objective of the Development Agreement was for PML to generate revenue by importing clean fill to deposit on the Property and for the Village to receive title to the Property via a warranty deed free of liens and encumbrances for one dollar when the project was finished but no later than December 31, 2015.

12. When the Development Agreement was signed the Village did not have a concept plan for the development of a municipal campus on the Property and was still discussing the various components of its municipal campus plan. These discussions pre-date the signing of the Development Agreement and the Village only contemplated a conceptual site plan after the Development Agreement was signed.

A. The Village retained Rolf Campbell and Associates in the fall of 2013 to develop a concept plan for the Village's municipal campus.

B. The first municipal campus concept plan was provided to the Village on September 24, 2013 which showed the locations of various buildings and other proposed uses. (Ex. PX 274)

C. A revised concept plan was provided to the Village on September 27, 2013.

[2] PML explained that Exhibit A is not attached to the Development Agreement because the Grading Plan consists of oversized sheets of paper and it was impractical to attach. There was no explanation as to why Exhibit C is not attached but this exhibit is not relevant to the parties' claims.

(Ex. PX 275)

D. Additions to the concept plan were made by the Village in May 2014. (Ex. PX 278)

E. The concept plan was last revised by Rolf Campbell and Associates in September 2014.

F. During the duration of PML's development of the Property, the Village's concept plan for a municipal campus kept changing and was never finalized but the Village still demanded that PML take into consideration where buildings and other structures may be located as PML developed the Property.

G. As of February 2018 the Village had not finalized its concept plan for the Property.

13. Recitals in a contract generally provide an explanation of the circumstances surrounding the execution of the agreement and ordinarily are not binding obligations on the parties or an effective part of their agreement unless they are referred to by the parties in the operative part of the agreement. *Trower v. Elder,* 77 Ill. 452, 456 (1875); *First Bank and Trust Co. of Il. v. Village of Orland Hills,* 338 Ill. App.3d 35, 44-45, 787 N.E.2d 300, 308-09 (1st Dist. 2003); *McMahon v. Hines,* 298 Il. App.3d 231, 237, 697 N.E.2d 1199, 1204 (2d Dist. 1998). When the parties intend to make the recitals an operative part of their agreement this intent is generally shown by language in the agreement that identifies the recitals as part of the consideration for entering into the contract. *Wilson v. Wilson,* 217 Ill. App.3d 844, 853, 577 N.E.2d 1323, 1329-30 (1st Dist. 1991). Language such as: a) "NOW, THEREFORE, in consideration of the foregoing Recitals, the provisions of which are hereby incorporated herein, and the mutual promises set forth herein, and for other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the parties agree as follows"[.] *Id.*; and b) "[F]or and in consideration of the premises set forth in the foregoing Recitals." *American Nat'l Bank & Trust Co. of Chicago v Chicago Title and Trust Co.,* 134 Ill. App.3d 772, 776, 481 N.E.2d 71, 74 (1st Dist. 1985) evidence this intent.

A. The preamble to the Development Agreement states that: "**NOW, THEREFORE, FOR AND IN CONSIDERATIN OF THE MUTUAL PROMISES, CONVENANTS, AND**

AGREEMENTS SET FORTH HEREIN, THE PARTIES HEREBY AGREE AS FOLLOWS". (Ex. VHW TX 1, p. 2)[3] This language is insufficient to show that Recitals A, C, E, or F were incorporated into the agreement or were part of the exchanged consideration. Absent language that shows the parties' intent to incorporate the Recitals into the operative part of the agreement a court may not consider the recitals in a contract as a statement of obligation but may only consider the recitals, if necessary, as an aid to determine the intention of the parties in construing the operative provisions of the agreement. *Cress v. Recreation Servs., Inc.*, 341 Ill. App.3d 149, 170, 795 N.E.2d 817, 838–39 (2d Dist. 2003). These Recitals are, therefore, merely an expression or explanation of the circumstances as to why PML and the Village entered into the Development Agreement.

14. Recital A is not part of the operative terms of the Development Agreement, and therefore, does not impose an obligation on PML to grade and compact the Property for a building pad for the Village's future municipal campus, or to fill low areas for future parks and recreational areas on the Property, or to surrender control of the means and methods of developing the Property.

A. The Village and the Village engineers believed that Recital A of the Development Agreement required PML to conform its grading plan to accommodate the Village's municipal campus concept plan and was a basis for not approving the grading plan submitted to the Village by PML. (Testimony of Lee Fell, Trans. dated January 15, 2020 a.m. session, at pp.134-136, 138-144; p.m. session at pp. 3-4, 23-26, and 50-51.) Such belief was incorrect.

B. The Village also incorrectly believed that the Development Agreement required PML to compact the Property and incur the costs of compacting the Property to

[3] During the trial each party preferred to use its own exhibits when questioning a witness and asked that the exhibit being used be admitted into evidence. This practice led to several duplicate exhibits being admitted. At the end of the trial the parties submitted a Parties' Agreed Joint Admitted Exhibit List. The Parties' Agreed Joint Admitted Exhibit List identifies the Village of Hawthorn Woods' exhibits as "DX __", but the Village's physical exhibits have the prefix VHW TX instead of the DX prefix reflected in the agreed exhibit list. When referring to the Village's exhibits the Court has used the VHW TX prefix that is on the physical exhibit as the Court is working off the physical exhibits and not the Agreed Exhibit List. The numerical designation of the Village's exhibit is the same regardless of which prefix is used.

accommodate the Village's municipal campus plan, thus the Village improperly made compaction of the Property a requirement for the issuance of a grading permit.

15. The only operative term in the Recitals is the provision in Recital B where the parties specifically agreed that PML could bring onto the Property an amount of fill that "will not exceed 1.20 million cubic yards". (Ex. VHW TX 1, p. 1)

A. Recital B did not guarantee that PML could bring 1.20 million cubic yards of fill onto the Property but merely established the maximum amount of fill that PML would be able to deposit onto the Property within the time limits set-forth in the Development Agreement.

16. Paragraph 8 of the Development Agreement required the Village to initially issue PML a grading permit for two years and if the project was not completed in this initial two year period, the Village was required to grant an extension of the grading permit for an additional two years. (Ex. VHW TX 1, p. 3, ¶8)

A. PML's engineers, Pearson Brown & Associates completed a full set of grading plans for the Property sometime in June/July 2012.

B. Donna Lobaito personally received PML's grading plan on January 11, 2013 and forwarded PML's grading plan to the Village engineers on January 17, 2013.

C. The initial grading plans had to be approved before Pearson Brown & Associates could add soil erosion and sediment control measures.

D. By January 11, 2013 PML had submitted to the Village: a) The Krueger Site Final Engineering plan dated January 11, 2013; b) copies of the signed Watershed Development Permit application; c) copies of the December 18, 2012 Drain Tile Investigation Plan; d) copies of the May 10, 2012 Wetland delineation Report; and e) copies of the completed IEPA Notice of Intent.

E. After reviewing the Development Agreement the Village engineers voiced their concern about the amount of fill the Village had agreed to accept when the Village had not yet developed their own concept development plan and advised the Village that it would not be in the Village's best interest to issue a grading permit until the Village knew how it wanted to develop the Property. (Testimony of Donna Lobaito, Trans. dated November 6, 2019,

1:30 p.m. session, p. 100.)

F. Lee Fell, one of the Village's engineers, advised the Village that the amount of fill being allowed on the site could pose compaction issues in the future for the Village if it wanted to put a Village Hall complex there and he recommended that the Village have a site plan developed so that the depositing of fill on the Property would be done in accordance with the Village's future use and the compaction costs could be passed on to PML. (Ex. PX 33-1)

G. Before the Village would issue PML a grading permit for the Property, the Village wanted to complete its conceptual municipal campus site plan for the Property. (Testimony of Donna Lobaito, Trans. dated November 6, 2019, 1:30 p.m. session, p. 117.)

H. The Village engineer was required to approve the final grading plans and have a grading permit issued to PML once PML submitted all plan studies, reports, surveys and other materials that might be necessary under the applicable Village Codes and Ordnances, or that might be reasonably requested by the Village Engineer. (Ex. VHW TX 1, p. 5, §1.3)

I. Neither the Village nor the Village engineers told PML that the grading plans submitted by Pearson Brown & Associates violated any specific code or other regulatory provision, thus the grading plans were code compliant. Therefore, based on when the submissions to the Village occurred, as discussed in paragraph 16-D, the initial grading permit should have been issued in February 2013.

J. A grading permit was issued on December 15, 2014 over two years after the Development Agreement was signed. (Ex. PX 405-1)

K. The initial grading permit should have been for a two-year period but instead it expired on September 15, 2015, nine months after its date of issuance. (Ex. PX 405-1)

L. PML was forced to seek the Court's intervention to obtain the two-year grading permit and on January 15, 2016 the Court issued a writ of mandamus ordering the Village to issue a grading permit to PML that expired on December 31, 2016.

M. The Village thereafter refused to issue a two-year extension of the permit and on December 9, 2016, the Court issued a second writ of mandamus ordering the Village to issue PML a grading permit for an additional two-year period until December 31, 2018.

17. The Village's delay for issuing a grading permit to PML was not because the plans

violated any Code, regulation or the terms of the Development Agreement as claimed by the Village, but occurred because the Village did not have a final concept plan for its municipal campus and wanted to force PML to conform its grading plan to the requirements of the Village's municipal campus concept plan and to perform work at PML's expense that was not required under the Development Agreement.

A. Had PML obtained all of the other agency permits that the Village engineers demanded from PML, PML's grading plan would still not have been approved because the Village's final concept plan for its future municipal campus was incomplete. (Testimony of Lee Fell, Trans. dated January 15, 2020 a.m. session, at pp. 141-43.)

18. Because the Village did not have its municipal campus concept plan finalized it would only issue earth change approvals which forced PML to work in areas that the Village believed would not have any buildings, roads, parking areas, or bike paths. (Testimony of Donna Lobaito, Trans. dated November 6, 2019, 1:30 p.m. session, p. 119.)

A. Under applicable industry standards, the determination of the means and methods for developing a parcel of property is the responsibility and under the control of the developer and nothing in the Development Agreement authorized the Village to dictate to PML the means and methods for depositing fill on the Property.

B. Throughout PML's dealings with the Village, PML sought to get a full grading permit from the Village, but the Village would not approve a full grading permit and forced PML to make concessions and accept earth change approvals from the Village in order to be able to work on the Property.

19. The Village's practice of only issuing earth change approvals and dictating the areas where the fill could be deposited deprived PML of the ability to develop the Property in accordance with its project plan; resulted in the Village dictating PML's means and methods for developing the Property causing a 40-foot high, pile of fill to accumulate at the entrance to the Property; and caused the issues and problems that later arose for which the Village issued stop work orders.

20. PML had a work phase and sequencing mock-up plan for the development of the Property which in the industry is known as the means and methods of construction. (Ex. PX 348)

21. PML's means and methods required PML to: a) Work the Property from east to west and from north to south. b) Access the Property from Krueger Road located on the southern end of the Property. c) Proceed with Phase 1 by creating a berm at the north end of the Property where the Legend Knoll Subdivision, a residential subdivision, was located and then proceed to the northeast corner of the Property and work from the back (north end) of the Property to the front (south end) towards the Krueger Road entrance. d) Complete Phase 1 and then proceed to Phase 2 where fill would be deposited to the west of the Phase 1 region and would be deposited from the north portion of the Property towards the south. and e) Complete Phase 2 and then deposit fill in the Phase 3 region west of the Phase 2 region depositing the fill from the northern portion of the Phase 3 area to the southern portion. (Ex. PX 348)

A. PML's sequencing plan would allow: a) trucks that brought in fill to drive over ground that was "virgin ground" that is ground that did not have fill deposited on it; b) for cost savings by locating the fill in its final resting place PML could save on machinery labor time, fuel consumption, and wear and tear on the machinery; c) the fill to be deposited in its final resting place thus avoiding having to relocate the fill to its final resting place; d) for the area that was graded to be stabilized; and e) for permanent seeding once the fill was in its final resting place thus avoiding having to seed more than once and helping to minimize or avoid soil erosion.

22. While this project was unusually large in area, PML's means and methods were consistent with the industry standards for sequencing this type of development and was reasonable.

23. The actual sequencing of the project as demanded and controlled by the Village through its earth change approvals was illogical and required PML to start depositing fill in the Phase 1A area located in front of the Krueger Road entrance thus creating a situation where trucks entering and leaving the Property had to constantly drive over an area where fill was placed creating mud and unsafe conditions. (Ex. PX 349 and Group Ex. PX 388)

A. Initially depositing fill in the Village's Phase 1A area required PML to incur additional labor costs due to having to move the mountain of fill that was approximately 15 feet high and four football fields in area that accumulated by the entrance and exceeded the designed plan elevation. (Group Ex. PX 388-6-10, 15)

24. The work sequencing forced onto PML by the Village caused or contributed to: a) poor site conditions and sediment being tracked onto Krueger Road; b) long lines of trucks waiting on Krueger Road to deposit fill onto the Property; c) the accumulation of a huge pile of fill at the entrance to the Property because the fill could not be placed in its final resting place; and d) PML having to perform unnecessary work to move the mountain of fill that accumulated at the entrance to the Property.

25. A haul road is constructed on a site to keep the trucks' tires clean and make it easy for the trucks to get around the site. Constructing a haul road is part of the contractor's means and methods and does not require a permit. A haul road would have been beneficial to this site, but the Village questioned why one was necessary and delayed PML's ability to install a haul road.

A. The location of where PML wanted to install a haul road is depicted in the grading plans submitted to the Village. (PX 348)

B. The Village's refusal to allow PML to build a haul road was unreasonable, impinged on PML's means and methods and forced PML to constantly have to put down three-inch stone for the trucks to drive over in attempts to control the amount of mud and dirt leaving the site.

26. Section 1.1 of the Development Agreement allowed PML to commence work at its own risk and expense if, such work had to be modified to conform to State, County and Village Codes and Ordinances, and any other applicable codes or requirements. (Ex. VHW TX 1, p. 4.)

A. The language in §1.1 that refers to "or requirements" when read in context with the rest of this section refers to other regulatory provisions that may be applicable and not to the Village's requirement that the grading work conform or accommodate the Village's municipal campus concept plan.

B. None of the work that had to be redone was due to violations of statutory or code violations, and Section 1.1 did not impose on PML the risk and expense of having to modify or re-do work to conform the Property to the Village's changing municipal campus concept plan.

27. Throughout the Development Agreement there were certain conditions that had to

occur before PML could start work on the Property, but the Village allowed work to commence on the Property even though the Village claimed these conditions were not met. (Ex. VHW TX 1, p.4, §1.1; p.5, §1.3) These conditions, however, were not a basis for the Village not to approve and issue a grading permit.

28. The Village improperly prohibited PML from removing and selling clay from the parcel as this activity is considered part of the developer's means and methods and such activity is not prohibited by the Development Agreement.

29. The Village claims that PML accepted changes and additional conditions to the Development Agreement in order to get started on the project, and because the Development Agreement contemplated that additional terms would be negotiated in the future. Modifications to a contract require consideration to be valid and enforceable. *Doyle v. Holy Cross Hosp.*, 186 Ill.2d 104, 112, 708 N.E.2d 1140, 1144-45 (1999); *De Fontaine v. Passalino,* 222 Ill. App.3d 1018, 1028, 584 N.E.2d 933, 937 (2d Dist. 1991). Here, there is no evidence of any additional consideration from the Village to support imposing on PML additional obligations not found in the Development Agreement; and the language of the Development Agreement does not clearly state that the parties intend to continue to negotiate major terms which would change the essence of the Development Agreement signed by PML and the Village. Because the Development Agreement is not clear on this point it must be construed in favor of PML as the Village is the party that drafted the Development Agreement. Moreover, the evidence shows that PML was coerced, through the Village's use of its police powers, to go along with these additional demands in order to get its project started or lose revenue opportunities.

30. A breach of contract occurs when: a) a valid contract exists; b) the non-breaching party performs; c) the other party breaches; and d) the non-breaching party is injured. *Catania v. Local 4250/5050 of Communication Workers of America,* 359 Ill. App.3d 718, 724, 834 N.E.2d 866, 971 (1st Dist. 2005); *Payne v. Mill Race Inn,* 152 Ill. App.2d 269, 273, 504 N.E2d 193, 196 (2d Dist. 1987). If there is a material breach of the contract by one of the parties, the other party is not required to perform and may seek damages. *Finch v. Illinois Community College Bd.,* 315 Ill. App.3d 831, 836, 734 N.E.2d 106, 110 (5th Dist. 2000); *Anderson v. Long Grove Country Club Estates, Inc.,* 111 Ill. App.3d 127, 139, 249 N.E.2d 343, 349 (2d Dist. 1969). "A material or total

breach is a failure to do an important, substantial, or material undertaking as set-forth in the contract." *Anderson v. Long Grove Country Club Estates, Inc.,* 111 Ill. App.3d at 139, 249 N.E.2d at 349.

A. The Village materially breached the terms of the Development Agreement by: a) refusing to approve PML's grading plans and issue the appropriate grading permit; b) imposing obligations on PML that were not bargained for and not part of the Development Agreement in order to obtain concessions from PML; and c) failing to allow PML to dictate the means and methods of developing the Property through the Village's use of earth change approvals.

B. The Village's breach of contract resulted in PML incurring damages.

31. The Development Agreement and the Village Code under Title 11, Section 11-1-2(IV) required PML to enter into and fund a Draw Down Deposit Agreement. (Exs. VHW TX 1, p. 2, ¶1; p. 6, §3.1; PX 61-2)

A. From this account PML was to pay for "inspections related to the grading, filling, sedimentation and soil erosion control measures, stormwater management, perimeter landscaping, and seeding operations."

B. Title 11, Section 11-1-2(IV) of the Village Code expanded the types of activities that PML had to pay out of the Draw Down Deposit account. (Ex. PX 61-2)

C. There was no separate Draw Down Deposit Agreement executed by PML and the Village, but PML deposited funds into a Draw Down Deposit account and paid the Village $31,644.35 out of this account. (Ex. PX 234)

D. PML did not contest the invoices provided by the Village relating to charges against the Draw Down Deposit account, but PML did object to some of the line items on the invoices.

E. The Draw Down Deposit account has a deficit of $53,103.25 as of June 2015. (Ex. PX 234)

F. The expenses the Village charged PML and that the Village debited against the Draw Down Deposit account were authorized charges under the terms of the Development Agreement and the Village Code.

32. Paragraph 15 of the Development Agreement required PML to keep all roads affected by the development project clean with daily street sweeping operations. In addition, PML was required to keep Krueger Road in good drivable condition and to fill potholes on Krueger Road when necessary. (Ex. VHW TX 1, p. 4, ¶15)

A. The term "daily street sweeping" read in the context of the goal to be accomplished means that PML had to conduct street sweeping every day and could not skip a day. The term did not mean that PML could limit the street sweeping to only once a day. The number of daily sweepings was dependent on how many sweepings it took to keep the affected roads clean.

B. PML cleaned Krueger Road several times a day and complied with the street sweeping requirement.

33. Paragraph 7 of the Development Agreement required PML, after completing its project, to reconstruct Kreuger Road to the Village's standards. (Ex. VHW TX 1, p. 3, ¶7)

A. The Development Agreement required the Village to provide PML with the required Village specifications and PML was to do all of the construction work.

B. PML's total financial donation towards the reconstruction of Krueger Road was to be $200,000.00.

C. The Village did not provide PML with the reconstruction specifications for Krueger Road and as of February 2018 the Village did not have a time frame for resurfacing Krueger Road.

D. PML neither donated the $200,000.00 to the Village nor reconstructed Krueger Road.

34. Paragraph 3 of the Development Agreement required PML to donate the Property to the Village for the sum of one dollar at the completion of the grading project, but no later than December 31, 2015. (Ex. VHW TX 1, p.2, ¶3)

A. Paragraph 3 read together with paragraph 8 of the Development Agreement contemplates for the possibility that the Property would be conveyed to the Village before PML completed the project and was still working on the Property. Had PML received a two-year building permit on the date that PML signed the Development Agreement and the permit was

extended for two years, the project's completion date would be October 12, 2016, which is nine and a half months past the last date by which PML had to donate the Property to the Village. (Ex. VHW TX 1, p.2, ¶3; p.3, ¶8)

B. Donation of the Property was to be by warranty deed free and clear of all liens and encumbrances.

C. PML was to pay all taxes, assessments and special assessments while the Property was in PML's possession.

D. The Village would only assume payment of all future taxes and assessments after the date the Property was conveyed to the Village.

E. PML did not pay the real estate taxes after 2015 even though it still had possession of the Property and allowed the taxes to become delinquent because it believed it was not responsible for payment of the real estate taxes after December 31, 2015. PML also claims that it did not have the funds to pay the real estate taxes after 2015 but there was no evidence presented that supports this claim.

F. PML offered to convey the property, but not by warranty deed, to the Village, but the Village did not accept PML's offer.

G. PML's failure to pay the real estate taxes when due and allowing the real estate taxes to become delinquent was a breach of the Development Agreement, but not a material breach as PML could have redeemed the taxes before it had to transfer the Property to the Village.

H. PML failed to redeem the real estate taxes and to convey the Property to the Village by warranty deed free and clear of all liens and taxes by December 31, 2015; the delinquent real estate taxes were sold at a tax sale and the time to redeem the taxes has expired. PML no longer holds title to the Property.

35. PML did not violate Recital C of the Development Agreement relating to depositing only clean dirt on the Property.

A. Recital C is not part of the operative provisions of the Development Agreement and there is no other language in the Development Agreement that refers to the material that can be brought onto the Property as "dirt". The Development Agreement required

PML to only deposit "clean fill" on the Property. (Ex. VHW TX 1, p. 1, Recitals A, B, and C; p. 2, Recital E; and p. 3 ¶7)

B. The Village's in-house engineer and Public Works Director, Erika Frable, also interpreted the Development Agreement to require that the material be clean fill not clean dirt because clean dirt cannot be properly compacted for the use the Village wanted to make of the Property. (Trial Testimony of Erika Frable, Trans. dated November 8, 2019, a.m. session, p. 119, 121, and Ex. PX 7.)

C. Clean fill includes a mixture of soil, concrete, rock, asphalt, and brick. (Trial Testimony of Erika Frable, Trans. dated November 8, 2019, a.m. session, p.122)

D. PML tested the fill as it was being brought onto the Property and if contaminants were detected PML would not accept the fill.

E. There is insufficient evidence to show that the fill PML deposited onto the Property violated the provisions of the Development Agreement.

36. The Development Agreement authorized the Village to conduct unannounced inspections of the Property and inspect delivery papers from the fill's site of origin.

A. The Development Agreement did not require PML to deliver to the Village the original or copies of the delivery papers PML received from its customers. The Development Agreement required PML to provide the Village with access to fill tickets PML received from its customers at PML's place of business. PML complied with this requirement when it made the delivery papers available for the Village to inspect at PML's place of business.

37. The Stop Work Order issued to PML on December 13, 2012 claiming that PML was doing work without a permit in violation of Village Code 8-2-1 was improperly issued as PML was not performing any work on the site but was seeking to evict an illegal squatter on the property pursuant to court order. (Exs. PX 351 and VHW TX 2)

38. The Stop Work Order issued on March 21, 2013 for violating Village Code 10-4-2 for doing work outside the scope of the issued grading permit does not specify the work that exceeded the scope of the grading permit, but appears to relate to sediment being tracked onto Krueger Road. (Exs. PX 352; VHW TX 24A)

A. Any sediment being tracked onto Krueger Road is as a result of the lack of a

haul road and the accumulation of fill at the entrance to the Property and both conditions are attributable to the Village's interference with PML's means and methods in developing the Property. (Group Ex. VHW TX 181)

B. The pictures showing the condition of Krueger Road do not support the Village's claimed violation, thus the issuance of this Stop Work Order is not supported by the evidence. (Group Ex. VHW TX 181)

39. The Stop Work Order issued on August 15, 2013 for violating Title 10, Chapter 4 of the Storm Water Management Ordinance fails to identify the specific provision in Title 10, Chapter 4 that PML violated. (Exs. PX 353 and PX 356)

40. The Stop Work Order issued on September 4, 2014 citing PML for a violation of Recital C of the Development Agreement because PML was not limiting the material deposited on the Property to clean dirt was a pretext by the Village to further exert control over PML's means and methods and how PML sequenced the work on the Property because Recital C did not require that only "clean dirt" be deposited on the Property and the conditions imposed on PML for lifting the Stop Work Order did not relate to the type of fill deposited on the Property, but instead focused on PML removing the pile of fill that had accumulated at the Property's entrance and acceptance of conditions relating to the Village's municipal campus concept plan. (Exs. PX 354; 28; 48; and 49)

41. The Village issued a Stop Work Order on November 20, 2014 because PML did not provide compaction reports to the Village, and for violations that did not arise out of any obligation under the Development Agreement except for the claimed failure to provide insurance and PML's failure to pay the real estate taxes. (Exs. PX 54; VHW TX 81A)

A. The Development Agreement did not require PML to compact the Property or provide compaction reports to the Village.

B. The Development Agreement did not limit PML to only working in an area that was no bigger than 10x10 cubic feet as the Development Agreement's unit of measurement was cubic yards and not cubic feet.

C. Providing insurance was required before any work was begun but the Village allowed work to begin before it was provided the required insurance policy, therefore, the

Village waived this provision as a basis for stopping the work at the site.

D. The payment of real estate taxes was part of the requirement that PML convey the Property to the Village by warranty deed free and clear of all liens, encumbrances and SSA assessments as of the date of the conveyance. However, the failure to pay the real estate taxes when due was not a material violation of the Development Agreement because the Development Agreement required that all real estate taxes be fully paid by the time of the conveyance of the Property, which provided PML with time to pay any delinquent taxes.

E. The November 20, 2014 Stop Work Order was rescinded on November 26, 2014 without any evidence that the alleged violations were cured. (Ex. PX 85).

42, The Stop Work Order issued on August 27, 2015 for violating section 10-4-2 of the Watershed Development Ordnance fails to identify the specific activity that violates a Watershed Development Ordinance provision. (Ex. PX 355)

A. The Army Corp of Engineers who have jurisdiction over the wetland involved in the alleged violation did not issue a notice of violation, nor did it issue any violation notices for any of the other alleged violations of the Watershed Development Ordinance.

43. PML completed the project in December 2018 and the work substantially complied with the original grading plans submitted by PML. (Ex. PX 476)

44. The Mayor's testimony that he was concerned that the Village was in over its head in allowing 1.2 million cubic yards of fill to be brought onto the property and that he did not like the way the site looked with only 300,000 cubic yards of fill on the property (Ex. PX 253) shows that the driving force behind the Village's refusal to approve PML's grading plan and the reason for issuing the Stop Work Orders was the Village's need to add the details it failed to negotiate for in the Development Agreement and to force PML to conform its grading on the Property to what the Village would need in order to construct its municipal campus on the Property once PML deeded the Property to the Village.

45. PML materially breached the Development Agreement when: a) it failed to redeem the real estate taxes and to convey the Property to the Village by warranty deed free and clear of all liens and taxes by December 31, 2015; b) it failed to fully fund the Draw Down Deposit account; and c)it failed to contribute $200,000.00 towards the reconstruction of Krueger Road.

46. When there is a material breach of the contract by one of the parties, the other party is not required to perform and may seek damages. *Finch v. Illinois Community College Bd.*, 315 Ill. App.3d 831, 836, 734 N.E.2d 106, 110 (5th Dist. 2000); *Anderson v. Long Grove Country Club Estates, Inc.*, 111 Ill. App.3d 127, 139, 249 N.E.2d 343, 349 (2d Dist. 1969). The party who materially breaches cannot take advantage of the terms that benefit him to recover damages. *Goldstein v. Lustig*, 154 Ill. App.3d 595, 599, 507 N.E.2d 164, 168 (1st Dist. 1987). "A material or total breach is a failure to do an important, substantial, or material undertaking as set-forth in the contract." *Anderson v. Long Grove Country Club Estates, Inc.*, 111 Ill. App.3d at 139, 249 N.E.2d at 349. A party who forces the other party to breach the contract cannot hold the breaching party liable for that breach. *Heard v. Pistakee Builders, Inc.*, 111 Ill. App.2d 227, 233, 250 N.E.2d 1, 4 (2d Dist. 1969).

A. The Village was the first to materially breach the Development Agreement, therefore, it cannot seek to enforce the terms that benefit it against PML and PML's performance of its obligations under the Development Agreement are excused.

47. PML suffered damages due to the Village's material breach of the Development Agreement.

48. The Village claims that PML failed to prove its damages because they are speculative and therefore PML should not be awarded damages. The awarding of damages in a breach of contract case is to put the non-breaching party in the same position it would have been if the contract had been performed, but not in a better position. *Mayster v. Santacruz*, 2020 Il App.(2d) 190840, ¶31.The measure of damages for a breach of contract is the amount that will compensate the aggrieved party for the loss the breach caused, and the aggrieved party must also make a reasonable effort to avoid damages from that breach. *Id.* To recover damages based on lost profits, the probable profits must be estimated with reasonable certainty and the plaintiff must prove that the breach was the cause of the lost profits. *Midland Hotel Corp. v. Rueben H. Donnelley Corp.*,118 Ill.2d 306, 316, 515 N.E.2d 61, 66 (1987).

49. PML's initial projected budget reflects total income of $9,055,500.00 with total costs of $3,285,00.00 leaving a net profit of $5,770,500.00. (Ex. PX 366). The Development Agreement does not reflect PML's price per load or expected profit.

50. PML's expert testified to the amount of damages that PML suffered as a result of the Village's material breach of the Development Agreement. PML's damages expert determined damages based on a completion date of December 31, 2015. The Development Agreement, however, does not support that assumption as it clearly anticipates that work will continue past that date because it provides for the issuance of grading permits that would be valid for four years. (Ex. VHW TX 1, p. 2, ¶3) Thus, the earliest the grading permits would expire if the initial permit was issued as soon as the Development Agreement was signed would have been October 2016, ten months after the turnover date. The Court however, determined, at paragraph 16-I, that the grading permit should have been issued in February 2013 which would push the completion date to February 2017 which impacts the calculations that were provided. For this reason and because the lost profits and other damages claimed have not been proven with reasonable certainty and because an aggrieved party has an obligation to avoid damages, the Court allows only the following damages:

A. Loss of actual revenue in the amount of $268,223.70 calculated based on the difference between the Target Fill Rate of $7.55 per cubic yard minus the actual Fill Rate of $7.32 per cubic yard which equals a loss of $.23 per cubic yard multiplied by the actual cubic yards deposited on the site of 1,166,190 cubic yards. (7.55 – 7.32 = .23 x 1,166,190 = 268,223.70) The Development Agreement does not guarantee the actual volume of fill to be deposited but only a ceiling, thus the loss revenue figure used is based on the actual volume of fill that was deposited.

B. Additional costs relating to site preparation, topsoil and clay work through the expiration of the grading permit of $4,898,161. 00. (Ex. PX-D 1.2)

C. Additional land costs attributable to the multiple revisions to PML's plans to comply with the Village's demands of $183,293.00.

D. Total damages of $5,349,677.70.

51. The Development Agreement also has a fee shifting provision that provides that the prevailing party shall be entitled to collect its reasonable attorney's fees and costs. (Ex. VHW TX 1, p. 7)

52. Plaintiff PML Development LLC is the prevailing party and is entitled to an award of reasonable attorney's fees.

IT IS HEREBY ORDERED THAT:

1. Plaintiff PML Development LLC is awarded damages on its breach of contract claim against defendant the Village of Hawthorn Woods in the amount of $5,349,677.70 and judgment is entered against defendant the Village of Hawthorn Woods and in favor of plaintiff PML Development LLC in the amount of $5,349,677.70 plus costs.

2. Plaintiff PML Development LLC's request for a declaratory judgment is resolved by the Court's breach of contract ruling or is moot and is therefore, denied.

3. Defendant the Village of Hawthorn Woods' counterclaim is dismissed with prejudice and judgment is entered in favor of plaintiff PML Development LLC.

4. Plaintiff PML Development LLC is entitled to an award of reasonable attorney's fees and shall file its petition for attorney's fees by December 23, 2020.

5. Defendant the Village of Hawthorn Woods shall file its response to the petition for attorney's fees which shall specifically identify the charge it objects to and the reason for the objection by January 27, 2021.

6. Plaintiff PML Development LLC shall file its reply in support of its petition for attorney's fees, if any, by February 10, 2021.

7. Plaintiff PML Development LLC shall provide a full set of courtesy copies to the Court by February 16, 2021.

8. Hearing on plaintiff PML Development LLC's fee petition shall be on February 26, 2021 at 9:00 a.m. in courtroom C-204.

Entered this 20th day of November 2020.

ENTER:

Julie A. Bruno

Judge

C 8741 V3

PML Development LLC v. Village of Hawthorn Woods
Case No. 15 CH 848

RESOLUTION NO. 08-20-12-1

A RESOLUTION AUTHORIZING THE EXECUTION
OF AN AGREEMENT – PML DEVELOPMENT

BE IT RESOLVED by the Mayor and Board of Trustees of the Village of Hawthorn Woods, Illinois, that the Chief Operating Officer be, and the same is, hereby authorized and directed to execute an agreement with PML Development, in substantially the form attached hereto as Exhibit "A", and, by this reference, made a part hereof.

The foregoing Resolution was adopted by a roll call vote as follows:

AYES: Ponzio, Riess, Morgan, Corrigan, DiMaggio, David

NAYS: 0

ABSENT AND NOT VOTING: 0

APPROVED: _____
Joseph Mancino, Mayor

ATTEST: Donna Lobaito
Donna Lobaito, Village Clerk

ADOPTED: August 20, 2012

APPROVED: August 20, 2012

VHW TX 1

HW002249

E 15

A 041

Exhibit "A"

DEVELOPMENT AGREEMENT
Former Weatherstone/Brickman Property
Krueger Road, Bounded by Fairfield and Midlothian Roads

AN AGREEMENT RELATED TO THE 62 ACRE PROPERTY (Former Brickman/Weatherstone property) FILL AND GRADING PROJECT ON KRUEGER ROAD, BOUNDED BY FAIRFIELD AND MIDLOTHIAN ROADS

This Development Agreement (the "**Agreement**") is made this 20th day of August, 2012 (the "**Effective Date**"), by and between PML Development, LLC, 3633 West Lake Avenue, Glenview IL 60026, an LLC Illinois Corporation (the "**Owner**"), consisting of Dan Powell and Mitch Maneval, and the Village of Hawthorn Woods, an Illinois municipal corporation (the "**Village**"). **Owner** and the **Village** are sometimes collectively referred to herein as the "**Parties**".

RECITALS

A. The properties are situated within the **Village**, consisting of PIN Numbers 14-04-400-010, 14-04-400-017 and 14-03-300-014, ("**Subject Property**") and are bounded by Fairfield, Midlothian and Krueger Roads, Hawthorn Woods, IL. The **Subject Property** was formerly bank owned and recently purchased by the **Owner** who wishes to provide additional fill to this property to grade a building pad for future municipal use on this site and fill low areas for future parks, recreational areas, and a municipal campus.

B. The engineering firm of Christopher B. Burke Engineering, Ltd. will review the Grading Plans, and the approved Grading Plans will be attached hereto as Exhibit "A" and made a part of this **Agreement**. The **Parties** agree that the amount of fill to be brought onto the **Subject Property** will not exceed 1.20 million cubic yards. The Stormwater Management Commission of Lake County ("**SMC**") must also approve the permit and grading plans.

C. The **Parties** seek to enter this **Agreement** to establish the terms for (i) the work on the **Subject Property**, (ii) the donations to the **Village**, and (iii) the general conditions of the **Subject Property** during the fill project and post fill/grading. The **Parties** acknowledge that only clean dirt may be deposited on this site, and that unannounced inspections to monitor the quality of fill and inspect delivery papers from site of origin will be conducted by **Village** representatives and those inspections will be reimbursed from the **Owner's** account on deposit with the **Village**. The **Village** retains the right to shut down operations at any time if inspections fail to provide proof of material content or fails quality standards.

D. The **Parties** now seek to enter into this **Agreement** pursuant to the Authority granted by, among others, the following: (i) Division 13 of Article 11 of the

Illinois Municipal Code (65 ILCS 5/11-13-1 *et seq.*); (ii) Division 5 of Article 9 of the Illinois Municipal Code (65ILCS 5/9-5-1 and 5/9-5-2); and (iii) Grading/Drainage Title 8 Chapter 6 of the Hawthorn Woods Municipal Code.

E. It is the intent of the **Parties** that the **Owners**, in accordance with this **Agreement**, are to provide for fill, grading and restoration of the **Subject Property**, the restorations of public easement and right of way properties, re-construction of Krueger Road, and assistance in tree removal at Community Park with trees infested with the Emerald Ash Borer.

F. The **Village** requires a Draw Down Deposit Agreement to be executed prior to work commencing.

NOW, THEREFORE, FOR AND IN CONSIDERATION OF THE MUTUAL PROMISES, CONVENANTS, AND AGREEMENTS SET FORTH HEREIN, THE PARTIES HEREBY AGRRE AS FOLLOWS:

1. The **Parties** agree that the Draw Down Deposit Agreement shall be executed and kept on file with the **Village**.

2. The **Parties** agree, all environmental measures will be in place in accordance with **Village** and SMC engineering codes.

3. In lieu of a community development cash donation by the **Owner**, the **Parties** agree that upon completion of the grading project, but no later than December 31, 2015, the entire 62 (+/-) acre parcel consisting of PIN Numbers 14-04-400-010, 14-04-400-017 and 14-03-300-014, **Subject Property**, will be donated to the **Village** for the total sum of $1.00 (One dollar) by warranty deed free and clear of all liens, encumbrances and SSA assessments as of the date of conveyance. The **Owner** agrees to pay all taxes, assessments, special service assessments for the sewers (SSA #4) and roads (SSA #2) while the **Subject Property** is in their possession. Upon ownership entitlement to the **Village** by warranty deed, the **Village** will assume ownership of the property and will assume responsibility for all property taxes and future assessments after the date of conveyance.

4. **Owner** agrees to save trees identified by the **Village** as significant trees and replace those significant trees damaged or lost with mutually agreeable replacement specimens on the parcel or another **Village** property as mitigation. Any mitigation replacement plan must be signed by the **Village's** Chief Operating Officer. **Owner** will tree spade existing evergreens and small trees that can be transplanted to the area of the **Village's** choice.

5. The **Parties** have agreed that a combined total of 25 Maples and Lindens will be planted and grouped on the property north of the wetland. Additionally, twenty-five evergreen and spruce trees will be planted in a grouping along Fairfield Road.

6. **Owner** agrees to add additional landscaping as referenced in number 5 of this **Agreement**. Specifically, Midlothian and Krueger road boundaries will be enhanced with rolling berms and additional landscape plantings with trees will be designed and planted. The berms and plantings will be completed along Midlothian Road and parts of Krueger Road upon initiation of the project to create a visual barrier for construction operations internally.

7. The **Village** agrees to allow temporary ingress/egress to the **Subject Property** off of Krueger Road. Krueger Road and the temporary ingress/egress are to be maintained in good condition throughout the life of the fill project by the **Owner** or their successors. Krueger Road will remain open to the public as it is a shared public road with other motorists. At the completion of the project, and prior to the return of the Landscape Bond, **Owner** shall bring the existing Krueger Road up to the current **Village** standards. The **Village** may choose the option of installing concrete ribbons at the time of reconstruction at the **Village's** expense. The actual road reconstruction will be completed by the **Owner**, or their assigns, at the **Village's** specifications with an anticipated **Owner** donation toward that reconstruction of Two Hundred Thousand dollars ($200,000.00).

8. The **Parties** agree, the grading permit will be valid for two (2) years from the date of issuance. Per Title 8, Section 8-6-9 of the Village Code, once the permit is issued, work must be commenced within one hundred eighty (180) days or such permit is null and void. **The Parties** agrees that if work is not completed within two (2) years, a permit extension will be granted by the **Village** for an additional two (2) years.

9. The **Parties** agree, the permit cost is $500.00.

10. The **Parties** agree, **Owner** will obtain any and all necessary approvals from the Illinois Department of Transportation for work in and/or adjacent to the Midlothian Road right-of-way. **Owner** will also obtain any and all necessary approvals from Lake County Division of Transportation for any work in and/or adjacent to the Fairfield Road right-of-way.

11. The **Owner** agrees, that prior to the release of the Landscape Bond all **Village** requirements for landscaping, soil stabilization, and site clean-up will be completed.

12. The **Owner** agrees to not remove any trees forming a hedge row on the perimeter unless specifically identified in the Restoration Plan attached hereto as Exhibit "B". Furthermore, the **Owner** agrees not to remove tagged significant trees. Such trees will be identified on a Tree Preservation Plan, prepared in accordance with the Village Code, and to be approved by the **Village** prior to the issuance of a grading permit. Such Tree Preservation Plan is attached hereto as Exhibit "C".

13. The **Parties** agree that tree replacement is important to the community. The value of such trees is significant to the **Village**.

14. The **Owner** agrees, to provide a landscape plan for the replacement species. Such plan shall be approved by the **Village** prior to the release of any Landscape Bond required to be posted for this project.

15. The **Parties** agree to keep all affected roads clean with daily street sweeping operations and Krueger Road in good drivable conditions by filling in pot holes, if necessary, during fill operations.

16. The **Parties** agree, that restoration work will commence as sections are completed to prevent sediment run off or soil erosion. Said re-seeding must be complete and in healthy growth conditions as determined by the Village Engineer or his/her designee before the release of any security deposits.

17. The **Parties** agree, a Landscape Bond (**"Bond"**) in language acceptable to the Village Attorney, or cash escrow to cover all the costs of restoration and landscaping required for compliance with the grading and restoration landscaping plan shall be deposited with the **Village** and at no time can the **Bond** be reduced to less than 10% of it original amount, or $8,000, whichever is greater. This will be an important component of the **Agreement** in that this will ensure the project is completed, including restoration.

18. The **Parties** agree, as a result of #17 above, **Owner** will need to submit to the **Village** an estimate of cost of restoration and landscaping to determine the **Bond** amount. This estimate of cost of restoration and landscaping is to be verified by the Village Engineer, or his/her designee.

19. The **Parties** agree, the Village Engineer shall make inspections to ensure compliance with the Grading Plan. The cost for these inspections or evaluations will be based on an hourly cost and are the responsibility of the **Owner**.

20. The **Parties** agree, an as-built survey will be provided by the **Owner** showing the work's compliance with the approved plans. Approval of the as-built survey will be required before the release of any posted security.

Section 1. Approvals and Requirements.

1.1 Village Approvals Granted. The **Village** represents that, subject to the requirements, when landscape and grading plans are approved and escrow is deposited, the **Owner** may commence the work. Any such work shall be done at **Owner's** risk, and such work may have to be modified at **Owner's** expense in order to conform to the State, County and Village Codes and Ordinances, and any other applicable codes or requirements.

1.2 Required Permits. No Work may commence unless and until the **Owner** secures all required permits (including without limitation watershed development and county/state highway access permits) as may be required from other agencies having jurisdiction over the **Subject Property** and copies of such permits are provided to the **Village. Owner** must also (a) pay any applicable permit or other fee that may be required pursuant to this **Agreement,** and (b) provide the **Village** with the requisite performance and payment security as provided in this **Agreement.**

1.3 Approvals. Prior to commencing any work, the **Owner** shall present to the Village Engineer all plans, studies, reports, surveys, and other materials that might be necessary under the applicable Village Codes and Ordinances or that might reasonably be requested by the Village Engineer. Upon the Village Engineer (and such other **Village** representatives as may be necessary or appropriate) determining that such submittals satisfy all the applicable Village Codes and Ordinances, the Village Engineer shall approve the final plans.

Section 2. Indemnification and Insurance.

2.1 Indemnification. **Owner** shall indemnify, defend, and save the **Village** and its officers, officials, employees, agents, attorneys, engineers, and representatives (the **"Village Indemnified Parties")** harmless from and against any and all claims, lawsuits, actions, demands, judgments, damages, injuries, liabilities, losses, costs, and expenses (including attorneys' fees and administrative expenses) (collectively, **"Claims"**), that may arise, or be alleged to have risen, out of, in connection with, or relating to this **Agreement,** the development, or any of the approvals granted as part of this **Agreement** (including without limitation the issuance by the **Village** of any permits before all public improvements are completed); provided, however, that the **Owner** shall not be required to indemnify or save harmless the **Village Indemnified Parties** to the extent the **Claims** arise from the grossly negligent or intentional conduct of the **Village Indemnified Parties.** It is expressly understood and agreed that the **Village** is not waiving any immunities that it may assert in response to any such action.

2.2 Insurance. Prior to the commencement of any work relating to the development on the **Subject Property, Owner** shall furnish to the **Village** evidence of comprehensive general liability insurance in the amounts of not less than $1,000,000 per occurance/$2,000,000 aggregate covering all activities of the **Owner** contemplated by this **Agreement.** Such insurance shall be written by an insurance company authorized to do business in the State of Illinois and having a rating from Best Reporting Service of a VI or better. Such insurance policy shall name the **Village Indemnified Parties** as additional insured, and it shall include a provision that the **Parties** shall not be terminated unless the **Village** has received written notice at least thirty (30) days prior to such termination. The Village Engineer shall be named as co-insured. In the event **Owner** allows such insurance to lapse prior to the **Village's** acceptance of all Public Improvements required pursuant to this **Agreement,** the **Village** shall have the right to immediately place a stop work order on any activity related to or construction of the

development on the **Subject Property**, notwithstanding any other provisions of this **Agreement** to the contrary. **Owner** agrees to deliver a copy of such insurance policy to the **Village** upon request.

2.3 Workers' Compensation Insurance. Prior to commencement of any work relating to the Development on the **Subject Property, Owner** shall furnish to the **Village** evidence of worker's compensation insurance as required by the State of Illinois.

Section 3. Draw Down Deposit Agreement to be Used for Inspections.

3.1 Work Escrow. The Draw Down Deposit Agreement funds will be used to pay for inspections related to the grading, filling, sedimentation and soil erosion control measures, stormwater management, perimeter landscaping, and seeding operations. If at any time the **Village** Chief Operating Officer determines that such escrow is insufficient to cover the costs of such inspections, the **Owner** shall be required to supplement such escrow in accordance with the terms of the Draw Down Deposit Agreement, or the **Village** shall have the right to place a stop work order on any work on the **Subject Property**. At the end of the project, any funds from the Draw Down Deposit Agreement still on account with the **Village** shall be refunded to the entity that made the deposit.

Section 4. Completion of Work and Inspections.

4.1 Within thirty (30) working days of receipt of written notice from the **Owner** to the **Village** that the improvements on the **Subject Property** have been completed and all required documentation has been submitted, the Village Engineer shall inspect said **Village** proposed restorations and indicate, in writing, either approval or disapproval of the same. If such restorations are not approved, the reasons therefore shall, within seven (7) working days, be set forth in a written notice to the **Owner**.

4.2 The **Owner** must correct the deficient items within thirty (30) days of receipt of notice. Once the corrections are made, the Village Engineer shall inspect the **Subject Property** and indicate, in writing, either the approval or disapproval of the same. The thirty (30) day period shall be automatically extended if and for so long as **Owner** is precluded from completing such work due in a written notices to the **Owner**.

4.3 Upon correction of the items set forth in the notice, the Village Engineer, at the **Owner's** written request to the **Village**, shall re-inspect the improvements to be corrected and either approve or disapprove said improvements within twenty (20) days of the receipt of **Owner's** notice requesting re-inspection.

4.4 If public property restoration is not completed by the **Owner**, approved by the **Village**, and paid for by the **Owner**, the **Bond** or other security can be proportionately reduced on an improvement-by-improvement basis, as long as the Village Engineer certifies the improvement as a stand alone functioning improvement.

Section 5. Remedy

In the event that **Owner** does not comply with any of the terms of this **Agreement**, the **Village** retains all remedies at law or in equity including the right to specific performance, the right to draw on any bonds or security posted for the project, and the right to issue a stop work order in order to assure compliance with the terms of this **Agreement.**

Section 6. Attorney Fees

In the event litigation is filed to enforce this **Agreement**, the prevailing party shall be entitled to collect its attorney's fees and costs.

Section 7. Severability

In the event any part or portion of this **Agreement**, or any provision, clause, wording or designation contained within this **Agreement**, is held to be invalid by a court of competent jurisdiction, such part, portion, provision, clause, wording or designation shall be deemed to be excised from this **Agreement** and the invalidity thereof shall not affect the remaining portions thereof.

Agreed by the **Parties** as dated below:

Pamela O. Newton
Village of Hawthorn Woods

August 20, 2012
Date

Donna Bosaito
Attest

Dan Powell
PML Development, LLC

10/11/12
Date

Donna Bosaito
Attest

APPEAL TO THE ILLINOIS APPELLATE COURT,
SECOND DISTRICT

FROM THE CIRCUIT COURT OF THE NINETEENTH
JUDICIAL CIRCUIT, LAKE COUNTY, ILLINOIS

PML DEVELOPMENT LLC, an Illinois limited liability company, Plaintiff/Appellee. v. VILLAGE OF HAWTHORN WOODS, a municipal corporation, Defendant/Appellant.	Circuit Court No. 15 CH 848 Hon. Luis A. Berrones, Judge Presiding.
VILLAGE OF HAWTHORN WOODS, Counter-Plaintiff/Appellant. v. PML DEVELOPMENT LLC, UNKNOWN OWNERS, NON-RECORD CLAIMANTS, Counter-Defendants/ Appellees.	

NOTICE OF APPEAL

On November 20, 2020, this Court entered a "Memorandum Order" that entered judgment on various claims and also set a briefing schedule for further proceedings on Plaintiff's request to recover attorney's fees and costs. On December 18, 2020, this Court found that the November 20 Memorandum Order was *not* a final judgment order.

Nonetheless, in an abundance of caution and to the extent that the November 20 Memorandum Order is deemed to be a final judgment order, pursuant to Illinois

C 9611 V3

Supreme Court Rules 301 and 303, Defendant/Counter-Plaintiff/Appellant, the Village of Hawthorn Woods ("Appellant") hereby appeals to the Illinois Appellate Court, the Second District, from the November 20, 2020 Order, as well as all prior non-final orders that produced the November 20, 2020 Order and any interlocutory orders entered by this Court that become appealable only upon the entry of a final judgment order, including, without limitation, the following:

1. The Order of January 15, 2016, which granted the Petition for Issuance of Writ of Mandamus filed by Plaintiff/Counter-Defendant/Appellee PML Development LLC ("Appellee").

2. The Order of December 9, 2016, which denied Appellant's Motion for Summary Judgment, Motion for Receiver, and Motion to Enforce Court Order, and which granted Appellee's Motion for Mandamus.

By this appeal, Appellant will respectfully ask the Appellate Court to reverse the November 20, 2020 Order and other orders identified above and remand this cause to the Circuit Court with directions to enter judgment in favor of Appellant and against Appellee on all matters, and to enter a briefing schedule on a fee petition to be submitted by Appellant; and for such other and further relief as the Appellate Court may deem proper.

Dated: December 21, 2020

Respectfully Submitted,

VILLAGE OF HAWTHORN WOODS

By: */s/ Nicholas D. Standiford*
One of Its Attorneys.

Patrick T. Brankin (ARDC No. 6228896)
Michael E. Kujawa (ARDC No. 6244621)
Nicholas D. Standiford (ARDC No. 6315763)
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mkujawa@schainbanks.com
nstandiford@schainbanks.com

Timothy D. Elliott (ARDC No. 6237023)
RATHJE WOODWARD LLC
300 E. Roosevelt Road, Suite 300
Wheaton, IL 60187
Phone: (630) 668-8500
Fax: (630) 668-9218
TElliott@rathjewoodward.com
Attorneys for Defendant/Counter-Plaintiff/Appellant

This form is approved by the Illinois Supreme Court and is required to be accepted in all Illinois Appellate Courts.

Instructions ▾
Check the box to the right if your case involves parental responsibility or parenting time (custody/visitation rights) or relocation of a child.
Just below "Appeal to the Appellate Court of Illinois," enter the number of the appellate district that will hear the appeal and the county of the trial court.
If the case name in the trial court began with "In re" (for example, "In re Marriage of Jones"), enter that name. Below that, enter the names of the parties in the trial court, and check the correct boxes to show which party is filing the appeal ("appellant") and which party is responding to the appeal ("appellee").
To the far right, enter the trial court case number and trial judge's name.

☐ THIS APPEAL INVOLVES A MATTER SUBJECT TO EXPEDITED DISPOSITION UNDER RULE 311(a).

FILED
12/29/2020 10:52 A
ERIN CARTWRIGHT WEINSTEIN
Clerk of the Circuit Court
Lake County, Illinois

APPEAL TO THE APPELLATE COURT OF ILLINOIS

SECOND **District**

from the Circuit Court of the Nineteenth Judicial Circuit, Lake **County**

In re

PML Development LLC

Plaintiff/Petitioner *(First, middle, last names)*

☐ **Appellant** ☒ **Appellee**

v.

Village of Hawthorn Woods

Defendant/Respondent *(First, middle, last names)*

☒ **Appellant** ☐ **Appellee**

Trial Court Case No.: 15 CH 0848

Honorable Luis A. Berrones **Judge, Presiding**

NOTICE OF APPEAL

In 1, check the type of appeal.
For more information on choosing a type of appeal, see *How to File a Notice of Appeal.*

1. Type of Appeal:

- ☐ Appeal
- ☐ Interlocutory Appeal
- ☐ Joining Prior Appeal
- ☐ Separate Appeal
- ☒ Cross Appeal

In 2, list the name of each person filing the appeal and check the proper box for each person.

2. Name of Each Person Appealing:

Name: PML Development LLC
First *Middle* *Last*

☒ Plaintiff-Appellant ☐ Petitioner-Appellant

OR

☐ Defendant-Appellant ☐ Respondent-Appellant

Name:
First *Middle* *Last*

☐ Plaintiff-Appellant ☐ Petitioner-Appellant

OR

☐ Defendant-Appellant ☐ Respondent-Appellant

C 10463 V3

In 3, identify every order or judgment you want to appeal by listing the date the trial court entered it.

3. List the date of every order or judgment you want to appeal:

11/20/2020, Ex. A hereto
Date

Date

Date

In 4, state what you want the appellate court to do. You may check as many boxes as apply.

4. State your relief:

☐ reverse the trial court's judgment *(change the judgment in favor of the other party into a judgment in your favor)* and ☐ send the case back to the trial court for any hearings that are still required;

☐ vacate the trial court's judgment *(erase the judgment in favor of the other party)* and ☐ send the case back to the trial court for a new hearing and a new judgment;

☒ change the trial court's judgment to say: in addition to the trial court's entry of judgment in the amount of $5,349,677.70 plus attorney's fees and costs, award additional damages of $1,503,033.30 against Defendant.

☐ order the trial court to:

☒ other: award $6,852,711 plus attorney's fees and costs in favor of Plaintiff and against Defendant.

and grant any other relief that the court finds appropriate.

If you are completing this form on a computer, sign your name by typing it. If you are completing it by hand, sign by hand and print your name. Fill in your address and telephone number.

/s/ Joseph L. Cohen
Your Signature

Your Name

321 N. Clark St., Suite 1600
Street Address

Chicago, IL 60654
City, State, ZIP

(312) 980-3876
Telephone

Additional Appellant Signature

All appellants must sign this form. Have each additional appellant sign the form here and enter their name, address, and telephone number.

Signature

Name

Street Address

City, State, ZIP

Telephone

GETTING COURT DOCUMENTS BY EMAIL: If you agree to receive court documents by email, check the box below and enter your email address. You should use an email account that you do not share with anyone else and that you check every day. If you do not check your email every day, you may miss important information or notice of court dates. Other parties may still send you court documents by mail.

☒ I agree to receive court documents at this email address during my entire case.

jlcohen@foxrothschild.com
Email

PROOF OF SERVICE ***(You must serve the other party and complete this section)***

In **1a**, enter the name, mailing address, and email address of the party or lawyer to whom you sent the document.

In **1b**, check the box to show how you sent the document, and fill in any other information required on the blank lines.

CAUTION: If the other party does not have a lawyer, you may send the document by email only if the other party has listed their email address on a court document.

1. I sent this document:

   a. To:

   Name: Patrick T. Brankin c/o Schain, Banks, Kenny & Schwartz, Ltd.
   First *Middle* *Last*

   Address: 70 West Madison St., Suite 5300, Chicago, IL 60602
   Street, Apt # *City* *State* *ZIP*

   Email address: pbrankin@schainbanks.com

   b. By:
   - ☐ Personal hand delivery
   - ☐ Regular, First-Class Mail, put into the U.S. Mail with postage paid at:

     Address of Post Office or Mailbox
   - ☐ Third-party commercial carrier, with delivery paid for at:

     Name (for example, FedEx or UPS) and office address
   - ☒ The court's electronic filing manager (EFM) or an approved electronic filing service provider (EFSP)
   - ☒ Email *(not through an EFM or EFSP)*
   - ☐ Mail from a prison or jail at:

     Name of prison or jail

In **1c**, fill in the date and time that you sent the document.

   c. On: 12/29/2020
   Date

   At: 5:00 ☐ a.m. ☒ p.m.
   Time

In **2**, if you sent the document to more than 1 party or lawyer, fill in **a**, **b**, and **c**. Otherwise leave **2** blank.

2. I sent this document:

   a. To:

   Name: Nicholas D. Standiford c/o Schain, Banks, Kenny & Schwartz, Ltd.
   First *Middle* *Last*

   Address: 70 West Madison St., Suite 5300, Chicago, IL 60602
   Street, Apt # *City* *State* *ZIP*

   Email address: nstandiford@schainbanks.com

   b. By:
   - ☐ Personal hand delivery
   - ☐ Regular, First-Class Mail, put into the U.S. Mail with postage paid at:

     Address of Post Office or Mailbox
   - ☐ Third-party commercial carrier, with delivery paid for at:

     Name (for example, FedEx or UPS) and office address
   - ☒ The court's electronic filing manager (EFM) or an approved electronic filing service provider (EFSP)
   - ☒ Email *(not through an EFM or EFSP)*

☐ Mail from a prison or jail at:

Name of prison or jail

c. On: 12/29/2020
Date

At: 5:00 ☐ a.m. ☒ p.m.
Time

In 3, if you sent the document to more than 2 parties or lawyers, fill in a, b, and c. Otherwise leave 3 blank.

3. I sent this document:

a. To:

Name: Timothy D. Elliott c/o Rathje Woodward LLC
First *Middle* *Last*

Address: 300 E. Roosevelt Rd., Suite 300, Wheaton, IL 60187
Street, Apt # *City* *State* *ZIP*

Email address: telliott@rathjewoodward.com

b. By: ☐ Personal hand delivery

☐ Regular, First-Class Mail, put into the U.S. Mail with postage paid at:

Address of Post Office or Mailbox

☐ Third-party commercial carrier, with delivery paid for at:

Name (for example, FedEx or UPS) and office address

☐ The court's electronic filing manager (EFM) or an approved electronic filing service provider (EFSP)

☒ Email *(not through an EFM or EFSP)*

☐ Mail from a prison or jail at:

Name of prison or jail

If you are serving more than 3 parties or lawyers, fill out and insert 1 or more *Additional Proof of Service* forms after this page.

c. On: 12/29/2020
Date

At: 5:00 ☐ a.m. ☒ p.m.
Time

Under the Code of Civil Procedure, 735 ILCS 5/1-109, making a statement on this form that you know to be false is perjury, a Class 3 Felony.

I certify that everything in the Proof of Service is true and correct. I understand that making a false statement on this form is perjury and has penalties provided by law under 735 ILCS 5/1-109.

If you are completing this form on a computer, sign your name by typing it. If you are completing it by hand, sign by hand and print your name.

/s/ Joseph L. Cohen
Your Signature

Joseph L. Cohen
Print Your Name

2-20-0779

APPEAL TO THE APPELLATE COURT OF ILLINOIS
SECOND JUDICIAL DISTRICT
FROM THE CIRCUIT COURT OF THE NINETEENTH JUDICIAL CIRCUIT
LAKE COUNTY, ILLINOIS

PML DEVELOPMENT LLC, AN ILLINOIS
LIMITED LIABILITY COMPANY
Plaintiff/Petitioner

Reviewing Court No: 2-20-0779
Circuit Court/Agency No: 2015CH000848
Trial Judge/Hearing Officer: LUIS A. BERRONES

v.

10

VILLAGE OF HAWTHORN WOODS, A
MUNICIPAL CORPORATION
Defendant/Respondent

CERTIFICATION OF RECORD

The record has been prepared and certified in the form required for transmission to the reviewing court. It consists of:

3 Volume(s) of the Common Law Record, containing 10536 pages
1 Volume(s) of the Report of Proceedings, containing 2870 pages
2 Volume(s) of the Exhibits, containing 3164 pages

APPELLATE COURT, STATE OF ILLINOIS
FIAT JUSTITIA
JULY 1, 1877
SECOND DISTRICT

I hereby certify this record pursuant to Supreme Court Rule 324, this 27 DAY OF JANUARY, 2021

Erin Cartwright Weinstein

(Clerk of the Circuit Court or Administrative Agency)

ERIN CARTWRIGHT WEINSTEIN, CLERK OF THE 19th JUDICIAL CIRCUIT COURT ©
WAUKEGAN, ILLINOIS 60085

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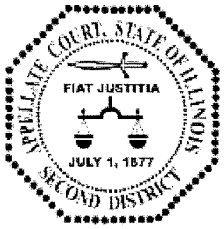

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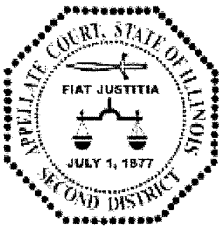

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Party	Exhibit #	Description/Possession	Page No.
DEFENDANT	1	DEVELOPMENT AGREEMENT & RESOLUTION	E 15-E 25
DEFENDANT	2B	EMAIL FROM LOBAITO TO NEWTON	E 26
PLAINTIFF	3	EMAIL CHAIN FROM E. FRABLE TO P. NEWTON LOBAITO RE WEATHERSTONE - MEETING WITH CBBEL	E 27-E 28
DEFENDANT	3	WETLAND DELINEATION REPORT	E 29-E 65
DEFENDANT	4	PRELIM. JURISDICTION DETERMINATION	E 66-E 68
PLAINTIFF	6	EMAIL FROM L. FELL TO P. NEWTON, D LOBAITO, E. FRABLE, CC L. FELL D. OLSON RE PARCEL 62 SITE WITH ATTACHMENTS, ETC	E 69-E 72
PLAINTIFF	7	EMAIL CHAIN FROM E. FRABLE TO D. LOBAITO, CC P. NEWTON, D. OLSON, K. KAZENAS, M. BARLETT RE CLEAN FILL	E 73-E 76

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NOTICE OF FILING and PROOF OF SERVICE

In the Supreme Court of Illinois

PML DEVELOPMENT, LLC,	)	
	)	
Plaintiff-Appellant,	)	
v.	)	No. 128770
	)	
VILLAGE OF HAWTHORN WOODS,	)	
	)	
Defendant-Appellee.	)	

The undersigned, being first duly sworn, deposes and states that on December 1, 2022, the Brief and Appendix of Plaintiff-Appellant was electronically filed and served upon the Clerk of the above court. On December 1, 2022, service of the Brief will be accomplished electronically through the filing manager, Odyssey EfileIL, to the following counsel of record:

Patrick T. Brankin
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Within five days of acceptance by the Court, the undersigned states that 13 paper copies of the Brief bearing the court's file-stamp will be sent to the above court.

/s/ Don R. Sampen
Don R. Sampen

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct.

/s/ Don R. Sampen
Don R. Sampen