No. 128252

In the

Supreme Court of Illinois

MB FINANCIAL BANK, N.A., as Successor Trustee to a certain trust dated May 9, 1980, known as Trust No. 1252; MB FINANCIAL BANK, N.A., as Successor Trustee to a certain trust dated July 1, 1982, known as Trust No. 1335; NEW WEST, an Illinois Limited Partnership, beneficial owner of Trust No. 1252; NEW BLUFF, an Illinois Limited Partnership, beneficial owner of Trust No. 1335; and BURNHAM MANAGEMENT COMPANY, an Illinois Corporation, as tax assessee,

Plaintiffs-Appellees,

v.

TIM BROPHY, Treasurer and ex-officio County Collector for Will County, Illinois,

Defendant-Appellant,

FOREST PRESERVE DISTRICT OF WILL COUNTY; JOLIET PUBLIC SCHOOL DIST. 86; JOLIET HIGH SCHOOL DIST. 204; JOLIET JUNIOR COLLEGE DIST. 525; CITY OF JOLIET; and JOLIET PARK DISTRICT,

Intervenors-Defendants-Appellants.

On Leave to Appeal from the Illinois Appellate Court,
Third Judicial District, Case No. 3-20-0192.
There Heard On Appeal from the Circuit Court of the Twelfth Judicial Circuit,
Will County, Illinois, Case No. 18 MR 2346.
The Honorable **John C. Anderson**, Judge Presiding.

BRIEF OF PLAINTIFFS-APPELLEES. CROSS-RELIEF REQUESTED

THEODORE R. TETZLAFF
(ttetzlaff@tetzlafflegal.com)
JOSHUA A. REDMAN
(jredman@tetzlafflegal.com)
TETZLAFF LAW OFFICES, LLC
227 West Monroe Street, Suite 3650
Chicago, Illinois 60606
(312) 574-1000

Counsel for Appellees MB Financial Bank, N.A., New West, New Bluff and *Burnham Management Company*

ORAL ARGUMENT REQUESTED

COUNSEL PRESS · (866) 703-9373 PRINTED ON RECYCLED PAPER

TABLE OF CONTENTS
AND STATEMENT OF POINTS AND AUTHORITIES

NATURE OF THE CASE

Plaintiffs filed their Complaint for Refund of Property Taxes, Declaratory Judgment and *Mandamus* on August 24, 2018 seeking a refund of $6,350,472.61 in property taxes that were paid by Plaintiffs while they were contesting condemnation of their properties. *See* C8-C31.[1] $6,350,472.61 in taxes was levied and paid by Plaintiffs between October 7, 2005 and August 25, 2017 for two parcels of land located in the City of Joliet, known as Evergreen Terrace I and Evergreen Terrace II (hereinafter "Evergreen Terrace" or the "Properties"). Evergreen Terrace was the subject of a contested condemnation action initiated by Joliet on October 7, 2005 and finally concluded on August 25, 2017. As a matter of law, at the conclusion of the condemnation case, Joliet became the owner of Evergreen Terrace retroactive to October 7, 2005, the date Joliet's condemnation petition was filed. Plaintiffs brought this action to recover the $6,350,472.61 in property taxes they paid while the condemnation was ongoing. The Defendant and Intervenors filed multiple 2-619 motions to dismiss Plaintiffs' Complaint[2] which were granted On December 4, 2019 (A1-A5[3]) and subsequently affirmed when Judge John C. Anderson denied Plaintiffs' Motion for Reconsideration on April 23, 2020. *See* AA42[4]. On appeal, the Appellate Court of Illinois, Third Judicial District,

[1] Citations to the Common Law Record are identified with the prefix, "C".
[2] The Will County State's Attorney filed a 2-619 motion on behalf of Defendant (C35-C44); the City of Joliet filed a 2-619.1 motion (C189-C200); Joliet Public School District 86 filed a 2-619.1 motion (C156-C163); Joliet Township High School District 204 and Joliet Junior College District 525 filed a 2-619 motion (C150-C154); Joliet Park District filed a 2-619 motion (C509-C520); and Forest Preserve of Will County filed a 2-619.1 motion (C170-C181).
[3] Citations to the Appendix filed by Defendant on June 29, 2022 are identified with the prefix, "A".
[4] Citations to the Appendix filed by Intervenors on June 28, 2022 are identified with the prefix, "AA".

unanimously reversed the dismissal of Plaintiffs' claim for refund under 35 ILCS 200/20-175, holding that "the plaintiffs were not responsible for the tax payments related to the retroactively owned property. We find it is cognizable for the plaintiffs to bring their claim under section 20-175(a)." *See* A14, ¶ 24; A16, ¶ 31. However, the Appellate Court affirmed the Circuit Court's dismissal of Plaintiffs' claims for declaratory relief and *mandamus*. *See* A15, ¶ 27. All of the questions at issue are raised on the pleadings, specifically, whether Plaintiffs are entitled to a refund of the property taxes they paid during a time that they retroactively ceased to be owners.

ISSUES PRESENTED FOR REVIEW ON DEFENDANTS' APPEAL

Whether Plaintiffs' tax payments after October 7, 2005, the date the condemnation petition was filed, retroactively became overpayments subject to refund under 35 ILCS 200/20-175(a) at the conclusion of the condemnation on August 25, 2017, when Plaintiffs retroactively became non-owners as of October 7, 2005.

ISSUES PRESENTED FOR REVIEW ON PLAINTIFFS' REQUEST FOR CROSS-RELIEF

Whether the taxes assessed and applied against Plaintiffs after the condemnation petition was filed on October 7, 2005 retroactively became "unauthorized by law" because the taxes became assessed against Plaintiffs who were retroactively no longer the owners of the Properties.

JURISDICTION

Jurisdiction over this appeal and request for cross-relief is pursuant to Illinois Supreme Court Rule 315. On December 23, 2021 the Appellate Court of Illinois, Third Judicial District, issued its decision. Defendant and Intervenors filed a petition for rehearing on January 13, 2022, which was denied on January 28, 2022 when the Appellate Court of Illinois, Third Judicial District, issued its Modified Order Upon Denial of Rehearing (the "Order"). *See* A6-A17 of Defendant's Appendix. Defendant and Intervenors' Petition for Leave to Appeal was filed on March 3, 2022, within 35 days of the Appellate Court's issuance of its Order. This Court Allowed Defendant and Intervenors' Petition for Leave to Appeal on May 25, 2022. Defendant filed a Notice of Election to file an Additional Brief on June 6, 2022. Intervenors moved to file their separate Notice of Election on June 8, 2022. Intervenors' motion was granted on June 21, 2022 and Intervenors filed their Notice of Election on that same date. Intervenors filed their Additional Brief on June 28, 2022. Defendant filed his Additional Brief on June 29, 2022. Plaintiffs filed their Notice of Election to file an Additional Brief on July 5, 2022. Plaintiffs filed a Motion for extension of time to file their Additional Brief on July 26, 2022. On July 27, 2022 the Court allowed Plaintiffs' Motion, granting Plaintiffs to August 24, 2022 to file their Additional Brief. Plaintiffs have hereby timely filed a single brief which includes their response to the separate briefs of Defendant and Intervenors and a request for cross-relief.

STATUTE INVOLVED

35 ILCS 200/20-175 (West 2018)

§ 20-175. Refund for erroneous assessments or overpayments.

(a) In counties other than Cook County, if any property is twice assessed for the same year, or assessed before it becomes taxable, and the erroneously assessed taxes have been paid either at sale or otherwise, or have been overpaid by the same claimant or by different claimants, the County Collector, upon being satisfied of the facts in the case, shall refund the taxes to the proper claimant. When the County Collector is unable to determine the proper claimant, the circuit court, on petition of the person paying the taxes, or his or her agent, and being satisfied of the facts in the case, shall direct the county collector to refund the taxes and deduct the amount thereof, pro rata, from the moneys due to taxing bodies which received the taxes erroneously paid, or their legal successors. Pleadings in connection with the petition provided for in this Section shall conform to that prescribed in the Civil Practice Law. Appeals may be taken from the judgment of the circuit court, either by the county collector or by the petitioner, as in other civil cases. A claim for refund shall not be allowed unless a petition is filed within 5 years from the date the right to a refund arose. If a certificate of error results in the allowance of a homestead exemption not previously allowed, the county collector shall pay the taxpayer interest on the amount of taxes paid that are attributable to the amount of the additional allowance, at the rate of 6% per year. To cover the cost of interest, the county collector shall proportionately reduce the distribution of taxes collected for each taxing district in which the property is situated.

(a-1) In Cook County, if any property is twice assessed for the same year, or assessed before it becomes taxable, and the erroneously assessed taxes have been paid either at sale or otherwise, or have been overpaid by the same claimant or by different claimants, the Cook County Treasurer, upon being satisfied of the facts in the case, shall refund the taxes to the proper claimant. When the Cook County Treasurer is unable to determine the proper claimant, the circuit court, on petition of the person paying the taxes, or his or her agent, and being satisfied of the facts in the case, shall direct the Cook County Treasurer to refund the taxes plus costs of suit and deduct the amount thereof, pro rata, from the moneys due to taxing bodies which received the taxes erroneously paid, or their legal successors. Pleadings in connection with the petition provided for in this Section shall conform to that prescribed in the Civil Practice Law. Appeals may be taken from the judgment of the circuit court, either by the Cook County Treasurer or by the petitioner, as in other civil cases. A claim for refund shall not be allowed unless a petition is filed within 20 years from the date the right to a refund arose. The total amount of taxes and interest refunded for claims under this subsection for which the right to a refund arose prior to January 1, 2009 shall not exceed $5,000,000 per year. If the payment of a claim for a refund would cause the aggregate total of taxes and interest for all claims to exceed $5,000,000 in any year, the refund shall be paid in the next succeeding year. If a certificate of error results in the allowance of a homestead exemption not previously allowed, the Cook County Treasurer shall pay the taxpayer interest on the amount of

taxes paid that are attributable to the amount of the additional allowance, at the rate of 6% per year. To cover the cost of interest, the Cook County Treasurer shall proportionately reduce the distribution of taxes collected for each taxing district in which the property is situated.

(b) Notwithstanding any other provision of law, in Cook County a claim for refund under this Section is also allowed if the application therefor is filed between September 1, 2011 and September 1, 2012 and the right to a refund arose more than 5 years prior to the date the application is filed but not earlier than January 1, 2000. The Cook County Treasurer, upon being satisfied of the facts in the case, shall refund the taxes to the proper claimant and shall proportionately reduce the distribution of taxes collected for each taxing district in which the property is situated. Refunds under this subsection shall be paid in the order in which the claims are received. The Cook County Treasurer shall not accept a claim for refund under this subsection before September 1, 2011. For the purposes of this subsection, the Cook County Treasurer shall accept a claim for refund by mail or in person. In no event shall a refund be paid under this subsection if the issuance of that refund would cause the aggregate total of taxes and interest refunded for all claims under this subsection to exceed $350,000. The Cook County Treasurer shall notify the public of the provisions of this subsection on the Treasurer's website. A home rule unit may not regulate claims for refunds in a manner that is inconsistent with this Act. This Section is a limitation of home rule powers under subsection (i) of Section 6 of Article VII of the Illinois Constitution.

STATEMENT OF FACTS

This appeal concerns the construction and application of Illinois law and statutes. On October 7, 2005, the City of Joliet ("Joliet") filed a condemnation petition against two multifamily housing projects, Evergreen Terrace I and Evergreen Terrace II (collectively "Evergreen Terrace" or the "Properties") owned by Plaintiffs. C10-C11, ¶¶ 2, 3, 9. Plaintiffs vigorously contested and opposed the condemnation in every forum. C11, ¶¶ 9-13. On August 25, 2017, after trial and multiple appeals, Joliet acquired fee-simple title to the Properties by order of the District Court for the Northern District of Illinois. C11, ¶ 13. Pursuant to the entry of that order Joliet became the legal owner of the Properties retroactive to the date of filing of the eminent domain action which was October 7, 2005. *See* C11, ¶¶ 13-14; C37, ¶ 10. Retroactive to October 7, 2005, Joliet, and not the Plaintiffs, was the owner of the Properties. *See id*. During the pendency of the condemnation, between October 7, 2005 and August 25, 2017, Plaintiffs paid $6,350,472.61 in property taxes; $4,595,740.70 for Evergreen Terrace I and $1,754,731.91 for Evergreen Terrace II. C12, ¶ 20. During that time, while the condemnation was ongoing, Plaintiffs — as owners with every intention to remain owners — could not protest the tax assessments based on lack of ownership, and they had no other basis in law or statute to file a protest of the $6,350,472.61 in property taxes paid. *See* C11, ¶¶ 13-14; C12, ¶ 20; C37, ¶ 10. Plaintiffs were the owners of the Properties while the condemnation was ongoing until they lost the condemnation and were retroactively divested. *See* C11, ¶¶ 13-14; C37, ¶ 10.

As stated by Defendant in his September 14, 2018 motion to dismiss this case, "Pursuant to the entry of that [August 25, 2017 order for immediate vesting of title] the

subject properties were retroactively considered to be the property of the City of Joliet from the date of filing of the eminent domain action." *See* C37, ¶ 10. Whether the $6,350,472.61 in paid property taxes are "overpayments" subject to refund under 35 ILCS 200/20-175(a) or through declaratory relief is a question of law for this Court to decide.

There are no material disputed facts relevant to the legal issues before this Court. While Defendant and Intervenors raise disputed facts outside of the record of this case concerning whether Plaintiffs received "benefits" during the 12 year condemnation, that question is neither material to the legal issues before this Court nor developed in any form in the record below; is categorically rejected by Plaintiffs; and is the subject of pure speculation by Defendant and Intervenors and should be disregarded.

ARGUMENT

I. Introduction.

Defendant Tim Brophy, Treasurer and ex-officio County Collector for Will County, Illinois ("Defendant"), and Intervenors Forest Preserve District of Will County, Joliet Public School District 86, Joliet High School District 204, Joliet Junior College District 525, City of Joliet, and Joliet Park District ("Intervenors"), collectively referred to herein as "Defendants", sidestep and largely ignore the unanimous Appellate Court's deliberate and thorough review of existing law and the Circuit Court's cursory conclusions. Instead, Defendants expressly plea that the well settled Illinois law that governs this case be ignored, overruled, or declared unconstitutional. Defendants do so by complaining that, in this particular condemnation case, Plaintiffs obtained "benefits" during the condemnation—benefits which presumably outweigh the detriment to ownership from any condemnation and its consequences for sale, improvements, as well as retention of tenants, vendors, contractors and employees—and Defendants do so without reference to the implications of their position on every other condemnation. This Court has long recognized the negative impact of condemnation on ownership, that "[t]he mere filing of a petition to condemn effectively encumbers the land, imposing a burden upon it, impeding its transfer, and to that extent destroying the fee-simple estate of the owner." *Pub. Bldg. Comm'n of Chicago v. Cont'l Illinois Nat. Bank & Tr. Co. of Chicago*, 30 Ill. 2d 115, 122 (1963).

The question of what "benefits" Plaintiffs received during the 12 years the Properties were being condemned has no bearing on the settled Illinois law that Plaintiffs were retroactively divested of ownership of the Properties; paid $6,350,472.61 in taxes

on property that they retroactively did not own; and are entitled to a refund of those overpayments under 35 ILCS 200/20-175. Any "benefits" Plaintiffs allegedly received, albeit irrelevant, are entirely absent from the record, never substantiated below, and not at issue before this Court. This case is about well settled Illinois law that a successful condemnor becomes the owner of the condemned property retroactive to the date the condemnation petition was filed, and the tax responsibility for the condemnee ceases on the date the condemnation petition was filed.

Here, as a matter of law, Plaintiffs were retroactively not the owners during the 12 years the condemnation was ongoing, during which $6,350,472.61 in taxes were assessed against Plaintiffs. "It is rather apparent that if a suit at law were brought against one for the payment of taxes on real estate, and his answer should disclose he was not the owner of the property at the time the tax was imposed, it would be a complete bar to judgment." *City of Chicago v. McCausland*, 379 Ill. 602, 607 (1942). Because the taxes were paid by Plaintiffs, who were retroactively not the owners of the Properties, 35 ILCS 200/20-175 permits Plaintiffs to receive a refund of those overpayments. *See* 35 ILCS 200/20-175(a). As this Court stated in construing 35 ILCS 200/20-175, "According to the [United States Supreme] Court, the commonsense interpretation of 'overpayment' is that 'a tax is overpaid when a taxpayer pays more than is owed, for whatever reason or no reason at all.'" *Alvarez v. Pappas*, 229 Ill. 2d 217, 225 (2008) (quoting *U.S. v. Dalm*, 494 U.S. 596, 609 n. 6 (1990)). "Webster's dictionary defines 'overpayment' as: 'payment in excess of what is due.'" *Alvarez*, 229 Ill. 2d at 225 (citing Webster's Third New International Dictionary 1609 (1986)). As a matter of law, all property taxes paid by Plaintiffs while the condemnation was ongoing were in excess of what was due by Plaintiffs.

The Appellate Court held that "after the August 2017 judgment Joliet obtained title to the properties retroactive to October 7, 2005, under Illinois law. *Chicago Park Dist. v. Downey Coal Co.,* 1 Ill. 2d 54, 57 (1953); *Forest Preserve District of Du Page County v. West Suburban Bank*, 161 Ill. 2d 448, 455 (1994). Therefore, as of October 7, 2005, Joliet was the owner of the property, was responsible for the taxes, and the plaintiffs may seek reimbursement of such paid taxes." *See* A12, ¶ 18. Plaintiffs respectfully request that this Court affirm the Appellate Court's January 28, 2022 Order concerning Plaintiffs' request for a refund of taxes under 35 ILCS 200/20-175.

II. Standard of Review.

The Circuit Court dismissed Plaintiffs' Complaint based on a 2-619 motion to dismiss by an order which interpreted Illinois statutes to hold that Plaintiffs did not have standing. The Appellate Court reversed and remanded the Circuit Court's dismissal as to Count I of Plaintiffs' Complaint and affirmed the Circuit Court's dismissal as to Counts II and III of Plaintiffs' Complaint. "Our review of a section 2–619 dismissal is *de novo*." *Van Meter v. Darien Park Dist.*, 207 Ill. 2d 359, 368 (2003). "The interpretation of a statute is a question of law that is subject to *de novo* review." *Alvarez v. Pappas*, 229 Ill. 2d 217, 220 (2008). The dismissal of a complaint on the ground of lack of standing is reviewed *de novo*. *Glisson v. City of Marion*, 188 Ill. 2d 211, 221 (1999). "A section 2–619 motion to dismiss presents a question of law. So too does the issue of a plaintiff's standing. Our review is therefore *de novo*." *Wexler v. Wirtz Corp.*, 211 Ill. 2d 18, 23 (2004). All of the issues presented for review, including the cross-relief requested, are reviewed *de novo*.

III. The Appellate Court correctly found that the taxes paid by Plaintiffs on Properties they retroactively did not own were overpayments subject to refund under 35 ILCS 200/20-175.

Defendants argue that Plaintiffs' tax payments were not overpayments under 35 ILCS 200/20-175 and that the only dispute is who was responsible for the property taxes on the Properties. *See* Defendant's Brief, p. 11. To the contrary, it is the fact that Plaintiffs were retroactively not the owners of the Properties, and therefore not responsible for the property taxes, that renders all of Plaintiffs' property tax payments during the condemnation as overpayments. Plaintiffs, as non-owners, owed nothing, so all of the property taxes Plaintiffs paid were overpayments in excess of what was owed.

A. Only the owner of a property is responsible for the taxes on that property.

It is a fundamental principle of law that only the owner of a property is responsible for the taxes on that property. "It is well settled that, in the absence of an agreement on the part of a lessee, it is the duty of the *owner* of land to pay all taxes and special assessments…" *601 W. 81st St. Corp. v. City of Chicago*, 129 Ill. App. 3d 410, 415 (1st Dist. 1984) (emphasis added). And by statute, "The *owner* of property on January 1 in any year shall be liable for the taxes of that year…" 35 ILCS 200/9-175 (emphasis added). "A copy of the bill shall be mailed by the collector *** to the *owner* of the property taxed or to the person in whose name the property is taxed." 35 ILCS 200/20-5(a) (emphasis added); *see also Alvarez v. Pappas*, 229 Ill. 2d 217, 227 (2008) ("The Property Tax Code mandates that defendant, as county collector, mail tax bills to property owners.") (citing 35 ILCS 200/20-5). Only owners, barring some other contractual agreement, are responsible for taxes. The taxing authority is not permitted to tax an entity that does not own the property being taxed.

B. A successful condemnor takes ownership of property retroactive to the date the condemnation petition was filed.

The Appellate Court determined that the City of Joliet—not Plaintiffs—was responsible for the property taxes on the Properties from the date the condemnation petition was filed (October 7, 2005) because on August 25, 2017 Joliet became the owner of the Properties retroactive to October 7, 2005. *See* A12-A13, ¶¶ 18-22. The Appellate Court stated, "Therefore, as of October 7, 2005, Joliet was the owner of the property, was responsible for the taxes, and the plaintiffs may seek reimbursement of such paid taxes." *See* A12, ¶ 18. Defendant acknowledged and admitted this very principle in his September 14, 2018 motion to dismiss: "Pursuant to the entry of that [August 25, 2017 order for immediate vesting of title] the subject properties were retroactively considered to be the property of the City of Joliet from the date of filing of the eminent domain action." *See* C37, ¶ 10.

It is the law of the case and the law of Illinois that Joliet, and not Plaintiffs, is the owner of the Properties retroactive to October 7, 2005. *See City of Chicago v. McCausland*, 379 Ill. 602, 605 (1942) ("while the right to title may vest on the date the money is paid, the title acquired relates back to the time of the filing of such report."); *Chicago Park Dist. v. Downey Coal Co.*, 1 Ill. 2d 54, 57 (1953) ("title acquired by the condemnor upon payment of the award in condemnation relates back to the date on which the petition…is filed."); *Bd. of Jr. Coll., Dist. 504 v. Carey*, 43 Ill. 2d 82, 85 (1969) ("though the Board's right to title vested when the award was deposited, the Board's title is deemed to have been acquired on the date of the filing of the petition."); *Forest Pres. Dist. of Du Page County v. W. Suburban Bank*, 161 Ill. 2d 448, 455 (1994), *as modified*

on denial of reh'g (Oct. 3, 1994) ("title acquired upon payment of just compensation relates back to the time of filing the complaint.").

Defendants do not dispute that *McCausland* and its progeny are the law. *See* Intervenors' Brief, p. 13. Likewise, Defendants do not dispute that *McCausland* and its progeny, as Defendants put it, "suggest that the owner should not be liable for such taxes" that are levied after the condemnation petition is filed. *See* Intervenors' Brief, p. 13. Instead of arguing that the Appellate Court misinterpreted or misapplied *McCausland* and its progeny, Defendants expressly ask that *McCausland* and its progeny, good law since 1942, be overruled. *See* Intervenors' Brief, p. 13. In so doing, Defendants rely on two cases concerning the separate issue of condemnation valuation, *Kirby Forest Industries, Inc. v. U.S.*, 467 U.S. 1 (1984) and *Forest Preserve Dist. of Du Page Cnty. v. First Nat'l Bank of Franklin Park*, 2011 IL 110759. However, neither case addresses the tax liability of a condemnee for taxes assessed between the date the condemnation petition is filed and the date the property is transferred. *McCausland* and the cases that followed specifically identify the date the condemnation petition is filed as the date when a condemnee's tax liability comes to an end; an issue completely distinct from the issue of valuation decided in *Kirby* and *Forest Preserve*. *See Forest Preserve Dist. of Du Page Cnty.*, 2011 IL 110759 at ¶ 45. *Kirby* and *Forest Preserve* address the issue of when a condemned property should be valued, which is not an issue in this case. *See Kirby Forest Industries, Inc.*, 467 U.S. at 16; *see also Forest Preserve Dist. of Du Page Cnty.*, 2011 IL 110759 at ¶ 49.

Defendants ask this Court to overrule *McCausland* based on their interpretation of *Forest Preserve*, but this Court in *Forest Preserve* expressly did not overrule the *McCausland* line of cases:

> The appellate court here correctly noted that *West Suburban's* discussion of cases finding a taking dating back to the filing of the complaint concerned whether landowners were liable for property taxes assessed after the condemnation complaints had been filed. *A party is liable for taxes on the property until compensation is paid and the landowner relinquishes title, but he may be reimbursed by the county for the taxes paid dating back to the filing of the complaint*. *** We agree with the appellate court that the discussion in *West Suburban* of cases like *McCausland* does not inform our decision here regarding the time of a taking for purposes of the holding in *Kirby*.

Forest Preserve Dist. of Du Page Cnty., 2011 IL 110759 at ¶ 45 (emphasis added); *see also Forest Preserve Dist. of Du Page Cnty. v. First Nat. Bank of Franklin Park*, 401 Ill. App. 3d 966, 989-90 (2010), *aff'd,* 2011 IL 110759. There is no ambiguity from this Court; *Kirby* and *Forest Preserve* dealt with determining the date of valuation, entirely distinct from the question of tax liability.

Defendants, at length, seek to diminish the Appellate Court's citation to this Court's statement that "A party is liable for taxes on the property until compensation is paid and the landowner relinquishes title, but he may be reimbursed by the county for the taxes paid dating back to the filing of the complaint." *See* A13, ¶ 19 (quoting *Forest Preserve Dist. of Du Page Cnty.*, 2011 IL 110759, ¶ 45). Defendants suggest this Court's statement is merely *obiter dictum* that is not binding as authority or precedent. *See* Intervenors' Brief, pp. 14-16. Whether this Court's statements in *Forest Preserve Dist. of Du Page County* concerning tax liability are *dictum*, *obiter dictum*, or binding precedent, this Court analyzed *Kirby Forest Industries, Inc. v. U.S.*, 467 U.S. 1 (1984) as well as the *McCausland* line of cases and expressly concluded "that the discussion in *West*

Suburban of cases like *McCausland* does not inform our decision here regarding the time of a taking for purposes of the holding in *Kirby.*" *Forest Preserve Dist. of Du Page Cnty.*, 2011 IL 110759 at ¶ 45. *Kirby* and *McCausland* concern entirely different issues and in no way does *Kirby's* analysis of the date of taking for purposes of valuation conflict with the relation back doctrine for purposes of tax responsibility. The Appellate Court specifically addressed that issue:

> [I]n [*Forest Preserve Dist. of Du Page Cnty.*, 2011 IL 110759] the court solely considered which date should be used to value the property for just compensation, and specifically stated that this was a question separate from the question of whether landowners were liable for property taxes assessed after the condemnation was filed. *Id*. ¶ 45. In fact, the supreme court specifically stated:
>
> > "A party is liable for taxes on the property until compensation is paid and the landowner relinquishes title, *but he may be reimbursed by the county for the taxes paid dating back to the filing of the complaint*. Yet, the condemning authority could abandon the taking at any time before acquiring title, leaving the landowner liable for the taxes without any hope of reimbursement." *Id*. ¶ 45. (Emphasis added.)
>
> This supports our holding that a condemnee who pays the taxes on the property during condemnation proceedings is eligible for reimbursement.

See A13, ¶ 19. The *Kirby Forest Industries, Inc. v. U.S.*, 467 U.S. 1 (1984) line of cases concerning date of taking for purposes of valuation has no bearing on who bears tax responsibility in a condemnation. The *McCausland* line of cases holding that a condemnee's tax responsibility ends on the date the condemnation petition is filed remain good law. *See* A11-A13, ¶¶ 17-19. Defendants ask this Court to make a leap with regards to the impact of *Kirby* that this Court already declined to make in *Forest Preserve Dist. of Du Page Cnty.*, 2011 IL 110759.

C. Condemnees in a concluded condemnation are not responsible for the property taxes assessed after the condemnation petition is filed.

Illinois courts have expressly held that a condemnee's tax liability ends on the date the condemnation petition is filed for the obvious reason that "[t]he mere filing of a petition to condemn effectively encumbers the land, imposing a burden upon it, impeding its transfer, and to that extent destroying the fee-simple estate of the owner." *Pub. Bldg. Comm'n of Chicago v. Cont'l Illinois Nat. Bank & Tr. Co. of Chicago*, 30 Ill. 2d 115, 122 (1963). The clear and defiant heading of Intervenors' second argument is, "There was no overpayment under Section 20-175 because Plaintiffs were liable for the property taxes until the property was taken on August 25, 2017, and remained liable after title vested with the City." *See* Intervenors' Brief, p. 12. But Intervenors are stating what they would like the law to be, not what the law actually is. Intervenors' statement would not reflect the law in Illinois unless, as Defendants have requested, the Court: (1) overrules *City of Chicago v. McCausland*, 379 Ill. 602 (1942); *Chicago Park Dist. v. Downey Coal Co.*, 1 Ill. 2d 54, 59-60 (1953); *Pub. Bldg. Comm'n of Chicago v. Cont'l Illinois Nat. Bank & Tr. Co. of Chicago*, 30 Ill. 2d 115, 118 (1963); *Bd. of Jr. Coll., Dist. 504 v. Carey*, 43 Ill. 2d 82, 86-87 (1969); and *County Treasurer and Ex Officio County Collector of Lake County*, 13 Ill. App. 3d 927, 929-30 (2d Dist. 1973); (2) disregards this Court's finding in *Forest Preserve Dist. of Du Page Cnty. v. First Nat'l Bank of Franklin Park*, 2011 IL 110759, ¶ 45 that the *McCausland* line of cases concerning tax responsibility are unaffected by *Kirby Forest Industries, Inc. v. U.S.*, 467 U.S. 1 (1984) concerning the date of taking for purposes of valuation; and (3) finds that 35 ILCS 200/9-185 and 35 ILCS 200/23-25(b) are unconstitutional for permitting retroactive exemption of the property in the hands of the condemnor. To find, as Defendants wish, that Plaintiffs were responsible for the taxes

assessed throughout the duration of the condemnation, and that Joliet's tax responsibility for the Properties did not begin until August 25, 2017, the Court would have to overturn well settled Illinois case law and statute.

i. Illinois case law identifies the date the condemnation petition is filed as the date that the condemnee's tax responsibility ends.

In *Board. of Junior College, District 504 v. Carey* the Illinois Supreme Court held that to hold a condemnee responsible for taxes that accrued after the condemnation petition was filed would be unconstitutional. *See Bd. of Jr. Coll., Dist. 504 v. Carey*, 43 Ill. 2d 82, 86 (1969). The Court held that requiring the landowner to pay property taxes accrued *after* the date the condemnation petition was filed would "make the condemnee liable for taxes on land when in law he had become divested of title to the land" and would "unconstitutionally effect a taking of private property for public use without just compensation." *See id.*; *see also Downey Coal Co.*, 1 Ill. 2d at 59 ("To permit taxes of subsequent years to be charged as a lien against just compensation for land, title to which relates back to a time before their assessment, would infringe the constitutional provision that property shall not be taken for public use without just compensation.").

Illinois courts have therefore also prohibited outstanding taxes from being deducted from a compensation award. *See Carey*, 43 Ill. 2d at 87 (holding that landowners were "not liable for any portion of the * * * real estate taxes assessed" after the filing date of the condemnation petition); *Pub. Bldg. Comm'n of Chicago v. Cont'l Illinois Nat. Bank & Tr. Co. of Chicago*, 30 Ill. 2d 115, 118 (1963) ("It is also settled that general taxes for the years following the year in which the petition to condemn is filed are not the obligation of the property owner and are not deductible from the award regardless of when it is paid."); *Downey Coal Co.*, 1 Ill. 2d at 59-60 (holding that "taxes levied

subsequent to the commencement of condemnation proceedings…may not be deducted from the [condemnation] award").

> [W]here there is a taking of title under eminent domain, the date of the filing of the condemnation petition is intended to be the termination date for liability for taxes on the land, and, therefore, general real-estate taxes for the year in which the petition is filed are to be prorated as of the date of the filing of the petition.

County Treasurer and Ex Officio County Collector of Lake County, 13 Ill. App. 3d 927, 929-30 (2d Dist. 1973) (citing *Pub. Bldg. Comm'n of Chicago v. Cont'l Illinois Nat. Bank & Trust Co. of Chicago*, 30 Ill. 2d 115 (1963)).

Here, contrary to the aforementioned cases in which the condemnations were short in duration or limited to valuation disputes, Plaintiffs contested not just the valuation of the Properties but the taking itself based on Plaintiffs' allegations that the taking was being performed for racially suspect purposes. *See City of Joliet, Illinois v. New West, L.P.*, 825 F.3d 827, 828 (7th Cir. 2016). Had Plaintiffs succeeded in defeating the condemnation action, or had Joliet withdrawn its condemnation petition, Plaintiffs would have remained, as owners, rightfully responsible for the taxes assessed and paid after October 7, 2005. But Joliet *was* successful in taking the Properties, and *did,* by law, become the owner of the Properties retroactive to October 7, 2005. Therefore, by law, Plaintiffs' tax responsibilities ceased on that date. "[T]he legal rights associated with the property became fixed at that point." *Forest Pres. Dist. of Du Page County. v. First Nat'l Bank of Franklin Park*, 401 Ill. App. 3d 966, 989 (2d Dist. 2010), *aff'd*, 2011 IL 110759. Plaintiffs here, unlike the condemnees in the aforementioned cases, intended to keep the Properties and continued paying the taxes during the condemnation based on that intention.

ii. The *McCausland* line of cases govern the facts of this case.

In addition to requesting that *McCausland* and its progeny be overruled (*see supra*, Section III(B)), Defendants contend that those cases are inapplicable because they involved unpaid taxes during a condemnation while the current action involves taxes that were paid during a condemnation. *See* Intervenors' Brief, pp. 17-18. The Illinois Supreme Court in *City of Chicago v. McCausland*, 379 Ill. 602 (1942) held, "To permit taxes of subsequent years to be charged as a lien against just compensation for land, title to which relates back to a time before their assessment, would infringe the constitutional provision that property shall not be taken for public use without just compensation." *Id.* at 607. Illinois Courts have consistently held that a condemnee's tax liability ends on the date the condemnation petition is filed. *See Bd. of Jr. Coll., Dist. 504 v. Carey*, 43 Ill. 2d 82, 86-87 (1969); *Pub. Bldg. Comm'n of Chicago v. Cont'l Illinois Nat. Bank & Tr. Co. of Chicago*, 30 Ill. 2d 115, 118 (1963); *Chicago Park Dist. v. Downey Coal Co.*, 1 Ill. 2d 54, 59-60 (1953); *County Treasurer and Ex Officio County Collector of Lake County*, 13 Ill. App. 3d 927, 929-30 (2d Dist. 1973).

In the aforementioned cases the condemnee did not pay property taxes after the condemnation was initiated; rather, the condemnor and/or county treasurer sought to deduct the unpaid taxes from the award. The Illinois Courts prohibited the unpaid taxes from being deducted, finding that the taxes were the responsibility of the condemnor, not the condemnee. *See Carey*, 43 Ill. 2d at 87 (holding that landowners were "not liable for any portion of the *** real estate taxes assessed" after the filing date of the condemnation petition); *Pub. Bldg. Comm'n of Chicago*, 30 Ill. 2d at 118 ("It is also settled that general taxes for the years following the year in which the petition to condemn is filed are not the

obligation of the property owner and are not deductible from the award regardless of when it is paid."); *Downey Coal Co.*, 1 Ill. 2d at 59-60 (holding that "taxes levied subsequent to the commencement of condemnation proceedings *** may not be deducted from the [condemnation] award").

> [W]here there is a taking of title under eminent domain, the date of the filing of the condemnation petition is intended to be the termination date for liability for taxes on the land, and, therefore, general real-estate taxes for the year in which the petition is filed are to be prorated as of the date of the filing of the petition.

County Treasurer and Ex Officio County Collector of Lake County, 13 Ill. App. 3d at 929-30 (citing *Pub. Bldg. Comm'n of Chicago v. Cont'l Illinois Nat. Bank & Trust Co. of Chicago*, 30 Ill. 2d 115 (1963)). Those cases expressly affirm settled Illinois law that liability for taxes in condemnation is linked directly to ownership. When ownership ends, tax liability ends, and Plaintiffs' ownership retroactively ended on October 7, 2005.

Defendants refer to this precedent—the relation back doctrine wherein the condemnor is retroactively the owner of the property as of the date the condemnation petition is filed—as a "legal fiction". *See* Intervenors' Brief, p. 28. Whether "legal fiction" or not, giving retroactive effect to ownership in condemnation cases is settled Illinois law. *See Forest Pres. Dist. of Du Page County v. W. Suburban Bank*, 161 Ill. 2d 448, 455 (1994), *as modified on denial of reh'g* (Oct. 3, 1994) ("title acquired upon payment of just compensation relates back to the time of filing the complaint."). This retroactivity is no more fictional and no less real than any court order entered *nunc pro tunc*, or entered retroactively to be "effective as of" a date prior to the order. Defendants further ignore that the relation back doctrine was established by this Court to rectify the unconstitutional taking of property. *See supra*, section III(C)(i).

When Joliet succeeded in its condemnation and acquired fee-simple title to the Properties on August 25, 2017, Joliet became the legal owner of the Properties retroactive to October 7, 2005, the date of filing of the eminent domain action. *See* C11, ¶¶ 13-14; C37, ¶ 10. By operation of law, Joliet retroactively became the owner of the Properties, and Plaintiffs were retroactively divested of ownership as of October 7, 2005. Under settled Illinois law, Plaintiffs therefore retroactively did not own the Properties when the taxes were assessed and paid. As a result, Plaintiffs did not owe any property taxes on the Properties during the duration of the condemnation and every payment Plaintiffs made was an overpayment of what they owed.

iii. That a condemnee's tax liability ends retroactive to the date the condemnation petition is filed finds additional support in 35 ILCS 200/23-25(b) and 35 ILCS 200/9-185.

There is further support in Illinois statute for the legal principle that the losing condemnee is not responsible for property taxes as of the date the condemnation petition is filed. Specifically, the Appellate Court cited 35 ILCS 200/9-185 as support.[5] 35 ILCS 200/9-185 expressly permits the condemnor to have retroactive exemption from taxation dating back to the date the condemnation petition was filed. *See* 35 ILCS 200/9-185. It states: "when a fee simple title or lesser interest in property is purchased, granted, taken or otherwise transferred for a use exempt from taxation under this Code, that property shall be exempt from taxes from the date of the right of possession, except that *property*

[5] While not cited by the Appellate Court, 35 ILCS 200/23-25(b) also supports the legal principle that the condemnor—not the condemnee—is responsible for the taxes on the property from the date the condemnation petition is filed. It states: "[n]othing in this Section shall affect the right of a governmental agency to seek a judicial determination as to the exempt status of property *for those years during which eminent domain proceedings were pending before a court*, once a certificate of exemption for the property is obtained by the governmental agency under Section 8-35 or Section 8-40." *See* 35 ILCS 200/23-25(b) (emphasis added).

acquired by condemnation is exempt as of the date the condemnation petition is filed." 35 ILCS 200/9-185 (emphasis added). The statute confirms the petition filing date as the delineating point for deciding tax responsibility. *See id*. The statute's allowance for retroactive exemption for a condemnor would be unnecessary if the condemnee was responsible for the taxes assessed while a condemnation is pending.

Defendants argue that Plaintiffs never sought exemption for the Properties, that the Properties have never been used for an exempt purpose, and that therefore 35 ILCS 200/9-185 does not apply to this case. *See* Intervenors' Brief, p. 36. Defendants miss the point of why the Appellate Court found support for Plaintiffs' position in the statute. The Appellate Court stated:

> We find further support for this decision in section 9-185 of the Code, which states that when a municipality acquires property by condemnation and it is exempt from taxation under the Code, it is exempt as of the date the condemnation petition is filed. 35 ILCS 200/9-185 (West 2018); *Application of County Treasurer and Ex Officio County Collector of Lake County v. Drobnick*, 13 Ill. App. 3d 927, 930 (1973). Therefore, regardless of whether the property in this case was tax exempt when it was condemned by Joliet, the legislature clearly intended the municipality to be liable or exempt from taxes from the date the petition was filed.

See A13, ¶ 20. While 35 ILCS 200/9-185 is not dispositive, the text of the statute declaring that property taken by condemnation is retroactively exempt in the hands of the condemnor dating back to the date the condemnation petition was filed is fully consistent with the established case law of *McCausland* and its progeny. Because Defendants argue that *McCausland* and its progeny should be overruled, they all but call for 35 ILCS 200/9-185 to be held unconstitutional. *See* Intervenors' Brief, p. 36. As stated *supra*, *McCausland* and its progeny are still good law which this Court expressly did not

overrule in *Forest Preserve. See Forest Preserve Dist. of Du Page Cnty.*, 2011 IL 110759, ¶ 45.

iv. There is sound policy for Illinois law that a condemnee's tax liability ends retroactive to the date the condemnation petition is filed.

There is a fundamentally pragmatic reason why a condemnee is not responsible for taxes after a condemnation petition is initiated; the very existence of a condemnation proceeding detrimentally impacts the property. The exigencies of a condemnation proceeding, along with common sense, dictate that a condemned property is impaired. As explained by the Illinois Supreme Court:

> The time of filing a petition to condemn is wholly without the control of the owner who, immediately upon the filing of the petition, no longer has the freedom to deal with the property as an owner in fee simple. He has no assurance that the case will proceed to trial and judgment in the year in which the petition is filed or within several years thereafter; he has no assurance that, when an award by a jury is made and judgment entered thereon, the condemning agency will pay the award within a reasonable time. In other words, between the time of filing the petition and the time that the award is actually paid by the condemnor, the owner of real estate cannot enter into long term leases, make improvements, or even maintain the property with hope of reimbursement, and certainly cannot sell it excepting subject to the proceedings then pending.

Pub. Bldg. Comm'n of Chicago v. Cont'l Illinois Nat. Bank & Tr. Co. of Chicago, 30 Ill. 2d 115, 121 (1963) (internal citations omitted); *see also Lake County Forest Pres. Dist. v. Vernon Hills Dev. Corp.*, 92 Ill. 2d 72, 78 (1982) ("A condemnee obviously sustains a very real and substantial interference with his property rights whenever a petition to condemn is filed."). Here, the condemnation encumbered the Properties for 12 years.

D. Plaintiffs' tax payments during the condemnation retroactively became "overpayments" at the end of the condemnation and are subject to refund under 35 ILCS 200/20-175.

"The Code does not treat excess property tax payments as nonpayments or as payments of something other than a tax; rather, such payments are described as 'overpayments' of taxes. The legislature anticipated that there will be situations in which taxpayers may overpay their taxes and it has provided mechanisms to obtain a refund of those taxes." *Alvarez v. Pappas*, 229 Ill. 2d 217, 224 (2008). 35 ILCS 200/20-175(a) provides Plaintiffs with the statutory mechanism to recover the overpaid taxes which the *McCausland* line of cases establish Plaintiffs did not owe. Defendants argue that there were no overpayments because "Plaintiffs paid the correct amount of taxes due and billed". *See* Intervenors' Brief, p. 12. But, to the contrary, because Plaintiffs were retroactively not the owners of the Properties, the correct amount of taxes due from Plaintiffs was *zero*, notwithstanding the amount billed. The entire $6,350,472.61 in property taxes paid by Plaintiffs were overpayments in excess of what a non-owner owes—which is nothing.

The Plaintiffs paid the property taxes while the condemnation action was ongoing because Plaintiffs opposed the condemnation and sought to keep the Properties. Had Plaintiffs been successful in opposing the condemnation, or had the City of Joliet abandoned its condemnation attempt, Plaintiffs would have rightly paid those taxes. But Plaintiffs were not successful in opposing the condemnation, and Joliet did not abandon its condemnation, so as a matter of law, Plaintiffs retroactively lost their ownership of the Properties dating back to the day the condemnation petition was filed.

Defendants contend that "overpayments" in 35 ILCS 200/20-175 is limited to property that has been twice assessed for the same year or assessed before it becomes taxable. *See* Defendant's Brief, p. 13. Defendants further contend that "the plain language of section 20-175 applies to only specific types of 'erroneous assessments' or 'overpayments,' namely, those involving property that has been twice assessed for the same year or assessed before it becomes taxable." *See* Defendant's Brief, p. 13. That is not what this Court held in *Alvarez v. Pappas*, 229 Ill. 2d 217 (2008). This Court in *Alvarez* specifically found "that the meaning of the language of the statute is unclear and ambiguous" and then looked to the legislative history to resolve the ambiguity and discern the legislature's intent.[6] *See Alvarez v. Pappas*, 229 Ill. 2d 217, 232 (2008). This Court held:

> the purpose of the [1975] amendment was to remedy an omission in the property tax laws and give taxpayers the right to claim refunds of their overpaid taxes. To give effect to the language of the statute, as written, would defeat the remedial purpose of the amendment. Accordingly, we conclude that, to give effect to the legislature's intent, we must construe section 20-175 as permitting refunds of overpaid taxes, regardless of whether any erroneous assessment of property is involved.

Id. at 233-34.

In interpreting the meaning of "overpayments" in 35 ILCS 200/20-175 this Court looked to the United States Supreme Court case of *U.S. v. Dalm*, 494 U.S. 596 (1990) and Webster's dictionary. In ruling in favor of Plaintiffs, the Appellate Court cited those sources from *Alvarez*:

> To determine the meaning of an overpayment under the statute, in *Alvarez* the supreme court stated that "Webster's dictionary defines 'overpayment'

[6] The applicable portion of 35 ILCS 200/20-175(a) is the same today as it was when interpreted by the Court in *Alvarez*. *Compare* 35 ILCS 200/20-175(a) (West 2018) *with Alvarez*, 229 Ill. 2d at 221.

> as: 'payment in excess of what is due.'" *Id*. at 225. The supreme court also quoted the U.S. Supreme Court case of *U.S. v. Dalm*, 494 U.S. 596, 609 n.6 (1990), stating "the commonsense interpretation of 'overpayment' is that 'a tax is overpaid when a taxpayer pays more than is owed, for whatever reason or no reason at all.'" *Alvarez*, 229 Ill. 2d at 225. As stated above, the plaintiffs were not responsible for the tax payments related to the retroactively owned property. We find that it is cognizable for the plaintiffs to bring their claim under section 20-175(a).

See A14, ¶ 24.

To interpret 35 ILCS 200/20-175 as Defendants request would do precisely what this Court in *Alvarez* stated the legislature had sought to avoid. It would bar Plaintiffs from being able to receive a refund of taxes that, by law, they were not responsible for and did not owe due to their retroactive lack of ownership. "[T]he General Assembly intended to broaden the scope of the statute to include overpayments of property taxes without regard to whether those overpayments were pursuant to erroneous assessments." *Alvarez v. Pappas*, 229 Ill. 2d 217, 233 (2008). To adopt Defendants' reading of the statute "would deprive property owners whose overpayment of their taxes does not involve an erroneous assessment of the ability to obtain a refund." *See id.*

Since this Court's ruling in *Alvarez*, the legislature has amended 35 ILCS 200/20-175 three times. *See* P.A. 97-521, § 5, eff. Aug. 23, 2011; P.A. 98-1026, § 5, eff. Jan. 1, 2015; and P.A. 100-1104, § 5, eff. Aug. 27, 2018. None of these amendments narrowed, changed or attempted to clarify the definition of "overpaid." It is a well-established principle of statutory construction that, where terms used in a statute have acquired a settled meaning through judicial construction and are retained in subsequent amendments, they are to be understood and interpreted in the same sense attributed to them by the court unless a contrary intention of the legislature is made clear. *See Karbin v. Karbin*, 2012 IL 112815, ¶ 47 (citing *R.D. Masonry, Inc. v. Industrial Comm'n*, 215 Ill.

2d 397, 404 (2005)). "This is because the judicial construction of a statute becomes a part of the law, and it is presumed that the legislature in passing the law knew of the construction of the words in the prior enactment." *R.D. Masonry, Inc.*, 215 Ill. 2d at 404.

Defendants cite *Sorce v. Armstrong*, 399 Ill. App. 3d 1097 (2nd Dist. 2010) and *Fredericksen v. Armstrong*, 2011 IL App (2d) 100459 to argue for a narrow interpretation of *Alvarez*, but the facts of *Sorce* and *Fredericksen* are inapposite to those present here. *Sorce* and *Fredericksen* involved erroneous calculations, not the taxation of a non-owner. *See Sorce*, 299 Ill. App. 3d at 1098-99; *Fredericksen*, 2011 IL App (2d) 100459 at ¶ 36. In *Sorce*, the Appellate Court of Illinois, Second District, stated that *Alvarez* "did not extend the coverage of section 20-175 *** to the payment of taxes where the amount of the taxes was incorrectly calculated." *Sorce*, 299 Ill. App. 3d at 1100-1101. There is no suggestion in this action that the assessments on the Plaintiffs were incorrectly calculated, and Plaintiffs here had no basis to apply for any exemption. In both *Sorce* and *Fredericksen* the calculation and exemption errors were evident at the time the taxes were paid. Objections were available to those plaintiffs but they were not invoked. Here Plaintiffs had no basis to object until August 25, 2017, when Plaintiffs' ownership was retroactively stripped to October 7, 2005.

Defendants speculate: "Presumably, the appellate court reasoned that since the City of Joliet was now the owner in 2005 (due to the date of the filing of the condemnation complaint), that the property was tax exempt and thus any property tax payments made by plaintiff would have been 'overpayments' under Section 20-175." *See* Defendant's Brief, p. 14. The Appellate Court said no such thing. The Appellate Court stated, "regardless of whether the property in this case was exempt when it was

condemned by Joliet, the legislature clearly intended the municipality to be liable or exempt from taxes from the date the petition was filed." *See* A13, ¶ 20. The taxes paid by Plaintiffs were not overpayments because the Properties would retroactively be exempt in the hands of Joliet; they were overpayments because "Plaintiffs were not responsible for the tax payments related to the retroactively owned property." *See* A14, ¶ 24. "[A]s of October 7, 2005, Joliet was the owner of the property, was responsible for the taxes, and the plaintiffs may seek reimbursement of such paid taxes." *See* A12, ¶ 18.

IV. Plaintiffs had no basis to seek the taxes in the condemnation action.

A refund of the taxes—which only became overpaid and ripe for refund when the condemnation was finally completed and the Properties transferred to Joliet on August 25, 2017—was unavailable to the Plaintiffs in the condemnation itself. First, the taxes were paid to the County, not to Joliet, and the County was not a party to the condemnation lawsuit filed by Joliet. The County Collector was never a party, nor would they be a proper party, to the condemnation action. The $6,350,472.61 paid by Plaintiffs were overpayments to the Treasurer and County Collector of Will County—they were not payments to the City of Joliet—the condemnor.

Second, Plaintiffs contested the condemnation and always intended to retain the Properties. The valuation phase, which Defendants contend should have been when Plaintiffs sought the overpaid taxes, occurred prior to the transfer of ownership of the Properties to Joliet on August 25, 2017. Until August 25, 2017—after the valuation phase and appeals were concluded—Plaintiffs remained the owners and had no basis to seek the taxes as overpayments. Any request for the taxes prior to August 25, 2017 would have been hypothetical and speculative in nature. As stated by the Appellate Court, "Courts do

not decide hypotheticals or render advisory opinions." *See* A16, ¶ 30 (citing *Simcox v. Simcox*, 131 Ill. 2d 491, 498 (1989); *Commonwealth Edison Co. v. Illinois Commerce Comm'n*, 2016 IL 118129, ¶ 10.) Plaintiffs did not and could not seek a refund of the overpaid taxes during the valuation phase of the condemnation because they remained owners throughout the condemnation until all appeals became final.

Lastly, Illinois case law precludes taxes from being included in valuation. The $6,350,472.61 paid by Plaintiffs were not funds to be included in the value of the Properties; they were overpaid taxes to be refunded by the Treasurer and County Collector who had assessed and received the tax payments. Real estate taxes are determined by market value, they are not a part of that market value, and as this Court held in *Forest Preserve Dist. of Du Page County*, valuation and tax liability are distinct issues governed by different case law. *See Forest Preserve Dist. of Du Page Cnty.*, 2011 IL 110759, ¶ 45. For all of these reasons it is 35 ILCS 200/20-175, not the condemnation itself, that provides the statutory mechanism for Plaintiffs to obtain a refund of their overpaid property taxes.

Defendants speculate, "if under *McCausland*, deducting the tax lien for unpaid taxes impairs just compensation, then the payment of such taxes likewise impairs just compensation." *See* Intervenors' Brief, p. 33. But the *McCausland* line of cases do not hold that outstanding taxes are part of a condemnee's just compensation, they hold that unpaid taxes cannot be *deducted* from a just compensation award because a condemnee's tax liability ends on the date the condemnation petition is filed. *See City of Chicago v. McCausland*, 379 Ill. 602, 606-07 (1942); *Bd. of Jr. Coll., Dist. 504 v. Carey*, 43 Ill. 2d 82, 86-87 (1969); *Pub. Bldg. Comm'n of Chicago v. Cont'l Illinois Nat. Bank & Tr. Co. of*

Chicago, 30 Ill. 2d 115, 118 (1963); *Chicago Park Dist. v. Downey Coal Co.*, 1 Ill. 2d 54, 59-60 (1953); *County Treasurer and Ex Officio County Collector of Lake County*, 13 Ill. App. 3d 927, 929-30 (2d Dist. 1973). The *McCausland* line of cases do not suggest that previously paid taxes should be included in the calculation of the value of the property for purposes of just compensation. As this Court in *Forest Preserve Dist. of Du Page County* made clear, the time of taking for purposes of valuation is entirely independent of the issue of tax liability. *See Forest Preserve Dist. of Du Page Cnty.*, 2011 IL 110759, ¶ 45.

Defendants further contend that *res judicata* prohibits Plaintiffs from seeking a tax refund under 35 ILCS 200/20-175 because of Defendants' contention that the taxes at issue could have been decided in the condemnation action. *See* Intervenors' Brief, p. 33. In no way have the requirements for *res judicata* been met. "For the doctrine of *res judicata* to apply, the following three requirements must be satisfied: (1) there was a final judgment on the merits rendered by a court of competent jurisdiction, (2) there is an identity of cause of action, and (3) there is an identity of parties or their privies." *Nowak v. St. Rita High Sch.*, 197 Ill. 2d 381, 390 (2001) (citing *River Park, Inc. v. City of Highland Park,* 184 Ill. 2d 290, 302 (1998). There is no identity of parties. The named Defendant in this case, the County Collector, was not a party to the condemnation action. Joliet is only a party to this action because it intervened to protect its purported interest. The taxes at issue were paid by Plaintiffs to Will County, not to Joliet. The condemnation action resulted in a final judgment on the merits as to Joliet's ability to take the Properties, and during the valuation phase there was a final judgment as to the value of the Properties. Whether Plaintiffs were entitled to a refund of overpaid taxes was

not, and could not, be at issue because they did not become overpayments until the conclusion of the condemnation itself as well as the valuation phase. Ownership did not revert back to October 7, 2005 until August 25, 2017—after the condemnation and valuation was completed. There was no legal basis before August 25, 2017—when "the subject properties were retroactively considered to be the property of the City of Joliet from the date of filing of the eminent domain action"—for Plaintiffs to seek a tax refund. *See* C37, ¶ 10. As to valuation, the Court determined the value of the Properties, but that valuation could not and did not include the overpaid taxes. There is no identity of cause of action between the condemnation in which Joliet took the Properties and this action where Plaintiffs seek a refund of overpaid taxes from the County Collector.

"*Res judicata* will not be applied where it would be fundamentally unfair to do so." *Nowak v. St. Rita High Sch.*, 197 Ill. 2d 381, 390 (2001). As stated by the Appellate Court, "At the time the taxes were paid, any objection to the taxes was speculative and hypothetical: the plaintiffs might have lost their ownership of the property, but they might have retained their ownership through prevailing in the litigation or through Joliet abandoning the claim of condemnation." *See* A16, ¶ 30. Plaintiffs had no basis to object to the taxes during the condemnation action, as the taxes only became overpayments subject to refund once Plaintiffs retroactively lost their ownership dating back to the day the condemnation petition was filed at the conclusion of the condemnation action. It would be manifestly unfair to require Plaintiffs to seek a refund of the overpaid taxes during the condemnation when the issue was not yet ripe.

Defendants cite *S.A.S. Co. v. Kucharski*, 53 Ill. 2d 139 (1972) to argue that Plaintiffs were required to seek a refund of their overpaid taxes during the condemnation.

See Intervenors' Brief, p. 34. The ultimate conclusion in *Kucharski*, however, was that the taxes could not be recovered because they were voluntarily paid. *See S.A.S. Co. v. Kucharski*, 53 Ill. 2d 139, 142-43 (1972). This Court in *Alvarez* expressly stated that 35 ILCS 200/20-175 "provides an exception to the voluntary payment doctrine." *Alvarez v. Pappas*, 229 Ill. 2d 217, 221 (2008). *Kucharski* (decided in 1972) also pre-dates the 1975 amendment to 35 ILCS 200/20-175 that added the very "overpayments" language under which Plaintiffs seek relief and which was construed by this Court. *See Alvarez v. Pappas*, 229 Ill. 2d 217, 233-34 (2008) ("the purpose of the [1975] amendment was to remedy an omission in the property tax laws and give taxpayers the right to claim refunds of their overpaid taxes."). Furthermore, the facts in *Kucharski* are inapposite. In *Kucharski* the plaintiff was never even an "owner" during the condemnation, which was concluded before the plaintiff (a tax deed buyer) became owner. *See S.A.S. Co. v. Kucharski*, 53 Ill. 2d 139, 140 (1972).Plaintiffs here, on the other hand, were the owners of the Properties while contesting the condemnation until they were retroactively made non-owners entitled to a refund.

As the Appellate Court in this action noted, 35 ILCS 200/20-175(a) "does not require the filing of an objection or paying under protest in order to seek a refund under that section." *See* A16, ¶ 29. Likewise, there is no requirement in 35 ILCS 200/20-175(a) that a condemnee seek a refund of the taxes paid during the condemnation itself in order to seek a refund under 35 ILCS 200/20-175(a). *See* 35 ILCS 200/20-175(a). Defendants would add obligations into the statute that the legislature did not include.

V. 35 ILCS 200/20-175 is an exception to the voluntary payment doctrine.

Defendants contend that Plaintiffs' tax payments were voluntarily made and therefore Plaintiffs cannot obtain a refund. Whether voluntary or not, it has no bearing on this case. This Court in *Alvarez* expressly stated that 35 ILCS 200/20-175 "provides an exception to the voluntary payment doctrine." *Alvarez v. Pappas*, 229 Ill. 2d 217, 221 (2008). Plaintiffs seek the refund of their $6,350,472.61 in overpaid taxes under 35 ILCS 200/20-175, the very statute that is an exception to the voluntary payment doctrine.

VI. Plaintiffs' claim for a refund under 35 ILCS 200/20-175 does not turn on whether the Properties were tax exempt.

Plaintiffs did not apply for tax exemption and could not have applied for tax exemption. That is not at issue. As the Appellate Court stated:

> We believe that the circuit court misinterpreted the plaintiffs' argument. They are not arguing that they were exempt from paying taxes. Instead, they are arguing that they are entitled to a refund under section 20-175(a) because they overpaid the taxes as they were not the true owners of the property when Joliet became the owners retroactive to 2005. As evidenced by the text of section 20-175(a) stated above, the plaintiffs' lack of seeking an exemption provides no barrier to their standing to argue the application of the overpayment statute.

See A11, ¶ 13. The Appellate Court further stated, "regardless of whether the property in this case was tax exempt when it was condemned by Joliet, the legislature clearly intended the municipality to be liable or exempt from taxes from the date the petition was filed." *See* A13, ¶ 20. While Joliet could itself seek retroactive exemption to the date the condemnation petition was filed under 35 ILCS 200/9-185, there is no suggestion or basis for any statutory exemption to Plaintiffs. *See* 35 ILCS 200/9-185. Significantly, Joliet's statutory right to seek retroactive exemption further supports the conclusion that it is the

condemnor, not the condemnee, who is responsible for taxes on condemned property retroactive to the date the condemnation petition was filed. *See* A7-A8, ¶¶ 18-20.

The very fact that Joliet became the owner of the Properties dating back to October 7, 2005 means that Joliet, not Plaintiffs, became the proper tax assessee as of that date. It is Plaintiffs' payment of taxes on Properties that they retroactively did not own that forms the basis for Plaintiffs' claim for a refund under 35 ILCS 200/20-175, not the exempt or non-exempt status of the Properties themselves.

VII. Defendants' speculative bases for reversing the Appellate Court's Order and overturning well settled Illinois law have no basis in the record of this case; in no way flow from the narrow facts of this case; and fail upon minimal scrutiny.

Defendants raise hypotheticals that have no relationship to the Appellate Court's limited fact-specific Order which is based in well-established legal precedent. Virtually all condemnation actions are disputed as to valuation; few as to taking. Whether contested for one reason or another, and irrespective of the length of the proceeding, retroactive ownership, limits on tax liability and the availability of a refund for overpayments has long been settled law. Defendants speculatively contend that the Appellate Court's ruling will cause manipulations of the property tax system. But Defendants ignore that Joliet, the condemnor, was in complete control of whether to bring the condemnation action and whether to abandon it. If a condemnee who pays property taxes during a condemnation is denied a refund upon losing the property at its conclusion, it would be the condemnor, not the condemnee, who manipulated the property tax system for its own gain.

The Appellate Court's holding that "the plaintiffs were not responsible for the tax payments related to the retroactively owned property" and its finding that "it is

cognizable for the plaintiffs to bring their claim under section 20-175(a)" to recover those overpayments has no bearing on the four speculative hypotheticals raised by Defendants. *See* A13-A14, ¶¶ 22-24.

The first hypothetical raised by Defendants is a financial institution's provision of escrow services for taxpayers. *See* Intervenors' Brief, p. 10. In this hypothetical the financial institution is merely making the tax payment with the taxpayer's money per a contractual relationship. There is no condemnation; there is no retroactive stripping of ownership; there is knowledge on the part of all involved and a contractual relationship as to tax payments. In no way could the Appellate Court's Order be interpreted to consider those tax payments as overpayments subject to refund.

The second hypothetical concerns a tenant paying a landlord's taxes under an informal or mistaken agreement. *See* Intervenors' Brief, p. 11. Once again, there is no condemnation; there is no retroactive stripping of ownership; there is knowledge on the part of all involved as to who owns the property; and a contractual relationship as to the tax payments exists.

The third hypothetical concerns a friend or relative who makes a tax payment as a favor for a financially strapped property owner. *See* Intervenors' Brief, p. 11. Under this hypothetical Defendants assert that the property owner who did not pay the property taxes could somehow obtain a refund of the taxes paid by their friend or relative. Once again, there is no condemnation; there is no retroactive stripping of ownership; and there is knowledge on the part of all involved as to who owns the property.

The last hypothetical concerns an actual criminal conspiracy to defraud. *See* Intervenors' Brief, p. 11. It should go without saying that the Appellate Court's Order

does not suggest that an intentional, criminal conspiracy to defraud could result in a tax refund.

VIII. There is nothing unconstitutional about Plaintiffs being awarded a refund of the taxes they paid during the condemnation action under 35 ILCS 200/20-175.

Defendants attack the constitutionality of the Appellate Court's decision as well as the case law and statutes that support that decision. The *McCausland* line of cases—cases Defendants contend are unconstitutional—were themselves a cure of a constitutional defect. *McCausland* and the cases that followed it were a direct response to the Court's holding that taking taxes from a condemnee after the condemnation petition is filed violates "the constitutional provision that property shall not be taken for public use without just compensation." *See City of Chicago v. McCausland*, 379 Ill. 602, 607 (1942). The constitutional necessity of the relation back doctrine and its implications for tax responsibility was further stated in the cases that followed *McCausland*. *See Bd. of Jr. Coll., Dist. 504 v. Carey*, 43 Ill. 2d 82, 86 (1969) (statute requiring the landowner to pay property taxes accrued *after* the date the condemnation petition was filed would "make the condemnee liable for taxes on land when in law he had become divested of title to the land" and would "unconstitutionally effect a taking of private property for public use without just compensation."); *Downey Coal Co.*, 1 Ill. 2d at 59 ("To permit taxes of subsequent years to be charged as a lien against just compensation for land, title to which relates back to a time before their assessment, would infringe the constitutional provision that property shall not be taken for public use without just compensation."); *Pub. Bldg. Comm'n of Chicago v. Cont'l Illinois Nat. Bank & Tr. Co. of Chicago*, 30 Ill. 2d 115, 118 (1963) ("It is also settled that general taxes for the years following the year in which the

petition to condemn is filed are not the obligation of the property owner and are not deductible from the award regardless of when it is paid."); *County Treasurer and Ex Officio County Collector of Lake County*, 13 Ill. App. 3d 927, 929-30 (2d Dist. 1973) ("the date of the filing of the condemnation petition is intended to be the termination date for liability for taxes on the land").

But Defendants now attack the constitutionality of this case law which itself was created to cure a constitutional defect—that a non-owner could not be taxed! It is within this historical context that Defendants now contend that awarding Plaintiffs a refund of their tax payments made after the condemnation petition was filed violates two provisions of the Illinois Constitution: Article VIII, § 1 and Article IX, § 4. *See* Ill. Const. art. VIII, § 1(a); Ill. Const. art. IX, § 4. Defendant asserts that permitting Plaintiffs to obtain a refund of the property taxes they paid during the condemnation is a violation of the Illinois Constitution's public funds clause. *See* Defendant's Brief, pp. 8-9. While this is the first time that any of the Defendants have made this argument, let alone any argument regarding Article VIII of the Illinois Constitution, Defendant is also wrong on the merits.[7] Article VIII, § 1(a) of the Illinois Constitution states, "Public funds, property or credit shall be used only for public purposes." Ill. Const. art. VIII, § 1(a). Defendant argues that a refund of Plaintiff's property taxes would be an improper use of public funds. However, the funds at issue were paid by Plaintiffs and Plaintiffs are seeking a refund of *their*

[7] Neither Defendant nor the Intervenors made this argument before the Circuit Court or before the Appellate Court. Nothing precluded Defendant or Intervenors from raising this argument in their motions to dismiss before the Circuit Court or in their responses to Plaintiffs' motion for reconsideration before the Circuit Court. Defendant and Intervenors' assertion that a refund to Plaintiffs violates Article VIII, § 1 of the Illinois Constitution cannot now be raised for the first time before this Court. *See Haudrich v. Howmedica, Inc.*, 169 Ill. 2d 525, 536 (1996) ("It is well settled that issues not raised in the trial court are deemed waived and may not be raised for the first time on appeal.").

overpayments. Because Plaintiffs were retroactively not the owners of the Properties, neither Defendant nor the Intervenors were entitled to receive tax payments from Plaintiffs. The condemnor, Joliet, was retroactively the responsible party. By Defendant's argument, no taxes could ever be refunded under 35 ILCS 200/20-175.

Defendant asserts, "By allowing the plaintiffs to use this public property for private purposes without being taxed violates the spirit of that provision of the Illinois Constitution." *See* Defendant's Brief, p. 9. Defendants speculate as to the "spirit" of the Illinois Constitution while established precedent holds that making a condemnee responsible for taxes assessed after the condemnation petition is filed constitutes an unconstitutional taking.

Defendant also argues, again for the first time in this action before this Court, that refunding the taxes paid by Plaintiffs under 35 ILCS 200/20-175 would violate Article IX, § 4 of the Illinois Constitution, because, as stated by Defendant, "the plaintiff would receive a benefit that other similarly situated tax assessed owners did not receive which is the ability to receive the benefit of the public services without paying taxes to support those services." *See* Defendant's Brief, pp. 9-10; *see also* Ill. Const. art. IX, § 4. Notwithstanding that this argument is improperly made for the first time here, Defendants ignore the singular fact that Plaintiffs, as a matter of law, were not owners of the Properties. Owners are never in a similarly situated position as non-owners! Other tax assessed owners of property are not similarly situated as Plaintiffs who were retroactively not owners of the Properties. Furthermore, Plaintiffs did not ask the City of Joliet to condemn the Properties, and Plaintiffs opposed that condemnation for more than a decade. Defendant would have this Court punish Plaintiffs because Plaintiffs dared to

oppose the City of Joliet's condemnation of the Properties and paid the property taxes during that condemnation with the intention of keeping the Properties. Defendant's interpretation would put condemnees in an impossible position: pay property taxes while opposing condemnation and be out those funds if the condemnation succeeds, or refuse to pay the property taxes during the condemnation and risk having the property seized by the taxing authority for lack of payment.

Defendants also disregard the effects of condemnation on Plaintiffs versus other tax assessed owners who did not have their property condemned. Plaintiffs were not in the same situation as other tax assessed owners and did not receive the full benefit of property ownership. "The mere filing of a petition to condemn effectively encumbers the land, imposing a burden upon it, impeding its transfer, and to that extent destroying the fee-simple estate of the owner." *Pub. Bldg. Comm'n of Chicago v. Cont'l Illinois Nat. Bank & Tr. Co. of Chicago*, 30 Ill. 2d 115, 122 (1963); *see also Lake County Forest Pres. Dist. v. Vernon Hills Dev. Corp.*, 92 Ill. 2d 72, 78 (1982) ("A condemnee obviously sustains a very real and substantial interference with his property rights whenever a petition to condemn is filed.").

Defendant would have this Court find that Plaintiffs, whose Properties were encumbered by condemnation for 12 years, were similarly situated to any property owner not subject to condemnation. To the contrary, Plaintiffs were encumbered to an extent unlike that of any other tax-assessed property owner. Plaintiffs' receipt of a refund of the property taxes they paid during the condemnation when they were retroactively not the owners of the Properties is no violation of the Illinois Constitution.

Defendant also argues that a refund to Plaintiffs would "harm the taxing bodies that provided those services to the plaintiffs and its tenants." *See* Defendant's Brief, p. 10. This policy argument would apply to any and all tax refund requests under 35 ILCS 200/20-175, not just Plaintiffs. Any refund of taxes is ultimately going to be a return to the taxpayer of funds that would have been used by the taxing bodies. Defendant's public policy argument undercuts the very legislative purpose of 35 ILCS 200/20-175, to return overpayments to taxpayers. The only differentiating factor between Plaintiffs and other recipients of tax refunds under 35 ILCS 200/20-175 is the amount of the refund due to the extraordinarily long duration of the condemnation action. What would truly be contrary to public policy would be to deny Plaintiffs a refund of property taxes for Properties that, as a matter of law, they did not own and were not responsible for, solely because they made the decision to exercise their right to object to the condemnation of the Properties. As the Appellate Court succinctly stated, "It would be nonsensical to hold that a condemnee who fails to pay taxes during the pendency of the condemnation proceedings is not liable for the taxes but find liable a condemnee who continues to pay the taxes to protect its interest should it win the lawsuit or the municipality abandon the proceedings." *See* A12, ¶ 17.

IX. No administrative remedies were available to Plaintiffs, or required, prior to filing suit.

Throughout this case Defendants have argued that Plaintiffs should have filed a tax objection and protest with each tax payment during the condemnation under 35 ILCS 200/23-5 *et seq*. The Appellate Court disagreed, holding that Plaintiffs had no basis to protest the tax payments while the condemnation was ongoing because Plaintiffs had not

yet been retroactively stripped of ownership of the Properties and therefore had no ripe basis to protest. The Appellate Court held:

> First, we note that section 20-175(a) as set out above (*supra* ¶ 12) does not require the filing of an objection or paying under protest in order to seek a refund under that section. Second, we agree with the plaintiffs that an objection to the taxes was not ripe for adjudication at the time they were paid. Courts do not decide hypotheticals or render advisory opinions. *Simcox v. Simcox*, 131 Ill. 2d 491, 498 (1989); *Commonwealth Edison Co. v. Illinois Commerce Comm'n*, 2016 IL 118129, ¶ 10. The basic rationale of the ripeness doctrine is to prevent the courts from entangling themselves in abstract disagreements through premature adjudication. *Morr-Fitz, Inc. v. Blagojevich*, 231 Ill. 2d 474, 490 (2008). At the time the taxes were paid, any objection to the taxes was speculative and hypothetical: the plaintiffs might have lost their ownership of the property, but they might have retained their ownership through prevailing in the litigation or through Joliet abandoning the claim of condemnation.

See A16, ¶¶ 29-30.

Now, for the first time in this case, Defendant argues that 35 ILCS 200/20-175 itself required Plaintiffs to first submit their claim for refund to the County Collector before filing suit.[8] *See* Defendant's Brief, pp. 16-17. Defendant cannot now raise this issue for the first time before this Court. *See Haudrich v. Howmedica, Inc.*, 169 Ill. 2d 525, 536 (1996). Notwithstanding that Defendant has improperly raised this issue for the first time before this Court, and the argument is therefore waived, Defendant is also wrong on the merits.

Nothing in 35 ILCS 200/20-175(a) requires the petitioner to make a particular request for a refund directly from the County Collector as a prerequisite to filing suit. *See* 35 ILCS 200/20-175(a). The legislature knows how to write an administrative prerequisite into a statute and it did not do so here. In fact, the statute does not require the

[8] Neither Defendant nor Intervenors raised this issue before the Circuit Court, and neither Defendant nor Intervenors raised this issue before the Appellate Court.

claimant to make any request of the County Collector. The statute mandates the County Collector to act, not the claimant. 35 ILCS 200/20-175(a) mandates that the County Collector "shall refund the taxes to the proper claimant" of the overpayments; something that Defendant has failed to do. *Id*. To this day, Defendant continues to refuse to acknowledge Plaintiffs as the proper claimant, and continues to deny that any overpayments were made. Nonetheless, Plaintiffs' Complaint against the Defendant Treasurer and ex-officio County Collector for Will County, Illinois itself functioned as a request for the County Collector to refund the overpaid tax payments. And since August 24, 2018, the date Plaintiffs filed their Complaint, Defendant has continuously rejected that request.

CONCLUSION

Plaintiffs respectfully request that the Court affirm the Order of the Appellate Court as to Count I of Plaintiffs' Complaint holding that a condemnee who pays the taxes on the property during condemnation proceedings is eligible for reimbursement under 35 ILCS 200/20-175 and that Plaintiffs' claim was properly brought within the statute of limitations. Plaintiffs further respectfully request that the Court use its authority under Illinois Supreme Court Rule 366(a)(5) to:

- enter judgment in favor of Plaintiffs on Count I;
- order the Defendant to issue a refund to Plaintiffs in the amount of $6,350,472.61 plus pre-judgment interest accruing from the date of each payment of property taxes; and
- such other and further relief as the Court deems just and proper.

See Ill. S. Ct. R. 366(a)(5) (eff. Feb. 1, 1994).

PLAINTIFFS' REQUEST FOR CROSS-RELIEF

I. Under *Millennium Park Joint Venture, LLC v. Houlihan*, 241 Ill. 2d 281 (2010), Plaintiffs may also receive declaratory relief independent of the relief sought under 35 ILCS 200/20-175 because the taxes levied against Plaintiffs were unauthorized by law.

In dismissing Count II for declaratory judgment and Count III for *mandamus* the Circuit Court stated: "[t]he Court finds Count II fails for essentially the same reasons expressed by defendants in their briefs and as explained relative to Count I. Counts II and III are dismissed on 2-619 grounds." *See* A5. On appeal the Appellate Court affirmed the Circuit Court's dismissal of Plaintiffs' Count II for declaratory relief and Count III for *mandamus*. *See* A15, ¶ 27. While the Appellate Court held that Plaintiffs could seek relief under 35 ILCS 200/20-175, the Appellate Court denied that Plaintiffs could also obtain declaratory relief. Plaintiffs appeal the Appellate Court's affirming of the dismissal of Counts II and III of their Complaint.

"[T]he general rule requiring a taxpayer to seek the relief provided by statute is subject to two exceptions[.]"*Millennium Park Joint Venture, LLC v. Houlihan*, 241 Ill. 2d 281, 296 (2010). Specifically, "a taxpayer need not look to the remedy at law but may seek injunctive or declaratory relief in circuit court where the tax or assessment is unauthorized by law or where it is levied upon property exempt from taxation." *Id.*; *see also W. Suburban Hosp. Med. Ctr. v. Hynes*, 173 Ill. App. 3d 847, 853 (1st Dist. 1988). "These two situations constitute independent grounds for equitable relief and in such cases it is not necessary that the remedy at law be inadequate." *Millennium Park*, 241 Ill. 2d at 296.

"Where a tax is unauthorized by law, the taxpayer may proceed with equitable redress regardless of the availability of a complete and adequate legal remedy."

Communications & Cable of Chicago, Inc. v. Dep't of Revenue of City of Chicago, 275 Ill. App. 3d 680, 684 (1st Dist. 1995) (citing *Lackey v. Pulaski Drainage Dist.*, 4 Ill. 2d 72, 78 (1954)). "[T]o claim that a tax is 'unauthorized by law' … the complaint must allege that the tax itself was invalid, or that the assessor lacked authority or discretion to impose the tax *as applied to the taxpayers*." *Communications and Cable of Chicago, Inc.,* 275 Ill. App. 3d at 683-84 (emphasis added). While real estate taxes are for a given property, they are only assessed and paid by "taxpayers". *See id*. "A copy of the bill shall be mailed by the collector *** to the *owner* of the property taxed or to the person in whose name the property is taxed." 35 ILCS 200/20-5(a) (emphasis added). The County Collector and Assessor lacked authority or discretion to apply the tax on the Properties as to Plaintiffs—the taxpayers—due to Plaintiffs' retroactive loss of ownership.

Under Illinois law, "The *owner* of property on January 1 in any year shall be liable for the taxes of that year". 35 ILCS 200/9-175 (emphasis added). Absent an agreement, it is the *owner* of property that is liable for taxes. *See 601 W. 81st St. Corp. v. City of Chicago*, 129 Ill. App. 3d 410, 415 (1st Dist. 1984); 35 ILCS 200/9-175; *Alvarez*, 229 Ill. 2d at 227 ("The Property Tax Code mandates that defendant, as county collector, mail tax bills to property owners." (citing 35 ILCS 200/20-5)). As a matter of law, Plaintiffs were retroactively not the owners of the Properties when the taxes were assessed. *See* C37, ¶ 10; *City of Chicago v. McCausland*, 379 Ill. 602, 605 (1942); *Chicago Park Dist. v. Downey Coal Co.*, 1 Ill. 2d 54, 57 (1953); *Bd. of Jr. Coll., Dist. 504 v. Carey*, 43 Ill. 2d 82, 85 (1969); *Forest Pres. Dist. of Du Page County v. W. Suburban Bank*, 161 Ill. 2d 448, 455 (1994), *as modified on denial of reh'g* (Oct. 3,

1994). It was Joliet, not Plaintiffs, that was retroactively the owner of the Properties and the proper tax assessee.

While the Appellate Court said, "We do not believe that the tax was unauthorized by law. The property was properly assessed and taxed, the question is who owed the taxes, which we do not believe is a question of unauthorized taxes", (A15, ¶ 27), Plaintiffs respectfully submit that by their ruling the Appellate Court overlooked the significance of ownership, or lack thereof, to whether a tax is authorized. Only owners of property are liable for taxes; the tax bills are mailed by the County Collector to the owners of the property; and the County Collector only has the authority or discretion to impose the tax as to the taxpayer/owners. *See* 35 ILCS 200/20-5(a); 35 ILCS 200/9-175; *601 W. 81st St. Corp.*, 129 Ill. App. 3d at 415; *Alvarez*, 229 Ill. 2d at 227. Because Plaintiffs were retroactively not the owners of the Properties, and only owners can be taxed, the Defendant Treasurer lacked authority or discretion to impose a tax on Plaintiffs. The $6,350,472.61 in taxes assessed between October 7, 2005 and August 25, 2017 was therefore "unauthorized by law" and the Defendant Treasurer and ex-officio County Collector for Will County, Illinois should be ordered to return the $6,350,472.61 plus pre-judgment interest to Plaintiffs.

CONCLUSION

As to Plaintiffs' Request for Cross-Relief, Plaintiffs respectfully request that the Court reverse the Order of the Appellate Court as to Counts II and III of Plaintiffs' Complaint, and use its authority under Illinois Supreme Court Rule 366(a)(5) to:

- enter judgment in favor of Plaintiffs on Count II and III of Plaintiffs' Complaint;

- find that the taxes assessed against Plaintiffs for the Property that retroactively was owned by the City of Joliet were unauthorized by law;
- order the Defendant to refund the $6,350,472.61 paid by Plaintiffs plus pre-judgment interest accruing from the date of each payment of property taxes; and
- such other and further relief as the Court deems just and proper.

See Ill. S. Ct. R. 366(a)(5) (eff. Feb. 1, 1994).

Respectfully submitted,

Plaintiffs-Appellees

/s/ *Theodore R. Tetzlaff*___
By: One of Their Attorneys

Tetzlaff Law Offices, LLC
Theodore R. Tetzlaff
Joshua A. Redman
227 W. Monroe St., Suite 3650
Chicago, IL 60606
(312) 574-1000 (T)
(312) 574-1001 (F)
ttetzlaff@tetzlafflegal.com
jredman@tetzlafflegal.com
info@tetzlafflegal.com

CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b) and Rule 315(h). The length of this brief, excluding the pages contained in the Rule 341(d) cover, the Rule 341(h)(1) table of contents and statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), contains 47 pages.

/s/ Theodore R. Tetzlaff
Theodore R. Tetzlaff

NOTICE OF FILING and PROOF OF SERVICE

In the Supreme Court of Illinois

MB FINANCIAL BANK, N.A., etc., et al.,	)	
	)	
Plaintiffs-Appellees,	)	
v.	)	No. 128252
	)	
TIM BROPHY,	)	
Defendant-Appellant,	)	
	)	
FOREST PRESERVE DISTRICT OF WILL COUNTY, et al.,	)	
	)	
Intervenors-Defendants-Appellants.	)	

The undersigned, being first duly sworn, deposes and states that on August 24, 2022, the Brief of Plaintiffs-Appellees. Cross-Relief Requested was electronically filed and served upon the Clerk of the above court. On August 24, 2022, service of the Brief will be accomplished electronically through the filing manager, Odyssey EfileIL, to the following counsel of record:

James W. Glasgow, State's Attorney
Scott Pyles, Assistant State's Attorney
WILL COUNTY STATE'S ATTORNEY
spyles@willcountyillinois.com

John M. Izzo
Graeme J. Quinn
PETRARCA, GLEASON, BOYLE & IZZO, LLC
jizzo@petrarcagleason.com
gquinn@petrarcagleason.com

Carl R. Buck
Lorien E. Schoenstedt
RATHBUN, CSERVENYAK & KOZOL, LLC
cbuck@rcklawfirm.com
lschoenstedt@rcklawfirm.com

Steven B. Adams
ROBBINS SCHWARTZ NICHOLAS LIFTON & TAYLOR, LTD.
sadams@robbins-schwartz.com

Richard J. Kavanagh
Kathy M. Sons
KGG, LLC
rkavanagh@kggllc.com
ksons@kggllc.com

Within five days of acceptance by the Court, the undersigned states that 13 paper copies of the Brief bearing the court's file-stamp will be sent to the above court.

/s/ Theodore R. Tetzlaff
Theodore R. Tetzlaff

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

/s/ Theodore R. Tetzlaff
Theodore R. Tetzlaff