No. 127149

IN THE
SUPREME COURT OF ILLINOIS

BRIAN J. STRAUSS,

Plaintiff-Appellant,

v.

CITY OF CHICAGO,

Defendant-Appellee.

On Appeal from the Illinois Appellate Court
No. 1-19-1977
There heard on appeal from
the Circuit Court of Cook County, Illinois
County Department, Law Division
No. 18 CH 256
The Honorable David B. Atkins, Judge Presiding

BRIEF OF DEFENDANT-APPELLEE

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POINTS AND AUTHORITIES

NATURE OF THE CASE

Plaintiff-appellant Brian J. Strauss filed this lawsuit against the City of Chicago, primarily challenging an ordinance that rezoned property at 1572 North Milwaukee Avenue. Strauss initially brought claims under both the federal and state constitutions alleging retaliation for the exercise of free speech and petitioning the court; due process and equal protection violations; and an inverse condemnation claim. The City twice removed the case to federal court, where the court twice dismissed the federal claims and remanded the state-law claims to state court.

Strauss then filed a second amended complaint that dropped the federal claims and alleged, among other claims, violations of due process and equal protection under the Illinois constitution and tort claims against the City based on a former alderman's conduct, including alleged interference with contract, interference with economic advantage, and intentional infliction of emotional distress. The City filed a motion to dismiss. The circuit court granted the motion. The appellate court affirmed. This court granted leave to appeal.

All questions are raised on the pleadings.

ISSUES PRESENTED

1. Whether Strauss's due process and equal protection claims fail as a matter of law because the challenged ordinance survives rational-basis review.

2. Whether the Local Governmental and Governmental Employees Tort Immunity Act ("Tort Immunity Act") bars Strauss's claims.

JURISDICTION

On August 30, 2019, the circuit court granted the City's motion to dismiss all claims in Strauss's second amended complaint. A106; C. 509.[1] Strauss filed a notice of appeal on September 26, 2019. A110; C. 515. The appellate court had jurisdiction pursuant to Ill. Sup. Ct. R. 303.

On March 5, 2021, the appellate court issued its decision affirming the circuit court's judgment. A79. This court rejected a petition for leave to appeal Strauss submitted on April 9, 2021. Then, on April 20, 2021, this court granted Strauss leave to file the PLA instanter. This court allowed the petition on September 20, 2021. This court has jurisdiction under Ill. Sup. Ct. R. 315.

[1] We cite to the pages of the common law record as "C. ___"; the Appellant's Brief as "Strauss Br. __"; and the appendix of that brief as "A___."

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Illinois constitution, article I provides:

> Section 2. Due Process and Equal Protection
>
> No person shall be deprived of life, liberty or property without due process of law nor be denied the equal protection of the laws.

* * * *

The Tort Immunity Act, 745 ILCS 10/2-103 ("enactment immunity"), provides:

> A local public entity is not liable for an injury caused by adopting or failing to adopt an enactment or by failing to enforce any law.

The Tort Immunity Act, 745 ILCS 10/2-109(c), provides:

> A local public entity is not liable for an injury resulting from an act or omission of its employee where the employee is not liable.

The Tort Immunity Act, 745 ILCS 10/1-204 provides:

> "Injury" means death, injury to a person, or damage to or loss of property . . . "Injury" includes any injury alleged in a civil action, whether based upon . . . the Constitution of the State of Illinois, and the statutes or common law of Illinois or of the United States.

The Tort Immunity Act, 745 ILCS 10/2-201 ("discretionary immunity"), provides:

> Except as otherwise provided by Statute, a public employee serving in a position involving the determination of policy or the exercise of discretion is not liable for an injury resulting from his act or omission in determining policy when

acting in the exercise of such discretion even though abused.

STATEMENT OF FACTS

Strauss brought this lawsuit against the City challenging the rezoning of property at 1572 North Milwaukee Avenue under various federal and Illinois constitutional provisions, and raising tort claims based on an alderman's conduct related to that ordinance. C. 9. After this case was removed to federal court, the district court dismissed the federal claims and remanded the state-law claims to state court. Strauss v. City of Chicago, 346 F. Supp. 3d 1193 (N.D. Ill. Sept. 28, 2018). Strauss did not appeal the federal court ruling and, instead, filed a second amended complaint in state court in which he named only the City as a defendant and raised only state-law claims. A1-A28; C. 209-235.

Second Amended Complaint

According to the allegations in the second amended complaint, Strauss is the president of 1572 North Milwaukee Avenue Building Corporation ("the corporation"), which owned and operated property located at that address. A2; C. 209. The property is a four-story building with eleven apartments. A3; C. 210. From 1974 to 2017, this property was zoned B3-2 under the Chicago Municipal Code. A3, A14; C. 210, 221. Strauss alleges that the other properties in the same business district had "B3-2 or greater" zoning classifications. A4; C. 211.

In 2015, Strauss initiated a lawsuit to evict Double Door Liquors, a commercial tenant that operated a concert venue in the building. A4; C. 211. According to Strauss, "[n]umerous problems arose with [Double Door], including constantly high noise levels that were problematic for residential tenants and commercial neighbors; illicit drug use and alcohol abuse by Double Door's customers; and, damage done to the property by Double Door and its patrons." A4; C. 211. Then, Double Door "violated the lease by not exercising the option to renew the lease in a timely manner and a failure to pay percentage rent." A4; C. 211.

At the time, Proco Joe Moreno was the alderman of the City's first ward, where the property is located. A2; C. 209. According to Strauss, Moreno had a "personal and financial relationship" with the owners of Double Door and, in 2012, he told Strauss that "only Double Door would be allowed in Strauss' building." A4; C. 211. Then, in 2016, while Strauss's lawsuit against Double Door was pending, Moreno introduced an ordinance to rezone the property from B3-2 to B1-1, which Strauss claims was an effort to "send a message" to Strauss to keep Double Door as a tenant. A5; C. 212. The B1-1 classification would have eliminated some of the permitted commercial uses, including the use of the property for a medium or large entertainment venue or as a liquor store. Municipal Code of Chicago, Ill. § 17-3-207; see also A5; C. 212. Strauss also claims that this classification would have affected his ability to sign new leases for the residential units on the upper floors. A5; C.

212. According to Strauss, these restrictions "meant a dramatic decrease in property value." A5; C. 212.

Strauss alleged that the proposed B1-1 rezoning was "arbitrary and capricious" and "indicative of" Moreno's "discriminatory intent." A6; C. 213. This proposed zoning amendment was presented to City Council's zoning committee on June 20, 2016, and held there. A6; C. 213. On July 19, 2016, Strauss met with Moreno who, once again, told him that only Double Door would be allowed to rent in the building. A6; C. 213.

Meanwhile, Strauss's eviction lawsuit against Double Door continued. On August 6, 2016, the court presiding over that action entered judgment for Strauss and ordered Double Door to vacate the premises by December 31, 2016. A6; C. 213. Double Door did not vacate by that deadline and, on February 6, 2017, Double Door was evicted. A6; C. 213.

On February 8, 2017, David Reifman, the Commissioner of the City's Department of Planning and Development, held a meeting with Strauss, Moreno, the owners of Double Door, Zoning Committee Chairman Daniel Solis, Zoning Administrator Patricia Scudiero, and an assistant to the mayor, Claudia Chavez. A6; C. 213. Strauss alleges that Commissioner Reifman tried to "broker a sale of the building" between Strauss and Double Door for $7,000,000, A7; C. 214, but neither Strauss nor Double Door was interested, A7; C. 214. Strauss alleges that Moreno told him that, if Double Door was not allowed back in the building, he would make the zoning process lengthy

and expensive; that the building could remain vacant for two to five years; and that Moreno would decide what kind of tenant goes into the building. A7; C. 214. According to Strauss, Moreno said that "all of [these] problems could be avoided" if Double Door were allowed back "at a rent far less than what the market would bear." A7; C. 214.

On February 25, 2017, Moreno made similar statements when he confronted Strauss in the basement of the building, and again on the sidewalk, some of which was videotaped. A8; C. 215. Among other things, Moreno said that Strauss is "not gonna have a tenant in here for three years"; Moreno would "have inspectors in here on a daily basis"; Strauss would "come back to [Moreno] on [his] knees"; Strauss would not be able to "sign a new lease with a tenant" as the other tenants moved out; and Strauss would have "an empty building with no income for [Strauss] or [his] family." A8; C. 215.

Around this time, some potential tenants "refused to sign a lease" of the commercial space that had been occupied by Double Door at the alleged "market rate" of $35,000 per month unless "the zoning classification remained at B3-2." A8; C. 215. And, on May 10, 2017, Strauss entered into a written contract with "Buyer A" to sell the building for $9.6 million. A8; C. 215. By June 8, 2017, the buyer had learned about the pending rezoning amendment and cancelled the contract. A8; C. 215.

Two days before Buyer A cancelled the contract, Moreno changed his rezoning proposal to RS-3, a classification generally used for areas developed

with single-unit detached houses. A9; C. 216. On June 22, 2017, the zoning committee deferred Moreno's second rezoning proposal. A10; C. 217.

On July 20, 2017, Strauss filed a federal lawsuit challenging the rezoning proposals. A10; C. 217. The next day, the zoning committee met, but Moreno's proposed rezoning was not on the agenda. A10; C. 217. Also that day, Strauss entered into a contract with "Buyer B" to sell the building for $9.1 million. A11; C. 218. The sale was contingent on the property retaining the B3-2 zoning classification. A11; C. 218. After meeting with Moreno, Buyer B cancelled the contract. A11; C. 218.

Strauss alleged that Moreno's first two rezoning proposals were reviewed by the Zoning Administrator and officials from the City's Department of Planning and Development and Department of Law, and none of them recommended the adoption of those proposals. A11; C. 218. The City officials met with Moreno and came up with a third option – rezoning from B3-2 to B2-2. A11; C. 218. The B2-2 classification excludes some of the uses that are allowed in B3-2 districts, including medium (150-999 occupancy) and large (1,000+ occupancy) entertainment venues. Municipal Code of Chicago, Ill. § 17-3-207. The B2 classification is meant to accommodate a broad range of retail and service uses oriented to pedestrians, while allowing for some other development options on streets where the market demand for retail and service uses might be low. Id. § 17-3-103-A; see also A11; C. 218.

In late August 2017, Moreno proposed the B2-2 rezoning. A11; C. 218. Strauss alleges that, just before a zoning committee meeting on September 11, 2017, Moreno was having a conversation with his chief of staff about what to do when this zoning proposal came up for a vote when Moreno "said he was going to 'Fuck with them, it makes their lawsuit weaker. . . .'" A13; C. 220. The committee subsequently adopted the B2-2 proposal, and it was placed on City Council's agenda for October. A13; C. 220. On October 11, 2017, City Council passed an ordinance adopting the rezoning to B2-2. A14; C. 221.

Strauss alleges that all three of Moreno's rezoning proposals left him unable to lease the commercial space vacated by Double Door at the market rate for B3-2 properties. A15; C. 122. In June 2018, the corporation sold the building for $9.1 million. A15; C. 222.

The second amended complaint alleged nine counts. Count I alleged that the rezoning proposals were made in retaliation for Strauss's lawsuits against City officials in violation of his rights under the Illinois constitution to free speech, to seek redress of grievances, and to a remedy. A16; C. 223. Counts II and III alleged that the rezoning of his property violated his rights to equal protection, A18; C. 225, and substantive due process, A18-A19; C. 2225-26. Count IV alleged that the manner in which the zoning proposals were introduced and amended violated his right to procedural due process. A21; C. 228. Count V alleged that Moreno's conduct and the City Council's rezoning amounted to a taking of Strauss's property without just

compensation. A23; C. 230. Count VI alleged that the rezoning proposals resulted in the cancellation of two contracts and an inability to receive "market value" rent, in violation of his right against the impairment of contracts and ex post facto laws. A24; C. 231. Counts VII-IX alleged claims of tortious interference with contract, A25; C. 232; tortious interference with prospective economic advantage, A26; C. 233; and intentional infliction of emotional distress, A27; C. 234.

Motion to Dismiss

The City moved to dismiss the case under sections 2-615 and 2-619 of the Illinois Code of Civil Procedure. C. 297. The City argued that Strauss failed to state claims under the Illinois constitution or common law, C. 311-27, and that the City is immune from Strauss's claims pursuant to the Tort Immunity Act, C. 327.

The circuit court granted the motion. A106; C. 509. The court rejected Strauss's equal protection and substantive due process claims because, based on the allegations in Strauss's complaint, the rezoning is rationally related to the legitimate governmental objective of guarding against problems with high noise levels, drug and alcohol abuse, and property damage that had arisen when Double Door operated a concert venue there. A107-A108; C. 510-11. In addition, the court rejected the notion that Moreno's alleged improper motive could be imputed to City Council or the mayor for purposes of determining the City's liability. A81; C. 511. Strauss's procedural due process claim

failed because the City held a hearing on the rezoning of the property before approving it, during which Strauss presented witnesses and had ample opportunity to raise objections. A108; C. 511. Finally, Strauss's inverse condemnation claim failed because neither the proposals nor the rezoning deprived Strauss of all economically viable use of the property. A108; C. 511.

As for Strauss's tort claims, the court held that the City is immune from liability under the Tort Immunity Act. A108; C. 511. Under section 2-103 of that statute, the City is immune from injuries "caused by adopting or failing to adopt an enactment." A108; C. 511. Further, under section 2-201, City employees are immune from an "act or omission in determining policy when acting in the exercise of such discretion even though abused." 745 ILCS 10/2-201. Moreno was exercising discretion and determining policy with respect to the zoning of Strauss's property. A109; C. 512. And since Moreno is immune, the City is immune as well, pursuant to section 2-109 of the Tort Immunity Act. A108-09; C. 511-12.

Appellate Court Decision

The appellate court affirmed. On the due process claim, the court first explained that Strauss did not have a right to keep a "particular zoning classification" because a "property owner cannot reasonably rely on the indefinite continuation of a zoning classification and acquires a property knowing that amendments can be made to a zoning ordinance within the limits of the law." A91. And any infringement of the right to use one's

property as he chooses is subject to rational basis review. A91. Rational-basis review applied to Strauss's equal protection claim as well. A93-94. The court held that the City's rezoning satisfied that test based on the allegations in Strauss's complaint, which identified problems at the location associated with the concert venue, including high noise levels, alcohol and illicit drug use, and property damage. A92-93. Even if these justifications are not what motivated Moreno, Moreno's "agenda was not the only justification," and the zoning classification must be upheld as long as there is "any conceivable basis for finding a rational relationship." A93.

The court then rejected Strauss's inverse condemnation claim because the economic impact of the rezoning was not so severe that it amounted to a taking, and Strauss alleged no bad faith conduct attributable to the City itself. A97-A98. In addition, the court explained that "[m]ere fluctuations in value during the process of governmental decisionmaking, absent extraordinary delay, are incidents of ownership" that are not so burdensome they amount to a taking of property. A98.

ARGUMENT

Strauss attempted a number of claims against the City based on a former alderman's threatening and inflammatory conduct and vindictive motives for proposing three different rezoning ordinances applicable to the property at 1572 North Milwaukee Avenue. But the alderman's first two proposals did not even make it out of committee. City Council ultimately

enacted the least restrictive proposal, changing the zoning just one level, from B3-2 to B2-2. And although Strauss sold the property for $9.1 million – the same amount he was willing to accept before the rezoning – he also alleged that the former alderman (who is not named in this lawsuit) engaged in tortious conduct when he met with potential buyers and informed them of pending zoning proposals, which Strauss claims prevented him from obtaining an even greater sales price or the maximum rental rate. As a matter of law, none of the claims provides a basis for municipal liability. The circuit court, therefore, correctly dismissed Strauss's complaint.

The circuit court granted the City's motion to dismiss under sections 2-615 and 2-619 of the Illinois Code of Civil Procedure. This court reviews an order granting either type of motion de novo. Shaker & Associates, Inc. v. Medical Technologies Group, Ltd., 315 Ill. App. 3d 126, 131 (1st Dist. 2000). A motion to dismiss under section 2-615 admits all well-pleaded facts and attacks the legal sufficiency of the complaint, Doe-3 v. McLean County Unit District No. 5 Board of Directors, 2012 IL 112479, ¶ 15, while a motion under section 2-619 admits the legal sufficiency of the complaint but raises affirmative matters, either on the face of the complaint or in other submissions, that defeat the claim, RBS Citizens, National Association v. RTG–Oak Lawn, LLC, 407 Ill. App. 3d 183, 203 (1st Dist. 2011). For either type of motion, the court accepts all well-pleaded facts in the complaint as true and makes reasonable inferences from those facts in favor of the

nonmoving party. Edelman, Combs & Latturner v. Hinshaw & Culbertson, 338 Ill. App. 3d 156, 164 (1st Dist. 2003). Illinois is a fact-pleading jurisdiction, so the plaintiff must allege facts, not simply conclusions, that are sufficient to bring a claim within a legally recognized cause of action. Marshall v. Burger King Corp., 222 Ill. 2d 422, 429-30 (2006). Under these standards, Strauss's complaint was properly dismissed.

Before turning to the merits, we address two preliminary issues. First, as we argued below, the dismissal of most of the claims may be affirmed based on lack of standing. Lack of standing is "affirmative matter" that supports dismissal. E.g., In re Estate of Schlenker, 209 Ill. 2d 456, 461 (2004). Strauss lacks standing to challenge the rezoning ordinance or to bring tortious interference with contract or prospective economic advantage claims based on the alleged interference with the sale of the property. Strauss never owned the property at issue; he alleges he was the president of the corporation that owned the property. A1; C. 209. In that circumstance, any cause of action arising from rights of a property owner belongs to the corporation itself, not its president. See Bevelheimer v. Gierach, 33 Ill. App. 3d 988, 993-94 (1st Dist. 1975). Shareholders and officers have "no standing under Illinois law" because the defendant's action "affects them only indirectly." Cashman v. Coopers & Lybrand, 251 Ill. App. 3d 730, 736 (2d

Dist. 1993); accord, e.g., Small v. Sussman, 306 Ill. App. 3d 639, 643-44 (1st Dist. 1999).[2] And that is true even if all the corporation's stock is owned by one person. Bevelheimer, 33 Ill. App. 3d at 992. Second, any claims for prospective relief should be dismissed for the additional, independent reason that they are moot. The corporation that owned the building sold it in June 2018. A15; C. 222. A property owner's claim for a declaration or an injunction becomes moot when property is sold and the plaintiff no longer holds title. Vulcan Materials v. Will County, 61 Ill. App. 3d 925, 926 (3d Dist. 1978).

In addition to these problems, as we explain in detail below, Strauss's claims fail on the merits. Strauss admits that his due process and equal protection challenges are subject to rational-basis review. In part I, we explain that the rezoning ordinance easily withstands rational-basis review. It is clear from the allegations in Strauss's complaint that eliminating use as a concert venue would address problems associated with such use and the

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[2] The appellate court declined to decide this issue, holding that "[b]ased on the record, we cannot determine at this time" whether the naming of Strauss as plaintiff rather than the corporation was a problem of "misnomer or mistaken identity." Strauss Br. A89. But Strauss did not correct any purported misnomer in either his first or second amended complaints. C. 109, 208. Nor did he move to amend the complaint to correct a misnomer, even after the City identified the standing problem in its motion to dismiss. C. 409. He has therefore waived the argument, and may not raise it in this court or for the first time in his reply brief. Arguments raised for the first time on appeal are forfeited. Wright Development Group, LLC v.

new zoning classification would allow for a broad range of uses compatible with other businesses nearby. Accordingly, Strauss has not met his burden of negating all rational bases for the ordinance, and his due process and equal protection challenges fail as a matter of law. This court need not apply the LaSalle/Sinclair factors that have been used to examine the rationality of prohibiting a particular land use because Strauss does not challenge a prohibition on a particular land use; but even if those factors are considered, Strauss fails to state a claim. And nothing about Moreno's alleged misconduct and personal motivations saves the complaint from dismissal; those are not attributable to the City or relevant to rational-basis review.

As we explain in Part II, alternatively, all of Strauss's claims for damages are barred by sections 2-103 ("enactment immunity") and 2-201 of the Tort Immunity Act ("discretionary immunity"). While the appellate court relied on the Tort Immunity Act to dismiss only the tort claims, Strauss's claims under the Illinois Constitution are also barred, as we explain in part II.A, and this court may affirm the dismissal of those constitutional claims on that alternative basis. This court may uphold the decisions of the lower courts "on any grounds which are called for by the record," regardless whether the lower courts relied on the grounds and regardless whether the lower court's reasoning was correct. Ultsch v. Illinois Municipal Retirement Walsh, 238 Ill. 2d 620, 639 (2010); Ill. Sup. Ct. R. 341(h)(7).

Fund, 226 Ill. 2d 169, 192 (2007). And, here, this court may wish to do so under the doctrine of "constitutional avoidance," which requires courts to "avoid reaching constitutional issues unless necessary to decide a case." People v. Bass, 2021 IL 125434, ¶ 30. A case should, instead, "be decided on non-constitutional grounds whenever possible." Id.

The enactment immunity in section 2-103 and the discretionary immunity in section 2-201, taken together, bar all of Strauss's claims under the Illinois Constitution and the common law. The City is immune from the due process and equal protection challenges to the rezoning ordinance because Strauss's alleged injury was "caused by adopting . . . an enactment," 745 ILCS 10/2-103. The City is also immune from liability for Moreno's conduct with respect to his three zoning proposals because those resulted from "act[s] . . . determining policy," and "the exercise of . . . discretion," id. § 2-201. This court may affirm dismissal of all claims on this alternative basis alone, without addressing the merits of the constitutional claims.

I. STRAUSS'S DUE PROCESS AND EQUAL PROTECTION CLAIMS FAIL BECAUSE THE REZONING ORDINANCE IS RATIONALLY RELATED TO LEGITIMATE GOVERNMENTAL OBJECTIVES.

Strauss's substantive due process and equal protection claims fail as a matter of law.[3] The level of scrutiny to be applied to a due process or equal

[3] Strauss has abandoned his other constitutional claims. He does not

protection challenge depends on the nature of the right at stake. The general rule for due process and equal protection challenges to economic regulations is that such legislation must bear only a rational relation to a legitimate governmental purpose, unless the regulation impacts a fundamental right or makes a suspect classification. City of New Orleans v. Dukes, 427 U.S. 297, 303 (1976); In re R.C., 195 Ill. 2d 291, 302-03 (2001); Tully v. Edgar, 171 Ill. 2d 297, 304 (1996). This court applies the same rational-basis standard under the Illinois Constitution that applies under the United States Constitution. McLean v. Department of Revenue, 184 Ill. 2d 341, 354 (1998) (due process); Jacobson v. Department of Public Aid, 171 Ill. 2d 314, 322 (1996) (equal protection). As Strauss concedes, Strauss Br. 15, rational-basis scrutiny applies here.

Under rational-basis review, legislation must bear only a reasonable relationship to a public interest. McLean, 184 Ill. 2d at 354. It is not the government's burden to show that a regulation is reasonable; it is the plaintiff's burden to show that a regulation is unreasonable. Cutinello v. Whitley, 161 Ill. 2d 409, 422 (1994). A plaintiff "must demonstrate

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challenge the dismissal of the claim in count I for "Right to Free Speech, Right to Redress Grievances and Right to Remedy and Justice Violations," Strauss Br. A16; count IV's procedural due process claim, id. at A19, or count VI's claim for "Ex Post Facto and Impairing Contracts Violations," id. at A24. Nor does he challenge the dismissal of count V's claim under the Takings Clause. We therefore do not discuss those claims further.

governmental action wholly impossible to relate to legitimate governmental objectives." LaSalle National Bank v. City of Highland Park, 344 Ill. App. 3d 259, 281 (2d Dist. 2003). The court may "hypothesize reasons for the legislation, even if the reasoning advanced did not motivate the legislative action." People ex rel. Lumpkin v. Cassidy, 184 Ill. 2d 117, 124 (1998). "'It is enough that there is an evil at hand for correction and that it might be thought that the particular legislative measure was a rational way to correct it.'" Harris v. Manor Healthcare Corp., 111 Ill. 2d 350, 369 (1986) (quoting Williamson v. Lee Optical of Oklahoma, Inc., 348 U.S. 483, 487-88 (1955)).

Accordingly, as this court has explained, "[s]o long as there is a conceivable basis for finding the statute rationally related to a legitimate state interest, the law must be upheld." Village of Lake Villa v. Stokovich, 211 Ill. 2d 106, 126 (2004); accord, e.g., Wauconda Fire Protection District v. Stonewall Orchards, LLP, 214 Ill. 2d 417, 434 (2005); Lumpkin, 184 Ill. 2d at 124; Chicago National League Ball Club, Inc. v. Thompson, 108 Ill. 2d 357, 368-69 (1985). This court has repeatedly upheld laws under the conceivable-basis standard as a matter of law and on the pleadings. See, e.g., Wauconda Fire Protection District, 214 Ill. 2d at 434; Segers v. Industrial Commission, 191 Ill. 2d 421, 437 (2000); Chicago National League Ball Club, Inc., 108 Ill. 2d at 369. And "[i]t is the burden of the person attacking the legislation to negate every conceivable basis which supports it." Allen v. Woodfield Chevrolet, Inc., 332 Ill. App. 3d 605, 611 (1st Dist. 2002); accord, e.g., Armour

v. City of Indianapolis, 566 U.S. 673, 681 (2012); Madden v. Kentucky, 309 U.S. 83, 88 (1940); Doolin v. Korshak, 39 Ill.2d 521, 528 (1968); Illinois Collaboration on Youth v. Dimas, 2017 IL App (1st) 162471, ¶ 79; Alamo Rent A Car, Inc. v. Ryan, 268 Ill. App. 3d 268, 272 (1st Dist. 1994).

Strauss has not alleged facts negating every conceivable rational basis for the B2-2 classification in the rezoning ordinance. Strauss does not even acknowledge the conceivable-basis standard, much less demonstrate how his allegations would show a constitutional violation under it. As the appellate court explained, A94-A95, and the federal district court explained before that, Strauss, 346 F. Supp. 3d at 1206, Strauss's own allegations establish a conceivably rational basis. According to Strauss, when the property was used as a concert venue, the area was plagued by "illicit drug use and alcohol abuse," "constantly high noise," and extensive property damage. A4; C. 211 ¶ 18. Strauss does not dispute that changing the zoning classification to B2-2 eliminates use of the property as a concert venue of the same size that was so problematic at this location. And while eliminating that use, the B2-2 classification still preserves the ability to use the property in a manner that fits in with other economically viable businesses in the area, including use as a restaurant, as a smaller entertainment venue, for retail, and for a number of other uses. See Municipal Code of Chicago, Ill. § 17-3-207 (table showing array of uses allowed in B2 zoning districts, and that medium (150-999 occupancy) and large (1,000 or more) entertainment venues are prohibited in

B2, but not B3, districts).

Strauss argues against this rationale, noting that because nearby properties are zoned "B3-2 or higher," Strauss Br. 20, maintaining the "nuisance justification" does not "appear to make sense when the City's zoning of the surrounding property would allow the same type of nuisance to continue next door." Strauss Br. 21. This argument is deeply flawed. In fact, it is eminently rational for City Council to focus on the exact property that has been causing a nuisance – that was, after all, where there was an immediate and likely risk the same use would occur. The space formerly occupied by Double Door was large enough and already designed to be a concert venue, so the risk of such use was particularly high. Strauss does not allege that any neighboring property was vacant, ripe for development, and suitable for use as a concert venue for more than 150 people. And even if there were other similarly problematic concert venues nearby, a legislative body "may, if it finds remedial measures necessary, address the problem one step at a time." Chicago National Baseball League, 108 Ill. 2d at 371. "[T]he legislature is not bound to pass one law meeting every exigency, but may consider degrees of evil." Cutinello, 161 Ill. 2d at 422.

Even aside from the nuisance justification in particular, the mere fact that a large property was available for business development made it rational to revisit the appropriate zoning classification for the property. After all, according to the allegations in Strauss's complaint, that had not been done

since 1974. Strauss Br. A3 ¶ 14. These are the sort of circumstances in which public officials will often revisit how the community has evolved and reassess whether the zoning classification remains a good fit. As for neighboring properties, that kind of assessment may well be premature, and certainly not urgent, without a vacancy because existing uses would most likely be grandfathered in under the Chicago Municipal Code § 17-15-103; rezoning would not effect a change until the use was discontinued, id. § 17-15-304.

The vacancy of the subject property exposes another problem with Strauss's equal protection claim because it explains why he was not similarly situated to the owners of neighboring properties. Equal protection requires that similarly situated individuals be treated in a similar manner. People v. Reed, 148 Ill. 2d 1, 7 (1992). "Two classes are similarly situated only when they are in all relevant respects alike." In re Destiny P., 2017 IL 120796, ¶ 15. Strauss's complaint falls short because he does not allege that he was treated differently from any other similarly situated property owners. For just this reason, the equal protection cases upon which Strauss relies, Strauss Br. 18-19, are readily distinguishable. See Village of Willowbrook v. Olech, 528 U.S. 562, 565 (2000) (village intentionally demanded larger easement of plaintiff than other similarly situated property owners); Safanda v. Zoning Board of Appeals, 203 Ill. App. 3d 687, 696 (2d Dist. 1990) (plaintiff's property treated differently than other properties with the same

dimensions). He identifies no one else with similarly-sized property near the Milwaukee-North-Damen intersection that was vacant and ripe for development, much less one that had operated at constantly high noise levels, with drug and alcohol abuse by patrons, and caused extensive property damage.

Moreover, here, it is clear from Strauss's complaint that the property is located in a district with heavy pedestrian traffic as well as retail and dining, A3; C. 210, and a large number of permitted uses in the B2-2 classification would complement those existing uses. The B2-2 classification allows retail, restaurant, entertainment, and other business uses, none of which Strauss claims would be a poor fit for this "vibrant and thriving business district." A3; C. 210. By the same token, it is rational to conclude that some uses under the B3-2 classification would be inappropriate. Strauss does not even argue, for example, that a large concert venue, gas station, or outdoor recreation facility – just to name a few – would be compatible with the surrounding uses.

A. The LaSalle/Sinclair Factors Provide No Basis For Reversal.

Instead of negating the rational reasons for the B2-2 classification, Strauss argues that the appellate court "should have considered how the LaSalle/Sinclair factors bear on the alleged rational basis for the downzoning ordinance." Strauss Br. 20. The appellate court, however, correctly determined that it was not required to apply those factors in this case

because the rational basis for the ordinance is apparent from the complaint. A92. And this court has made clear that the LaSalle/Sinclair factors do not displace ordinary principles of rational-basis review. Instead, they are "simply an alternate statement of the rational basis test which was tailored to address the specific interests advanced by the enactment of zoning ordinances, namely, the promotion of the public health, safety, morals, or general welfare." Napleton v. Village of Hinsdale, 229 Ill. 2d 296, 315 (2008). The LaSalle/Sinclair factors are "examples of 'facts which may be taken into consideration in determining validity of the ordinance,'" id. at 317 (quoting LaSalle National Bank of Chicago v. County of Cook, 12 Ill. 2d 40, 46 (1957)), and are to be used "within the framework of a traditional rational basis standard of review," id. They do not create a "heightened level of scrutiny." Id. And they are not required in every due process challenge to a zoning ordinance, including the facial challenge at issue in Napleton. Id. at 318-19.

Here, the appellate court – as well as the circuit court and federal district court before that – properly applied a traditional rational-basis review without resorting to LaSalle/Sinclair factors. As we explain above, a conceivable rational basis for the zoning change is readily apparent from the allegations in Strauss's complaint. Moreover, the LaSalle/Sinclair factors are ill-suited to reviewing Strauss's unique due process challenge. Those factors are used when a plaintiff claims that a zoning classification is keeping it from using its property in a particular way. Strauss, however, did not seek to use

his property in any particular way. Strauss had evicted Double Door and does not claim that he wished to continue to use the property as a concert venue or in any other way that is not permitted under the B2-2 zoning classification.[4] Rather, he claims a right to a broad zoning classification that he believes would maximize the property's rental rate and sales price. A15; C. 122. But the right to a zoning classification is not, by itself, a property interest protected by the due process clause. This court has long recognized that "a property owner has no right in the continuation of a zoning classification." Pioneer Trust & Savings Bank v. County of Cook, 71 Ill. 2d 510, 517 (1978); accord, e.g., 1350 Lakeshore Associates v. Healey, 223 Ill. 2d 607, 615 (2006); Morgan Place v. City of Chicago, 2012 IL App (1st) 091240, ¶ 44; Ropiy v. Hernandez, 363 Ill. App. 3d 47, 51 (1st Dist. 2005); 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).[5]

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[4] If Strauss had wanted to use the property as a concert venue, that may well have been authorized if such use had resumed within 18 months after Double Door vacated the property. See Municipal Code of Chicago, Ill. § 17-15-103 ("any situation that becomes a nonconformity upon adoption of any amendment to this Zoning Ordinance, may be continued in accordance with the regulations of this chapter."); id. § 17-15-0304 (nonconforming use is prohibited after it has "discontinued for 18 continuous months or more").

[5] There is a limited exception for a property owner with a "vested right" because of "a substantial change of position, expenditures or incurrence of obligations made in good faith by an innocent party under a building permit or in reliance upon the probability of its issuance." 1350

Rather, all property owners buy their property on the assumption that a municipality may amend its zoning ordinance and apply it to developments that have not yet received zoning approval and uses that are not already established. Constantine v. Village of Glen Ellyn, 217 Ill. App. 3d 4, 23 (2d Dist. 1991); see also Furniture LLC v. City of Chicago, 353 Ill. App. 3d 433, 438 (1st Dist. 2004); River Park, Inc. v. City of Highland Park, 23 F.3d 164, 166 (7th Cir. 1994). Even when a zoning change reduces the value of property, that does not raise due process concerns. "Deprivation of mere hoped-for economic gain is . . . a minimal incursion, if it is an incursion at all, into plaintiffs' property rights. As such, it is not a deprivation in the constitutional sense and does not raise due process concerns." Groenings v. City of St. Charles, 215 Ill. App. 3d 295, 309 (2d Dist. 1991); see also Residences at Riverbend Condominium Association v. City of Chicago, 5 F. Supp. 3d 982, 988 (N.D. Ill. 2013) ("Illinois courts do not recognize property values . . . as [a] constitutionally protected property interest[ ].").

In the line of cases upon which Strauss relies, property owners have asserted "the privilege to use one's property in his own way and for his own purposes," Napleton, 229 Ill. 2d at 308, rather than a right to a particular

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Lakeshore Associates, 223 Ill. 2d at 615. Strauss rightly does not assert this exception, since he did not seek a building permit at all, much less make substantial expenditures toward starting a particular use.

zoning classification without regard to the actual use of the property. That is because "[n]ormally the land owner is interested particularly in a specific use which he proposes, and so it is natural that he will try the case and the judge will reach his decision in terms of the reasonableness of excluding that specific use." Sinclair Pipe Line Co. v. Village of Richton Park, 19 Ill. 2d 370, 378 (1960). In each case, beginning with LaSalle and Sinclair themselves, the property owner wished to use the property in a particular way that was disallowed under the current zoning. LaSalle, 12 Ill. 2d at 43-44 (proposed use as a gas station); Sinclair, 19 Ill. 2d at 376 (proposed use of crude oil storage); see also Cosmopolitan National Bank v. City of Chicago, 27 Ill. 2d 578, 585 (1963) (proposed use as a funeral parlor); Trust Co. v. City of Chicago, 408 Ill. 91, 101-02 (1951) (proposed use of apartment buildings); Paul v. City of Ogle, 2018 IL App (2d) 170696, ¶ 2 (proposed use as a garbage truck and dumpster storage facility); Whipple v. Village of North Utica, 2017 IL App (3d) 150547, ¶ 29 (proposed use as a sand mine).[6] None involved only

[6] The same is true for the other cases cited by amici, see Brief of Amicus Curiae Station Place Townhouse Association 21, 30, which involved five proposed residential developments, Harris Trust & Savings Bank v. Duggan, 95 Ill. 2d 516 (1983); 1350 Lake Shore Associates, 352 Ill. App. 3d 1027; Northern Trust Bank v. County of Lake, 311 Ill. App. 3d 332 (2d Dist. 2000); Zeitz v. Village of Glenview, 304 Ill. App. 3d 586 (1st Dist. 1999); Harvard State Bank v. County of McHenry, 251 Ill. App. 3d 84 (2d Dist. 1993), a proposed use as a quarry, Lambrecht v. County of Will, 217 Ill. App. 3d 591 (3d Dist. 1991), and a proposed use as a private landing area for a gyrocopter, Robrock v. County of Piatt, 2012 IL App (4th) 110590.

an abstract interest in a particular zoning category, without any proposed use.

This case is more like the facial challenge in Napleton, where this court did not apply the LaSalle/Sinclair factors. In Napleton, this court addressed a facial challenge to a rezoning ordinance that placed the plaintiff's property into a zoning classification that did not allow financial institutions on the ground floor, affecting the potential for renting to such businesses. 229 Ill. 2d at 302-03. This court declined to apply the LaSalle/Sinclair factors to the plaintiff's facial challenge to the zoning classification and held that, in any event, those factors did not create a heightened standard of scrutiny in zoning cases. Instead, as we explain above, they are an alternate statement of rational basis tailored to zoning ordinances, Napleton, 229 Ill. 2d at 315, that sets forth examples of facts which may be considered, id. at 317 (citing LaSalle, 12 Ill. 2d at 46), and which are to be used "within the framework of a traditional rational basis standard of review," id.

As with the facial challenge in Napleton, the circuit court and appellate court here properly applied traditional rational-basis review without resorting to LaSalle/Sinclair factors. To be clear, we agree with the general principle that "there is no difference between a facial and as-applied challenge here where the challenged ordinance affected . . . one property alone." Strauss Br. 16. But either way, the ordinance is still subject to rational-basis review and need not be analyzed under the LaSalle/Sinclair

factors. As in Napleton, those factors simply do not make sense in this context, where the property owner had no particular use in mind and, instead, just wanted to retain the more permissive zoning classification in order to maximize profits through lease or sale of the property.

Indeed, it would be exceptionally difficult to apply the LaSalle/Sinclair factors in this context. The factors touch on both the existing and new zoning classifications. Thus, without a proposed use, the court would need to examine how the factors apply to the full range of possible uses in both zoning classifications. Here, in addition to a long list of permitted business and residential uses that the two classifications share, the B3-2 classification allows larger concert venues, gas stations, hotels, residential storage warehouses, and outdoor participatory sports and recreation facilities. Municipal Code of Chicago, Ill. § 17-3-207. A LaSalle/Sinclair analysis would require the court to consider these possibilities and more to determine whether each of them would be consistent with the uses nearby, result in diminished property values for the property and/or neighboring properties, affect the public welfare, and serve the general needs of the community. This would be a chaotic and unwieldy inquiry. That sort of review is ill-suited and unfamiliar to rational-basis review.

The application of the LaSalle/Sinclair factors in this context is like trying to fit a square peg into a round hole. Indeed, stretching the application of the LaSalle/Sinclair factors to this context would unduly

complicate rational-basis review and potentially protract litigation into discovery and trials that simply are not necessary when, as here, the rational relationship to legitimate governmental objectives is apparent from the complaint. Moreover, such an inquiry involves precisely the sort of broad balancing of interests and determinations of policy that should be left to legislators, not the judiciary. "[A] zoning ordinance is a legislative enactment," and it is not the court's role to "step[ ] into the [legislative body's] shoes" and "exercise[ ] its independent judgment" on zoning matters. First American Bank v. Village of Wilmette, 2019 IL App (1st) 181436, ¶ 77.

In the end, even straining to apply the LaSalle/Sinclair factors here would not help Strauss, because he cannot negate all rational bases for the rezoning ordinance. The LaSalle factors are: "(1) [t]he existing uses and zoning of nearby property"; "(2) the extent to which property values are diminished by the particular zoning restrictions"; "(3) the extent to which the destruction of property values of plaintiff promotes the health, safety, morals or general welfare of the public"; "(4) the relative gain to the public as compared to the hardship imposed upon the individual property owner"; "(5) the suitability of the subject property for the zoned purposes"; and "(6) the length of time the property has been vacant as zoned considered in the context of land development in the area in the vicinity of the subject property." LaSalle, 12 Ill. 2d at 46-47. Sinclair added, as additional factors, consideration of any comprehensive zoning plan and "community need for the

proposed use by the plaintiff." 19 Ill. 2d at 378.[7]

Under the third and fourth factors, it is rational to conclude the gain to the public welfare exceeds the hardship and loss of value to the property owner, where the rezoning ordinance eliminates a use that had become a nuisance and the owner was still able to sell the building for $9.1 million, A15; C. 222, the same amount he was willing to accept before the rezoning, A11; C. 218. As for the first and fifth factors, there are no allegations that the new zoning classification is inconsistent with existing uses or unsuitable for the uses allowed in B2 zones. And the consistency with existing uses in the area is particularly significant because, underlying all of the factors, and "[o]f paramount importance," is "the question of whether the subject property is zoned in conformity with surrounding existing uses and whether those uses are uniform and established." LaGrange State Bank v. Cook County, 75 Ill. 2d 301, 391 (1979); accord, e.g., Thornber v. Village of North Barrington, 321 Ill. App. 3d 318, 327 (2d Dist. 2001); Zeitz v. Village of Glenview, 304 Ill. App. 3d 586, 595 (1st Dist. 1999). As we explain above, it appears that myriad uses allowed in B2 districts would mesh well with the other businesses

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[7] Strauss characterizes Sinclair as adding consideration of "community need for an ordinance." Strauss Br. 16 (emphasis added). That is incorrect. The court considered the need for the proposed use and held that the circuit court had properly limited its relief to allowing that particular use, as opposed to invalidating the entire zoning classification, 19 Ill. 2d at 378-80, as Strauss is asking the court to do here.

operating nearby.

Ultimately, the LaSalle/Sinclair factors are designed to cull out zoning classifications that are clearly out of sync with the character of the area. In LaSalle, for instance, the property was zoned for single-family residences on an irregularly shaped lot at the intersection of two busy streets in a mostly commercial area, including numerous factories, office buildings, and a 40-acre tract zoned for a large shopping center. 12 Ill. 2d at 47-48. And in Whipple, a special use permit had been granted to allow an industrial sand-mining operation in an area where "the nearby property [was] primarily agricultural," 2017 IL App (3d) 150547, ¶ 29, which was "not in harmony with the community's comprehensive plan," id. ¶ 33. From the allegations in Strauss's complaint, it is clear that the B2-2 classification is a far cry from the obviously out-of-sync zoning at issue in those cases. This case does not involve the same sharp contrast between single family homes and commercial uses, or between agricultural and heavy industrial uses. It involves a fairly minor gradation in the spectrum of business uses, eliminating some of the more intensive commercial uses. And Strauss does not explain how, even in light of any of the LaSalle/Sinclair factors, it would be irrational for City Council to prohibit some of the more intense uses that are allowed in the B3 classification.

B. The Alleged Private Motives Of A Single Alderman Do Not Show That The City Lacked A Rational Basis.

Strauss also argues that he has satisfied rational-basis review because

he alleges the rezoning ordinance was "a punitive measure that had the sole purpose and effect of harming a single property owner to satisfy the vindictive interests of Moreno and Double Door." Strauss Br. 14. See also id. at 20 ("ordinance was an arbitrary attempt to single Plaintiff out for punishment"); id. at 21 (the "function" of the ordinance was "to punish"). This argument should be rejected for several reasons. To begin, Strauss's allegations about vindictive motives are limited to Moreno, and he is not even a defendant in this case. Even if that alderman's threats and inflammatory conduct suggest that he had an improper motive, his motivation cannot be attributed to any of the other 49 members of City Council. As this court has explained, "[s]tatements of individual legislators," especially those made outside the course of official legislative debate, "reflect only the viewpoints of those individuals, not necessarily the intent of the legislature as a whole when the bill was debated and passed." Morel v. Coronet Insurance, 117 Ill. 2d 18, 24 (1987). The statements of individual legislators "do not constitute meaningful evidence of legislative intent." Id. This principle, of course, applies just the same when the legislative body is a city council. Thus, as the Seventh Circuit held in Civil Liberties for Urban Believers v. City of Chicago, 342 F. 3d 752, 764 (7th Cir. 2003), an alderman's motive for proposing a zoning change "in no way demonstrates that the City Council and the Mayor, who have final authority under state law to enact city ordinances, endorsed any such motives," id. at 764 (citations omitted). Absent some evidence that

the City Council "approved both the rezoning *and* the illicit motivation therefor," the City cannot be liable for the alderman's actions. Id.

Moreover, Strauss's repeated and hyperbolic use of the term "Aldermanic Prerogative" in the complaint, e.g., Strauss Br. A13-A14, should be ignored. He defines "aldermanic prerogative" as an alleged practice of City Council members to "defer[ ] local matters to the alderman of the affected ward" and "blindly support" zoning changes proposed by those aldermen. A13; C. 220. But the actual facts alleged in Strauss's complaint undermine the notion that other aldermen gave blind deference to Moreno's proposals. Far from simply jumping on board with Moreno's proposals, the aldermen on the zoning committee had the matter reviewed by the Zoning Administrator and Department of Law. A11; C. 218. Moreover, the committee did not advance either of the proposals (RS-3 and B1-1) that the Zoning Administrator and Law Department would not recommend. It was only after the third proposal for a modest zoning change that the committee held a hearing at which it heard testimony from all sides, C. 68-82, as well as the recommendation of the Zoning Administrator, C. 83. It is clear from the allegations in Strauss's complaint, therefore, that the aldermen did not base their support solely on Moreno's preferences.

In any event, whatever the reasons each alderman had for casting his or her vote, the constitutionality of a zoning ordinance does not depend on the actual motives of the officials passing the legislation. "In considering the

constitutionality of a statute, this court is not at liberty to inquire into the motives of the legislature, but may only examine the legislature's powers under the constitution." People v. Gallegos, 293 Ill. App. 3d 873, 878 (3d Dist. 1997); accord, e.g., Scandroli v. City of Rockford, 86 Ill. App. 3d 999, 1003 (2d Dist. 1980). "'Even a showing of animus is insufficient where there is an otherwise legitimate state purpose and a rational basis for its implementation.'" Illinois Collaboration on Youth v. Dimas, 2017 IL App (1st) 162471, ¶ 37 (quoting AFSCME v. State of Illinois, 2015 IL App (1st) 133454, ¶ 37). As we explain above, rather than focusing on motives, "[s]o long as there is a conceivable basis for finding the statute rationally related to a legitimate state interest, the law must be upheld." Stokovich, 211 Ill. 2d at 126. See also Flying J Inc. v. City of New Haven, 549 F.3d 538, 545 (7th Cir. 2008) ("A given action can have a rational basis and be a perfectly logical action for a government entity to take even if there are facts casting it as one taken out of animosity." And under rational-basis review, "it is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature." FCC v. Beach Communications, Inc., 508 U.S. 307, 315 (1993).

To be sure, as Strauss points out, this court has held that zoning power "cannot be exercised to satisfy the individual desires of a few," or to "confer special benefits on plaintiff's neighbors." Strauss Br. 17 (citing Cosmopolitan National Bank, 27 Ill. 2d at 585; Trust Co., 408 Ill. 91). This general

principle, however, does not invite reliance on the actual motives of legislators, much less suggest that a single alderman's allegedly improper motive suffices to plead a claim. Instead, under rational basis review, if a benefit to a few individuals is one possible reason for the ordinance but there is another conceivable reason that rezoning advances a public purpose, a zoning ordinance passes muster. In other words, a plaintiff must still negate all the conceivably rational bases, leaving as the only possible purpose of the ordinance to confer special benefits on a select few.

One of the cases Strauss relies upon, Drury v. Village of Barrington Hills, 2018 IL App (1st) 173042, illustrates this point. There, shortly after a large-scale horse boarding operation lost several rounds of litigation concerning compliance with a zoning ordinance, a member of the Barrington Hills Zoning Board of Appeals introduced an ordinance to allow such boarding and made it retroactive to negate prior violations. Id. ¶ 32. Barrington Hills did not even defend the ordinance, instead conceding that it "bore no rational relationship to the public health, safety, welfare, or morals and was void ab initio." Id. ¶ 45; see also id. ¶ 49. The ordinance was defended instead by some intervenors, id. ¶ 46, but they did not identify a way in which the ordinance was rationally related to the public welfare, either. And the court did not conceive of one. The court made clear that rational-basis scrutiny is extremely deferential, id. ¶¶ 76-79, and its focus was not on the "'true' reason" for the zoning decision; rather, "[t]he singular

focus is on whether the public welfare justifies the zoning restriction." Id. ¶ 91. But it still could not find anything to explain the ordinance. Rather, "the *only* justification for the ordinance is that a chosen few individuals wanted it." Id. ¶ 99. In short, Drury is an example of a case where the plaintiffs met their burden of pleading facts negating all rational bases for the ordinance. That does not help Strauss because, here, there are conceivably rational bases for the ordinance, as we explain above.

Finally, Strauss's reliance on Southwest Illinois Development Authority ("SWIDA") v. National City Environmental, LLC, 199 Ill. 2d 225 (2002), is misplaced. To begin, that case involved a claim under the Takings Clause, and Strauss no longer challenges the dismissal of his takings claim. And the holding is not useful by way of analogy to his due process or equal protection claims, either. The Takings Clause requires that property be taken only for a "public use," which this court regarded as distinct from a "public purpose." Id. at 239. This court held that the under the "public use" requirement, "something more than a mere benefit to the public must flow from the contemplated improvement," id. at 239, and examined whether "the true beneficiaries of this taking are private businesses and not the public," id. at 240. This court has never interpreted the Due Process Clause to

require the government to meet the same "public use" requirement.[8] As we explain above, the rational-basis test governs here, and the rezoning ordinance passed scrutiny under that test.

II. THE TORT IMMUNITY ACT BARS STRAUSS'S CLAIMS.

In addition, all of Strauss's claims against the City are barred under the Tort Immunity Act. State law immunity, like federal immunity, is an affirmative defense. Van Meter v. Darien Park Dist., 207 Ill. 2d 359, 370 (2003). The burden is on the government to establish that the Tort Immunity Act bars liability, and the Act is "strictly construed against the public entities involved." Id. Whether an official is entitled to immunity is properly decided at the outset of litigation, in a motion to dismiss under section 2-619. DeSmet v. County of Rock Island, 219 Ill. 2d 497, 504 (2006); see also Imbler v. Pachtman, 424 U.S. 409, 419 n.13 (1976) ("An absolute immunity defeats a suit at the outset, so long as the official's actions were within the scope of the immunity.").

The Tort Immunity Act applies to Strauss's constitutional claims, as well as his tort claims, and those clams are barred by the enactment and

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[8] In Kelo v. City of New London, 545 U.S. 469 (2005), the Supreme Court rejected such a distinction between "public use" and "public purpose" for purposes of the Takings Clause in the federal constitution. "[T]akings that serve a public purpose" may "satisfy the Constitution even if the property is destined for subsequent private use." Id. at 498. SWIDA was decided before Kelo and this court has not reconsidered its approach in light

discretionary immunities in the Act. The enactment immunity in section 2-103 immunizes the City from liability for "an injury caused by adopting or failing to adopt an enactment." 745 ILCS 10/2-103. And the discretionary immunity in section 2-201 immunizes the City from an employee's "act or omission in determining policy when acting in the exercise of such discretion even though abused." Id. 10/2-201. The combined effect of these provisions is that the City is immune from liability for any injury caused by enacting the rezoning amendment, as well as any injury caused by Moreno's untoward conduct.

A. The City Is Immune From Liability On Strauss's Constitutional Claims Under Section 2-103.

The Tort Immunity Act applies with full force to claims under the Illinois constitution, including the immunity in section 2-103 for injuries caused by adopting an enactment. That provision bars Strauss's constitutional claims here.

1. The Tort Immunity Act applies to Strauss's constitutional claims.

The Tort Immunity Act extends to claims under the Illinois constitution. Its broad purpose is "to protect local public entities and public employees from liability arising from the operation of government." Village of Bloomingdale v. CDG Enterprises, Inc., 196 Ill. 2d 484, 490 (2001) (citing

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of that precedent.

745 ILCS 10/1–101.1(a)). The Act immunizes public entities and employees from damages claims for injuries arising from certain enumerated acts and omissions, and defines "injury" as follows:

> "Injury" means death, injury to a person, or damage to or loss of property . . . "Injury" includes any injury alleged in a civil action, whether based upon the Constitution of the United States or the Constitution of the State of Illinois, and the statutes or common law of Illinois or of the United States.

745 ILCS 10/1-204 (emphasis added). Section 2-101 clarifies that the Act does not preclude "relief other than damages," and contains a list of express exceptions to the Act. 745 ILCS 10/2-101 (listing exceptions based on contract, common carrier operations, and four specific statutes). Claims based on the Due Process Clause or the Equal Protection Clause of the Illinois constitution are not on that list.

Under the plain language of the Act, then, it applies to Strauss's claims for damages under the Illinois constitution. It is well settled that "[w]here an enactment is clear and unambiguous a court is not at liberty to depart from the plain language and meaning of the statute by reading into it exceptions, limitations or conditions that the legislature did not express." CDG Enterprises, 196 Ill. 2d at 493. And it only makes sense that the General Assembly would treat claims under the Illinois constitution like tort claims arising under the common law, since the same sort of claims arising under the federal constitution have long been recognized as a species of torts. City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687, 709

(1999) ("there can be no doubt that claims brought pursuant to § 1983 sound in tort"); Heck v. Humphrey, 512 U.S. 477, 483 (1994) ("[w]e have repeatedly noted that 42 U.S.C. § 1983 creates a species of tort liability") (quoting Memphis Community School District v. Stachura, 477 U.S. 299, 305 (1986)).

Regardless, given the broad definition of "injury" and limited number of exceptions, this court has rejected the notion that the Act "categorically excludes" non-tort actions. Raintree Homes, Inc. v. Village of Long Grove, 209 Ill. 2d 248, 261 (2004). In CDG Enterprises, for example, the court held that the statutory immunities applied to a non-tort quasi-contract claim. 196 Ill. 2d at 501. The court made clear that, unless expressly excepted in the Tort Immunity Act, its immunities apply to all injuries, regardless of the cause of action. Id. Thus, consistent with CDG Enterprises, the Act's definition of "injury" means that Illinois constitutional claims are covered, too.

In the appellate court, Strauss argued the definition of "injury" in section 1-204 should be interpreted another way in order to "avoid . . . constitutional problems or absurd results." Strauss Reply Br. 18 (Ill. App. Ct.). Strauss argued that, because section 1-204 also covers injuries "based upon the Constitution of the United States" and federal "statutes and common law," giving effect to the plain language of section 1-204 would mean that the immunities in the Act could be applied to actions arising under federal law, even though the legislature "does not have power to alter rights

and remedies under . . . federal constitution or under federal law." Id. Strauss argued that the General Assembly "did not intend references to the state and federal constitution to be taken literally." Id. at 19. This argument not only runs afoul of the plain language of the Act, but fails to give any meaning to the words referring to the Illinois constitution. And, under settled principles of statutory interpretation, this court will "construe the statute to avoid rendering any part meaningless or superfluous." Solon v. Midwest Medical Record Association, 236 Ill. 2d 433, 440 (2010).

To be sure, the Act cannot apply to claims arising under federal laws, even though the definition of "injury" includes injuries based on the constitution, statutes, and common law "of the United States," because that portion of the statute is preempted by federal law. See Anderson v. Village of Forest Park, 238 Ill. App. 3d 83, 92 (1st Dist. 1992). Despite the plain language of the Tort Immunity Act, its application to federal constitutional claims would be unconstitutional under the Supremacy Clause in the federal constitution. Id. The General Assembly, however, prepared for this contingency. The Act provides that, if any of its provisions are held invalid, that "shall not affect other provisions, or applications of the Act which can be given effect without the invalid provision or application." 745 ILCS 10/1-102. Plainly, the Tort Immunity Act can be applied to claims under the Illinois

constitution without giving effect to the invalid portion referring to federal law.[9]

The appellate court addressed the application of the Tort Immunity Act to Illinois constitutional claims in Rozsavolgyi v. City of Aurora, 2016 IL App (2d) 150493, vacated on other grounds, 2017 IL 121048.[10] It held that the Act's immunities apply to civil actions "based upon . . . the Constitution of the State of Illinois." Id. ¶ 113. The court noted that it had, in a few earlier opinions, reached the opposite conclusion; but it declined to follow those decisions because they either preceded or did not discuss the 1986 amendment to section 1-204 that changed the definition of "injury" to expressly include the "Constitution of the State of Illinois." Id. ¶ 114 (citing Birkett v. City of Chicago, 325 Ill. App. 3d 196, 202 (2d Dist. 2017); Firestone v. Fritz, 119 Ill. App. 3d 685, 689 (2d Dist. 1983); Streeter v. County of Winnebago, 44 Ill. App. 3d 392, 395 (2d Dist. 1976)). See also Stephanie M.

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[9] Strauss rightly does not claim that application of the Tort Immunity Act here would violate the Illinois constitutional provision that provides "Every person shall find a certain remedy in the laws for all injuries and wrongs which he receives to his person, privacy, property or reputation." Ill. Const.1970, art. I, § 12. This court has twice rejected such challenges to the Tort Immunity Act. Michigan Avenue National Bank v. County of Cook, 191 Ill. 2d 493, 487-88 (2000); Sullivan v. Midlothian Park District, 51 Ill. 2d 274, 277 (1992).

[10] Although the opinion was vacated, it is, nevertheless, persuasive, given the court's thorough and cogent rationale.

Ailor, The Legislature Versus the Judiciary: Defining "Injury" Under the Tort Immunity Act, 57 DePaul L. Rev. 1021, 1051-52 (Summer 2008). The court concluded that, given the "Raintree Homes pronouncement that the statute generally does not exclude non-tort claims" and the clear language in section 1-204, "the Tort Immunity Act clearly encompasses constitutional claims." Rozsavolgyi, 2016 IL App (2d) 150493, ¶ 113.

Similarly, in Oxford Bank & Trust v. Village of LaGrange, 879 F. Supp. 2d 954 (N.D. Ill. 2012), the federal district court applied Illinois law to similar constitutional challenges of a zoning classification and held that the claims were barred under the Tort Immunity Act. Id. at 965-66.[11] Like Strauss, the plaintiffs there argued that a rezoning violated their equal protection and due process rights under the Illinois constitution by prohibiting use of the property as a pawn shop. Id. at 960-61. The property owners alleged that the ordinance had been passed out of spite, specifically targeted them, and caused them to lose a tenant. Id. at 964. The court ruled that the Tort Immunity Act applies to state constitutional claims and dismissed those claims based on several immunities in the Act. Id. at 965-66.

The rulings in Rozsavolgyi and Oxford Bank are sound and should be followed here. Under the definition of "injury," it is clear that Illinois

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[11] This court may consider decisions from lower federal courts as persuasive authority. Pielet v. Pielet, 2012 IL 112064, ¶ 39; Wilson v. County

constitutional claims are subject to the immunities in the Act. Indeed, it seems likely that the very purpose of the 1986 amendment to the Tort Immunity Act was to effectively reverse the holdings in Streeter and Firestone, where the courts had declined to apply the Tort Immunity Act to claims under the Illinois constitution. And the General Assembly had sound policy reasons for including constitutional claims. The purpose of the Tort Immunity Act is to ensure that public funds are not dissipated by private damages awards. Anthony v. City of Chicago, 382 Ill. App. 3d 983, 987 (1st Dist. 2008). And, particularly relevant here, the enactment and discretionary immunities in the Act, like the legislative immunity that applies to federal claims, "encourage legislators best to represent their constituents' interests." Biblia Abierta v. Banks, 129 F.3d 899, 904 (7th Cir. 1997). "If legislators feared that they would be subject to civil liability for their attempts to introduce new legislation or propose amendments, our government would become stagnant, changes would not be considered, let alone implemented." Id.

2. Section 2-103 bars Strauss's constitutional challenges to the rezoning ordinance.

As we explain above, Strauss's due process and equal protection challenges are based on allegations concerning City Council's passage of the

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of Cook, 2012 IL 112026, ¶ 30.

ordinance that rezoned the property to the B2-2 classification. The City is immune from these claims under section 2-103, which provides:

> A local public entity is not liable for an injury caused by adopting or failing to adopt an enactment or by failing to enforce any law.

745 ILCS 10/ 2-103. The rezoning ordinance was, of course, "an enactment." And there is no exception from the immunity in section 2-103 based on "corrupt or malicious motives." CDG Enterprises, 196 Ill. 2d at 493. The City is thus immune from all damages – including any lost rent or diminution of property value – caused by that rezoning, and regardless of any alleged malicious motive of the former alderman.

B. The City is Immune from Strauss's Tort Claims Under Sections 2-201 and 2-109.

The City is also immune from liability for the alleged tortious interference with contract or prospective economic advantage and intentional infliction of emotional distress. Those claims are based on allegations about threats the former alderman made in response to the eviction of Double Door, three rezoning proposals, and two meetings the alderman had with potential property buyers. Strauss Br. 27-28. The City is immune from liability under section 2-201, which provides:

> Except as otherwise provided by Statute, a public employee serving in a position involving the determination of policy or the exercise of discretion is not liable for an injury resulting from his

> act or omission in determining policy when acting in the exercise of such discretion even though abused.

745 ILCS 10/2-201.[12] When a public employee is immune under section 2-201, the local public entity will not be liable, either. That is because, under section 2-109, such an employer is "not liable for an injury resulting from an act or omission of its employee where the employee is not liable." 745 ILCS 10/2-109.

Discretionary immunity has two requirements. First, the official's position must be one that required either making policy determinations or exercising discretion; and second, the allegedly harmful act or omission must result from both a determination of policy and an exercise of discretion. Harinek v. 161 North Clark Street Ltd. Partnership, 181 Ill. 2d 335, 341 (1998). Strauss does not appear to dispute that the first prong of the immunity is satisfied. Nor could he plausibly do so. An employee is required to make policy determinations if he or she must "balance competing interests" and "make a judgment call as to what solution will best serve each of those interests." Harinek v. 161 North Clark Street, 181 Ill. 2d 335, 342 (1998); accord, e.g., Kevin's Towing, Inc. v. Thomas, 351 Ill. App. 3d 540, 548 (2d Dist. 2004). And an employee is charged with using his discretion when

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[12] To the extent Strauss's tort claims are based on the City Council's vote to pass the rezoning ordinance, they are barred under section 2-103 for the same reasons discussed in part II.A.

it is "not legally mandated that he choose one over the other" and there is no "preordained blueprint for his decision." Brooks v. Daley, 2015 IL App (1st) 140392, ¶ 18. These describe the role of an alderman. An alderman is elected for the very purpose of balancing competing interests and making policy decisions, and must exercise complete discretion in doing so. Aldermen are elected by their constituency to create and advocate for initiatives that will advance the health, safety, and welfare in their ward, including making and voting on ordinance proposals that create policies affecting the alderman's ward, as well as the entire City.

The second prong of discretionary immunity is also satisfied. Moreno was determining policy and exercising discretion when he spoke with Strauss about the Double Door eviction, submitted ordinance proposals, and informed potential buyers about those proposals. Most obviously, he determined policy and exercised discretion when he made the zoning proposals. Such proposals are the first step toward passing any ordinance, and thus a quintessential example of policymaking. And, of course, there is no legal mandate about the particular zoning classification an alderman may propose.

So, too, an alderman 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. It 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 laws, and guard against incompatible uses that could harm nearby businesses or residents.

More specifically, here, Moreno's actions – even accepting the allegations of untoward conduct – were the result of his decisions about how to carry out the alleged policy choice to advocate for keeping Double Door in the neighborhood, and they required the exercise of judgment. There were certainly no statutes or regulations that provided "a blueprint for how to proceed," Brooks, 2015 IL App (1st) 140392, ¶ 18. So these were not the sort of ministerial tasks that remove his conduct from the scope of immunity under section 2-201. See Snyder v. Curran Township, 167 Ill. 2d 466, 474 (1995) (Ministerial tasks are those performed "on a given state of facts in a prescribed manner, in obedience to the mandate of legal authority, and without reference to the official's discretion as to the propriety of the act."). Granted, Moreno's conduct might fairly be described as an abuse of this discretion. An abuse of discretion, however, is still subject to immunity under section 2-201. 745 ILCS 10/2-201 (Immunity applies "when acting in the exercise of such discretion even though abused.") (emphasis added).

Strauss makes a surprising argument: that Moreno's conduct is not covered under section 2-201 because section 2-201 "does not apply to . . . ordinary tortious conduct." Strauss Br. 22 (heading) (capitalization removed); see also id. at 26 ("Section 2-201 does not encompass independent

tortious actions simply because they may be related to the immunized conduct"); id. at 29 ("intentional tortious character of outward actions belie any question of policymaking"). Strauss argues that an alderman lacks power to "destroy private contractual relationships" or to "inflict emotional distress." Id. at 28. He similarly characterizes the appellate court holding to be that "an alderman has legal discretion to tortiously interfere with private contractual relationships and inflict emotional distress as part of a 'pressure campaign' against anyone who opposes his or her political allies." Id. at 23. To bolster his point, Strauss compares his claims to the claims involving allegedly defamatory statements to the media or prospective employers that were not immune under section 2-201 in Stratman v. Brent, 291 Ill. App. 3d 123, 131 (2d Dist. 1997); Breuder v. Board of Trustees, 238 F. Supp. 3d 1054 (N.D. Ill. 2017); and Mucha v. Village of Oak Brook, 2008 WL 4686156 (N.D. Ill. 2008).

This argument should be rejected. Allegations of tortious conduct – whether the claim is tortious interference with contract, intentional infliction of emotional distress, or any other – cannot negate discretionary immunity. If that were so, that immunity could never be applied to tort claims, sharply undermining the plain language and goals of the Tort Immunity Act. Indeed, section 2-201 expressly states that it applies even when official discretion is "abused," 745 ILCS 10/2-201, which is what Strauss's claims boil down to.

In addition, none of the cases Strauss relies upon recognized an

exception to section 2-201 based on the notion that conduct involved "independent tortious actions," as Strauss claims, Strauss Br. 26. On the contrary, in Breuder and Mucha, the court carefully distinguished the comments officials had made internally, during official meetings or to other employees, finding those to be discretionary acts covered by section 2-201, Breuder, 238 Ill. App. 3d at 1066; Mucha, 2008 WL 4686156, *10, notwithstanding allegations that the statements were defamatory. The allegedly defamatory statements to the media, however, may or not have been discretionary, depending, not on whether the conduct was tortious, but on whether the officials' roles included interfacing with the media. Breuder, 238 F. Supp. 3d at 1066; Mucha, 2088 WL 4686156, * 11. As we explain above, the role of an alderman includes communicating with current and prospective property and business owners in the community, as well as proposing zoning changes. The City is immune from liability for any injuries caused by the discretionary policy decisions made while doing so, even if an official abuses his discretion.

Strauss also tries to reframe the issue as whether Moreno had "discretion to prohibit a property owner from leasing its property to all but one particular tenant" or "to require plaintiff to lease its property to that tenant." Strauss Br. 27. In fact, Moreno did not, and could not impose those requirements. Indeed, the tenant Moreno preferred was evicted, never to return. Moreno's lack of authority to do those things does not undermine the

discretionary nature of the actions he did take.

Strauss attempts to take advantage of the principle that "[a]n act or omission is discretionary when it is 'unique to a particular public office.'" Albers v. Breen, 346 Ill. App. 3d 799, 808 (4th Dist. 2004) (quoting Snyder, 167 Ill. 2d at 474). He argues that Moreno's actions were "not uniquely related to his[ ] official discretion." Strauss Br. 25; see also id. at 27 (arguing that private meetings and threats were unrelated to "an exercise of discretion unique to the office" of an alderman). But the cases he relies upon undermine, rather than support this argument. Those cases establish that an activity is not unique to the particular public office if it is the sort of activity in which anyone, not just a public official, would typically exercise the same sort of discretion, such as making decisions about where to turn while driving, Currie v. Lao, 148 Ill. 2d 151, 167 (1992), or speaking to a prospective employer of a former employee, Stratman, 291 Ill. App. 3d at 131. Section 2-201 does apply, however, when an official exercises discretion over matters central to his official functions. For example, in Harinek, this court held that a fire marshal's decision to place a person next to the door that caused her injury was unique to his public office, since it was the marshal's job to plan and execute fire drills, and he was under no legal mandate to do so in a prescribed manner, 181 Ill. 2d at 343. And in Gavery v. Lake County, 160 Ill. App. 3d 761 (2d Dist. 1987), a personnel director's decision to send a letter about problems with a health care provider previously covered by

health insurance was clearly within the scope of his duties and thus also within the scope of section 2-201, id. at 765. Moreover, allegations that Moreno exercised this discretion in a malicious or abusive *manner* do not undermine that he was exercising discretion unique to the officer of an alderman.

Nothing about Moreno's conduct resembles the sort of discretionary decision-making that people who are not aldermen would engage in. It is not typical for just anyone who supports a policy to meet with the building owner and attempt to affect changes, or to meet with prospective investors in the community about pending zoning proposals. These are things an alderman is uniquely positioned to do.

Ultimately, Strauss's tort claims are no different than the sort of claims based on malicious motives and abuses of discretion that this court has rejected as a basis for avoiding any of the absolute immunities in the Tort Immunity Act. In Village of Bloomingdale v. CDG Enterprises, 196 Ill. 2d 484 (2001), this court addressed similar allegations of misconduct of elected officials in a zoning case, and declined to recognize an exception to an immunity based on "corrupt or malicious motives" where the Tort Immunity Act provided none. Id. at 497. CDG claimed that, when it had petitioned Bloomingdale to annex and rezone certain property it was under contract to purchase, the mayor and other officials initially assured CDG the petition would be approved. Id. at 486-87. Then Bloomingdale officials secretly

formed a plan to develop a golf course next to the property; changed those plans so some of the holes would be on CDG's property; and created opposition to CDG's plan. Id. at 487. Village officials allegedly pressured planning commission members to vote against the plan, and it was voted down. Id. One of the parcels at issue was bought by individuals "closely aligned with certain of the Village's officials." Id. CDG claimed that, by this conduct, the Village had "deliberately frustrated CDG's business expectancy" and breached an obligation under a quasi-contract in order to develop the golf course and "help cronies." Id. at 488. This court applied the immunity under section 2-104 of the Act for injuries caused by the refusal to issue any permit or approval. Id. The court declined to apply a common law exception for "corrupt or malicious motives," explaining that no such exception was supported in the plain language of section 2-104. Id. at 493-94.

Just 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 abuses of discretion. Since section 2-201, like the immunity at issue in CDG Enterprises, contains no exceptions for conduct involving corrupt or malicious motives, Strauss cannot avoid that immunity here. Indeed, if anything, the case for rejecting Strauss's claim is even stronger than in CDG Enterprises because, as we have explained, section 2-201 expressly provides that the

immunity applies even when an official's discretion has been "abused." 745 ILCS 10/2-201.

CONCLUSION

For the foregoing reasons, the judgment of the circuit court should be affirmed.

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 containing the Rule 341(d) cover, the Rule 341(h)(1) table of contents and statement of points and authorities, the Rule 341(c) certificate of compliance, and the certificate of service, is 13,681 words.

/s/ Suzanne M. Loose
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CERTIFICATE OF SERVICE

The undersigned certifies under penalty of law as provided in 735 ILCS 5/1-109 that the statements in this instrument are true and correct and that the foregoing Brief of Defendant-Appellee was served on the following counsel of record, at the following email addresses, via File & Serve Illinois on March 24, 2022:

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