Docket No. 128612

IN THE SUPREME COURT OF ILLINOIS

VILLAGE OF KIRKLAND, a municipal corporation, Plaintiff-Appellee,	) Appellate Court Case No. 2-21-0301)) Appeal from the Circuit Court of DeKalb Cty.)
vs.	) Case No. 2019 L 000033)
KIRKLAND PROPERTIES HOLDINGS COMPANY, LLC I and KIRKLAND PROPERTIES HOLDINGS COMPANY, LLC II, Defendants-Appellants.	) Judge Hon. Bradley J. Waller, Presiding))) Date of Judgment: June 2, 2021) Date of Appellate Court Opinion: April 21, 2022

BRIEF OF PLAINTIFF-APPELLEE VILLAGE OF KIRKLAND

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POINTS AND AUTHORITIES

I. INTRODUCTION

On June 18, 2019, the Village of Kirkland, an Illinois municipal corporation (the "Village") situated in DeKalb County, Illinois, filed a complaint against Defendants, Kirkland Properties Holdings Company, LLC I ("KPHC I") and Kirkland Properties Holdings Company, LLC II ("KPHC II") alleging that Defendants breached an Annexation Agreement for failing to deposit letters of credit with the Village in at least the proportionate amount of the number of lots that they owned in Phases I and II of the Hickory Ridge subdivision (the "Subdivision") within the Village. (C. 8-64). The letters of credit sought by the Village were to secure the repair, completion and/or replacement of the roads in the Subdivision. (C. 10).

The Village entered into the Annexation Agreement on or about May 5, 2003, with then beneficial owners David R. Rood, Barbara L. Rood, Robert D. Rood and Ann M. Rood and The National Bank and Trust of Sycamore as Trustee of Trust No. 40-4235000 (the "Trust"), which agreement required the "Landowner" of the Subject Property to be annexed to construct all required roadways and to deposit with the Village a letter of credit to secure the completion of the roadways. (C. 550-51).

Thereafter, on November 30, 2011, the Subject Property was transferred via Trustee's deed from the Trust to Plank Road, LLC. (C. 546, 622-26). From there, portions of the Subject Property were transferred via special warranty deed from Plank Road, LLC, to KPHC I and KPHC II (collectively, the "Defendants"). (C. 554, 556-67). At the time the Village filed suit, KPHC I owned 15 of the total 56 lots in Phase I of the Subdivision while KPHC II owned 19 of the total 26 lots in Phase II of the Subdivision. (C. 543).

On December 7, 2020, the trial Court dismissed the Village's Third Amended Complaint against the Defendants seeking both monetary damages and specific performance (C. 688), reasoning that the Defendants were not bound by the Annexation Agreement because the Defendants had purchased less than the entire parcel annexed, and the Annexation Agreement did not specifically state that it was binding on successor owners of less than the entire parcel. (R. 20-25). On December 23, 2020, the Village appealed the dismissal of its Third Amended Complaint. (C. 734).

On June 2, 2021, despite finding that the Defendants were not parties to the Annexation Agreement, the trial court applied a prevailing party attorney fee provision in the Annexation Agreement and entered a monetary judgment in favor of the Defendants and against the Village for attorney fees incurred in the amount of $19,381.24. (C. 924). On June 3, 2021, the Village filed its notice of appeal from this judgment (C. 926), which appeal was consolidated with the Village's previous appeal of the dismissal of its Third Amended Complaint against the Defendants.

On April 21, 2022, the Appellate Court, Second District, reversed the dismissal of the Village's Third Amended Complaint against the Defendants and vacated the attorney fee judgment.

II. ISSUES PRESENTED FOR REVIEW

A. WHETHER THE TRIAL COURT ERRED IN DISMISSING THE VILLAGE'S THIRD AMENDED COMPLAINT FOR BREACH OF THE ANNEXATION AGREEMENT BASED ON THE DEFENDANTS BEING OWNERS OF LESS THAN THE ENTIRE PARCEL SUBJECT TO THE ANNEXATION AGREEMENT

B. WHETHER THE APPELLATE COURT PROPERLY EXERCISED JURISDICTION OVER THE VILLAGE'S APPEAL FROM THE ATTORNEY FEE JUDGMENT

C. WHETHER THE TRIAL COURT ERRED IN AWARDING THE DEFENDANTS ATTORNEY FEES BASED ON A PREVAILING PARTY ATTORNEY FEE PROVISION IN THE ANNEXATION AGREEMENT

III. STATEMENT OF FACTS

The Village filed suit against Defendants on June 18, 2019. The Village's original Complaint was voluntarily amended (C. 125, 177, 178-236) and, upon motion of the Defendants, the Village's Amended Complaint and Second Amended Complaint were dismissed without prejudice (C. 265, 541).

A. THE THIRD AMENDED COMPLAINT

On August 27, 2021, the Village filed its Third Amended Complaint against the Defendants. (C. 543). As alleged, the Complaint stated as follows:

1. The Parties

The Village is an Illinois municipal corporation located in DeKalb County, Illinois. (C. 543). Defendants are Illinois limited liability companies that do business in DeKalb County, Illinois. (C. 543). KPHC I owns 15 of the total 56 lots in "Phase One" of the Subdivision within the Village, while KPCH II owns 19 of the total 26 lots in "Phase Two" of the Subdivision. (C. 543-544). Defendants were the sole owners of record of their respective lots in the Subdivision at the time the suit was brought by the Village. (C. 618).

2. The Annexation Agreement

On or about May 5, 2003, the Village entered into the Annexation Agreement with the Trust, who was the sole owner of the Subject Property at that time. (C. 544, 593-99). The Annexation Agreement was recorded with the DeKalb County Recorder's Office as document no. 2003021067. (C. 544, 569-91). Relevant portions of the Annexation Agreement are as stated below.

Section 1 of the Annexation Agreement provided that the Annexation Agreement was made **"pursuant to and in accordance with, among other statutory provisions, Section 11-15.1-1 et. seq."** of the Illinois Municipal Code. (C. 572).

Section 10 of the Annexation Agreement provided:

Section 10. Roadways.

The Landowner shall construct all roadways required to be developed on the Subject Property. Said construction shall be completed in accordance with the Village's standards and ordinances, except that

(A) All roads constructed shall have a 66 foot right-of-way and a 24 foot paved surface centered over a 26 foot wide, 12" deep gravel bedrock surface, with ditches having a minimum depth of 18" on both sides, which shall drain to one of the areas described in Section 11. All roads shall be paved in two 1 ½" lifts. Prior to the occupancy of any building, the gravel base shall be constructed to the approved thickness. Once 50% of the buildings in a particular phase are occupied, no further occupancy permits shall be issued for that phase until the first layer of the bituminous surface has been installed throughout that phase. Once 80% of the buildings in a particular phase are occupied, no further occupancy permits shall be issued for that phase until the final layer of the bituminous surface has been installed throughout that phase. The Landowner shall maintain the stone base and shall seal coat the same to control dust if required by Village prior to the installation of the bituminous surface. Landowner shall be responsible for maintenance and snow removal on all roads in the subdivision until said roads are accepted by the Village. Upon the proper completion of the street construction, the Village shall promptly accept such improvements and thereafter maintain such improvements;

(C. 577).

Further, Section 14 of the Annexation Agreement provided:

Section 14. Irrevocable Letter of Credit.

In lieu of a construction bond or development bond or bonds, the Village will require an irrevocable letter of credit from a financial institution to guarantee construction and quality of all public facilities to be constructed in any stage or unit of development for which approval is sought. Said letter of credit shall be in the amount of one hundred percent (100%) of the contract costs of construction of all of the public facilities in the unit or stage or one hundred twenty five percent (125%) of Landowner engineer's contract estimate for the unit or stage as approved by the Village Engineer; and said letter of credit shall be payable to the Village.

(C. 579).

Section 28, Paragraph I of the Agreement provided that it was binding on successors and assigns:

> **I. Binding on Assigns. All terms and provisions of this Agreement shall be binding upon, inure to the benefit of, and be enforceable by the parties hereto, their heirs, executors, administrators, successors and assigns.**

(C. 585).

Finally, the Annexation Agreement contained two attorney fee provisions in Section 28, Paragraph J and Section 28, Paragraph M:

> **J. Indemnify. Each of the parties (the "Indemnifying Party") agrees to indemnify, hold harmless and defend each other party from and against (a) any and all liability, loss, cost and damage ("Loss") and (b) reasonable attorney's fees and expenses, court costs and all other reasonable out-of-pocket expenses ("Expenses") incurred by such other party (the "Indemnified Party") in connection with or arising out of: (i) any breach of any warranty or the inaccuracy of any representation made by such Indemnifying Party in the Agreement or in any certificate, document or instrument delivered by or on behalf of such Indemnifying Party pursuant hereto; and (ii) any material breach by such Indemnifying Party of, or any failure of such Indemnifying Party to perform, any of its obligations under this Agreement or under any instrument contemplated hereby. Each of the parties to this Agreement agrees to give prompt notice to all other parties of the assertion of any claim, or the commencement of any suit, action or proceeding in respect of which indemnity shall be sought hereunder. The Indemnifying Party (or parties) shall have the right to assume the defense of any claim, suit, action or proceeding at its own expense, and, if at the request and expense of the Indemnifying Party, shall assume such defense. No party shall be liable under this paragraph for any settlement effected without its or any claim, litigation or proceeding in respect of which indemnity may be sought hereunder. Failure by the indemnified party to give prompt Notice shall not limit its rights other than this Agreement. In the event of any dispute concerning the terms of this Agreement, then the prevailing party shall be entitled to collect all its costs associated with the settlement of such dispute, including, but not limited to, its attorney's fees and court costs.**
>
> *** * ***
>
> **M. Litigation. If any action at law or in equity, including an action for declaratory relief, is brought by a party hereto in connection with this Agreement or a breach hereof, the prevailing party in any final judgment or the non-dismissed party in the event of a dismissal shall be entitled to the full amount of all reasonable expenses, including all court costs and**

actual attorney's fees paid or incurred in good faith, in connection with such action.

(C. 585-86).

3. The Village's Compliance with the Terms of the Annexation Agreement

Pursuant to the Annexation Agreement, the Village annexed the Subject Property to the Village, rezoned the Subject Property to allow for single family residential homes and approved two final plats of subdivision, recorded as document numbers 2004006047 and 2007000300, respectively, with the DeKalb County Recorder's Office. (C. 546). The lots in the Subdivision, as a result of the Annexation Agreement, have access to water mains, access to Village treatment plant services, and the Village provides potable water for the Subdivision. (C. 547). Prior to its annexation to the Village, the Subject Property was in unincorporated DeKalb County, which does not provide potable water treatment services. (C. 547).

4. Acquisition of Lots in the Subdivision by KPHC I and KPHC II

On November 30, 2011, the Trust assigned its ownership of the Subject Property to Plank Road, LLC via Trustee's Deed. (C. 546, 622-66). On January 25, 2017, Plank Road LLC, transferred portions of the Subject Property to KPHC I and KPHC by special warranty deed. (C. 544, 556-67). Specifically, lots 49, 50, 56-62, 71-74, 78 and 108 were transferred to KPHC I and lots 16-20, 26, 27 and 32-38 were transferred to KPHC II. (C. 555-67). The deeds by which Defendants took and accepted title from Plank Road, LLC expressly stated that the transfer was subject to the Annexation Agreement. (C. 556, 559). Furthermore, the contract by which Defendants acquired and were assigned the lots was subject to all "agreements with any municipality regarding the development of the Property." (Impounded Exhibit E)

5. KPHC I's and KPHC II's Failure to Deposit a Letter of Credit

On May 8, 2019, the Village sent demand letters to the Defendants requesting that they deposit a letter of credit in at least the proportionate amount of their lots in the Subdivision and/or the amount of road frontage of such lots in order to secure the repair, completion and/or replacement of the roads in the Subdivision. (C. 550, 628-39). The Defendants did not deposit the requested letter of credit nor did they complete the roads. (C. 552), and the Village commenced the suit at issue.

B. DEFENDANTS' MOTION TO DISMISS

On October 16, 2020, the Defendants filed a Section 2-615 Motion to Dismiss the Village's Third Amended Complaint, in which it primarily argued that they were not bound by the Annexation Agreement because they owned less than the entire parcel annexed and encompassed by the Annexation Agreement. (C. 655). Alternatively, the Defendants argued that they were not liable for any of the obligations of the previous owner because they were not the successor of the prior owner and there was otherwise not an "assignment or contractual privity." (C. 656).

C. THE TRIAL COURT'S ANALYSIS AND DECISION TO DISMISS THE THIRD AMENDED COMPLAINT WITH PREJUDICE

On December 4, 2020, the trial court conducted a hearing on the motion, following which it dismissed the Village's Third Amended Complaint with prejudice. (C. 686). In dismissing with prejudice the Village's Third Amended Complaint, the trial court relied on *Doyle v. Village of Tinley Park*, 2018 IL. App. (1st) 170357, and interpreted that case to mean that in order for an annexation agreement to be binding on a successor owner of less than the entire parcel annexed that the annexation agreement must expressly and specifically state that requirement. (R. 21). The trial court distinguished this matter from

the case of *United City of Yorkville v. Fidelity and Deposit Company of Maryland*, 2019 IL App. (2d) 180230, 143 N.E.3d 69, *rehearing denied*, (Apr. 12, 2019), *appeal denied*, 132 N.E.3d 308 (Ill. 2019) and *appeal denied*, 132 N.E.3d 336 (Ill. 2019) in that the annexation agreement in *United City of Yorkville* expressly provided that it would "run with the land" and was "assignable to and binding upon each and every subsequent grantee and successor in interest of the owners, developers and city." (R. 22). In comparison to the language of the annexation agreement in *Yorkville*, the trial court characterized the language in the Annexation Agreement at issue as "paltry" and "minimal." (R. 22-23). As such, the trial court maintained that the Village's Third Amended Complaint did not state a cause of action. (R. 45).

D. FIRST NOTICE OF APPEAL

On December 23, 2020, within 30 days of the December 4, 2020, dismissal order, the Village filed a notice of appeal. (C. 734).

E. ATTORNEY FEE JUDGMENT

On December 17, 2020, the Defendants filed a motion for an award of attorney's fees and costs against the Village. (C. 689-734). The motion was premised upon the Defendants being able to enforce the prevailing party attorney fee provision in Section 28J of the Annexation Agreement under the "Indemnify" heading. The Defendants maintained that since they prevailed, that they were the "prevailing party" under this Section 28J and entitled to their attorney fees. (C. 692).

The motion was contradictory to earlier arguments made by the Defendants' counsel in arguing for the dismissal of the Third Amended Complaint. Specifically, in

arguing for the dismissal of the Third Amended Complaint the Defendants' counsel argued that the Defendants would have no standing to enforce the Annexation Agreement:

> Second, counsel made this argument that if this situation was reversed, this situation would be far different, that Kirkland Properties Holding Company, the defendant here, could sue the village and enforce this annexation agreement, that they would have standing to enforce this annexation agreement, but that's simply not true under the holding in *Doyle*.
>
> As counsel went on to say, the *Doyle* court very specifically said in *Doyle*, you have no standing because you are only a holder of a portion of this subject property and not the whole, and as such, the annexation agreement is not enforceable, so the reversal in this ruling cuts both ways.
>
> Just like the Village of Kirkland cannot sue the defendants because they lack this critical language, the defendants cannot sue the plaintiff for its failure to perform its covenants and duties under the annexation agreement.

(R. 14-15). Contrarily, in their memorandum of law in support of the motion for attorney fees, the Defendants argued that the attorney fee provision in Section 28J of the Annexation Agreement allowed *non-parties* to the Annexation Agreement to recover attorney's fees. (C. 807).

Following a hearing, the Court found that although the Defendants were not parties to the Annexation Agreement, they were entitled to seek attorney fees as *non-parties* under Section 28J of the Annexation Agreement (C.862), reasoning as follows:

> In an attempt to be consistent with my substantive ruling that defendants are not successor parties to the agreement, I cannot find the defendants are a party to the annexation agreement, which renders the balance of paragraph 28M and an analysis thereof moot.
>
> Paragraph 28J, however, appears to broaden the use of the terms dispute and party. It's again, as I stated a moment ago, any dispute. It is not limited in scope, it is any dispute concerning the terms of this agreement.
>
> Paragraph 28J, like paragraph 28M, references, prevailing party, but within a different context. Party does not have to mean a party and/or successor to the agreement. A party can mean exactly why we're before me, a litigant, a plaintiff or a defendant. That's what we have here. Defendants are parties as

> contemplated by paragraph 28J, in as much as they were joined as parties to this litigation.

(R. 181).

On June 2, 2021, after an evidentiary hearing as to the amount of attorney's fees that should be awarded, the trial court granted judgment in favor of Defendants and against the Village for $19,381.24. (C. 924).

F. SECOND NOTICE OF APPEAL

On June 3, 2021, a day after the entry of the attorney fee judgment, the Village filed a notice of appeal from the June 2, 2021, attorney fee judgment. (C. 926).

G. APPELLATE COURT DECISION

On April 21, 2022, the Appellate Court, Second District, reversed the dismissal of the Village's complaint against the Defendants and vacated the attorney fee judgment. This appeal followed.

IV. ARGUMENT

A. WHETHER THE TRIAL COURT ERRED IN DISMISSING THE VILLAGE'S THIRD AMENDED COMPLAINT FOR BREACH OF THE ANNEXATION AGREEMENT BASED ON THE DEFENDANTS BEING OWNERS OF LESS THAN THE ENTIRE PARCEL SUBJECT TO THE ANNEXATION AGREEMENT

1. Standard of Review

A motion to dismiss pursuant to section 2-615 of the Code of Civil Procedure challenges the legal sufficiency of the complaint and asserts that the plaintiff has failed to state a cause of action. 735 ILCS 5/2-615 (West 2020). When ruling on a section 2-615 motion to dismiss, the trial court must accept as true all well-pled facts, as well as any reasonable inferences that may arise from them. *Cochran v. Securitas Sec. Servs. USA*, 2017 IL 121200, ¶ 11, 419 Ill. Dec. 374, 93 N.E.3d 493. Section 2-615 dismissals are reviewed *de novo*. *Cochran*, 2017 IL 121200 at ¶ 11.

As the Appellate Court in this case aptly noted, the trial court's dismissal here was guided by its interpretation of section 11-15.1-4 of the Municipal Code and also by the language of the Annexation Agreement. Interpretation of statutes and contracts are also subject to *de novo* review. *Valerio v. Moore Landscapes, LLC*, 2021 IL 126139, ¶ 20, 451 Ill. Dec. 59, 183 N.E.3d 105.

2. Argument

To plead a breach of contract a plaintiff must allege facts establishing the following elements: (1) the existence of a contract, (2) a breach of the contract, (3) plaintiff's performance of its duties under the contract, and (4) damages. *Vill. of Orland Park v. First Fed. Sav. & Loan Ass'n of Chicago*, 135 Ill. App. 3d 520, 529 (1st Dist. 1985).

An annexation agreement is a type of contract between a municipality and a landowner by which the municipality annexes land into the municipality and the landowner agrees to construct or maintain certain municipal infrastructure; such agreements are binding for periods not exceeding 20 years. 65 ILCS 5/11-15.1-1 (West 2022); see also *Matulis v. Montalbano Builders, Inc. (In re Annex Certain Prop. to the City of Wood Dale)*, 244 Ill. App. 3d 820, 825 (2nd Dist. 1993). A properly executed annexation agreement is binding on successor owners of record and can even be specifically enforced by the municipality:

> "Any annexation agreement executed pursuant to this Division 15.1, or in conformity with Section 11-15.1-5 [65 ILCS 5/11-15.1-5] hereof, shall be binding upon the successor owners of record of the land which is the subject of the agreement and upon successor municipal authorities of the municipality and successor municipalities. Any party to such agreement may by civil action, mandamus, injunction or other proceeding, enforce and compel performance of the agreement."

65 ILCS 5/11-15.1-4 (West 2022).

None of the core elements of a breach of contract action are in dispute in this case. Rather, the issue boils down to whether the Defendants are successor owners of records such that they are bound by the Annexation Agreement pursuant to section 11-15.1-4 of the Municipal Code. The Defendants argue that they are not bound because they only own a portion of the Subject Property.

The cardinal rule in construing a statute is to ascertain and give effect to the intent of the legislature. The most reliable indication of the legislature's intent is the plain language of the statute. *Kleinhans v. Callas (In re Vill. of Bull Valley)*, 392 Ill. App. 3d 577, 585 (2nd Dist. 2009). When a statute's language is clear, the language will be given effect without resort to other aids of statutory construction. *Kleinhans*, 392 Ill. App. 3d at 585. Likewise, a court should not depart from the plain language of a statute by reading

into its exceptions, limitations, or conditions that the legislature did not express. *Kleinhans*, 392 Ill. App. 3d at 585.

The Defendants' argument that they cannot be bound by the Annexation Agreement because they own only a portion of the Subject Property defies the rules of statutory interpretation. Section 11-15.1-4 of the Illinois Municipal Code does not state anything of the sort. In fact, it specifically states that an annexation agreement is binding on successor *owners* (emphasis on the plural) of record. 65 ILCS 5/11-15.1-4 (West 2022). Indeed, the statute specifically contemplates that there could be more than one record owner of the land at issue.

The Defendants' proposed interpretation impermissibly reads into section 11-15.1-4 of the Illinois Municipal Code a limitation or exception that just does not exist. Nowhere in Section 11-15.1-4 of the Illinois Municipal Code does it state that for an annexation agreement to be binding on a successor owner that the successor owner must own the entire parcel annexed. Such a requirement or exception should not be read into the provision where it does not exist. See *Kleinhans*, 392 Ill. App. 3d at 585.

This is even more so when the public policy behind an annexation agreement is considered. Public policy favors the enforcement of annexation agreements. As aptly noted in *Orland Park*:

> The authorization of preannexation agreements by statute, such as section 11-15.1-1, serves to further important governmental purposes, such as the encouragement of expanding urban areas and to do so uniformly, economically, efficiently and fairly, with optimum provisions made for the establishment of land use controls and necessary municipal improvements including streets, water, sewer systems, schools, parks, and similar installations. This approach also discourages fragmentation and proliferation of special districts. Additional positive effects of such agreements include controls over health, sanitation, fire prevention and police protection, which are vital to governing communities.
>
> *Vill. of Orland Park*, 135 Ill. App. 3d at 526.

As noted above, annexation agreements are critical to the implementation of municipal infrastructure such as roads, sewers, and parks. Surely, the legislature did not intend a loophole whereby a successor developer could purchase only a portion of land subject to an annexation agreement to escape responsibility to complete vital municipal infrastructure. What purpose does an annexation agreement serve if it can be effectively nullified by severing a small parcel from the original property configuration? Yet another question is that if a successor owner of record of only a portion of the land annexed does not have to complete the municipal improvements required by an annexation agreement, who will pay for the residents to have sewer, roads, and other amenities? Rhetorical as these questions may be, they demonstrate the absurdity of the Defendants' interpretation of section 11-15.1-4 of the Illinois Municipal Code.

The case of *Doyle v. Vill. of Tinley Park*, 2018 IL App (1st) 170357, relied upon by the Defendants and the trial court, is inapplicable to this case. In *Doyle*, single lot homeowners brought a breach of contract action against the developer of their subdivision, alleging that the developer had failed to install a working storm drain system for their home as was required in an annexation agreement entered into by the developer and the Village. *Doyle*, 2018 IL App (1st) 170357, at ¶ 17. The Doyles claimed that they had standing to enforce the annexation agreement as successor owners of a single lot in the annexed subdivision. *Doyle*, 2018 IL App (1st) 170357, at ¶ 17. The trial court dismissed the complaint, finding the Doyles lacked standing under the annexation agreement.

On appeal, the Doyles again argued that they had standing to enforce the annexation. The Appellate Court, 1st District, rejected the Doyles' argument, and found as follows:

> **Initially, we do not find that the wording of the annexation agreement supports the Doyles' construction. The agreement defines the "Subject Property" as an 828-acre parcel of land contiguous with the village—*i.e.*, the entire subdivision. If the drafters of the agreement intended to confer successor status upon each and every purchaser of a lot within the subdivision (as opposed to, say, a developer who purchased the entire subdivision property from Malone), the agreement would have said "successor owners of record of the Subject Property *or any portion thereof.*"**

Doyle, 2018 IL App (1st) 170357, at ¶ 30. The *Doyle* Court also reasoned:

> **Moreover, if we adopted the Doyles' interpretation of the annexation agreement and the statute, then each and every homeowner in the subdivision would succeed to Malone's interest in the property. *Humphrey Property Group, L.L.C. v. Village of Frankfort*, 392 Ill. App. 3d 611, 614 (2009) (with respect to an annexation agreement, a successive purchaser of land stands in the place of the original landowner who made the contract with the municipality). As successors, the homeowners would stand in Malone's shoes and be bound to Malone's obligations—and, as a result, the village could sue the Doyles, or any other homeowners in the subdivision, for failing to properly design and construct storm sewers in accordance with the annexation agreement. See *Village of Orland Park v. First Federal Savings & Loan Ass'n of Chicago*, 135 Ill. App. 3d 520, 526, 90 Ill.Dec. 146, 481 N.E.2d 946 (1985) (because annexation agreement was binding upon successor owner of property, village could sue successor owner to enforce its provisions). We decline to find that either the parties to the contract or the legislature intended such an absurd result.**

Doyle, 2018 IL App (1st) 170357, ¶ 32.

First, *Doyle* is not comparable to the present matter because the fact pattern was a homeowner trying to step into the developer's shoes to sue *the developer*. It was quite the contradictory argument made by the plaintiffs in *Doyle* to ask to step into the shoes of the developer and then try to enforce the agreement against the developer. Even if the Doyles were correct that they were a successor in interest to the Annexation Agreement, they would succeed to the developer's interest and would in effect be suing themselves. The helpful takeaway from the *Doyle* case is that an annexation agreement will not be

interpreted in a manner to achieve an absurd result, a holding that gets lost by the Doyles' convoluted argument. See *Id.*

Second, and moreover, *Doyle* is not analogous to this case because it pertains to a single residential homeowner trying to step into to the shoes of the original developer as a successor party to an annexation agreement. The *Doyle* Court recognized the absurdity of determining a single residential homeowner to have successor status under an annexation agreement because this would result in the Village being able to sue single family homeowners for obligations the developer had under the annexation agreement such as roads, sewers, and other infrastructure that a typical single lot homeowner would not be required to worry about. See *Doyle*, 2018 IL App (1st) 170357, ¶ 32. Here, unlike *Doyle*, the Defendants are not single residential homeowners. The Defendants are developers and collectively own 34 of the lots in the subdivision. The developer Defendants in this case are not in the least comparable to the Doyles and the policy concerns about the unfairness of obligating a single residential homeowner to complete municipal infrastructure do not exist.

This is why *Doyle* should not be read without also reading the Appellate Court, Second District, case of *United City of Yorkville v. Fid. & Deposit Co. of Maryland*, 2019 IL App (2d) 180230, ¶ 99, 143 N.E.3d 69, 90, *reh'g denied (Apr. 12, 2019)*, *appeal denied*, 132 N.E.3d 308 (Ill. 2019), and *appeal denied*, 132 N.E.3d 336 (Ill. 2019), which distinguished and criticized *Doyle*. In *United City of Yorkville*, Kimball Hill entered into an annexation agreement with the City of Yorkville concerning a subdivision Kimball Hill intended to develop. Part of Kimball Hill's obligations under the annexation agreement included the completion of certain public improvements. Kimball Hill went bankrupt

before completing the required public improvements and subsequently two different developers, TRG Venture Two, LLC and William Ryan Homes, Inc., purchased several of the subdivided lots from Kimball Hill, with the intent to develop and improve them with residences for resale. The City brought suit against TRG and William Ryan Homes after they failed to complete the required public improvements under the annexation agreement. The trial court dismissed the City's complaint, ruling that the obligations to complete the public improvements did not transfer to TRG and William Ryan Homes because they did not purchase the entire parcel annexed. On appeal, this Court reversed and held:

> ***Doyle* does not apply to the facts before us. First, the Annexation Agreement contains language that we presume the annexation agreement in *Doyle* did not contain. Early in the Annexation Agreement, the "PROPERTY" is described as "consisting of approximately 300 acres." However, as noted, section 9 of the Agreement refers to the rights and duties of "DEVELOPER and all successor developers of the PROPERTY *or any parcel or phase thereof*." (Emphasis added.) This language contemplates that the original "PROPERTY" might eventually be owned by more than one developer. Construed together, section 9 and section 22.B indicate that development duties can indeed fall on a developer that owns less than the entire "PROPERTY," in which case the liability will be proportionate to the amount of property that the developer owns. We are not privy to the entire agreement in *Doyle*, but we presume that the absence of language comparable to section 9 led the court to hold that the annexation agreement would bind only "a developer who purchased the entire subdivision property from Malone."**

United City of Yorkville, 2019 IL App (2d) 180230 at ¶ 99.

This *United City of Yorkville* Court further reasoned:

> **As for *Doyle*'s analysis of section 11-15.1-4, we think that the court should have contrasted two types of parties who purchase from the original developer a portion of subdivided land that is the subject of an annexation agreement. The first is a party who, like the plaintiffs in Doyle, purchases a lot in order to construct, or have constructed, a residence for himself. The second is a party—namely a developer—who purchases lots in order to construct homes for third-party buyers. We agree with the Doyle court that it would be unfair to impose the obligations of an annexation agreement upon the first type of purchasers. However, it would be eminently fair to impose those**

> **obligations upon the second type—developers—even though, like the first type, they do not purchase the entirety of "the land which is the subject of the [annexation] agreement." See 65 ILCS 5/11-15.1-4 (West 2002). Not uncommonly, a unitary tract of land governed by an annexation agreement is later divided and sold to different developers, as happened in this case. The public policy in favor of ensuring the fulfillment of an annexation agreement (see *Village of Orland Park v. First Federal Savings & Loan Ass'n of Chicago,* 135 Ill. App. 3d 520, 526, 90 Ill.Dec. 146, 481 N.E.2d 946 (1985)) would be frustrated if the succession of duties under section 11-15.1-4 continued only as long as the land remained under common ownership.**

United City of Yorkville, 2019 IL App (2d) 180230, at ¶ 100.

The *United City of Yorkville* Court was correct to distance its case from the *Doyle* decision and its convoluted fact pattern. The *United City of Yorkville* Court recognized that the analysis in *Doyle* should have considered the differences between a developer who acquires property subject to an annexation agreement in order to develop and resell, and a single lot owner residing in their home. *United City of Yorkville*, 2019 IL App (2d) 180230, at ¶ 100. This is because it is inherently fair to obligate a successor developer to complete infrastructure- even if they do not purchase the entirety of the annexed land. As this Court noted in *Yorkville*, it is common for the original developer to sell the annexed land off to other developers that ultimately complete the development.

Public policy favors fulfillment of the obligations in an annexation agreement. *United City of Yorkville*, 2019 IL App (2d) 180230, at ¶ 100. In this case, these obligations included development of streets, storm water infrastructure, and school impact fees. (C. 569-91). To say that these obligations no longer exist because the successor developer did not purchase the subject property in its entirety makes little sense and would leave a neighborhood of homeowners lacking necessary services. The *United City of Yorkville* case clearly is more well-reasoned than is *Doyle*, and is certainly more applicable to this case.

The Village's position is also consistent with *City of Elgin v. Arch Ins. Co.*, 2015 IL App (2d) 150013. In *City of Elgin*, the City filed suit for breach of annexation agreement against a successor developer who had acquired less that the entire parcel annexed, as well as the surety company who had guaranteed the original developer's performance under the annexation agreement. *City of Elgin*, 2015 IL App (2d) 150013 at ¶ 4-6. The surety in turn filed a counterclaim against a successor developer. *City of Elgin*, 2015 IL App (2d) 150013 at ¶ 7. The *City of Elgin* Court determined that the surety's counterclaim should survive dismissal and accepted, for the purposes of the pleading, that the successor developer was bound by the terms of the annexation agreement even though it owned just a portion of the subject property. *City of Elgin*, 2015 IL App (2d) 150013 at ¶ 21, 23-24.

In its recitation of the facts, the *City of Elgin* Court noted that the annexation agreement at issue did contain language that stated the annexation agreement was binding on any successors and assigns of "all or any part of" the property. *City of Elgin*, 2015 IL App (2d) 150013 at ¶ 3. However, the City of Elgin Court did not hold that this language was the reason that successor owners of less than the entire annexed parcel were bound by the annexation agreement. There is no holding, let alone dicta, in the *City of Elgin* case that even comes close to stating this.

The trial court's and the Defendants' position that the language in the Annexation Agreement at issue is insufficient to bind successor owners who own only a portion of the Subject Property is flawed. An annexation agreement does not need to contain specific language to bind successor owners who have acquired the entire parcel or even less than the entire parcel. It is the law. Section 11-15.1-4 of the Illinois Municipal Code is incorporated into every annexation agreement unless the annexation agreement provides

otherwise. *City of Elgin*, 2015 IL App (2d) 150013 at ¶21. A properly executed annexation agreement is binding on successor owners of the land annexed--period. There is no requirement that successor owners own the entire annexed parcel in order to be bound by the annexation agreement. There is no requirement that the annexation agreement contain certain language for the agreement to bind successor owners. There are no exceptions, limitations, or other requirements contained in the statute, and as noted above, nor should we read into the statute any exceptions, limitations, other requirements not appearing in plain language. See *Kleinhans*, 392 Ill. App. 3d at 585.

Notwithstanding that there is no statutory requirement that an annexation agreement contain any special language in order for successor owners to be bound, the language in the Annexation Agreement at issue more than sufficiently states that successors owners will be bound and creates in itself a covenant running with the land. Notably, the Defendants during argument on their Motion to Dismiss the Village's Third Amended Complaint even admitted that the Annexation Agreement was a covenant running with the land. (R. 7-8). The Defendants' argument remained that the covenant runs only with the entire parcel (R. 7), a position that is belied by the Annexation Agreement itself.

Section 28, paragraph I, of the Annexation Agreement plainly states that the Annexation Agreement is binding on successors and assigns:

> **I. <u>Binding on Assigns</u>. All terms and provisions of this Agreement shall be binding upon, inure to the benefit of, and be enforceable by the parties hereto, their heirs, executors, administrators, successors and assigns.**

(C. 585).

In interpreting the Annexation Agreement, the basic rules of contract interpretation apply. *Reserve at Woodstock, LLC v. City of Woodstock*, 2011 IL App (2d) 100676, ¶ 39,

958 N.E.2d 1100. The primary objective is to give effect to the intent of the parties, and a court will first look to the language of the contract itself to determine the parties' intent. 2011 IL App (2d) 100676 at ¶ 39. The best indicator of intent is the contract language given its plain and ordinary meaning. *Gallagher v. Lenart*, 226 Ill. 2d 208, 232, 874 N.E.2d 43, 58 (2007). An agreement is to be interpreted as a whole, with meaning and effect given to every provision when possible. *Hot Light Brands, L.L.C. v. Harris Realty Inc.*, 392 Ill. App. 3d 493, 499 (2nd Dist. 2009). If clear and unambiguous, specific terms within a contract will be given their plain, ordinary, and popular meaning. *Thompson v. Gordon*, 241 Ill. 2d 428, 441, 349 Ill. Dec. 936, 948 N.E.2d 39 (2011).

Following these rules, the Defendants are both successors of and assigns to the Subject Property. Black's Law Dictionary defines "assign" as "to transfer, make over, or set other set over to another" such as "to transfer; or to assign property, or some interest therein." Black's Law Dictionary 118 (6th ed. 1990). An assign is a grantee of the subject premises, that is, someone to whom a property interest has been conveyed. *Sanni, Inc. v. Fiocchi*, 111 Ill. App. 3d 234, 240 (2nd Dist. 1983). Under this common definition, the Defendants are assigns having taken their respective portions of the Subject Property via special warranty deeds, subject to the recorded Annexation Agreement. (C. 559, 556). Black's Law Dictionary defines "successor" as one who "succeeds or follows; one who takes the place that another has left and sustains the like part or character; one who takes the place of another by succession." Black's Law Dictionary 1431 (6th ed. 1990). Under this common definition, by those same warranty deeds, Defendants are successors to the original owner of record that entered into the Annexation Agreement. (C. 559, 556).[1]

[1] Defendants also made an evidentiary admission in their motion to dismiss the Village's original complaint in stating in the response that "the Defendants, along with dozens of other lot owners (who are

It is of no consequence that Defendants are not the original owner of record which entered into the Annexation Agreement or even its first assignee or successor. It is of no consequence that the Defendants do not own the entire parcel annexed. The language in 28, paragraph I of the Annexation Agreement is plural (successors and assigns), not singular. It is not limited to only the first successor or assign. It is not limited to only a successor or owner who owns the entire Subject Property. It is not limited to successors and assigns who are expressly assigned the duties and obligations of the Annexation Agreement. It is not limited to successors and assigns who are the continuation of the Landowner or merged or consolidated with the Landowner. The Annexation Agreement is binding on successors and assigns, in the plural, which the Defendants clearly are and have on at least one occasion admitted.

The language in the Annexation Agreement at issue is not that different from the language in the annexation agreements in *United City of Yorkville* that was found to be binding on a subsequent developer who purchased only a portion of the annexed property. See *United City of Yorkville*, 2019 IL App (2d) 180230 at ¶ 99-100. While the Annexation Agreement at issue here does not specifically state that it binds successor owners of "any parcel or phase thereof" of the annexed property, this intent is made clear when reviewing the Annexation Agreement as a whole. Looking at the Annexation Agreement as a whole, it is clear the original parties intended that there could be more than one owner of record

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without explanation not named as defendants in Plaintiff's Complaint), are the successors in interest to the Developers." (C. 94). While the Defendants state in their brief that the Village "relies" on this statement as a judicial admission, this is not the case. The Village has never called the statement a judicial admission. The statement is an evidentiary admission as it was not made in a verified pleading. See *Abruzzo v. City of Park Ridge*, 2013 IL App (1st) 122360, ¶36. The statement is supportive of the Village's position that the Defendants are successors in interest to the Subject Property and is demonstrative of the Defendants' pattern of reversing positions when it suits them.

and more than one successor owner and/or assign of the Subject Property as the property was subdivided and developed. (C. 568, 571-573). For instance, in the introductory paragraphs, the Annexation Agreement sets forth that the landowner intends to subdivide and develop the property. (C. 571-72). Section 5 of the Annexation Agreement provides that the Subject Property would be developed in stages. (C. 573). Section 6 of the Annexation Agreement also contemplates subdivision of the Subject Property and obligates the Village to maintain the zoning classification through the term of the Agreement. (C. 574). Section 19 specifically contemplates successor developers, as it waives water and sewer fees for those properties improved by the Trust's affiliated construction company and requires those same fees for all other improved properties. (C. 581). In sum, it is obvious that the original parties intended to confer successor status to subsequent developer-owners, whether the developer is a first, second, or third successor owner or whether the developer acquires just a portion of the Subject Property. Accordingly, under the terms and provisions of the Annexation Agreement itself, the provisions of the Annexation Agreement are binding upon the Defendants.

The Defendants make several other minor arguments that can be summarily rejected. For instance, the Defendants argue that the Village's Third Amended complaint was properly dismissed because there are no allegations that establish that the original owner, the Trust, assigned Plank Road, LLC, the successor owner before the Defendants, its obligations under the Annexation Agreement. The argument makes little sense because, as noted above, the obligations in an annexation agreement transfer by operation of law. Stated again, section 11-15.1-4 of the Illinois Municipal Code is incorporated into every annexation agreement unless the annexation agreement provides otherwise. *City of Elgin*,

2015 IL App (2d) 150013 at ¶21. There does not have to be an express assignment or assumption of the liabilities. See *City of Elgin*, 2015 IL App (2d) 150013 at ¶21. When recorded, an annexation agreement puts every subsequent purchaser on notice of their potential obligations and liabilities. The Annexation Agreement in this case is no different. The Defendants became responsible for the obligations under the Annexation Agreement when they acquired their respective portions of the Subject Property.

The Defendants next argue that the Village's claim for specific performance was deficient because the Village cannot establish an inadequate remedy at law. This argument borderlines frivolity. Granted, specific performance is a form of mandatory injunctive relief and ordinarily ordinary injunctive relief is not appropriate when there is an adequate remedy at law. *New Park Forest Assoc. II v. Rogers Enterprises, Inc.*, 195 Ill. App. 3d 757, 761 (1st Dist. 1990). However, it is well settled that a party does not need to establish the traditional elements of injunctive relief in order to specifically enforce an annexation agreement. *Orland Park*, 135 Ill. App. 3d at 528-29. Indeed, "the fact that money damages may also be available does not preclude a party from enforcing other terms of a preannexation agreement under section 11-15.1-4 of the Municipal Code." *Orland Park*, 135 Ill. App. 3d at 528; see also *Shelbyville v. Shelbyville Restorium, Inc.*, 96 Ill. 2d 457 (1st Dist. 1983). Put another way, "the presence of a monetary remedy in addition to the enforcement provisions contained in section 11-15.1-4 of the Municipal Code cannot be deemed a sufficient basis upon which to dismiss the amended complaint." *Orland Park*, 135 Ill. App. 4d at 529.

In sum, for the reasons above, the trial court erred in dismissing the Village's Third Amended Complaint. Section 11-15.1-4 of the Municipal Code binds successor owners of

record of land subject to an annexation agreement, whether or not the successor owner owns the entire property annexed or only a portion of the property annexed.

B. WHETHER THE APPELLATE COURT PROPERLY EXERCISED JURISDICTION OVER THE VILLAGE'S APPEAL FROM THE ATTORNEY FEE JUDGMENT

1. Standard of Review

The question of whether an Appellate Court has jurisdiction is one of law and is reviewed *de novo*. *C.O.A.L., Inc. v. Dana Hotel, LLC*, 2017 IL App (1st) 161048, ¶46, 82 N.E.3d 1262, 1275.

2. Argument

Defendants claim that the Appellate Court lacked jurisdiction over the Village's attorney fee appeal due to a deficiency in the Notice of Appeal. Any deficiency in the notice of appeal was one of form and the Defendants cannot demonstrate any prejudice. Thus, the Appellate Court did have the requisite jurisdiction.

A notice of appeal confers jurisdiction on a court of review to consider only the judgments or parts of judgments specified in the notice of appeal. *Gen. Motors Corp. v. Pappas*, 242 Ill. 2d 163, 176, 950 N.E.2d 1136 (2011). While the filing of a notice of appeal is jurisdictional, such notice is to be liberally construed. *Maywood-Proviso State Bank v. Vill. of Lisle*, 234 Ill. App. 3d 206, 214 (2d Dist. 1992). The purpose of the notice of appeal is to inform the appellee that the appellant seeks review of the trial court's decision. *Maywood-Proviso State Bank*, 234 Ill. App. 3d at 214. The notice of appeal "should be considered as a whole and will be deemed sufficient to confer jurisdiction on an appellate court when it fairly and adequately sets out the judgment complained of and the relief sought, thus advising the successful litigant of the nature of the appeal." *Gen. Motors*

Corp., 242 Ill. 2d at 176. "Consequently, where the deficiency in notice is one of form, rather than substance, and the appellee is not prejudiced, the failure to comply strictly with the form of notice is not fatal." *Gen. Motors Corp.*, 242 Ill. 2d at 176.

Numerous Supreme Court and Appellate Court cases have consistently held that the failure to include a prayer for relief is an error of form and not substance, and thus, does not deprive the reviewing court of jurisdiction. See *National Bank of the Republic v. Kaspar American State Bank*, 369 Ill. 34, 40, 15 N.E.2d 721 (1938); *Gen. Motors Corp.*, 242 Ill. 2d at 176; *Illinois Bell Telephone Co. v. Purex Corp., Ltd.*, 90 Ill. App. 3d 690, 693 (1st Dist. 1980); *Peluso v. Singer General Precision, Inc.*, 47 Ill. App. 3d 842, 851 (1st Dist. 1977). So too in this case, any deficiency in the prayer for relief was one of form.

As an aside, it is clear in reading the notice of appeal that the Village was seeking a reversal of the attorney fee award. The notice of appeal specifically described the order of which the Village was seeking review, in that it provided that the Village was appealing "from the Judgment of the Circuit Court of the Twenty-Third Judicial Circuit, DeKalb County, Illinois entered on June 2, 2021, granting the Defendant-Appellee's Petition for Attorney Fees and entering a monetary judgment against Plaintiff-Appellant's in the amount of $19,381.24." (C. 926). While the Notice of Appeal did not specifically state that it was asking for a "reversal" of the June 2, 2021, attorney fee award, the relief sought was evident. When you combine language of the notice with the fact that the Village's position in the trial court was consistently that an attorney fee award was inappropriate because the Defendants were found not to be parties to the Annexation Agreement containing the attorney fee provision, it was even more clear that the Village was seeking reversal of the attorney fee award.

When before the Appellate Court, the Defendants failed to argue any prejudice. Now before this Court, the Defendants still do not argue any prejudice. Accordingly, without any claims of prejudice, the failure to specifically request reversal of the attorney fee order did not deprive the Appellate Court of jurisdiction because any deficiency was one of form. See *Gen. Motors Corp.*, 242 Ill. 2d at 176.

In sum, the Appellate Court did not err in exercising jurisdiction over the attorney fee appeal.

C. WHETHER THE TRIAL COURT ERRED IN AWARDING THE DEFENDANTS ATTORNEY FEES BASED ON A PREVAILING PARTY ATTORNEY FEE PROVISION IN THE ANNEXATION AGREEMENT

1. Standard of Review

The standard of review for an award of attorney fees is *de novo* when the issue is not the trial court's calculation of the fees, but rather whether the trial court misapplied the law in awarding fees in the first place. *Pietrzyk v. Oak Lawn Pavilion, Inc.,* 329 Ill. App. 3d 1043, 769 N.E.2d 134 (1st Dist. 2002); see also *Mirar Dev., Inc. v. Kroner*, 308 Ill. App. 3d 483, 485, 720 N.E.2d 270, 272 (3d Dist. 1999). Here, the issue is not the trial court's calculation of fees. Rather, the issue is whether the trial court misinterpreted the Annexation Agreement and misapplied the law in awarding any fees at all.

2. Argument

First and foremost, the attorney fee judgment must be reversed because the Defendants are not the proper prevailing party. As noted above, the trial court erred in dismissing the Village's Third Amended Complaint. That being the case, the Defendants are not the prevailing party and therefore not entitled to attorney fees.

Assuming arguendo that the Defendants are the prevailing party (and they are not), the attorney fee judgment was still improper. Illinois courts will not award attorney fees unless fees are specifically authorized by statute or provided for by contract between the parties. *W.E. O'Neil Const. v. General Casualty,* 321 Ill.App.3d 550, 558 (1st Dist. 2001). There is no statute at issue here relative to the claim for the attorney's fees, leaving only a contract, the Annexation Agreement, as the purported basis for the attorney's fees claimed by Defendants. A claim for attorney fees based on a contract may be brought only by a party to that contract, by someone in privity with such a party, or who is a direct beneficiary. *Kohlmeier v. Shelter Ins. Co.*, 170 Ill. App. 3d 643, 653 (5th Dist. 1988); *Sabath v. Mansfield*, 60 Ill. App. 3d 1008, 1016 (1st Dist. 1978).

Quite simply, the Defendants were found by the trial court not to be parties or in privity with the parties to the Annexation Agreement. If the Defendants are not parties and not in privity with the parties to the Annexation Agreement, then how can they enforce a provision in the contract absent being a third party beneficiary? It is clear that the Defendants want the benefits of the Annexation Agreement but not the obligations. The whole notion that the Defendants are not parties to and cannot be bound by the Annexation Agreement but are still be entitled under attorney fees under the Annexation Agreement is illogical.[2]

Setting aside that the argument is illogical and assuming for the exercise that nonparties to a contract may recover attorney fees under that contract, the argument still

[2] During oral argument on the Motion to Dismiss the Village's Third Amended Complaint, the Defendants even took the position that because the Annexation Agreement was not enforceable as to them, that they would have no standing to sue under the Annexation Agreement: "Just like the Village of Kirkland cannot sue the defendants because they lack this critical language, the defendants cannot sue the plaintiff for its failure to perform its covenants and duties under the annexation agreement." (R. 14-15). This is yet another example of the Defendants reversing their position when it suits them.

fails. The provision under which the Defendants were awarded attorney fees, Section 28, paragraph J, of the Annexation Agreement does not allow for attorney fees for nonparties:

> J. Indemnify. Each of the parties (the "Indemnifying Party") agrees to indemnify, hold harmless and defend each other party from and against (a) any and all liability, loss, cost and damage ("Loss") and (b) reasonable attorney's fees and expenses, court costs and all other reasonable out-of-pocket expenses ("Expenses") incurred by such other party (the "Indemnified Party") in connection with or arising out of: (i) any breach of any warranty or the inaccuracy of any representation made by such Indemnifying Party in the Agreement or in any certificate, document or instrument delivered by or on behalf of such Indemnifying Party pursuant hereto; and (ii) any material breach by such Indemnifying Party of, or any failure of such Indemnifying Party to perform, any of its obligations under this Agreement or under any instrument contemplated hereby. Each of the parties to this Agreement agrees to give prompt notice to all other parties of the assertion of any claim, or the commencement of any suit, action or proceeding in respect of which indemnity shall be sought hereunder. The Indemnifying Party (or parties) shall have the right to assume the defense of any claim, suit, action or proceeding at its own expense, and, if at the request and expense of the Indemnifying Party, shall assume such defense. No party shall be liable under this paragraph for any settlement effected without its or any claim, litigation or proceeding in respect of which indemnity may be sought hereunder. Failure by the indemnified party to give prompt Notice shall not limit its rights other than this Agreement. In the event of any dispute concerning the terms of this Agreement, then the prevailing party shall be entitled to collect all its costs associated with the settlement of such dispute, including, but not limited to, its attorney's fees and court costs.

(C. 585).

This provision addresses the indemnity obligations of a "party" or parties" to the Annexation Agreement, including the right to attorney fees and costs. It is inconceivable how the terms "party" and "parties" can be taken to include nonparties, when the terms are given their plan meaning. "Parties to a deed or contact are those with whom the deed or contract is actually made." Black's Law Dictionary 1119 (6th ed. 1990). When the entire paragraph is read in context, the terms "party" or "parties" means the parties to the Annexation Agreement, along with any successors or assigns. This is the plain and obvious meaning.

The Defendants hyperfocus on the last sentence of Section 28 paragraph J: **"In the event of any dispute concerning the terms of this Agreement, then the prevailing party shall be entitled to collect all its costs associated with the settlement of such dispute, including, but not limited to, its attorney's fees and court costs.**" (C. 585). The Defendants read only this sentence, place emphasis on the term "any dispute" within that sentence and ignore all the other language in Section 28.J. Words derive their meaning from the context in which they are used, and a contract must be construed as a whole, viewing each part in light of the others. *Board of Trade of the City of Chicago v. Dow Jones & Co.*, 98 Ill. 2d 109, 122-23, 456 N.E.2d 84 (1983). The intent of the parties is not to be gathered from detached portions of a contract or from any clause or provision standing by itself. *Gallagher v. Lenart*, 226 Ill. 2d 208, 233, 874 N.E.2d 43, 58 (2007).

The Defendants argue that interpreting the attorney fee provision in Section 28.J as pertaining to nonparties is the only way to distinguish that section from the attorney fee provision in Section 28.M and prevent one of those sections from becoming meaningless. This is an example of why it is important to read the provisions in context and not to hyperfocus on a single sentence or word. Section 28.J is found in the section entitled "Indemnify," and governs when the obligation to indemnify kicks in and is in dispute. It allows attorney fees associated with such a dispute and does not necessarily require litigation to be brought. (C. 585). Paragraph 28.M governs in the event of litigation over the Annexation Agreement, and in fact requires litigation to be brought. (C. 586). Both provisions can easily be read in conjunction with one another without rendering the other meaningless.

In any event, if the Defendants are not parties or in privity with a party to the Annexation Agreement, the only way for the Defendants to recover attorney fees under the Annexation Agreement is if they are third party beneficiaries. There are two types of third-party beneficiaries, intended and incidental. An intended beneficiary is intended by the parties to the contract to receive a benefit for the performance of the agreement and has rights and may sue under the contract; an incidental beneficiary has no rights and may not sue to enforce them. *Salvi v. Village of Lake Zurich*, 2016 IL App (2d) 150249, ¶ 53. The Defendants are not intended third party beneficiaries.

Intent to benefit a third party is to be determined from the contract provisions and from the circumstances attending the execution of the contract. *Salvi*, 2016 IL App (2d) 150249 at ¶ 53. Illinois law holds a strong presumption against creating contractual rights in third parties, and the presumption can only be overcome by a showing that the language and circumstances of the contract manifest an affirmative intent by the parties to benefit the third party. *Bates & Rogers Construction Corp. v. Greeley & Hansen,* 109 Ill. 2d 225, 486 N.E.2d 902 (1985). So strong is the presumption against third-party beneficiary status that an intent to benefit a third party must be "practically an express declaration." *Barba v. Vill. of Bensenville*, 2015 IL App (2d) 140337, ¶ 22.

The Annexation Agreement does not reveal any intended third party beneficiaries. While there are incidental benefits arising out of the Annexation Agreement to Village residents related to the construction of vital municipal infrastructure, there are no express declarations that the Annexation Agreement was entered into for the benefit of any noncontracting parties. In fact, sections 23 and 28I of the Annexation Agreement

specifically states that the Annexation Agreement is enforceable by the *parties*. (C. 582, 585).

In sum, the trial court erred in awarding the Defendants attorney fees. One, the trial court mistakenly found that the Defendants were the prevailing party. Two, even if they were the prevailing party the Defendants were found not to be a party or in privity with a party to the Annexation Agreement by the trial court and were not third party beneficiaries of the Annexation Agreement.

V. CONCLUSION

In conclusion, for all the reasons set forth above, the Defendants are bound by the Annexation Agreement as successor owners of records and the trial erred in dismissing the Village's Third Amended Complaint. Because the Defendants are not the prevailing party, the trial court erred in awarding the Defendants attorney fees. The Village requests that this Court affirm the decision of the Second District, Appellate Court and/or reverse the decision of the trial court, and remand the matter back to the trial court for further proceedings consistent with the decision of this Court.

Respectfully submitted,
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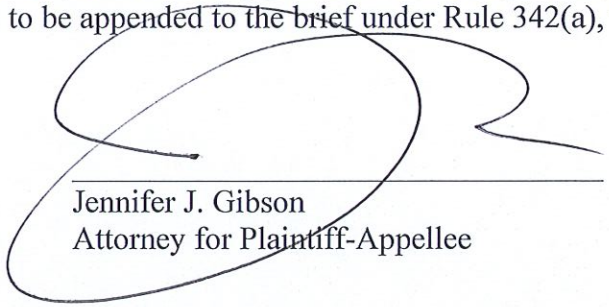
CERTIFICATION

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages or words contained in the Rule 341(d) cover, the Rule 341(h)(1) 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), the appendix, is 33 pages.



Jennifer J. Gibson
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CERTIFICATE OF SERVICE

The undersigned certifies that on December 14, 2022, she caused a copy of the foregoing **Brief of Plaintiff-Appellee, VILLAGE OF KIRKLAND**, to be served upon the following by electronic transmission:

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

Jennifer J. Gibson
Attorney for Plaintiff-Appellee

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Docket No. 128612

IN THE SUPREME COURT OF ILLINOIS

VILLAGE OF KIRKLAND, a municipal corporation, Plaintiff-Appellee,	)	Appellate Court Case No. 2-21-0301
vs.	)	Appeal from the Circuit Court of DeKalb Cty.
KIRKLAND PROPERTIES HOLDINGS COMPANY, LLC I and KIRKLAND PROPERTIES HOLDINGS COMPANY, LLC II, Defendants-Appellants.	)	Case No. 2019 L 000033
	)	Judge Hon. Bradley J. Waller Presiding
	)	Date of Judgment: June 2, 2021
	)	Date of Appellate Court Opinion: April 21, 2022

NOTICE OF FILING

TO: Colin W. Anderson
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Please take notice that on December 14, 2022, the undersigned electronically filed via the court's Odyssey EfileIL system with the Clerk of the Illinois Supreme Court, the Plaintiff-Appellee's Brief.

ZUKOWSKI, ROGERS, FLOOD & McARDLE

By: ***/s/ Jennifer J. Gibson***
Jennifer J. Gibson

PROOF OF SERVICE

The undersigned certifies, under penalties as provided by law pursuant to Section 1-109 of the Illinois Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct, and that on December 14, 2022, I served copies of the foregoing Notice of Filing and Brief by electronic transmission to the addressee(s) as shown at the email address(s) above.

/s/ Christina Walker

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