No. 1-127149

IN THE SUPREME COURT OF ILLINOIS

BRIAN J. STRAUSS, *individually and d/b/a 1572 North Milwaukee Building Corporation,*	)	Appellate Court
	)	First Judicial District
	)	Case No. 1-19-1977
Plaintiff / Appellant,	)	
	)	Circuit Court
v.	)	Cook County, Illinois
	)	Case No. 2018 CH 256
	)	
CITY OF CHICAGO,	)	The Honorable
	)	David B. Atkins
Defendant / Appellee.	)	*Judge Presiding*

REPLY BRIEF OF THE PLAINTIFF-APPELLANT BRIAN J. STRAUSS

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INTRODUCTION

Throughout its brief the City bobs and weaves, avoiding the clear thrust of Plaintiff's arguments and the plain allegations of the Complaint. With regard for the deferential standard of review at the pleading stage, the City repeatedly attempts to shoehorn this case into the mold of an ordinary zoning dispute where a disgruntled property owner simply disagrees with an official's actions aimed at improving the lives of his constituents. The City cannot credibly cram the facts alleged in the Complaint into the placid portrait it consistently paints in defense of truly indefensible actions. Plaintiff was singled out as the victim of a pressure campaign undertaken through a variety of measures with the sole aim to devalue his property to force him to effectively surrender control to Alderman Morenon's political ally. The City cannot be allowed to use the broad rational basis test to escape liability by applying it to a proffered justification that is inconsistent with the allegations of the Complaint and the reasonable inferences to be drawn therefrom.

At its core, the City seeks unlimited power in all matters arguably *related* to zoning regardless of how tenuous the connection. By stretching the already vast provisions of the Tort Immunity Act, the City seeks to craft a quilt of immunity that will cover actions taken by a municipal actor outside of those covered by the immunity provisions. The City creates a binary system wherein *any* action is immunized by the Tort Immunity Act as either a discretionary act or an act that constitutes an abuse of discretion. This "heads I win, tails you lose" approach fails to consider that not all acts are discretionary and not every malicious or corrupt action is automatically considered a simple abuse of discretion to be swept under the immunity rug.

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ARGUMENT

I. The Court Should Reverse The Dismissal Of Plaintiff's Due Process And Equal Protection Counts, Because Plaintiff's Allegations Cast Sufficient Doubt On Whether The Downzoning Ordinance Rationally Related To The Public Welfare

In advancing its arguments concerning Plaintiff's substantive due process and equal protection counts, the City runs the gamut, ticking off the veritable laundry list of well-worn defenses. Inevitably, these all circle back to Alderman Moreno's pressure campaign of veiled extortion and downzoning (although phrased in a much blander manner) being rationally related to a legitimate government purpose. Blithely dismissing the well-established *LaSalle/Sinclair* factors, the City takes an improperly myopic view of the Complaint in order to claim that its legitimate purpose was the elimination of certain problems caused by a concert venue that had already been remedied by Plaintiff with the eviction of the Double Door. The City ignores that it was the City itself that tried to force Plaintiff to allow the Double Door to remain at the property – the exact opposite of the City's purportedly dispositive rationale basis – and the litany of actions outlined in the Complaint that display the irrationality of the downzoning ordinance.

A. Plaintiff Alleges Sufficient Facts To Question The City's Rational Basis

The City concedes that a zoning ordinance does not pass rational basis review when the only justification for the ordinance is satisfying the individual desires of or conferring a special benefit upon a select few. (Appellee Brief at 35-36.) The City, however, does not really grapple with the allegations in the Complaint showing that the only basis for the downzoning ordinance was to punish Plaintiff and satisfy Alderman Moreno's political ally Double Door. The City repeats possible concerns about noise, drugs, alcohol, and property damage at a hypothetical concert venue that could be located at the property in

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the future, but does not address the allegations demonstrating that the downzoning ordinance was not rationally related to these concerns. Whether the City will ultimately be able to establish a rational basis for the downzoning ordinance, at this stage of the proceedings, where all facts and reasonable inferences are construed in the light most favorable to Plaintiff, Plaintiff's allegations are enough for this case to proceed. *Drury v. Vill. of Barrington Hills*, 2018 IL App (1st) 173042, ¶¶ 113-114 (even if intervenors could ultimately prove a rational basis, the plaintiffs' allegations that the subject ordinance was passed to benefit one person were enough to state a claim); *Whipple v. Village of North Utica*, 2017 IL App (3d) 150547, ¶¶ 22 (plaintiff does not need to prove an ordinance unconstitutional at pleading stage, only to allege sufficient facts to allow the cause to proceed further).

The City erroneously argues that Plaintiff does not allege facts negating every conceivable rational basis for the downzoning ordinance. The City disregards the allegations in the Complaint, which negate the City's proffered justification that the downzoning ordinance was necessary to prevent a raucous concert venue from occupying the property. The City ignores the allegations that the City itself – through Alderman Moreno as well as other City officials who tried to broker a deal to sell the property to Double Door – that tried to convince Plaintiff to allow Double Door to remain at the property. The City ignores the allegations that its alderman threatened Plaintiff with financial ruin for attempting to evict this concert venue from the property. The City ignores the allegations that the downzoning ordinance was introduced and passed as a punitive measure only after Plaintiff succeeded in evicting this concert venue from the property. That the City went to such great lengths to keep a concert venue at the property is enough

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at this stage to negate the City's proffered justification that it was acting to prevent a concert venue from occupying the property. *Drury*, 2018 IL App (1st) 173042, ¶¶ 113-114; *Whipple*, 2017 IL App (3d) 150547, ¶¶ 22.

The City tries to deflect from the allegations concerning Alderman Moreno by arguing that actual motives are not relevant to rational basis review and that Alderman Moreno's motives cannot be attributed to the City Council. While subjective motives may not be enough to strike down an ordinance under the rational basis standard, the statements and conduct of Alderman Moreno and other City officials here do more than just show subjective motives. They help negate the City's proffered rational basis by showing that the only justification for the downzoning ordinance was to serve the interests of Double Door. *Drury*, 2018 IL App (1st) 173042, ¶¶ 99 ("when the record shows, as alleged here, that the *only* justification for the ordinance is that a chosen few individuals wanted it, our supreme court has typically invalidated that ordinance.").

The City's argument that Alderman Moreno's actions cannot be attributed to the City Council likewise fails to pay appropriate regard to the allegations in the Complaint. While the City contends that Plaintiff's allegations of aldermanic privilege "should be ignored" – a bold claim at the pleading stage – the Complaint alleges sufficient facts to show Alderman Moreno's aldermanic privilege at work. As the Complaint alleges, the Zoning Committee and City Council defer to zoning measures proposed by the local Alderman. The transcript of the Zoning Committee meeting bears this out. Neither Alderman Moreno, Zoning Administrator Scudiero, Chairman Solis, nor anyone else at the Zoning Committee meeting identified any real benefit to the public from the downzoning ordinance. Instead, Alderman Moreno reminded the Zoning Committee that the

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downzoning ordinance was within the "purview" of "the local alderman, which is me in this case." Administrator Scudiero did not indicate there was any reason for the downzoning ordinance except that it was not as harsh as Alderman Moreno's previous proposals in terms of floor area. As Administrator Scudiero explained, "the alderman has worked with the law department and the department of planning and development to amend the application to a B2-2."

Simply because Alderman Moreno worked with the department of law and the department of planning and development to amend his downzoning proposal does not mean that Plaintiff's allegations concerning aldermanic privilege should be disregarded, as the City argues. This is especially so considering the fact that Alderman Moreno consulted with these City departments after Plaintiff filed a lawsuit and Alderman Moreno stated that the reason for amending his downzoning proposal was to "F*** with them" and "make[] their lawsuit weaker." As Plaintiff's allegations show, Alderman Moreno was the driving force behind the downzoning ordinance and the reason the downzoning ordinance was passed, notwithstanding whether he received advice from the City department of law and department of planning and development. The City's citation to *Civil Liberties for Urban Believers v. City of Chicago*, 342 F. 3d 752, 764 (7th Cir. 2003) and *Morel v. Coronet Insurance*, 117 Ill. 2d 18, 24 (1987) is inapposite. Neither decision addressed allegations of aldermanic privilege like Plaintiff's here, which establish that Alderman Moreno was the key policymaker behind the downzoning ordinance. The City's arguments to the contrary would only go to the weight of the evidence at trial and cannot override Plaintiff's allegations at the pleading stage.

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The City similarly inverts the pleading standard in arguing that "the mere fact that a large property was available for business development made it rational to revisit the appropriate zoning classification for the property." (Appellee Brief at 21.) This does not show that the more restrictive zoning classification the City chose was rationally related to a legitimate public interest. Moreover, when the allegations in the Complaint are construed in the light most favorable to Plaintiff, the timing of the City's actions tends to show the absence of a rational basis. After maintaining the same zoning classification for more than forty years, and pressuring Plaintiff to allow Double Door to remain at the property, the City downzoned the property only after Plaintiff evicted Double Door. The City similarly misses the mark in contending that it was rational to single Plaintiff's property out for downzoning, because it was the only property that had been used as a concert venue. (*Id.*) Whether the City may ultimately succeed with such a claim, at this stage of the proceedings, the fact that the City singled Plaintiff out for downzoning certainly tends to support Plaintiff's claim of arbitrariness.

The City's attempt to distinguish *Southwest Illinois Development Authority* and *Drury* is misguided. While the City correctly observes that *Southwest Illinois Development Authority* addressed the scope of "public use" under Article I, Section 15 of the Illinois Constitution, it fails to appreciate that the public use inquiry is similar to, if not coterminous with, the rational basis test. *See* 199 Ill.2d 225, 236 (equating public use requirement to "what traditionally has been known as the police power"), *quoting Berman v. Parker*, 348 U.S. 26, 32 (1954). Likewise, the City's discussion of *Drury* is merely a comparison of outcomes, with the City claiming that the plaintiffs in *Drury* pled sufficient facts, but Plaintiff here has not. This ill-fitting comparison is made all the easier by the City's failure

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to address the facts in Plaintiff's Complaint that show the lack of a rational basis for the downzoning ordinance.

B. *The LaSalle / Sinclair Factors Should Not Be Ignored*

The City makes a series of unsupported arguments concerning the *LaSalle/Sinclair* factors. (Appellee Brief at 23-32). The City claims the *LaSalle/Sinclair* factors are irrelevant, because Plaintiff's claim is more like the facial challenge in *Napleton v. Village of Hinsdale*, 229 Ill. 3d 296 (2008) and the rational basis for the downzoning ordinance is apparent on the face of the Complaint. The City reaches this point by taking the Complaint's allegations regarding noise, drugs, alcohol, and property damage out of context while ignoring that the remainder of the Complaint, which shows the irrationality of the downzoning action. Contrary to the City's approach, the validity of a Complaint should be assessed by reading it in the entirety and considering its allegations under the factors set forth in *LaSalle National Bak of Chicago v. County of Cook*, 12 Ill. 2d 40 (1957) and *Sinclair Pipe Line Co. v. Village of Richton Park*, 19 Ill. 2d 370 (1960).

While the City is correct that the *LaSalle/Sinclair* factors do not establish a heightened level of scrutiny, they are certainly relevant to whether the downzoning ordinance was grounded in a rational basis. The City wrongly contends that the *LaSalle/Sinclair* factors are only used "when a plaintiff claims that a zoning classification is keeping it from using its property in a particular way" and that Plaintiff's claim "is more like the facial challenge in Napleton, where this court did not apply the LaSalle/Sinclair factors," because Plaintiff does not seek to use the property in a particular way. (Appellee Brief at 24, 28.) The City claims that, "[a]s in Napleton, those factors simply do not make sense in this context, where the property owner had no particular use in mind and, instead,

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just wanted to retain the more permissive zoning classification…" (*Id.* at 29.) The City's argument relies on a basic misinterpretation of *Napleton*. Contrary to the City's argument, *Napelton* did not hold that the *LaSalle/Sinclair* factors are only relevant when the plaintiff asserts a specific use for its property. *Napelton* explained that the factors established in *LaSalle* are relevant when considering a zoning measure in the context of a particular parcel of property, but are not relevant when the plaintiff makes a facial challenge and asserts that an ordinance is invalid as to every property in general. 229 Ill. 3d at 316-319. As the City concedes, Plaintiff's claim only concerns the particular parcel of property at issue. (Appellee Brief at 28.) The *LaSalle/Sinclair* factors are therefore relevant to whether the downzoning ordinance was a rational exercise of the City's zoning power in the context of this particular property. *Napleton*, 229 Ill. 3d at 316-319.

The City's is likewise misguided in claiming that applying the *LaSalle/Sinclair* factors "would be a chaotic and unwieldly inquiry." (Appellee Brie at 29.) Contrary to the City's hyperbole, the *LaSalle/Sinclair* factors may be applied here to assess whether there was a rational basis for a downzoning ordinance in the context of this particular parcel of property. As set forth in Plaintiff's opening brief, each of these factors tend to show that downzoning was not rationally related to the public welfare, but rather an arbitrary punitive measure passed to serve the interests of Double Door. (Appellant Brief at 20-21.)

In a related vein, the City argues that Plaintiff does not have a protected property interest that is entitled to due process protection, because he does not assert a specific use of the property and "the right to a zoning classification is not, by itself, a property interest protected by the due process clause." (Appellee Brief at 25.) The City's tortured logic confuses the issues. "Zoning classifications are not the measure of the property interest but

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are legal *restrictions* on the use of property." *River Park, Inc. v. City of Highland Park*, 23 F.3d 164, 166 (7th Cir. 1994) (emphasis in original). Whether Plaintiff had a property interest in a zoning classification, Plaintiff "surely had a property interest in the land." *Id.* at 165-66. The City's arbitrary regulation of Plaintiff's property without a rational basis constitutes a deprivation of property for purposes of due process. *Id.*

The authorities cited by the City are plainly inapposite. The City cites to a number of authorities that discuss the vested rights doctrine, but these have no bearing on whether Plaintiff alleges a protected property interest for due process purposes.[1] Equally unavailing is the City's citation to *Groenings v. City of St. Charles*, 215 Ill. App. 3d 295, 299 (2nd Dist. 1991), in which the plaintiffs did not allege arbitrary regulation of their property, but rather claimed that the defendant municipalities should have annexed their property; and *Residences at Riverbend Condominium Association v. City of Chicago*, 5 F. Supp. 3d 982, 988 (N.D. Ill. 2013), which held that the plaintiffs did not have a protected property interest in adjacent property they did not own. Neither of these decisions has any relevance here where Plaintiff asserts arbitrary regulation of property that Plaintiff owned.

Despite the City's strained attempt to avoid the application of the *LaSalle/Sinclair* factors, they apply with equal force here and show that the City arbitrarily singled Plaintiff out for punitive downzoning that was related not to the community welfare, but rather the vindictive interests of Alderman Moreno and Double Door. When the allegations in Plaintiff's Complaint are considered alongside these factors and in the appropriate light,

[1] *See Pioneer Trust & Savings Bank v. County of Cook*, 71 Ill. 2d 510, 517 (1978); *1350 Lakeshore Associates v. Healey*, 223 Ill. 2d 607, 615 (2006); *Morgan Place v. City of Chicago*, 2012 IL App (1st) 091240, ¶ 44; *City of Elgin v. All Nations Worship Center*, 369 Ill. App. 3d 664, 668 (2d Dist. 2006); *Wakeland v. City of Urbana*, 333 Ill. App. 3d 1131, 1142 (3d Dist. 2002); *Constantine v. Vill. of Glen Ellyn*, 217 Ill. App. 3d 4, 23 (2nd Dist. 1991); and *Furniture LLC v. City of Chicago*, 353 Ill. App. 3d 433, 438 (1st Dist. 2004).

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Plaintiff has stated a due process and equal protection claim that should be allowed to proceed. *Drury*, 2018 IL App (1st) 173042, ¶¶ 113-114; *Whipple*, 2017 IL App (3d) 150547, ¶¶ 22.

II. The Court Should Reverse The Dismissal Of Plaintiff's Tortious Interference And Intentional Infliction of Emotional Distress Counts, Because The Discretionary Policymaking Immunity In Section 2-201 Of The Tort Immunity Act Does Not Apply To Alderman Moreno's Ordinary Tortious Conduct

The City's tort immunity argument does not squarely address the points raised by Plaintiff, the language of the Tort Immunity Act, or the standard applicable to its affirmative defense of tort immunity at the pleading stage. The City is not entitled to dismissal unless it meets its burden of showing there is no possibility that Plaintiff can recover outside the scope of the Tort Immunity Act. *Van Meter v. Darien Park Dist.*, 207 Ill. 2d 359, 367 (2003); *Tzakis*, 2019 IL App (1st) 170859, ¶ 95. The Court should reverse the dismissal of Plaintiff's Complaint, because the City cannot and has not made this showing on the pleadings.

A. The City Fails To Carry Its Burden Of Showing That Section 2-201 Bars Plaintiff's Claims

The City erroneously argues that the discretionary policymaking immunity afforded by Section 2-201 applies to Plaintiff's tortious interference and intentional infliction of emotional distress counts, because an alderman both exercises discretion and makes policy determinations when he "decides whether, what, and how to communicate with property owners or anyone planning to develop a property or open a business in the neighborhood." (Appellee Brief at 48.) The City contends that "[i]t is typical for an alderman to stay informed about upcoming economic developments and their impact, foster community input, ensure that newcomers comply with relevant zoning and licensing

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laws, and guard against incompatible uses that could harm nearby businesses or residents." (*Id.* at 48-49.) The City, however, has not submitted evidence to support these assertions or carried its burden of proving its tort immunity defense at the pleading stage.

The City's tort immunity argument rests on the faulty premise that the office of City of Chicago Alderman carries with it the lawful discretion to decide "whether, what, and how to communicate with property owners or anyone planning to develop a property or open a business in the neighborhood," and that an Alderman is necessarily making policy when he or she does so. Under the City's reading of Section 2-201, a an alderman is absolutely immune from liability for "whether, what, and how" he or she communicates with property owners, developers, and business owners in the neighborhood, because an alderman has the discretion to say what he or she will to those in his or her ward and all of an alderman's pronouncements represent the making of policy. But the City has not made any showing to support these broad claims. And the Court should reject them, for it would immunize virtually anything a government employee says as a discretionary policy decision. See *Snyder v. Curran Tp.*, 167 Ill. 2d 466, 474 (1995), *citing* W. Prosser, Torts § 132, at 988-90 (4th ed. 1971); *Tzakis v. Berger Excavating Contractors, Inc.*, 2019 IL App (1st) 170859, ¶ 95, *aff'd in part, rev'd in part by* 2020 IL 125017 (given the potential breadth of Section 2-201, a court must be "especially careful" in its application).

Contrary to the City's reading of the cases cited in Appellant's opening brief, Section 2-201 does not apply to tortious statements and conduct simply because a government official might have policymaking discretion in some aspects of his or her job. Courts decline to apply Section 2-201 where a government official's tortious conduct falls outside his or her policymaking discretion, including where the government official

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tortiously interacts with others outside his or her official duties. *Stratman v. Brent*, 291 Ill. App. 3d 123, 131 (2d Dist. 1997) (Section 2-201 did not apply to police chief's defamatory statements to prospective employer) (3d Dist. 2003) (Section 2-201 did not apply to tortious interference and defamation by board member who published defamatory letter); *ATC Healthcare Svcs., Inc. v. RCM Techs., Inc.*, 282 F. Supp. 3d 1043, 1054 (N.D. Ill. Sept. 30 2017) (Section 2-201 did not apply to tortious interference with employment contracts, which were "independent of the policy decision to terminate the contract with [plaintiff]"); *Breuder v. Bd. of Trustees of Cmty. Coll. Dist. No. 501, DuPage Cty., Illinois*, 238 F. Supp. 3d 1054, 1064-66 (N.D. Ill. Mar. 3 2017), *aff'd in part, appeal dismissed in part by* 888 F.3d 266 (7th Cir. 2018) (Section 2-201 did not necessarily provide immunity for defamatory statements to media); *Mucha v. Vill. of Oak Brook*, No. 07 C 5350, 2008 WL 4686156, at *9-11 (N.D. Ill. May 29, 2008) (declining to apply Section 2-201 to defamatory statements to media).

Likewise, here, the City fails to make any showing that Alderman Moreno's tortious interference with prospective purchasers and threatening behavior on Plaintiff's property were part of his official discretion. Nor has the City made any showing that Alderman Moreno made policy during his meetings with the prospective purchasers or confrontation with Plaintiff. These gratuitous efforts to inflict injury upon Plaintiff were not part of Alderman Moreno's aldermanic discretion, nor an example of policymaking. *Valentino v. Vill. of S. Chi. Heights,* 575 F.3d 664, 679 (7th Cir. 2009) (municipal employee's "one-time decision to fire one employee…does not amount to a judgment call between competing interests," as necessary to invoke discretionary policymaking immunity under Section 2-201).

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The City constructs a strawman by suggesting that Plaintiff's argument is that Section 2-201 does not apply to tort claims. (Appellee Brief at 49-51.) The is not Plaintiff's argument. Rather, the lesson to be gleaned from the foregoing authorities is that Section 2-201 does not apply to ordinary tortious conduct that falls outside a government official's official policymaking discretion. If an alderman rear-ends another motorist on the way to work, Section 2-201 obviously does not afford the alderman immunity from a negligence cause of action simply because he or she may otherwise have immunity for the discretionary policymaking functions of his or her job. So too here, that Alderman Moreno may have had immunity under Section 2-201 for the discretionary policymaking aspects of his job does not mean that he has immunity from liability for convincing prospective purchasers to back out of their contracts with Plaintiff and engaging in threatening behavior on Plaintiff's property.

The City's attempt to force this case within the holding of *Village of Bloomingdale v. CDG Enterprises*, 196 Ill.2d 484 (2001) is unavailing. The City is wrong to claim that "[j]ust as CDG alleged interference with a business expectancy and accused the village of being improperly motivated to help a particular individual, Strauss's claims are all about improper motives and abuse of discretion." (Appellee Brief at 54.) Plaintiff does not, as the plaintiff did in *CDG Enterprises*, seek to craft an exception to the Tort Immunity Act for "corrupt or malicious motives." *See* 196 Ill.2d at 493. Unlike in *CDG Enterprises*, where the only basis for the plaintiff's claim was the village's official denial of the plaintiff's zoning petition, Plaintiff asserts tortious interference and intentional infliction of emotional distress claims based on conduct outside Alderman Moreno's official

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policymaking discretion. Accordingly, the City fails to carry its burden of establishing Section 2-201 immunity.

B. The Tort Immunity Act Cannot Bar Plaintiff's Constitutional Claim

The City wrongly contends that the Tort Immunity Act bars Plaintiff's substantive due process and equal protection counts under the Illinois Constitution. It is fundamental that "[w]here rights have been conferred and limits on governmental action have been defined by the people through the constitution, the legislature cannot enact legislation in contravention of those rights and restrictions." *In re Pension Reform Litig.*, 2015 IL 118585, ¶ 79. Thus, regardless of how the language in the Tort Immunity Act is read, the Tort Immunity Act cannot immunize the City from any cause of action available under the Illinois Constitution. *Id.*

The Village's reliance on *Rozsavolgyi v. City of Aurora*, 2016 IL App (2d) 150493 is unavailing. *Rozsavolgyi* addressed whether the Tort Immunity Act applied to claims under the Illinois Human Rights Act. 2016 IL App (2d) 150493, ¶¶ 97-115. While the Appellate Court in *Rozsavolgyi* characterized such claims as constitutionally grounded, it did not suggest that the Tort Immunity Act bars relief available under the Illinois Constitution. *Id.* at ¶¶ 111-115. This Court then vacated the Appellate Court's opinion in *Rozsavolgyi v. City of Aurora*, 2017 IL 121048.

The City stretches *Village of Bloomingdale v. CDG Enterprises, Inc.*, 196 Ill. 2d 484 (2001) too far in arguing that "[t]he court made clear that, unless expressly excepted in the Tort Immunity Act, its immunities apply to all injuries, regardless of the cause of action." (Appellee Brief at 41.) *CDG* merely held that the carve-out for liability based upon contract in Section 2-101(a) of the Act does not apply to a quasi-contract claim, which is based on a theory of unjust enrichment. 196 Ill. 2d at 500-01. The only authority supporting

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the City's position is *Oxford Bank & Trust v. Village of LaGrange*, but the federal district court's one-paragraph analysis in this opinion was undertaken without the benefit of any argument from the plaintiffs. 879 F. Supp. 2d 954, 965-66 (N.D. Ill. 2012). The Court should decline to follow this reasoning and should instead hold that the Tort Immunity Act does not apply to claims under the Illinois Constitution, because the General Assembly does not have the power to alter rights and remedies under the Constitution. *In re Pension Reform Litig.*, 2015 IL 118585, ¶ 79.

III. The Styling Of Plaintiff's Name Is Not A Ground For Dismissal

The Court should reject the City's argument that Plaintiff lacks standing because Plaintiff filed suit as Brian J. Strauss, individually and d/b/a as 1572 North Milwaukee Building Corporation rather than in the name of the corporation itself. (Appellee Brief at 14-15). The City does not dispute that Strauss has standing to assert the injuries he suffered as a result of Alderman Moreno's intentional infliction of emotional distress, but contends that Plaintiff's constitutional and tortious interference counts can only be asserted in the name of the corporation. (Appellee Brief at 14.) The styling of Plaintiff's name is not a reason for dismissal, however.

Section 2-401(b) provides that "[m]isnomer of a party is not a ground for dismissal but the name of any party may be corrected at any time, before or after judgment." 735 ILCS 5/2-401(b). Illinois courts have held that a misnomer occurs where, as here, the plaintiff simply confuses whether it is a corporation or a d/b/a and there is no surprise or prejudice. *Bristow v. Westmore,* 266 Ill. App. 3d 257, 262 (2nd Dist. 1994) (finding misnomer where plaintiff filed suit as corporation rather than sole proprietorship, because parties were fully aware of actual litigants and there was no prejudice); *Sjostrom v.*

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McMurray, 47 Ill. App. 3d 1040 (2nd Dist. 1977) (misnomer where d/b/a filed suit as corporation).

Here, there is no dispute that the parties were fully aware of the identity of the litigants and that this matter concerned the corporation's property interests. The Complaint makes clear that the owner of the property is 1572 Building Corporation, and that Plaintiff seeks compensation for the City's interference with the property. (Complaint, A001-28 at ¶¶ 3, 11, 117, 125, 138.) Accepting the City's argument would exalt form over substance and run counter to the Code's purpose of facilitating the resolution of controversies according to the substantive rights of the parties. Bristow, 266 Ill. App. 3d at 262; *see also U.S. Bank Nat. Ass'n v. Luckett*, 2013 IL App (1st) 113678, ¶ 23 ("Illinois courts have consistently been reluctant to dismiss cases because of minor variations in a plaintiff's name"); *Illinois Inst. of Tech. Research Inst. v. Indus. Comm'n*, 314 Ill. App. 3d 149, 156-57 (1st Dist. 2000) (finding misnomer where the claimant incorrectly filed on behalf of her husband).

The styling of Plaintiff's name should therefore not serve as a basis for dismissal. 735 ILCS 5/2-401(b). Rather, the appropriate course would be to reverse the circuit court's dismissal of Plaintiff's Complaint and remand to the circuit court where the styling of Plaintiff's name may be corrected through an amendment under Section 2-616(a), which provides that "[a]t any time before final judgment amendments may be allowed…introducing any party who ought to have been joined as plaintiff or defendant." 735 ILCS 5/2-616(a). Under Section 2-616(a), courts consider whether: (1) the proposed amendment would cure the defect; (2) other parties would sustain prejudice or surprise; (3) the proposed amendment is timely; and (4) previous opportunities to amend can be

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identified. *Pennymac Corp. v. Jenkins*, 2018 IL App (1st) 171191, ¶ 31 (allowing amendment to substitute the proper plaintiff). Prejudice is the most important factor and "absent prejudice, courts should liberally permit amendments to pleadings.". *Sheth v. SAB Tool Supply Co.*, 2013 IL App (1st) 110156, ¶¶ 101, 104. Prejudice does not exist where, as here, the amendment will not change the facts or theory of the case. *Miller v. Pinnacle Door Co.*, 301 Ill. App. 3d 257, 261 (4th Dist. 1998).

The City contends that Plaintiff waived this argument by not moving to amend the Complaint. (Appellee Brief at 15, n.2.) But affirming dismissal on the grounds of an uncorrected misnomer would not be appropriate, because "[m]isnomer of a party is not a ground for dismissal" and Plaintiff's name "may be corrected at any time, before or after judgment." 735 ILCS 5/2-401(b). The Court should therefore reverse the circuit court's dismissal of Plaintiff's Complaint and remand to the trial court where any misstyling of Plaintiff's name may be corrected consistent with 735 ILCS 5/2-401(b) and 735 ILCS 5/2-616(a).

CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that the Court reverse the Appellate Court's decision affirming the Circuit Court's dismissal of Plaintiff's Complaint with prejudice.

DATED: May 3, 2022

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

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, and the Rule 341(c) certificate of compliance, the certificate of service, and the signature block is 18 pages.

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CERTIFICATE OF SERVICE

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this Certificate of Service are true and correct and that, on May 3, 2022, he served the foregoing Reply Brief on counsel of record via the Odyseey eFileIL electronic filing system to the parties listed below:

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