Nos. 130036 & 130058

IN THE
SUPREME COURT OF ILLINOIS

WAUKEGAN POTAWATOMI CASINO, LLC, an Illinois limited liability company, Plaintiff-Appellee, v. THE ILLINOIS GAMING BOARD, an Illinois administrative agency; in their official capacities, CHARLES SCHMADEKE, Board Chairman; DIONNE R. HAYDEN, Board Member; ANTHONY GARCIA, Board Member; MARC E. BELL, Board Member; and MARCUS FRUCHTER Board Administrator; and THE CITY OF WAUKEGAN, an Illinois municipal corporation, Defendants-Appellants.	)	On Appeal from the Illinois Appellate Court, First Judicial District, No. 1-22-0883 There on appeal from the Circuit Court of Cook County, Illinois, County Department, Chancery Division, No. 2021 CH 5784 The Honorable CECILIA A. HORAN, Judge Presiding.

REPLY BRIEF OF STATE DEFENDANTS-APPELLANTS

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INTRODUCTION

In October 2019, the Illinois Gaming Board ("Board") accepted applications for the Waukegan owners license under the Illinois Gambling Act ("Act"), 230 ILCS 10/1 *et seq.* (2022), and commenced its statutory duty to award the license to a suitable applicant. That process required the Board to consider each applicant "only after" Defendant-Appellant City of Waukegan ("City") had certified to the Board that: (1) the applicant had negotiated in good faith with the City; (2) the City and applicant had "mutually agreed" on certain items; and (3) the applicant had publicly presented its casino proposal. *Id.* § 7(e-5)(i)-(viii). The City voted to certify three applicants, but not Plaintiff-Appellee Waukegan Potawatomi Casino, LLC ("WPC"), and submitted those applicants to the Board. Over the next two years, the Board investigated the applicants, unanimously voted to select Full House as the final applicant, and unanimously voted to find Full House preliminarily suitable for licensure. Following the Board's unanimous vote, Full House began developing its casino in December 2021. It opened its temporary casino and commenced gambling operations in February 2023. Finally, in June 2023, the Board unanimously voted to grant Full House a full, unencumbered license.

WPC nonetheless argues that it should be permitted to undo the Board's licensing process — and strip Full House of its license — based on allegations that the City conducted a "sham" process that discriminated

against WPC and submitted noncompliant certifying resolutions to the Board. But a federal court recently concluded that WPC could not establish unlawful discrimination. And WPC's assertion that the City's certifying resolutions did not comply with section 7(e-5) cannot support a claim against the Board. Having failed to obtain the City Council's vote to become an applicant before the Board, WPC lacked standing to challenge any Board decision under the Act. In any case, its claim became moot in June 2023 when the Board awarded the Waukegan license to Full House. The appellate court therefore erred in concluding that WPC could proceed with its claim, and its decision should be vacated.

ARGUMENT

I. WPC lacked standing as a matter of law to challenge the Board's decision.

WPC's claim failed at the outset because WPC lacked standing. Standing requires an actual or threatened injury to a legally cognizable interest, which required that WPC's injury be: (1) distinct and palpable, (2) fairly traceable to the Board's actions, and (3) substantially likely to be prevented or redressed by the relief sought. *Greer v. Ill. Hous. Dev. Auth.*, 122 Ill. 2d 462, 492-93 (1988). As a threshold matter, although WPC suggested that the circuit court erred by deciding standing on a motion to dismiss, AE Br. 15-16, standing was properly raised at that stage of the litigation because WPC's lack of standing is evident from the factual allegations in the complaint, *see Glisson v. City of Marion*, 188 Ill. 2d 211, 220 (1999) (affirming

dismissal under 735 ILCS 5/2-619(a)(9) for lack of standing under relevant statute).[1] Indeed, it is apparent from the complaint that WPC never qualified as an applicant before the Board and thus suffered no legally cognizable injury that can be redressed through this action. None of WPC's arguments change that conclusion.

A. WPC did not suffer any injury, or immediate threat of injury, from the Board's decision.

WPC incorrectly asserts that it possessed a legally cognizable interest in applying to the Board for the Waukegan license because it submitted a casino proposal to the City. AE Br. 16-20. Under the Act, WPC was never eligible to apply to the Board for the license because it failed to obtain the City Council's vote. Thus, WPC had no legally cognizable interest in challenging the Board's decision to issue the license.

As a factual matter, the City Council voted twice to reject WPC's casino proposal, C16, meaning that WPC had "no chance" of applying to the Board for the license, *Lake Cnty. Riverboat, L.P. v. Ill. Gaming Bd.*, 332 Ill. App. 3d 127, 140 (1st Dist. 2002). WPC therefore did not sustain, nor was it in immediate danger of sustaining, any direct injury from the Board's decision to consider the certified applicants. *See id.* (applicant who did not propose Mississippi River casino lacked standing to challenge statutory provision that

[1] Citations to the briefs filed in this Court appear as "Bd. Br __" for the Board's opening brief and "AE Br." for WPC's response brief. The common law record is cited as "C__," and the record of proceedings as "R__."

permitted only existing licensee to relocate casino earmarked for Mississippi River); *see also Chi. Tchrs. Union, Loc. 1 v. Bd. of Educ.*, 189 Ill. 2d 200, 208 (2000) (physical education teachers' tenured status meant that they were not at serious risk of losing their jobs under statute that permitted some students to opt out of physical education classes and thus lacked standing to challenge statute). The City Council's vote rejecting WPC's casino proposal meant that WPC was never eligible to be considered for the casino license. WPC therefore could not suffer a legally cognizable injury from the Board's decision to issue the Waukegan license because it could not have been considered for the license.

WPC has acknowledged that it never appeared before the Board as an applicant for licensure. *See* C1394; AE Br. 41-42. Thus, WPC could not pursue statutory remedies under the Act against the Board for an alleged violation of the certification requirement. *See* C1394; AE Br. 41-42. WPC lacks standing to challenge the Board's decision to issue the license for that same reason. WPC could not apply for the Waukegan license. Ultimately, WPC's allegations are insufficient for standing because they are nothing more than a generalized interest in how the Board made its licensing decision.

B. Section 7(e-5) did not create a "right" to a "fair FRQ process," as WPC contends.

WPC relies on inapplicable competitive bidding case to support its incorrect assertion that it had a legally cognizable interest in a "fair and lawful RFQ process." AE Br. 16. By its plain terms, section 7(e-5) permitted host

municipalities to decide whether to certify an applicant. The provision did not govern how the City selected applicants. Section 7(e-5) merely prohibits the Board from considering an applicant for a license unless the City certifies that the applicant had negotiated with it in good faith and "mutually agreed" upon certain items, 230 ILCS 10/7(e-5)(i)-(v) (2022); the City had passed a resolution or ordinance in favor of the casino, *id.* § 7(e-5)(vi); and the applicant had presented its casino proposal at a public meeting and made it available online, *id.* § 7(e-5)(vii)-(viii). The Act imposed no restrictions on which prospective casino entities the City could certify beyond the previously listed items. In other words, the City's decision on whether to negotiate with or certify a casino entity was not governed by section 7(e-5). Section 7(e-5) thus created no corresponding right or interest to participate in any process before the City.

WPC's reliance on competitive bidding cases is misplaced. Unlike section 7(e-5), competitive bidding statutes standardize the selection criteria and require a public body to award the contract to the lowest responsible, responsive bidder, thereby creating an expectation among bidders of how the contract will be awarded. *See, e.g., Keefe-Shea Jt. Ventures v. City of Evanston*, 332 Ill. App. 3d 163, 171-72 (1st Dist. 2002); *Cardinal Glass Co. v. Bd. of Educ. of Mendola Cmty. Consol. Sch. Dist. No. 289*, 113 Ill. App. 3d 442, 446-48 (3d Dist. 1983). In *Cardinal Glass*, for example, the court explained that the low bidder had standing based on a legitimate expectation that it would have been awarded the contract if the public body had complied with the statute. 113 Ill.

App. 3d at 446-47; *see L.E. Zannini & Co. v. Bd. of Educ., Hawthorne Sch. Dist. 73*, 138 Ill. App. 3d 467, 474 (2d Dist. 1985) (low bidder had standing to challenge school board's award of contract to competing bidder); *State Mech. Contractors, Inc. v. Vill. of Pleasant Hill*, 132 Ill. App. 3d 1027, 1030 (4th Dist. 1985) (same). Here, in contrast, the statute required only that the City certify that it had negotiated with applicants and ensured public notice of the proposals that it advanced to the Board. *See* 230 ILCS 10/7(e-5) (2022).

The decisions in *Court St. Steak House v. Cnty. of Tazewell*, 163 Ill. 2d 159, 165 (1994), and *Keefe-Shea*, 332 Ill. App. 3d at 171-72, did not address standing and they too involved competitive bidding processes. In *Court St. Steak House*, this Court affirmed the dismissal of a low bidder's *mandamus* claim on the merits because, even under the relevant competitive bidding statute, the public body could consider the public interest when choosing the lowest responsible bidder. 163 Ill. 2d at 165. And in *Keefe-Shea*, the appellate court simply recognized that the "right to participate in a fair bidding process" arose "as a necessary corollary" to a competitive bidding statute's mandate that the municipality award the contract "to the lowest, responsive, responsible bidder." 332 Ill. App. 2d at 172.

But, again, section 7(e-5) did not establish a competitive bidding process, nor did it create any expectation that WPC (or any applicant) could compete before the Board for the Waukegan license if its proposal met certain statutory criteria. Instead, section 7(e-5) made clear that any applicant would

need to obtain the City's certification to become an applicant before the Board. And the Act required the Board to consider an applicant for licensure after the City had certified the items in section 7(e-5)(i)-(viii). But the Act did not create any right to a fair competitive process before the City.

Similarly, *Aramark Corr. Serv., LLC v. Cnty. of Cook*, No. 12 C 6148, 2012 WL 3961341, *5 (N.D. Ill. Sept. 10, 2012), does not extend the reasoning of competitive bidding cases to section 7(e-5), as WPC argues, AE Br. 18. The court there concluded that under the county's request-for-proposal process, which identified the criteria for awarding a public food service contract, "a bidder denied a contract because it was awarded to an unqualified bidder had standing to file suit." *Aramark Corr. Serv.*, 2012 WL 3961341, *5. WPC's reliance on *Aramark* thus continues to ignore that section 7(e-5) did not restrict the City's discretion to certify applicants. Under that provision, the City could decide to certify applicants (or not) based on its own criteria.

The Board was required to undertake a competitive and open bidding process after the City's decision to certify multiple applicants, *see* 230 ILCS 10/7.12 (2022) (Board must select applicant via "open and competitive bidding process" if host community certified multiple applicants); *id.* § 7.5 (Board's competitive bidding process), before deciding on the final applicant's suitability for licensure, *id.* § 7(b). Additionally, the Act provides statutory remedies for applicants alleging that they were "aggrieved by an action of the Board denying . . . a license," *id.* § 5(b)(1), with any Board decision subject to

review under the Administrative Review Law, *id.* § 17.1. However, WPC could not seek statutory remedies under the Act, *see id.* § 5(b)(1); C1394, because it was prohibited from being considered for licensure under the Act.

C. WPC's alleged injury was neither traceable to the Board nor likely to be redressed through this action.

Additionally, WPC's alleged injury is neither traceable to the Board, nor likely to be redressed through this action. The Board's acceptance of the City's certifying resolutions did not cause WPC's alleged injury. As WPC alleged, before the Board proceeded with its licensing process, the City Council had already voted not to approve WPC's proposal and instead to advance only the three other applicants to the Board. *See* C16. WPC's reliance on *Lac Du Flambeau Band of Lake Superior Chippewa Indians v. Norton*, 422 F.3d 490, 493-94 (7th Cir. 2005), AE Br. 23-24, therefore is misplaced. There, the casino operator had standing to challenge a federal regulator's approval of a Tribal-State casino compact under the relevant statute because it had plausibly alleged that its pending casino application could be adversely affected by the challenged compact. *Id.* at 500-501. Here, by contrast, WPC's alleged injury was not traceable to the Board because the City Council's independent decision not to certify WPC's proposal meant that it could not be considered by the Board. *See Scrementi v. Wilcox*, 2021 IL App (1st) 210238, ¶¶ 19-20 (traceability element not met where alleged injury was not direct result of defendants' enforcement of statute); *cf. Carr v. Koch*, 2012 IL 113414, ¶ 37 (taxpayer's alleged tax increase was not traceable to state official's

enforcement of school funding statute because statute did not require school districts to impose tax rate).

Further, WPC's alleged injury is unlikely to be redressed, even if this Court grants its requested relief. Citing *Ill. Rd. & Transp. Builders Ass'n v. Cnty. of Cook*, 2022 IL 127126, ¶ 23, WPC argues that it needed only to have a "substantial probability" that it would have been among the applicants submitted to the Board if the City "had complied with section 7(e-5)." AE Br. 24-26. It further alleged that it satisfied that burden by alleging that the City's outside consultant had advised that the City could not "go wrong" with any of the proposals, including WPC's, and that, as a result of the City's alleged failure to negotiate with applicants, the CIty did not become aware of flaws in other applicants' proposals. AE Br. 25. But *Ill. Rd. & Transp. Builders* does not support WPC's argument.

There, the Court concluded that a builders' association suffered a direct injury due to the county's yearly diversion of nearly $200 million from road construction projects, which reduced the pool of jobs available to its members. *Ill. Rd. & Transp. Builders*, 2022 IL 127126, ¶ 18. As the Court explained, the redressability component was satisfied because it was substantially likely that the increased availability of funds would increase economic opportunities for the members, even if each member could not show that it would have received additional business. *Id.* at ¶¶ 18-20. In reaching that conclusion, the Court declined to credit the county's speculation that it could somehow "reconfigure

its revenue sources" to better fit its priorities or "manage to spend the funds on only transportation-related projects" that the association's members could not perform. *Id.* at ¶¶ 20-22.

Here, by contrast, WPC does not seek to compete for a pool of public contracts that are substantially likely to become available. This case involves a single license that was awarded to another applicant under a statutory provision that gave the City discretion to choose which proposals to advance to the Board. *See* 230 ILCS 10/7(e-5) (2022). WPC speculates what negotiations might have uncovered, whether there were "serious flaws" in other applicants' proposals, how those issues might have been addressed, and how that might have affected the City Council's vote. Under these circumstances, WPC's speculation is precisely what the Court in *Ill. Rd. & Transp. Builders* declined to credit. 2022 IL 127126, ¶¶ 20-22.

Additionally, the City Council vote not to certify WPC's casino proposal twice belies any conclusion that it would likely vote to advance WPC to the Board. Indeed, as the federal court concluded, the City had "many rational bases" for not certifying WPC's proposal to the Board. *Waukegan Potawatomi Casino, LLC v. City of Waukegan*, No. 20-cv-00750, 2024 WL 1363733, *9 (N.D. Ill. Mar. 29, 2024). Specifically, the City could have reasonably decided that: (1) WPC's proposed casino was "too large" and "did not match the realities of the economic market in Waukegan"; (2) by not including a temporary casino or entertainment complex, WPC's proposal provided less opportunities for

economic development and thus was less desirable; (3) WPC's offer price was lower than or lacked the detail and transparency of other proposals; (4) WPC had less experience as a casino operator than other applicants; (5) WPC's proposal raised "competition concerns" stemming from the City's geographic proximity to Milwaukee, where WPC operated a casino pursuant to a "significantly more favorable revenue sharing rate with Wisconsin" than it proposed with the City; and (6) the City had doubts about WPC as an operator, given one alderman's observation that its presentation was "too hurry up and get it done." *Id.* at **9-10.

Further, because the City had "multiple rational bases" for voting against WPC's proposal, WPC's "theory of a rigged process" could not support a claim that the City Council intentionally discriminated against it when it voted not to advance WPC's proposal. *See id.* at *10. As a result, there is not a substantial probability that the City would change its mind about WPC's proposal on a third vote. And section 7(e-5) provides no mechanism requiring the City to conduct a new RFQ process, even if this Court issued declarations that the City "failed to satisfy the requirements necessary for the [Board] to consider issuing a license" and that the Board "lack[ed] authority to consider issuing a license." C22-23. In short, WPC is unlikely to obtain the effective relief it seeks, an opportunity to compete before the Board, even if it obtains the injunctive relief that it requested. WPC therefore lacked standing to

proceed with its claim challenging the Board's decision to award the Waukegan license.

II. WPC's claim is moot because it can no longer obtain effective relief.

WPC's claim became moot because the Board unanimously voted to grant the sole Waukegan license to Full House in June 2023. WPC's own conduct created the risk that its claim would become moot. WPC waited two years to commence this action with full acknowledgement that the Board's steps toward licensing risked mooting its claim. C12, 21-22, C1373. WPC did not bring its claim until after the Board announced that it would vote to select a final applicant and vote on whether that applicant was preliminarily suitable for licensure. *See* C20-21.

Nor did WPC take steps to prevent its claim from becoming moot during the pendency of this action. After the circuit court denied its TRO motion to enjoin the Board from making a finding of preliminary suitability, and the appellate court denied its petition for review, WPC did not pursue its request for a preliminary injunction to prevent the Board from taking further action on the license. Nor did WPC seek to expedite its appeal from the circuit court's dismissal of its action in May 2022, despite the circuit court's admonition that mootness presented an issue. R46 (even if WPC had standing, "then we do get into the mootness argument").

When the Board's vote to award the license to Full House became final last year, WPC's claim became moot because a court could no longer grant

effective relief. Nor can WPC avoid the finality of the Board's licensing process by attacking its statutory authority to issue the Waukegan license.

A. Because the sole Waukegan license was issued, WPC cannot obtain effective relief.

In keeping with *Marion Hosp. Corp. v. Ill. Health Facilities Planning Bd.*, 201 Ill. 2d 465 (2002), the issuance of the Waukegan license mooted WPC's claim. WPC's efforts to distinguish *Marion Hospital* are unpersuasive. WPC argues that *Marion* is inapplicable because it has challenged "the very license needed for a Waukegan casino to exist." AE Br. 30. But that does not accurately reflect WPC's allegations. Although WPC sought relief against the Board, its claim is based entirely on alleged deficiencies in the City's certifying resolutions, which were a statutory prerequisite to licensure. *See* C17. Specifically, WPC claimed that the Board lacked authority to undertake its statutory duty because, in WPC's view, the City did not adequately negotiate with applicants and reach mutual agreement on certain items. C17-19.

WPC thus faces the same mootness challenge as the plaintiff in *Marion*. As *Marion* determined, even if the plaintiff could obtain an order invalidating the planning permit, that order would have no legal import because it could not affect the validity of the permittee's operating license, which was issued by a separate entity that conducted its own statutory process. 201 Ill. 2d at 474-75. Like the planning permit in *Marion*, the certifying resolutions here were passed by the City Council, not the Board, pursuant to its own process. Applying the reasoning of *Marion*, even if WPC obtained an order declaring

the City's certifications invalid, that would not provide a basis to retract Full House's license.

WPC's attempt to distinguish the certifying resolutions from the permit in *Marion*, AE 30-31, should be rejected for similar reasons. In *Marion*, the statutory scheme required applications for operating licenses to include proof that the applicant had obtained a permit. 201 Ill. 2d at 473. In the instant case, section 7(e-5) required owners license applications to include a certification from the City regarding the items in section 7(e-5)(i)-(viii). Applying *Marion*'s reasoning, once the Board obtained the certification, it was entitled to rely on it and proceed with its consideration of applicants unless or until it had been "stayed, reversed or otherwise legally invalidated." 201 Ill. 2d at 473-74. And now that the Board awarded the license, a court order invalidating the City's certifying resolution would not provide a basis for undoing the license. *See* 230 ILCS 10/5(c)(15) (2022).

Citing *Schnepper v. American Info. Techs., Inc.*, 136 Ill. App. 3d 678 (1st Dist. 1985), WPC also argues that the Board could not moot the appeal in this case "by taking the very action that a complaint challenges." AE Br. 31. But *Schnepper* did not alter the "general rule" that an appeal can be mooted by "changed circumstances," or events that prevent the court from granting effective relief. 136 Ill. App. 3d at 680; *see also In re J.B.*, 204 Ill. 2d 382, 386-87 (2003) (parent's appeal challenging termination of her parental rights mooted by intervening adoption that became final during pendency of appeal);

Steinbrecher v. Steinbrecher, 197 Ill. 2d 514, 516 (2001) (appeal challenging court-ordered partition and sale of property became moot when court confirmed judicial sale of property). And here, the issuance of the Waukegan license to Full House, whose interests cannot be adversely affected in this action, *see* Bd. Br. 39-43, prevents the court from granting WPC effective relief.

And, in any case, the Board did not "act at its own peril," as WPC asserts. AE Br. 31. It acted pursuant to its statutory mandate to issue the Waukegan license "promptly and in reasonable order," 230 ILCS 10/5(b)(1), 7(e-5)(3) (2022); *see id.* § 7(e-10) (licenses "shall be issued within 12 months after" date application is submitted), after the circuit court denied WPC's TRO motion, C1398, and the appellate court denied its petition for review, C1522.

B. The Board acted within its statutory authority and the Waukegan license it issued therefore cannot be undone.

WPC cannot avoid mootness by attacking the Board's statutory authority to issue the Waukegan license. An agency's decision can be collaterally attacked only if it is void on its face as being unauthorized by the agency's enabling statute. *Newkirk v. Bigard*, 109 Ill. 2d 28, 40 (1985). The decision cannot be deemed void because of irregularities or defects in the agency's process of exercising its power. *See id.* Here, the Board did not exceed its statutory authority and thus its decision awarding the Waukegan license to Full House is not void.

It is beyond dispute that the Board has the general power to award licenses, *see* 230 ILCS 10/5(b)(1) (2022) (Board has duty "[t]o decide promptly and in reasonable order all license applications"), as well as statutory authority to issue the Waukegan license specifically, *id.* § 7(e-5)(3) (Board "may issue one owners license authorizing the conduct of riverboat gambling in the City of Waukegan"); *see id.* § 7(e-10) (directing Board to issue newly authorized licenses within 12 months of application submissions).

The Board did not act beyond the scope of its authority when it issued the Waukegan license because section 7(e-5) expressly authorized it to do so. *See Genius v. Cnty. of Cook*, 2011 IL 110239, ¶¶ 24-36 (rejecting claim that county appeal board lacked jurisdiction over employee discharge proceeding that was not initiated properly under ordinance); *Newkirk*, 109 Ill. 2d at 37 (although its order was facially defective, agency had statutory authority to enter it). Section 7(e-5) provides that the Board "shall consider issuing" the Waukegan license "only after" the City "has certified to the Board" the items in section 7(e-5)(i)-(viii). The provision thus directed the Board to consider an applicant for the Waukegan license after the City tendered a certification regarding the specified items. *Id.* § 7(e-5).

The Board followed the statutory process precisely as described. The City tendered a certifying resolution to the Board for each applicant that the Board considered. C15-16, C29-297 (North Point), C298-423 (Full House), C721-92 (Rivers). The Board then commenced its competitive bidding process

after the City submitted the certifications and ultimately issued the license. *See* A180. The Board therefore did not "disregard an express, threshold restriction on its power to act," as WPC asserts. AE Br. 35. On the contrary, the Board acted within its statutory mandate to consider applications for the Waukegan license after obtaining certifications from the City.

WPC's allegations that the City's certifications did not comply with section 7(e-5), or that such alleged noncompliance was "obvious" and "more than merely technical," AE Br. 33; C18, do not support its assertion that the Board lacked statutory authority to issue the license. As a threshold matter, those allegations are not well-pleaded facts, but legal conclusions that the court need not accept as true. *See Patrick Eng'g, Inc. v. City of Naperville*, 2012 IL 113148, ¶ 31.

Beyond that, it is not "obvious" that the Board lacked the inherent authority to accept the certifications and consider issuing the license. On the contrary, WPC's allegations suggest at most an error in the statutory process. *See Genius*, 2011 IL 110239, ¶¶ 28-29 (because agency possessed statutory authority to discharge employee, it did not act without jurisdiction when it commenced a hearing under the wrong rule); *Newkirk*, 109 Ill. 2d at 39 (agency did not act without jurisdiction when it failed to comply with mandatory requirements of enabling statute); *cf. Restore Constr. Co., Inc. v. Bd. of Educ. of Proviso Twshp. High Sch. Dist. 209*, 2020 IL 125133, ¶¶ 36-37

(where school board had power to enter into contract, its contract was not *ultra vires*, even if it did not comport with statutory procedures).

Moreover, WPC's argument that the Board acted without jurisdiction by issuing the Waukegan license ignores the context of the licensing process here. *See Genius*, 2011 IL 110239, ¶ 29 ("context" of agency action "is important" consideration when determining scope of agency's authority). Under the Act, while the City had a role in selecting applicants to advance to the Board, the Board was required to "investigate applicants," "determine the eligibility of applicants for licensure," and "select among competing applicants." 230 ILCS 10/5(c)(1) (2022); *see id.* § 7(b) (Board independently considers certain factors when determining whether to grant license). Indeed, for the Waukegan license, the Board would select the final applicant pursuant to an "open and competitive bidding process." *Id.* § 7.12. And that competitive bidding process permitted the Board to "conduct further negotiations" with the applicants to increase or otherwise enhance the bid proposals that they had negotiated with the City. *Id.* § 7.5(7). Understood in that context, the City's alleged noncompliance with the certification requirements was not "so fundamental an error as to be deemed jurisdictional." *Genuis*, 2011 IL 110239, ¶ 29.[2]

[2] In contrast to the City, Rockford certified only one applicant, *see* A180, thus obviating the need for the Board to undertake a competitive bidding process under section 7.12.

C. Full House's superseding interest in the license precludes effective relief.

WPC's claim is moot for the additional reason that principles of fairness and finality preclude relief that would interfere with the interests that Full House, who is not a party to this action, has acquired in the Waukegan license. *See J.B.*, 204 Ill. 2d at 386-87 (intervening third-party adoption mooted appeal from termination of parental rights); *Steinbrecher,* 197 Ill. 2d at 516 (intervening judicial sale mooted appeal challenging court-ordered partition and sale of property). WPC's efforts to evade these principles are unpersuasive.

WPC first asserts forfeiture. AE Br. 36. But that argument should be rejected because it "ignores the basic principles that questions affecting a court's authority to hear a given controversy may be raised at any time." *J.B.*, 204 Ill. 2d at 388.

Next, WPC argues that Full House can still be joined because no court in this action has "adjudicated any interest in a casino license." AE 36. This ignores that Full House has acquired a superseding interest in the Waukegan license. WPC cannot obtain effective relief because the court did not adjudicate any interest in the license *before* Full House acquired it. *See Steinbrecher*, 197 Ill. 2d at 523; *Town of Libertyville v. Moran*, 179 Ill. App. 3d 880, 886 (2d Dist. 1989) (appeal becomes moot if "specific property, possession, or ownership of which is the relief being sought on appeal, has been conveyed

to third parties," if record discloses that third-party purchaser was not "party or nominee of a party to the litigation").

For the same reason, WPC's argument that it was not required to obtain a stay, AE Br. 37-38, fails to recognize that by not obtaining a stay or preliminary injunction, WPC ran the risk that the license's issuance would moot its claim. That is because the court cannot undo Full House's interest in its license, which is *res judicata* between the Board and Full House. *See Vill. of Bartonville v. Lopez*, 2017 IL 120643, ¶¶ 71-72; *Crossroads Ford Truck Sales, Inc. v. Sterling Truck Corp.*, 2011 IL 111611, ¶ 56.

Lastly, WPC contends that these principles do not apply here because Full House did not obtain a property right in its owners license. AE 37. But Full House has an interest in the license that is governed by the Act because it was awarded the license. *Cf. J & J Ventures Gaming L.L.C. v. Wild, Inc.*, 2016 IL 119870, ¶ 32 (by legalizing gambling, legislature created certain rights and duties under the statutory scheme). Accordingly, its license cannot be revoked or rescinded except as provided in, and subject to its procedural protections afforded to licensees under, the Act. *See* 230 ILCS 10/5(b)(1) (2022) (licensee may request hearing); *id.* § 5(c)(15) (Board may suspend, revoke or restrict licenses for violations of the Act or Board rules or for "engaging in a fraudulent practice").

In short, WPC's claim for declaratory and injunctive relief was mooted by the Board's unanimous vote to grant the Waukegan license to Full House.

The Board had the inherent authority to issue the vote, and its decision is now final and conclusive.

III. WPC did not and cannot plead a claim for *mandamus*.

Although WPC did not plead a claim for *mandamus*, C22-23, it asserts that the well-pleaded facts in its complaint entitle it to *mandamus* relief against the Board, AE Br. 38-43. WPC is mistaken.

Mandamus is "an extraordinary remedy" to enforce, as a matter of right, "the performance of official duties by a public officer where no exercise of discretion on his part is involved." *Noyola v. Bd. of Educ.*, 179 Ill. 2d 121, 133 (1997); *see Lewis E. v. Spagnolo*, 186 Ill. 2d 198, 229 (1999) (*mandamus* action seeks to compel public officer to "do what the law requires"). A writ of *mandamus* will issue only if the court finds: (1) a clear right to the requested relief, (2) a clear duty by the public official to act, and (3) clear authority in the public official to comply with the writ. *Noyola*, 179 Ill. 2d at 133.

Additionally, there are important limits on *mandamus*: it cannot be used to "substitute[s] the court's discretion or judgment for that of the official," *Cordrey v. Prisoner Review Bd.*, 2014 IL 117155, ¶ 18, or "to direct the manner of performance of an action which requires the exercise of discretion." *Lucas v. Taylor*, 349 Ill. App. 3d 995, 1004 (4th Dist. 2004) (cleaned up). Thus, even when public officials have exercised their discretion erroneously, *mandamus* cannot be used to direct them to reach a particular result. *Hadley v. Ryan*, 345 Ill. App. 3d 297, 301 (4th Dist. 2003).

Under these principles, WPC could not plead a claim for *mandamus*. WPC argues that section 7(e-5) "unambiguously restricts the Board's power," such that the Board was required to comply with the statute's requirement "prohibiting consideration of a license until the City satisfied section 7(e-5)." AE Br. 41. But as this Court has explained, a plaintiff cannot state a *mandamus* claim simply by alleging that a public official violated a statutory provision. *See Lewis E.*, 186 Ill. 2d at 229-30. To state a claim, WPC had to identify the specific statutory duties that it seeks to compel the official to perform and explain how that official violated those statutory duties. *Id.* WPC could not satisfy that requirement because, as discussed *supra* pp. 16-17, the Board issued the Waukegan license pursuant to its statutory duty.

Further, the Board's decision to issue a license necessarily involves the exercise of discretionary judgment. *See, e.g.,* 230 ILCS 10/7(e-5) (2022) (the Board shall "*consider* issuing a license") (emphasis added); *id.* § 7(b) (Board considers certain factors); *id.* § 5(b)(1) (Board has duty to "decide" all license applications). And while WPC argues that the Board was required under section 7(e-5) not to consider issuing the Waukegan license, AE Br. 41, its argument is based on its interpretation of the certifying resolutions and allegations regarding the City's process, *id.* at 35, 41-42. WPC's analysis therefore would require the exercise of discretionary judgment, which cannot be the basis of a *mandamus* action. *See Cordrey*, 2014 IL 117155, ¶ 18. In short, WPC is not entitled to *mandamus* relief.

CONCLUSION

State Defendants-Appellants the Illinois Gaming Board; Chairman Charles Schmadeke; Members Dionne R. Hayden, Anthony Garcia, and Jim Kolar; and Board Administrator Marcus Fruchter ask this Court to vacate the appellate court's decision and affirm the circuit court judgment.

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CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Ill. Sup. Ct. R. 315 and, to the extent applicable, Ill. S. Ct. R. 341(a) and (b). The length of this brief, excluding the pages or words contained in the Ill. S. Ct. R. 341(d) cover, the Ill. S. Ct. R. 341(h)(1) table of contents and statement of points and authorities, the Ill. S. Ct. R. 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Ill. S. Ct. R. 315, is 5,716 words.

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CERTIFICATE OF FILING AND SERVICE

I certify that on June 18, 2024, I electronically filed the foregoing **Reply Brief of State Defendants-Appellants** with the Clerk of the Illinois Appellate Court, First Judicial District, using the Odyssey eFileIL system.

I further certify that the other participants in this case, named below, are registered service contacts on the Odyssey eFileIL system and thus will be served via the Odyssey eFileIL system.

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Under penalties as provided by law pursuant to section 1-109 of the Illinois Code of Civil Procedure, I certify that the statements set forth in this instrument are true and correct to the best of my knowledge, information, and belief.

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