No. 125017

IN THE SUPREME COURT
OF THE STATE OF ILLINOIS

DENNIS TZAKIS, ET AL., ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED, A PROPOSED CLASS ACTION,

Plaintiffs/Appellees,

v.

BERGER EXCAVATING CONTRACTORS, INC., ET AL., INCLUDING A PROPOSED DEFNDANTS' CLASS,

(Maine Township, City of Park Ridge and Metropolitan Water Reclamation District of Greater Chicago,

Defendants/Appellants).

On Leave to Appeal from the Appellate Court of Illinois, First Appellate District, Fourth Division, No. 1-17-0859, There Heard on Appeal from the Circuit Court of Cook County, Illinois, County Department, Chancery Division, Circuit Court Case No. 09 CH 6159 Consolidated with 10 CH 38809, 11 CH 29586, 13 CH 10423, and 14 CH 6755, Hon. Sophia H. Hall, Judge Presiding.

DEFENDANTS-APPELLANTS' JOINT REPLY BRIEF AND RESPONSE TO REQUEST FOR CROSS RELIEF

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E-FILED
5/5/2020 9:50 AM
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JOINT REPLY

INTRODUCTION

Government's essential function is to provide services for the benefit of the public at large. The government provides these services not for profit but because its citizens and residents need them. See *Martin v. Lion Uniform Co.*, 180 Ill. App. 3d 955, 962 (1989) ("It performs functions which an individual could not or would not undertake."). It does so even though there is tremendous risk that it may not always succeed in providing them to each citizen. Police, fire, flood, health, and welfare protection are government services because no rational for-profit business would attempt to provide these services to the entire public. Government does. It is asked to do so not in spite of the risk but because of it.

The ongoing pandemic is a perfect and contemporary example of the risks government faces in trying to protect the public at large. The federal, state, and local governments have all been taking protective action to try and minimize the spread of COVID-19. These actions include limiting access to public spaces; ordering the closure of non-essential businesses; limiting the ability of non-familial groups to congregate; and providing protective equipment to at-risk workers and residents. Despite these actions, citizens are still being infected by, getting sick, and, tragically, dying because of the virus. The burden of imposing an impossible duty of perfect protection from a hazard, whether the risk be a virus—or flooding—would overwhelm any local government that attempted to meet that standard. And it has never been and should never be the law.

In Illinois, local government has always had protection from lawsuits for an alleged failure to provide its services perfectly. Initially, government could not be sued

because it was immune. After limiting the application of that doctrine, courts recognized that government still needed protection from the avalanche of claims that it would face for not providing necessary, risk-intensive services perfectly to all people at all times. So, courts held that when the government was performing a government service, it owed no duty to particular citizens absent a special relationship. At the same time, the General Assembly codified additional immunities through the Local Governmental and Governmental Employees Tort Immunity Act. ("Tort Immunity Act" or "the Act") 745 ILCS 10/1 *et seq.* (West 2020). These liability protections are essential in allowing local government to provide important services to the general public, whether they be police, fire, or flood protection. *Id.* And while this Court eliminated the protection of the public duty rule in *Coleman v. East Joliet Fire Protection District*, 2016 IL 117952, it should not further expose units of local government or their taxpayers by making that decision apply retroactively.

Plaintiffs' claims demonstrate why local government has always had those protections and why those protections should not be eroded retroactively, particularly in this case where local governments consistently relied on the rule for five years prior to the *Coleman* decision. In the Amended Fifth Amended Complaint Amending the Complaint Only on Its Face (A5AC), Plaintiffs attempt to hold the City of Park Ridge (Park Ridge), Maine Township, and the Metropolitan Water Reclamation District of Greater Chicago (District) (collectively the LPEs) liable for failing to prevent flooding. A ruling for Plaintiffs in this case would mean the LPEs are being held liable for imperfect flood prevention—a service provided to the public at large. Historically, local governments have endeavored to provide this service without threat of liability. As no

local government can guarantee protection from any hazard whether it be crime, fire, flood, or virus, exposing them to liability if they undertake these actions will lead to less, not more, effort to protect citizens from these threats.

Importantly, and contrary to the posture Plaintiffs took in their response brief, this case is not actually about the LPEs' failure to maintain property or infrastructure that they owned, possessed, or controlled. Instead, Plaintiffs seek to make the LPEs liable for all flooding damages within their jurisdiction. To do so, they argue—without supporting legal or factual authority (and contrary to their own research)—that the LPEs acquired either an ownership or possessory interest in property owned, developed, and controlled by others simply by reviewing, approving, or issuing permits on that property. Such a ruling would be unprecedented. Perhaps realizing that result is contrary to the law, Plaintiffs obscure their aim with another novel theory: stormwater can be owned. And stormwater that passes through infrastructure owned by an entity becomes subject to the entity's control forever, no matter how many other places it goes after it leaves. Again, no legal support exists for this position.

Realizing that these expansive duties are unlikely to find support if plainly set out, Plaintiffs' brief frames their demands as simply seeking recovery for injuries caused by a "public improvement" and a failure to properly design or maintain public property. This is not what was alleged in the operative complaint. The A5AC's allegations reveal the truth—Plaintiffs demand local governments provide perfect flood control. Plaintiffs demand that local government perfectly predict conditions decades into the future. And based on those infallible predictions, Plaintiffs further demand the LPEs undertake massive construction and maintenance programs to expand facilities which the local

governments neither own nor control. Such expansive duties have never been imposed. The reason is simple. Any government burdened with such duties would fail in trying to live up to them and incur liability to be paid by its taxpayers. This is not the law in Illinois and it should not become the law. To illustrate why demanding perfection from local government in protecting residents from a hazard is unwise, a prescient passage in a more than century-old opinion from this Court addressing liability for failure to protect residents from fire still holds true today (tailored to these defendants and the specific hazard raised in Plaintiffs' complaint):

> "To permit recoveries to be had for all such and other acts would virtually render [local government] an insurer of every person's property within the limits of its jurisdiction. It would assuredly become too [burdensome] to be borne by the people of any large [jurisdiction], where loss by [flooding] is annually counted by the hundreds of thousands, if not by the millions. When the excitement is over and calm reason assumes its sway, it may appear to many where other methods could have been adopted to stay destruction, that appear plausible as theories, and their utter fallacy can not be demonstrated by any actual test. To allow recoveries for the negligence of the [government in flood protection] would almost certainly subject property holders to as great, if not greater, [burdens] than are suffered from the damages from [flooding]." *Wilcox v. City of Chicago*, 107 Ill. 334, 339-40 (1883).

The Court's logic is as sound now as when it was written. Demanding a government perfectly protect residents from dangers would put the government to an impossible task and expose its taxpayers to massive tax increases.

Because Plaintiffs continue to press their Taking claims without factual or legal support, it is also critical that the Court clearly rule the government does not take property based on damages caused by others. And the Court should also rule that the Illinois Constitution's Taking provision does not mandate compensation be paid to property owners for government's failure to act. No language in the constitution, case law, or public policy compels such an unprecedented ruling.

In the law, words matter. The use of particular words, phrases, and even punctuation has consequences. For Plaintiffs, the unavoidable consequence of their own allegations and admissions is dismissal of all claims against the LPEs with prejudice.

ARGUMENT

I. Plaintiffs' Brief Confirms that *Coleman v. East Joliet Fire Protection District* Should Not Apply Retroactively and as a Result the Public Duty Rule Bars Plaintiffs' Claims.

As the LPEs set forth in their opening brief, when this Court considers whether a new rule of law should apply retroactively, it almost uniformly orders prospective application. (LPEs' Br., 22-23.) Plaintiffs' brief does not dispute this reality. In fact, throughout the section of their argument related to retroactive application, Plaintiffs identified no cases where the Court applied a new rule of law retroactively. (Pltf. Br., 28-39.) This is critical because Plaintiffs concede that *Coleman* "changed Illinois law." (Pltf. Br., 34.) In determining whether this change in law should be applied retroactively, this Court should reach the same result it nearly always has: new rules that would cause hardship to litigants that relied on them should only apply prospectively.

In an effort to avoid the dismissal warranted by this Court's prior precedent, Plaintiffs raise three equally unavailing arguments to attempt to justify applying *Coleman* retroactively. First, they argue for the first time to this court and without any legal support that they should gain the benefit of *Coleman* as if they were a party to that decision. Of course, the Plaintiffs' decision to raise yet another novel argument against the application of the public duty rule is unsurprising because, as the appellate court noted, Plaintiffs have consistently presented "shifting arguments concerning the

applicability of the public duty rule." (A 12, ¶ 24) [1] More importantly, this unsupported argument lacks any merit as they were not a party to *Coleman* and should not gain the benefit awarded to the prevailing party before this Court.

Next, they argue that the factors the Supreme Court announced in *Chevron Oil Co. v. Huson*, 404 U.S. 97, 106-07 (1971), favor retroactive application. Their analysis of each of the three factors is faulty. Initially, they argue that the public duty rule was not "clear precedent" because they claim no court had applied it in a case involving a public improvement. This is incorrect for two reasons: (1) the presence of a public improvement is irrelevant to the rule's application, and (2) courts had applied the public duty rule to claims involving public improvements. Plaintiffs continue their faulty analysis by extrapolating that a "purpose" behind the *Coleman* decision would be furthered by retroactive application of it. This is erroneous because the multiple opinions provide no clear purpose that would benefit from a retroactive application. To complete their inaccurate analysis of the retroactivity factors, Plaintiffs mistakenly argue that retroactive application would not cause inequity or undue hardship. To reach that conclusion, they mislead the Court regarding the allegations in the A5AC and the status of the litigation, including the ability to recover their damages from other defendants. Accordingly, and as stated in the LPEs' opening brief, this Court's precedent supports applying *Coleman* only prospectively.

Plaintiffs' final effort to avoid the warranted application of the public duty rule is simply to claim that the public duty rule would not bar their claims. As with their first two arguments relating to the public duty rule, the Plaintiffs' final argument also fails

[1] Citations to the LPEs' initial appendix are noted as: (A __).

because prior to *Coleman*, the rule barred tort claims related to a variety of governmental services, including several that referenced sewer and flooding services.

For these reasons which are explained in detail below, as well as those raised in the LPEs' opening brief, this Court should affirm the trial court's dismissal of Plaintiffs' claims against the LPEs based on the public duty rule.

A. Because this Case is not *Coleman v. East Joliet Fire Protection District*, this Court's Rule Allowing Decisions to Apply to the Parties in a Particular Matter Has No Bearing on Whether *Coleman* Applies Retroactively to Save Plaintiffs' Claims.

The Plaintiffs' initial retroactivity argument is indicative of the overall weakness of their legal and factual position. Rather than address the substance of the LPEs' opening brief, Plaintiffs chose to first argue that the LPEs mischaracterized *Molitor v. Kaneland Community Unit Dist.*, 18 Ill. 2d 11 (1959). In particular, they argue the LPEs failed to inform the Court that *Molitor* would allow application of the new rule announced in *Coleman* to this case. (Resp. Br., p. 28-33.) Plaintiffs argue that, because the *Molitor* decision was applied to the parties in that case, Plaintiffs should gain the benefit of the decision issued in *Coleman*. The LPEs admit that their opening brief did not recount the fact that this Court allows rules announced in a particular case to apply to *the parties in that case* regardless of whether or not the decision will be applied retroactively in other cases. *Molitor*, 18 Ill. 2d at 27-29. There is a simple reason for the LPEs' omission: this is not the *Coleman* case. The Plaintiffs here are not Marcus Coleman. The LPEs are not the East Joliet Fire Protection District or its employees. And this Court did not abolish the public duty rule in this case. As such, the benefit Marcus Coleman was entitled to by prosecuting his appeal is not transferable to Plaintiffs here.

Tellingly, Plaintiffs cite no authority that would allow retroactive application of a rule announced in one case to parties in a separate case based on the proposition that the "new rule shall apply to the instant case." *Id*. at 27. No case exists because this Court has rejected a nearly identical argument. In *List v. O'Connor*, 19 Ill. 2d 337, 340 (1960), this Court found that sovereign immunity barred a claim that arose prior to 1959 even though that case reached this Court after *Molitor* was decided. *Id.* at 339-40. The same is true here. Because neither the LPEs nor the Plaintiffs were parties to *Coleman*, there is no justification to apply *Coleman*'s holding retroactively in this case. Plaintiffs' remaining arguments fare no better.

B. The Three Retroactivity Factors Favor Limiting *Coleman* to a Prospective Application

Perhaps realizing their plea to be treated as though they were Marcus Coleman lacked support, Plaintiffs' next argue that the framework established by the Supreme Court of the United States in *Chevron Oil Co. v. Huson*, 404 U.S. 97, 106-07 (1971), and which this Court endorsed in *Aleckson v. Village of Round Lake Park,* 176 Ill. 2d 82, 87-88 (1997), supports retroactive application of *Coleman*. It does not. Rather, as the trial court found and was detailed in pages 25 to 31 of the LPEs' opening brief, a review of these factors supports a prospective application. As detailed below, each portion of Plaintiffs' retroactivity analysis is flawed. With their faulty analysis properly disregarded, this Court should hold *Coleman*'s abolition of the public duty rule does not apply retroactively.

1. Both the Trial Court and Appellate Court were Correct that *Coleman* Overturned Precedent that was Relied upon by the LPEs.

Plaintiffs concede that *Coleman* created new law. (Pltf. Br., 34.) This should have led to a concession that both the trial court (C 3160-63)[2] and appellate court (A 21-23, ¶¶ 35-37) reached the correct conclusion that the threshold *Chevron* factor was easily cleared. Instead, Plaintiffs chose to contest this finding by arguing that although it was new law, the LPEs could not have relied on the public duty rule for two reasons: (1) no court had applied it to allegations identical to theirs, and (2) the District and another unrelated unit of local government did not raise it in other cases. Neither of these arguments carries the day.

In Plaintiffs' first argument, they state that because this case involves a "public improvement" and no other court addressed the rule's application to public improvements, the public duty rule was not a clear precedent that could be relied upon. This argument should be rejected for two reasons. First, Illinois courts had applied the public duty rule to the provision of governmental services for decades without any regard to the presence of "public improvement," and LPEs were justifiably relying on it. Next, even though the application of the public duty rule never depended on the existence of a public improvement—to the extent this Court is persuaded it should have—the A5AC does not allege specific facts to support the conclusion that the LPEs owned, controlled, or possessed any of the relevant improvements. Plaintiffs' mischaracterization regarding the A5AC's allegations about the LPEs and their infrastructure reappears throughout their brief. So, when Plaintiffs' frequent statement that the LPEs owned a relevant "public

[2] Citations to the record on appeal are noted as follows: (C __) or (SUP C __)(for citations to the Supplemental common law record).

improvement" is revealed to be a fallacy, any arguments that rely on it being true, including this one, fail.

Plaintiffs next argue that, because the LPEs and other local governments did not raise the public duty rule in other cases, the rule was either unclear or the LPEs could not have really relied upon it. This argument deserves little consideration. Essentially, Plaintiffs argue that one party's choice not to raise a particular argument in one case prevents that party—or even another party—from relying upon that argument in a different case, involving different claims, brought by different parties. No case, law, statute, or rule supports their position.

a. Prior to Coleman, the Public Duty Rule's Application to Government Providing Governmental Services was Clear and LPEs' Relied on that Clear Precedent.

The public duty rule and the broad scope of its application to various government services was clear for decades prior to *Coleman*. In fact, this Court previously stated that the "public duty rule is a long-standing precept which establishes that a governmental entity and its employees owe no duty of care to individual members of the general public to provide governmental services, such as police and fire protection." *Zimmerman v. Village of Skokie*, 183 Ill. 2d 30, 32 (1998). The rule was grounded on the premise that the duty of the government to "preserve the well-being of the community is owed to the public at large rather than to specific members of the community." *Id.* (quoting *Schaffrath v. Village of Buffalo Grove*, 160 Ill. App. 3d 999, 1003 (1987)).

As the appellate court noted "whether a particular category of governmental service has or has not been considered . . . is not dispositive of the issue" and courts have applied the rule to "a variety of governmental services." (A 17-18, ¶ 29 (collecting cases).) The presence of a "public improvement" had never been mentioned as a possible

exception to the public duty rule. And Plaintiffs cited to no case that did so. During the long-standing application of the public duty rule, the courts' focus was on the government activity or service being provided rather than the existence of a public improvement. If a plaintiff was challenging the effectiveness of the government's provision of a service offered for the well-being of the general public, the rule applied.

For example, in *Remet Corp. v. City of Chicago*, 509 F.3d 816 (7th Cir. 2007), the plaintiff sought to hold the city liable for failing to provide water service to its building. In that case, plaintiff alleged the city had shut off water to perform maintenance on a nearby water main. *Id*. at 818. The claims specifically included allegations that the city failed to "exercise reasonable care in the control, repair, and maintenance of the underground water lines" and thus fire damaged the plaintiff's building. *Id*. Despite the specific allegation that the city failed to maintain its own infrastructure, the Seventh Circuit held that, under the public duty rule, the city owed no duty to adequately provide the government service of uninterrupted water service for fire protection. *Id*. at 820.

The provision of flooding protection is certainly a government service for the well-being of the general public. So, the public duty rule's application to a claim alleging such a service was performed inadequately is neither novel nor unclear. In fact, several Illinois courts have referenced the public duty rule in relation to an alleged failure to provide adequate flooding protection or sewer service cases—which again is what the A5AC actually alleges. See, *e.g.*, *Town of Cicero v. Metropolitan Water Reclamation District of Greater Chicago*, 2012 IL App (1st) 112164, ¶ 41 n.4 and *Alexander v. Consumers Illinois Water Co.*, 358 Ill. App. 3d 774, 779 (2005). In *Town of Cicero*, a municipality sued the District based on the District's alleged failure to properly anticipate

a storm and utilize the District's infrastructure to provide relief to the municipal sewer systems. *Town of Cicero*, 2012 IL App (1st) 112164, ¶¶ 7-10. Thus, District-controlled "public improvements" were explicitly at issue. Even so, the First District noted, without deciding the issue, that "that the 'public duty rule' would appear to bar" any tort claims against the District. *Id.* ¶ 41 n.4 (citing *Harinek v. 161 North Clark Street Ltd. Partnership*, 181 Ill. 2d 335, 345 (1998)). Once again, as it was in *Remet*, the type of activity being challenged—not the presence of a "public improvement" —was the determinative factor on the rule's application.

In this case, the protection of the community from flooding is a government service for the benefit of the public at large. The application of the public duty rule to such a service was clear and would apply with equal force to this case. That was the reason the LPEs consistently raised it as a defense for nearly five years before finally succeeding on it. Accordingly, the threshold first *Chevron* factor is satisfied and supports prospective application of *Coleman*.

b. Even if the Presence of a Public Improvement Affected the Application of the Public Duty Rule, the A5AC does not Contain Well-Pled Factual Allegations Showing the LPEs owned, controlled, or Possessed any Relevant Public Improvement.

The false thread Plaintiffs weave throughout their brief is that their claims against the LPEs must survive because the so-called "Prairie Creek Stormwater System" (PCSS) is a public improvement. Indeed, this framing reappears throughout their brief and it, therefore, demands careful scrutiny. Applying that level of inspection reveals that this pillar of Plaintiffs' argument exists only in their imagination. Even if Plaintiffs' arguments about the relevance of a "public improvement" were correct—which they are not as demonstrated above—Plaintiffs' claims against the LPEs fail because the specific

factual allegations of the complaint and its exhibits demonstrate that the PCSS is not a public improvement, and, even if it were, it was not created, owned, or possessed by these LPEs.

First off, neither the LPEs nor the Court need consider the A5AC's conclusory statements or legal conclusions. See, *e.g.*, *Patrick Engineering, Inc. v. City of Naperville*, 2012 IL 113148, ¶ 31. Instead, only well-pleaded factual allegations are taken as true. *Id*. This Court has affirmed dismissal when a complaint contains inconsistent, ambiguous allegations. *Van Dekerhov v. City of Herrin*, 51 Ill. 2d 374, 376-77 (1972). Further, when facts evident from exhibits attached to the complaint contradict the allegations, the facts of the exhibit control. See, *e.g.*, *Coghlan v. Beck*, 2013 IL App (1st) 120891, ¶ 24. Upon examination of the A5AC's specific factual allegations and its exhibits, as opposed to its frequent conclusory statements, Plaintiffs' rhetorical thread comes undone leaving their claims without cover from a deserved dismissal.

In assessing the allegations at issue, it is important to note that the A5AC is so replete with conclusory, contradictory, and ambiguous statements that Plaintiffs attempted to ameliorate them by incorporating instructions in the A5AC. For example, Plaintiffs define "this Defendant" differently throughout the complaint (See, *e.g.*, A5AC ¶¶ 21, 208, 216, 217, 221.)[3] Other paragraphs provide a separate definition for the word "Defendant." (A5AC ¶¶ 22, 217.1.) Following the first of those definitions, Plaintiffs incorporate "at all relevant times" into every paragraph. (A5AC ¶ 23.) They then advise that asterisks following an allegation means the allegation is qualified by "upon information and belief" "unless otherwise evident from the context." (A5AC ¶ 24.)

[3] As they were in their opening brief, any citations to specific portions of the A5AC refer to its numbered paragraphs for ease of reference and continuity.

Tellingly, Plaintiffs felt these caveats and instructions were necessary to clarify the A5AC—which was their sixth attempt to file a clear, competent pleading. Their attempt to assert factual allegations that follow those instructions provide no greater clarity.

The A5AC is littered with so many improper allegations that, for the sake of efficiency, a sampling of them are identified below:

- Paragraphs that are directed against multiple entities and assert they all conducted the same action, possessed the same knowledge, or had the same duties and responsibilities:
    - multiple "easement holders" of the same easements. (A5AC ¶¶ 66.3, 67.3, 68.1, 76.3);
    - multiple entities were "permitted and/or authorized" by those easements to "construct, build, improve, maintain, clean and/or perform any other activity related to or arising out of the ownership and/or operation of" certain sewers or portions of Prairie Creek, (A5AC ¶¶ 66.4, 67.4, 68.2, 76.4);
    - multiple entities represented the same facts to an unidentified developer, (A5AC ¶ 75);
    - multiple entities "authorized and permitted" the construction of the same facilities, infrastructure and sewers, (A5AC ¶¶ 82, 88.3);
    - multiple entities all took or failed to take the same actions (A5AC ¶¶ 25, 63, 64, 74, 82, 83, 88.3, 90, 96, 102, 138-39.3, 208, 210, 212, 381, 388, 395-97);

- multiple entities own and operate the same property (A5AC ¶¶ 98, 99, 100, 208, 210, 212, 381, 388, 395-97);

- Allegations that contain legal conclusions (See, *e.g.*, A5AC ¶¶ 69, 79, 172, 177, 213–15, 266, 268, 270, 272, 277, 278, 280, 281, 283, 284, 286, 287, 289, 291, 293, 295, 297, 298, 300-02, 304, 307, 309, 313, 318-20, 455-62, 969-70, 978, 980-81, 987, 1031, 1043, 1076-77, 1108, 1112, 1113, 1120, 1161, 1172, 1184, 1238-41, 1248, 1279, 1290, 1292, 1321.)

None of these allegations are properly pled and accordingly are unworthy of consideration. Some even contradict existing law. For example, Plaintiffs' arguments suggest that the LPEs' alleged acceptance of easements makes them an owner of property. Of course, an easement is a non-possessory interest in land. See, *e.g.*, *Nationwide Financial, L.P. v. Pobuda*, 2014 IL 116717, ¶ 29. So, an LPE's acceptance of an easement, if one even existed, does not convert the LPE to an owner or possessor of that property. Similarly, a local government's authority to issue permits of development does not create a duty on the municipality to ensure that development does not cause injury to others. See, *e.g.*, *Ferentchak v. Village of Frankfort*, 105 Ill. 2d 474, 484-85 (1985). When these conclusory, improper and legally incorrect allegations are properly ignored, the A5AC lacks specific factual allegations to support the argument that the PCSS is a unified system of public improvements owned, operated, controlled, or possessed by the LPEs.

It is also critical to note that the PCSS as a unified "stormwater system" is Plaintiffs' invention in an effort to create a claim where none exists. The A5AC's "Main Drain" is actually Prairie Creek. (Compare A5AC ¶¶ 25, 84-88.3 with C 588-616, 625-

31(exhibits identify the waterway studied and/or source of flooding as Prairie Creek).) While Prairie Creek, like most creeks, streams, and rivers in urban areas, has been channelized or modified in part, it is still a creek. (See, *e.g.*, C 598-99 ("Prairie Creek extends as an open channel for only about 3700 feet from Lutheran General to its confluence with Farmers Creek"), C 637 (study intended to investigate "overbank flood damages . . . in the . . . Prairie Creek watershed" and to "[p]repare updated . . . floodplain inundation mapping for Farmers and Prairie Creeks.").) Despite Plaintiffs' allegations and arguments, it has not been converted into a "man-made public improvement" by the LPEs. (C 638 ("Prairie Creek is the primary tributary to Farmers Creek").) Even if Prairie Creek was rendered man-made, Plaintiffs have no support for arguing the LPEs were responsible for that conversion.

To the contrary, Plaintiffs' own allegations make clear that any changes to Prairie Creek, or stormwater basins along it, were made by private developers. In particular, Plaintiffs allege that Advocate Health and Hospitals Corporation (Advocate) and an unidentified subdivision developer designed, constructed or owned the stormwater infrastructure for which they seek to hold the LPEs accountable. The A5AC sets out that part of Prairie Creek which it calls the "Main Drain" was straightened before or around 1960 and was depicted on a subdivision plan submitted by a developer. (A5AC ¶ 62.) The A5AC first alleges that "one or more of the governmental defendants approved" the straightening of Prairie Creek. (A5AC ¶ 88.3.) Later, it clarifies this approval came not from the LPEs but from Cook County. (A5AC ¶ 174.) Additionally, the A5AC sets out that Advocate (or its contractors)—not the LPEs—further modified the pre-development drainage patterns in the area. (A5AC ¶¶ 102-03.) Advocate's alteration of the drainage

pattern continued and included its construction, expansion and/or modifications of its Ballard, Pavilion, and Dempster stormwater basins. (A5AC ¶¶ 112, 119, 120, 122, 126, 132.) So, based on the allegations of the complaint, Prairie Creek was straightened by a developer, and the drainage pattern adjacent to the creek was modified by a private hospital. Plaintiffs allege these changes caused or exacerbated the flooding of the creek and for that reason have sued the parties responsible for them—Advocate and its consultants.

In stark contrast to these clear, specific allegations that the drainage modification and development of stormwater facilities were made by private entities, Plaintiffs' specific allegations relating to the LPEs' ownership and development of stormwater infrastructure along Prairie Creek are lacking. Realizing this weakness, Plaintiffs allege in conclusory fashion or merely upon information and belief that Cook County, Park Ridge, Maine Township and/or the District control storm sewers and stormwater upstream from the Advocate basins. (A5AC ¶¶ 98, 100, 209.1.1, 209.1.2.) Additionally as to the District, they allege in conclusory fashion that the District "owns and/or controls all drains, basins, structures, components and other stormwater improvements" based on only its authority to manage stormwater in Cook County that was acquired in 2004. (A5AC ¶¶ 968-69.) Tellingly, the legislation granting the District that authority did not order, mention, or suggest that by its passage, the District became the owner of or entity responsible for maintenance, redesign, and expansion of all stormwater infrastructure within its jurisdiction. (Compare A5AC ¶ 969 with Pub. Act 93-1049 (eff. Nov. 17, 2004).) As for Maine Township, Plaintiffs only assert upon information and belief that "stormwater from Maine Township north of the Ballard basin flows into" the basin.

(A5AC ¶ 209.1.1.) When questioned on this point by the circuit court judge during oral argument, Plaintiffs admitted that they had not discovered or pled evidence of ownership by Maine Township of the PCSS at all. (C 2223-24, Hr'g Tr. at p.116:19-117:7 (Sept. 27, 2011).) See *Abruzzo v. City of Park Ridge*, 2013 IL App (1st) 122360, ¶ 36 (discussing judicial admissions). These are the totality of any potentially specific allegations related to ownership of any component of the PCSS by the LPEs. And they are woefully insufficient to infer the LPEs own, control or possess the entirety of the PCSS which Plaintiffs invented.

Even if that invention were legitimate, despite the contradiction clear from the exhibits, a glaring ambiguity exists because of both the A5AC's allegations and Plaintiffs' brief. Plaintiffs imply that each LPE would be responsible for ensuring the entire system functions, even if the alleged defect was outside their jurisdiction or downstream of infrastructure they own. If the LPEs have overlapping responsibility, which entity has primary responsibility for what structure? Do the County, Advocate or other entities also have a duty to undertake the same activities in the same areas? Neither the A5AC nor Plaintiffs' brief clarifies an answer to any of these fundamental questions about the so-called PCSS. There is no statute, rule, or public policy to support imposing a duty on government to maintain, redesign, or expand infrastructure that it did not build, own, or control.

As such, Plaintiffs' arguments premised on the LPEs' control over the non-existent "PCSS" public improvement, including that the public duty rule should not bar their claims, fail.

c. That the District or other local government did not raise the public duty rule in every case or claim is irrelevant to whether the rule was relied upon.

Plaintiffs suggest without any legal support that the LPEs could not have relied upon the public duty rule because the District did not raise it in two different cases and because the City of Danville failed to raise it another case. (Pltf. Br., 35.) Yet, the LPEs raised and relied upon the public duty rule in this case for five years before it was decided. (C 3161.) And the District had raised and prevailed on it in other cases at both the trial and appellate court. (C 1888, n.1 (referencing unpublished appellate decision in favor of the District), C 1307-14, C 1383-84, C 1442-44 (trial court decisions).) Plaintiffs identify no case, statute, or rule that holds a precedent is not clear if it is not relied upon in every case where it could have been. This case does not provide a scenario where the Court should create such a rule because the LPEs consistently raised and relied upon the public duty rule.

With each of Plaintiffs' arguments against the first *Chevron* factor turned aside, the Court's nearly uniform precedent supports prospective application of *Coleman* because it overturned existing law that the LPEs had relied upon.

2. Because the Tort Immunity Act does not Impose Liability on Municipalities, the *Coleman* Decision's Purpose would not be Furthered by its Retroactive Application.

The second factor is whether retroactive application will further the purpose of the new rule or whether prospective application will hinder it. (Br., 26-28.) As the appellate court noted, *Coleman* did not produce an opinion that garnered a majority of this Court. (A 24, ¶ 38.) As such, there is no clearly identifiable overarching purpose to its holding. (A 24, ¶ 38.) Accordingly, this factor should not determine whether the ruling applies retroactively.

Nevertheless, Plaintiffs offer their own interpretation of the purpose for *Coleman* which they claim will be furthered by retroactive application. Specifically, Plaintiffs' argue that *Coleman*'s overarching purpose was removing incompatibility between the public duty rule and the legislature's intent to *impose liability* as codified in the Tort Immunity Act. (Pltf. Br., 36-38.) This theory on *Coleman's* "purpose" is premised on a misreading of the Tort Immunity Act and a misunderstanding of the legislature's express purpose in enacting it.

The Tort Immunity Act does not "impose liability;" it protects municipalities from liability. In creating the Act, the General Assembly made clear this was its intent: "[t]he purpose of this Act is to *protect local public entities *** from liability* arising from the operation of government." (Emphasis added.) 745 ILCS 10/1-101.1(a) (West 2020). It is for this reason that this Court has routinely stated that the Act does not create duties. See, *e.g.*, *Barnett v. Zion Park Dist.*, 171 Ill. 2d 378, 386 (1996). Although the lead opinion in *Coleman* suggested the General Assembly intended to impose liability by passing the Tort Immunity Act, it did so without any citation. *Coleman*, 2016 IL 117952, ¶ 58 (opinion by Kilbride, J. joined by Burke, J.). This is unsurprising given the General Assembly's stated purpose in passing the Act; as well as, the legislature's decision that, in addition to the immunities and defenses the Act provides, local government could avail itself of any defense that a private person could advance. 745 ILCS 10/1-101.1(b) (West 2020).

This Court has previously stated that to determine what duties a local government owes it should look to the common law, not the Act. *Village of Bloomingdale v. CDG Enterprises, Inc.*, 196 Ill. 2d 484, 490 (2001). This is critical because, prior to *Coleman*

and, even in the opinions of at least five justices in that case, the determination of duty is distinct from the determination of whether an immunity found in the Act applies. See *Id*. (citing *Barnett*, 171 Ill.2d at 388.). See also *Coleman*, 2016 IL 117952, ¶ 51 (opinion by Kilbride, J. joined by Burke, J.); ¶ 99 (Thomas, J. dissenting, joined by Garman, C.J. and Karmeier, J.). Because the public duty rule was a part of the common law prior to *Coleman*, reliance on it to determine if the LPEs owed a duty is not in conflict with the Act. And, therefore, retroactive application of the rule's abolition would not further the purpose of the Act. For this reason, the second *Chevron* factor does not support retroactive application of *Coleman*.

3. Plaintiffs' Novel "Public Improvement" Argument has no Bearing on the Fact that Retroactive Application of *Coleman* Would Cause the LPEs Hardship.

The hardship that the LPEs would suffer by a retroactive application of the abolition of the public duty rule is clear. The trial court recognized it. (C 3160-63.) In fact, the appellate court also noted that "if *Coleman* is applied to their case, defendants will undergo significant hardship." (A 28, ¶¶ 44-45.) The LPEs expounded on those hardships in their opening brief. (Br., 28-31.) It is unnecessary to regurgitate those again here. They are apparent and weigh strongly in favor of a prospective application of *Coleman*.

Plaintiffs' argument on this third factor is premised nearly completely on their manufactured "public improvement" distinction. As detailed above, this distinction is both irrelevant to the application of the public duty rule and not supported by the Plaintiffs' own allegations in the A5AC. *Supra* pp. 12-18. With this artificial distinction removed, Plaintiffs' arguments that the LPEs would not face hardship by retroactive application collapse. Accordingly and consistent with the *Chevron* factors, the Court

should hold that its decision in *Coleman* which overturned decades of precedent only applies prospectively to avoid the hardship the LPEs will face if it applied retroactively.

Because the *Chevron* factors support limiting the public duty rule's abolition to cases that arise after *Coleman* was decided, and because if applied to this case the rule bars Plaintiffs' claims, this Court should affirm the dismissal of the A5AC's claims against the LPEs in their entirety.

C. The Public Duty Rule Does Not Violate the Illinois Constitution.

In a final effort to avoid dismissal of their claims because of the public duty rule, Plaintiffs argue that the rule violates the Illinois Constitution if applied to this case. (Pltf. Br., 41-43.) Plaintiffs' constitutionality argument is premised on two incorrect beliefs: (1) that the public duty rule was a "judicially created immunity" rather than a common-law rule used to determine whether a duty existed; and (2) that their claims fall under "statutory" duties found in the Act. With these erroneous beliefs as a foundation, Plaintiffs twist this Court's rulings to argue the rule violates the Illinois Constitution's sovereign immunity and separation of powers provisions. (Pltf. Br., 41-42.) Plaintiffs are wrong on all aspects of this argument.

First, the public duty rule was never an immunity for local government; it was a rule by which courts could determine whether a duty existed. For example, in *Zimmerman for Zimmerman v. Village of Skokie*, 183 Ill. 2d 30, 46 (1998), the Court explained the rule and its relationship to legislative grants of immunity:

> "The distinction between an immunity and a duty is crucial, because only if a duty is found is the issue of whether an immunity or defense is available to the governmental entity considered: unlike immunity, which protects a municipality from liability for breach of an otherwise enforceable duty to the plaintiff, the public duty rule asks whether there

> was any enforceable duty to the plaintiff in the first place." (Internal quotation marks and citation omitted.) *Id*.

Five of the justices who decided the *Coleman* case recognized this critical distinction. *Coleman*, 2016 IL 117952, ¶ 58 (opinion by Kilbride, J. joined by Burke, J.); ¶ 99 (Thomas, J. dissenting, joined by Garman, C.J. and Karmeier, J.). Thus, the public duty rule was never an "immunity" and its application cannot violate the sovereign immunity provision of the Illinois Constitution.

Similarly, determining whether a duty exists in a particular case is a question of law for the courts to decide. *Simpkins v. CSX Transportation, Inc.*, 2012 IL 110662, ¶ 14. As stated previously, the Tort Immunity Act did not create duties or limit defenses available to local government. 745 ILCS 10/1-101.1 (West 2020). Rather, even with that legislation, this Court looks to the common law to determine whether a duty exists. *Bloomingdale*, 196 Ill. 2d at 490 (citing *Barnett*, 171 Ill. 2d at 388.). So, determining whether a duty applies to a specific complaint is clearly within the judicial power. Accordingly, a court using that power to determine whether a duty exists by utilizing the public duty rule is not coopting the legislative power in violation of the separation of powers.

For these reasons and those identified in the LPEs' opening brief and in addition to those expressed by the trial court, the Court should rule that *Coleman's* abolition of the public duty rule does not apply retroactively and that rule bars Plaintiffs' claims against the LPEs.

II. Even if *Coleman* Applies Retroactively, Plaintiffs' Claims Should be Dismissed because the LPEs owe Plaintiffs no Duty.

Even if *Coleman* applies retroactively, Plaintiffs' claims against the LPEs should also be dismissed because this Court's standard four-factor duty inquiry supports finding

the LPEs do not owe Plaintiffs a duty. In particular, the LPEs' opening brief detailed why the third and fourth factors in the Court's traditional duty analysis weigh against imposing the duties Plaintiffs seek. (Br., 33-35.) Plaintiffs' arguments to the contrary are unpersuasive.

In arguing that a duty exists, Plaintiffs initially reiterate that their claims are for the LPEs' failure to maintain their property and for unreasonable conditions caused by that property. Once again, perfect flood prevention, not improper maintenance, is the actual gravamen of the A5AC. Even if improper maintenance were at issue, the A5AC's specific factual allegations are insufficient to infer that the LPEs' owned any property that allegedly caused Plaintiffs' flooding. *Supra* pp. 16-17. Accordingly, the LPEs' duty to maintain their own property has no bearing on this case. Similarly, because the LPEs neither own nor lease the stormwater facilities at issue, they have no duty regarding the plan to construct those improvements.

Plaintiffs engage in no additional discussion of the Court's traditional four-factor duty analysis; instead, they curiously suggest that the LPEs' discussion of the third and fourth factors is "a deliberate act of misdirection." (Pltf. Br., 43.) But, the magnitude of the burden (factor 3) and the consequences of placing that burden on the defendant (factor 4) are part the legal analysis set forth by this Court in determining whether a duty exists. See, *e.g.*, *Simpkins*, 2012 IL 110662, ¶ 18. Plaintiffs' avoidance of that analysis does not cure their problem. A ruling in this Court that local public entities owe a duty to landowners to take preventative flood measures on property that they do not own or control would announce a new theory of liability against governmental entities across the

state. Both the *Simpkins* factors and public policy strongly caution against creating such an expansive duty.

The duty to provide perfect flood control would be a massive burden and imposing it would be catastrophic for LPEs, and any other local government within Illinois that has stormwater infrastructure within its jurisdiction. As detailed previously, the A5AC explicitly states the infrastructure at issue in this case was built by private entities or other units of government. *Supra* pp. 16-17. The LPEs' are alleged to have merely approved a subdivision plan, approved development permits, or have storm sewers that also convey water to Prairie Creek. In effect, Plaintiffs seek to make a local government responsible to modify existing waterways and infrastructure owned by other entities, including other units of government, if flooding is known to occur. This is not a limited duty and consideration of what it would do to the LPEs or other local governments is not misdirection, it is essential.

Plaintiffs' allegations of how the LPEs breached these invented duties demonstrate the massive undertaking that would be required to comply with them. See A5AC ¶¶ 967.4, 992, 1040-41, 1124, 1169, 1252 (alleging LPEs breached a duty by failing to pump down different infrastructure including those owned by other entities); ¶¶ 992, 1124, 1252 (alleging LPEs breached a duty by failing to erect flood protection barriers); ¶¶ 1032, 1072, 1077, 1092, 1162, 1198, 1207, 1223, 1285, 1290, 1327 (alleging LPEs breached a duty by the inadequate design, engineering, maintenance and operation of or failing to redesign either Prairie Creek itself or basins that are owned by and were constructed by Advocate). By identifying these "failures" as the breaches of the duties they are seeking to impose, Plaintiffs assert each LPE would have had to do all of these to

avoid liability. Make no mistake, these are massive undertakings, with massive costs. In fact, the studies appended to the A5AC suggest that the cost of flood control projects along Prairie Creek, which Plaintiffs call a "redesign" of the PCSS, would be in the millions and would not eliminate flooding. (C 595 (estimating $19.2 to $20.3 million cost for one proposed flood control alternative); C 641 (estimating $2.8 million flood control project cost to provide only 59% protection); C 645 (estimating $2.2 million flood control project cost to provide only 50% protection).) Each of these proposed solutions cost more than fifteen times the average annual flood damages they attempt to remedy. (C 632 (noting annual flood damages along the creeks average less than $150,000).) Of course, because these "redesigns" would eliminate slightly more than half of the flooding damages, the LPEs would still need to pump down basins and erect flood protection barriers, which would have an additional cost. If the LPEs do so perfectly before each and every rain event in the future, they may avoid additional liability. If not, the LPEs have become Plaintiffs' insurer.

More significantly, because this Court's decisions bind all lower courts within the state to follow the decision in any similar case, if Plaintiffs prevail, the LPEs would now have an obligation to provide that same level of protection for any other area within their jurisdictions that may flood. See, *e.g.*, *Price v. Philip Morris, Inc.*, 2015 IL 117687, ¶ 38 (citing *Agricultural Transportation Ass'n v. Carpentier*, 2 Ill.2d 19, 27 (1953)). For Park Ridge, this would mean providing perfect protection for 37,000 residents. Maine Township would be tasked with protecting 135,000 people. And the District's responsibility would be to perfectly cover over five million residents within its boundaries. In 2004, the General Assembly stated average annual damages caused by

flooding exceeded two hundred million dollars in Cook County alone. See Transcripts of the Ill. Senate Proceedings of November 9, 2004, pp. 11-12. Utilizing the ratio of fifteen times annual damages to protect sixty percent of annual damages the A5AC's exhibits reflect, the cost to protect Cook County property owners from just more than half of its annual flooding damage would exceed three billion dollars. And the county would still suffer over eighty-five million dollars in annual flooding damages unless the additional extreme actions Plaintiffs suggest were perfectly undertaken all across the County every time before it rains. Local government budgets throughout the region would be decimated by such a requirement. This is not misdirection. It is the direct, unavoidable result if the Court rules local government has the duty to perfectly protect residents against flooding as Plaintiffs' actually seek. It is why this Court considers the magnitude of the burden and the effect of imposing it as part of its common-law duty analysis. *City of Chicago v. Beretta U.S.A. Corp.*, 213 Ill. 2d 351, 391-93 (2004). And, in this case, these factors overwhelming favor finding no duty exists because the burden of imposing this duty on local governments and their taxpayers would be immense.

For this additional reason, even if the Court declines to apply the public duty rule, it should affirm the trial court's dismissal of all tort claims against the LPEs.

III. No Precedent Exists for Sustaining Taking Claims Based on Damages Caused by Private Entities' Development of Private Property or When Government is Only Alleged to Have Failed to Act.

In hopes of preserving their Taking claims, Plaintiffs misstate the allegations of the A5AC, misconstrue existing precedent and extrapolate upon non-binding decisions of courts in other states. Each of these efforts are inadequate to preserve their baseless Taking claims.

A. Because the Assertions in Plaintiffs' Brief Directly Contradict the A5AC's Actual Allegations and Facts Demonstrated by the Exhibits to the A5AC, Plaintiffs' Attempts to Save Its Taking Claims Fail.

Plaintiffs' arguments in support of their Taking claims repeatedly misconstrue the allegations in the A5AC. First, in their brief for the first time, Plaintiffs suggest they asserted a claim for "consequential damages" under the Illinois Constitution. They did not. Plaintiffs titled each of their claims under the Illinois Constitution as "Taking" claims. (A5AC Counts 39, 60, 76.) More importantly, these counts do not mention "consequential damage" at all. Similarly, the "Common" allegations supporting these claims also do not contain that phrase. (A5AC ¶¶ 579-91.) Plaintiffs did not suggest they were pursuing a claim for consequential damages under the Illinois Constitution in the complaint or in their briefing before the trial and appellate courts. A response brief before this Court is not the place to amend the complaint. Accordingly, this Court should disregard Plaintiffs' repeated reference to an unalleged consequential damage claim.

Equally surprising, Plaintiffs' brief further attempts to amend what the A5AC asserted with respect to the Taking claims. As identified in the LPEs' opening brief, the A5AC's Taking claims directed at each LPEs assert Plaintiffs' damages were caused as a result of the LPEs' "failing to redesign its PCSS Properties" and "failing to sand bag a barrier" to protect their homes. (A5AC ¶¶ 588, 1092, 1223, 1327.) Plaintiffs' brief simply ignores the A5AC's actual words and asserts that the A5AC alleges facts that "demonstrate direct governmental action" in the creation of the invented PCSS. (Pltf. Br., 44-46.) The "facts" identified in the brief were not referenced in the Plaintiffs' Taking claims counts. (Compare Pltf. Br., 44-46 with A5AC ¶¶ 39, 60, 76.) As such, the Court

should disregard this untimely amendment to the A5AC and rule that based on the Plaintiffs' actual allegations they failed to state a Taking claim against any of the LPEs.

Importantly, of the five "facts" that Plaintiffs argue demonstrate government action (listed as A through E in their response brief), the first fact (fact "A") —that the LPEs "governmentally acted to abandon the Prairie Creek and artificially redirect" the natural upstream flows of that creek—is wholly unsupported by any citation to the record. (Pltf. Br., 44-45, 50.) This is unsurprising since that allegation appears nowhere in the A5AC or its exhibits. Instead, the A5AC actually alleges that Prairie Creek's straightened path was first identified in a plan submitted by the developer of Plaintiffs' subdivision. (A5AC ¶ 62.) Rather than allege who straightened Prairie Creek, the A5AC repeatedly alleges simply that the creek "had been converted by urbanization including public improvements such as channelization." (A5AC ¶ 84.)

Facts "B" through "D" allege that the LPEs "approved" or "supervised and controlled, through their permitting process," engineering and construction of the PCSS, but Plaintiffs cite in support of those Facts "B" though "D" just two letters from Gewalt Hamilton Engineering to the District dated 1994 and 2001, respectively, (RA 143, 147),[4] which do not state or infer in any way that any LPE "approved," "supervised," or "controlled" any aspect of the construction of the PCSS. Further still, these two letters, which relate to the District's permitting process, do not mention Maine Township or Park Ridge at all, let alone infer that those two public entities exercised sufficient control over the PCSS to satisfy a claim under the Taking Clause.

[4] (RA _) refers to the Response Appendix filed by Plaintiffs.

Finally, Fact "E" alleges that the LPEs "constructed sewers adjacent to those townhomes," which "served as the conduit to back-flow water directly into Plaintiff's homes." (Pltf. Br., 46.) Setting aside that the flooding sequence Plaintiffs allege—in which storm water sewers that run from the street to Prairie Creek caused a surcharge of water to cascade over the upstream Pavilion Basin and Dempster Basin walls into the Plaintiffs' homes—fails any test of reasonable foreseeability, the cited paragraphs from the A5AC (A5AC ¶¶ 43, 209.3) do not support this fact at all.

Again, there is no identification of who channelized the creek. Rather, the A5AC simply states that "one or more of the governmental defendants approved" the straightening before confirming that Cook County—not the LPEs—was the entity that approved and oversaw that development. (Compare A5AC ¶ 88.3 with ¶ 174.) Apparently emboldened by their self-granted freedom from citations to the record or the actual allegations of the operative pleading, Plaintiffs double down on this misstatement in their response brief, stating: "it was the LPEs who were responsible for changing nature;" and "it was also the LPEs who built the 60 inch underground culvert." (Pltf. Br., 50.) Again, these allegations are not in the A5AC. The actual allegations of the complaint are that an unknown developer or some other unknown government entity straightened Prairie Creek and Cook County approved that action. This directly contradicts Plaintiffs' argument in their brief regarding their Taking claims. To the extent any action was taken, the A5AC confirms that action was taken by some entity other than the LPEs. As such, the non-existent "facts" trumpeted throughout Plaintiffs' argument are not based in reality and cannot sustain Plaintiffs' Taking claims.

In another portion of Plaintiffs' arguments related to their Taking claims, Plaintiffs completely misconstrue whether their properties were prone to natural overflows. Realizing that the U.S. Supreme Court's decision in *U.S. v. Sponenbarger*, 308 U.S. 256, 265 (1939), bars their Taking claims, Plaintiffs simply create another new fact in hope of distinguishing the claim. In their brief, Plaintiffs assert that their homes are "not located 'where natural overflows or spillways have produced natural floodways.'" (Pltf. Br., 54.) Again, this is directly contradicted by the A5AC and its exhibits. The A5AC alleges that the natural path of Prairie Creek flowed through the Robin Alley Culverts in the east in a "semi-circular" path to the south and west until curving back to the 90 degree turn in the "Main Drain." (A5AC ¶¶ 35, 49, 61.) This path runs directly through homes that Plaintiffs identify as the "Robin Dee Community." (RA 9.) Thus, Plaintiffs' homes were built in the direct, natural path of Prairie Creek. (C 619 ("the downstream housing was constructed directly in the historic drainage path to the north.").) Plaintiffs' homes were built by a developer within what were unquestionably natural floodways. As such, Plaintiffs are asking this Court to rule the LPEs took Plaintiffs' property by not preventing flooding in a historical drainage path. *Sponenbarger* forecloses such a result. *Id*. at 265 (government cannot be liable for flooding that "would occur had the Government undertaken no work of any kind.").

Realizing that the actual allegations of the A5AC and the facts demonstrated in its exhibits would bar their Taking claims, Plaintiffs simply invented new ones to use in their brief. Their repeated attempts to distract having now been exposed, the fact remains A5AC's Taking Claims are legally insufficient.

B. None of the Cases Cited by Plaintiffs Support a Ruling that the A5AC's Taking Claims Are Sufficient.

The LPEs' opening brief sets out how Plaintiffs' Taking claims fail as a matter of law because they are premised on damages caused by private entities, or by the LPEs alleged failure to act. (Br., 36-39.) None of the case law cited by Plaintiffs supports abandoning the Court's adherence to the limited lockstep approach that requires the Court interpret analogous provisions of the Illinois and U.S. Constitution's consistently. Based on that doctrine, a Taking claim cannot stand against a governmental entity absent allegations that its *direct action* caused an intrusion on Plaintiffs' property. (Br., 39-41.) In addition to the direct governmental action requirement, Plaintiffs' claims fail because they explicitly allege the water intrusions of their property were caused by other entities. (Br., 36-39.) As such, the A5AC fails to state a claim for a taking by any of the LPEs. In their response, Plaintiffs failed to identify a single case that cures either of these defects.

First, Plaintiffs are unable to identify what government action by each LPE caused the flooding they experienced. This is critical because the LPEs can only take property based on their own actions. See, *e.g.*, *Sorrells v. City of Macomb*, 2015 IL App (3d) 140763, ¶¶ 31-33. Plaintiffs identify no case in which a court ever held that one government's action renders a different government entity responsible for a taking, or where several governments' inactions render them all liable for the same taking. As such, Plaintiffs must allege what each LPE did to take their property. Their brief does not even attempt to do so. (Pltf. Br., 44-46.) Instead, Plaintiffs generally refer to the LPEs and all government collectively. This is not sufficient. They are seeking recovery from each, they must show what each did separately. Using Maine Township as an example, Plaintiffs' brief fails to identify what Maine Township did individually to cause water

intrusion on their properties that would justify a taking. (Plaintiffs do not even allege that Maine Township was involved in the permitting process, because it was not). (Pltf. Br., 44-49.) By itself, this failure requires dismissal of Count 76 and the corresponding Counts against the District and Park Ridge.

Similarly, Plaintiffs with respect to the District and Park Ridge, argue without legal support that approval or issuance of a permit for development may give rise to a government taking. Of the five "direct government actions" that Plaintiffs argue support their Taking claim, three are simply the unidentified collective LPEs' review and approval of permits. (Pltf. Br, 44-45 ("approved townhome construction"; "supervised and controlled through their permitting process").) This does not qualify as the type of government action necessary to sustain a Taking claim. See, *e.g.*, *Hampton v. Metropolitan Water Reclamation District of Greater Chicago*, 2016 IL 119861, ¶ 21 (government action occurring outside the property must give rise to "a direct and immediate interference with the enjoyment and use of the land.") (quoting *Arkansas Game & Fish Comm'n*, 568 U.S. 23, 33 (2012)). Importantly, Plaintiffs identify no case that held the issuance of a permit for private development constitutes sufficient government action to find a taking. This is unsurprising because, if a landowner is damaged by a development constructed pursuant to a permit, the damage is caused by the development not the government's issuance of the permit.

In addition and despite Plaintiffs' suggestion to the contrary throughout the A5AC and their brief, the issuance of a permit neither converts the government into a partner of the developer nor makes the government liable under the theory of *respondeat superior*. As with many of Plaintiffs' novel arguments, there is no support for their position. In

fact, it directly contradicts both this Court's prior rulings and the Tort Immunity Act. This Court has held the government does not assume a duty merely by enforcing its building or safety standards. *Ferentchak v. Village of Frankfort*, 105 Ill. 2d 474, 484-85 (1985). In *Ferentchak*, the Court dismissed a claim against a village based on its failure to ensure a developer complied with its codes in building plaintiffs' home. *Id*. It ruled a municipality's decision to enforce design standards, which are "designed to protect the public," are "passive public protection" not "active individual assistance" and for that reason dismissal was warranted. *Id*. at 485. This is consistent with the General Assembly's grant of immunity from any liability based on a local government's issuance of any permit. 745 ILCS 10/2-104 (West 2020). Because neither the General Assembly nor this Court believe a local government that issues permits should be liable on that basis, Plaintiffs' allegation that the LPEs became partners in the development of either the Plaintiffs' subdivision or Advocate's property is contrary to the law. The Court should decline the invitation to overturn its prior ruling, and Section 2-104. With this warped view of the effect of permit issuance rejected, Plaintiffs' argument that any of the LPEs' acted in any direct fashion toward their property collapses.

In fact, each Illinois or federal case cited by Plaintiffs was premised on clear government action rather than an invented partnership or vicarious liability. In *Maezes v. City of Chicago*, 316 Ill. App. 464 (1942), the District hired a contractor to build an intercepting sewer for the District. Similarly, in *People ex rel. Pratt v. Rosenfield*, 399 Ill. 247, 248–49 (1948), the city, state, and railroad entered into an agreement to reconstruct a viaduct that allowed a city street to cross the railroad. *Id*. In *Ridge Line, Inc. v. U.S.*, 346 F.3d 1346, 1355 (Fed. Cir. 2003), the federal government was constructing a post

office. Unlike Plaintiffs' allegations in the A5AC, these cases all allege clear government action. Here, Plaintiffs' claims, if they exist, lie against the developers or owners of the developed property not whichever LPE issued the permit.

Plaintiffs' remaining Taking arguments have no application because they are premised on the LPEs owning, possessing or controlling the PCSS and failing to maintain it. As previously addressed, the A5AC does not contain specific allegations to find that Prairie Creek has become a man-made stormwater system. Further, there are no specific factual allegations that support an inference that any—let alone all—of the LPEs own this invented stormwater system.

Finally, even the out-of-state opinions Plaintiffs cite provide no support for Taking liability to be triggered by a local government's issuance of permits for development or its failure to correct defects existing in property it neither owned nor leased. First, none of these cases involved the Illinois Constitution. And none of those jurisdictions interpret their Taking clause utilizing the limited lockstep approach this Court has endorsed. See *Hampton*, 2016 IL 119861, ¶ 10 (reinforcing applicability of federal case law to Illinois Takings clause). Because they interpret different provisions using a different standard, these cases are of limited benefit to determine whether Plaintiffs sufficiently state a taking claim. As the LPEs' opening brief made clear, neither Illinois nor federal case law recognize taking by inaction. (Br., p. 39-41.) The inapplicability of these cases becomes even starker because the facts of this case are so distinct.

In addition to the different legal standards those courts applied, the A5AC's unique factual allegations render the cases cited by Plaintiffs useless. First, none of the

cases involve more than a single entity. See *Collier v. City of Oak Grove*, No. WD 65355, 2007 WL 1185982 (Mo. Ct. App. Apr. 24, 2007), *rev'd on other grounds, Collier v. City of Oak Grove*, 246 S.W.3d 923 (Mo. 2008) (involved only City of Oak Grove); *City of Oroville v. Superior Court of Butte County*, 7 Cal. 5th 1091 (Cal. 2019) (only Oroville was a party); *State ex rel. Livingston Court Apartments v. Columbus*, 130 Ohio App. 3d 730, 731 (Ohio Ct. App. 1998) (only the City of Columbus); *Livingston v. Virginia Department of Transportation*, 726 S.E.2d 264 (Va. 2012) (only the Virginia Department of Transportation); *Fletcher v. City of Independence*, 708 S.W.2d 158 (Mo. Ct. App. 1986) (only City of Independence). Accordingly, none of those other courts were required to determine whether Taking liability could exist when plaintiffs allege multiple entities, including private entities, caused the same intrusion. The A5AC is a different animal in which the Plaintiffs allege claims against five government entities and two private companies for the same injuries.

Although relied upon heavily by Plaintiffs to advance their Taking arguments, *Oroville* actually supports the LPEs in this case. First, the California Supreme Court reversed the appellate court and held that the City was not liable for a sewage back-up. 7 Cal. 5th at 1098. The Court clarified that, even under California's more expansive view of Taking, "[p]ublic entities are not strictly or otherwise automatically liable for any conceivable damage bearing some kind of connection, however remote, to a public improvement." *Id*. Rather, the plaintiffs would need to show that the damage was substantially caused by the inherent risk of either the design, construction, or maintenance of the public improvement. *Id*. The court found that even though sewage backed-up into plaintiffs' residence from the city's sewer a taking did not occur because

plaintiffs failed to install a legally required backwater valve. *Id*. So even under California's more expansive taking jurisprudence, a plaintiff must show a defect of specific public improvement caused their damages. And Plaintiffs' claims here would still fail as they cannot allege these LPEs owned any public improvement that substantially caused them damage.

Similarly, the remaining cases did not require the courts to determine whether taking liability exists when multiple government entities are alleged to own, control, or possess the same privately constructed infrastructure based on their issuance of permits. Plaintiffs' expansion of taking liability would be unprecedented and is not even suggested in any of the cases cited by Plaintiffs. In addition, none of the cases Plaintiffs rely upon ruled that a government entity engaged in a taking by failing to correct a defect in property owned by another entity. Even the decisions that held a Taking claim could be based on inaction did so because the government caused the alleged defect it failed to correct, or it had an affirmative duty to act and did not. See, *e.g.*, *Collier*, 2007 WL 1185982, at *9; *State ex rel. Livingston*, 130 Ohio App. 3d at 731 (lack of maintenance caused sewer deterioration); *Livingston*, 726 S.E. 2d at 275 (failure to act when duty to act exists). None of those scenarios is present in this case. The heart of Plaintiffs' allegations against these LPEs is Plaintiffs' belief that the LPEs should be required to correct defects caused by a neighborhood developer, a hospital, or the County. Expanding taking liability to this extreme would make governments insurers of all property damages within their jurisdiction. It would also undoubtedly lead to local government providing fewer and fewer services. Importantly, this drastic result for local governments is not

even necessary to ensure Plaintiffs can recover for their damages because they still have viable tort claims against a private entity.

Because neither Illinois nor federal law have the expansive interpretation of taking liability advocated by Plaintiffs or that exist in other states, this Court should continue to follow the limited lockstep approach to interpret the Illinois Constitution and based on that approach, reverse the appellate court and affirm the trial court's dismissal of Plaintiffs' Taking claims.

Further, for the reasons identified in the LPEs' opening brief, if the Court finds a Taking claim was properly stated, it should rule that those claims are barred by the Tort Immunity Act. (Br, 41-44.)

IV. The Tort Immunity Act Bars Plaintiffs' Taking Claims.

The Tort Immunity Act bars Plaintiffs' Taking Claims for damages. 745 ILCS 10/1-204 (West 2020) (definition of "Injury"); Ill. Const. 1970, art. XIII, § 4 (expressly allowing the General Assembly to provide sovereign immunity by statute); *Harris v. Thompson*, 2012 IL 112525, ¶¶ 16-17 (finding that Ill. Const. 1970, art. XIII, § 4 "now makes the General Assembly the ultimate authority in determining whether local units of government are immune from liability"); *Rozsavolgyi v. City of Aurora*, 2016 IL App (2d) 150493, ¶ 112, *vacated on other grounds*, 2017 IL 121048. But see *Birkett v. City of Chicago*, 325 Ill. App. 3d 196 (2001).

The appellate court found that the LPEs are "undoubtedly correct" that many of the actions alleged by Plaintiffs are barred by 745 ILCS 10/2-201 (West 2020), but stopped short of dismissing Plaintiffs' claims because some actions, like failing to repair a defective condition, are immunized only if the defendant presents evidence that it made

a conscious decision not to make the repair. (A 48, ¶ 93.) This legal standard is consistent with *Andrews v. MWRD*, 2019 IL 124283, ¶ 46, which held that defendants must submit evidence of a "conscious decision" with respect to acts or omissions alleged in the complaint. And Plaintiffs' response brief argues that, "[t]here is no conscious act by an MWRD employee evident in the record" (curiously no mention of Maine Township or Park Ridge). (Pltf. Br., 68.) However, the appellate court does not observe in its opinion that Plaintiffs repeatedly allege prior knowledge of flooding risk and a "conscious disregard" for that risk, including in their allegations underlying their Taking claims. (A5AC ¶¶ 462, 471, 480, 590.) In fact, this is an allegation that they repeat throughout their response brief. (Pltf. Br., 56, 63.) Defendants need not present evidence of a conscious decision because Plaintiffs have pled themselves out of court. See *Tucker v. Soy Capital Bank and Trust Co.*, 2012 IL App (1st) 103303, ¶ 47 (noting that attachments to the complaint defeated claims without additional evidence required).

The appellate court also rejected immunities under § 2-104 (immunity for issuing permits) and § 2-105 (immunity relating to property inspection), finding that these immunities do not apply to an LPE's own property. (A 49, ¶ 98; A 50, ¶ 101.) However, as set forth above, Plaintiffs do not sufficiently allege that the LPEs own the PCSS, and so, these immunities also bar claims for damages against the LPEs.

CONCLUSION

For all of the foregoing reasons as well as those detailed in its opening brief, Maine Township, the City of Park Ridge, and the Metropolitan Water Reclamation District of Greater Chicago pray that this Court reverse the Illinois Appellate Court, First

District, Fourth Division's decision and affirm the decision of the Circuit Court of Cook County, Illinois dismissing Plaintiffs' claims against the LPEs in their entirety.

RESPONSE TO PLAINTIFFS' REQUEST FOR CROSS RELIEF

Plaintiffs' request for cross-relief asks the Court to overturn the appellate court's dismissal of Plaintiffs' adjacent landowner and statutory Tort Immunity Act duties claims. In the event the Court declines to reinstate the claims, Plaintiffs ask that they be allowed to replead the claims. For the reasons below as well as those identified by the First District in dismissing those claims, this Court should deny each aspect of the request for cross-relief.

I. The Public Duty Rule Bars Each Claim Asserted by Plaintiffs' in Their Request for Cross-Relief.

A critical element of each of the claims Plaintiffs seek to have reinstated in their request for cross-relief is the existence of a duty. Without it, their claims fail. The LPEs' position regarding the retroactivity of *Coleman* and the application of the public duty rule have already been set out in tremendous detail. (Br., 22-33; *supra* pp. 5-23.) Accordingly, the LPEs simply reassert that for those reasons, the public duty rule applies to this case and bars all of Plaintiffs' claims asserted against the LPEs, including those they seek to resurrect in their request for cross-relief. For this reason alone, the Court should deny Plaintiffs' request for cross-relief in its entirety.

II. Plaintiffs' Adjacent Property Owner Claims Fail Because LPEs' are not Landowners or Possessors of any Property Adjacent to Plaintiffs.

Even if this Court determines that the public duty rule does not apply to the A5AC's claims, the appellate court was correct in dismissing Counts 25, 45, and 64. The LPEs are not landowners of any property adjacent to Plaintiffs. (A 38, ¶ 70.) For this reason, the First District correctly held that adjacent landowner liability could not apply to the LPEs. (A 38, ¶¶ 70-71.)

Although Plaintiffs do not dispute the LPEs were not adjacent landowners, Plaintiffs ask this Court to overturn this straightforward ruling because they allege adjacent landowner liability should apply to possessors of land, which should apply to the LPEs. They are incorrect. Unsurprisingly, adjacent landowner duty is generally owed only by landowners. See, *e.g.*, *Van Meter v. Darien Park District*, 207 Ill. 2d 359, 369 (2003). The justification for this is clear: an owner can both possess and control their land. *Dealers Service & Supply Co. v. St. Louis National Stockyards Co.*, 155 Ill. App. 3d 1075, 1079 (1987). In seeking to expand this limited duty, Plaintiffs rely heavily on the Restatement (Third) of Torts: Physical & Emotional Harm §§ 49, 54. Neither this Court nor the appellate court has ever adopted these provisions. The specific factual allegations in this case do not warrant adoption of it here.

Importantly, the LPEs are not "possessors" of any land adjacent to Plaintiffs. (Pltf. Br., 75.) At most, the A5AC asserts the LPEs were easement holders. (A5AC ¶¶ 66.3, 67.3, 68.1, 76.3.) Easements are non-possessory property interests. See, *e.g.*, *Nationwide Financial, L.P. v. Pobuda*, 2014 IL 116717, ¶ 29. Accordingly, even if the LPEs all held an easement, this does not convert them into possessors of land. As such, Counts 25, 45, and 64 were properly dismissed.

III. Because the Tort Immunity Act does not Create Independent Statutory Duties upon which Plaintiffs can Assert a Claim, the Appellate Court's Dismissal of Counts 34, 35, 57, 58, 74 and 75 was Correct.

Two years ago, this Court reaffirmed that the Tort Immunity Act does not create any duties and any duties codified in the Act are coextensive with those found at common law. *Monson v. City of Danville*, 2018 IL 122486, ¶ 24. The Court correctly found that the express purpose of the Act was to provide immunities and defenses for local governments in the hope of protecting them from the dissipation of public funds on

damage awards. *Id*. These rulings were not ground-breaking but instead were just the latest in a long, unbroken chain of cases spanning 40 years reaching the same result. *Id*. (collecting cases). See also *Village of Bloomingdale v. CDG Enterprises, Inc.*, 196 Ill. 2d at 490. The appellate court followed this Court's clear direction in dismissing Counts 34, 35, 57, 58, 74 and 75 with prejudice.

Despite this unbroken line of cases, which were reaffirmed so recently, Plaintiffs ask this Court to abandon decades of precedent to find for the first time that sections 3-102 and 3-103 of the Act create statutory duties independent of the common law. (Pltf. Br., 76-87.) Plaintiffs are not asserting claims under common law by their own admission. (Pltf. Br., 81.) If they prevail on those arguments, they ask the Court to then rule that the majority of immunities found in the Act could not apply to claims brought for alleged breaches of these statutory duties. (Pltf. Br., 79-80, 83-87.) This Court should decline Plaintiffs' invitation to punish local government by twisting the language of a statute that was passed solely to protect those governments.

With respect to section 3-102 duties and their interplay with other immunities found in the Act, both the appellate court and this Court in *Monson* fully explained why Plaintiffs' argument is erroneous. (A 35, ¶ 58); *Monson*, 2018 IL 122486, ¶¶ 19-25. Rather than attempt to improve on this Court's analysis from such a short time ago, the LPEs fully adopt this Court's explanation of what Section 3-102 does and how it interacts with the remainder of the Act. *Id*. Accordingly, the LPEs request this Court affirm the appellate court's dismissal of Counts 34, 57 and 74 with prejudice.

Like section 3-102, section 3-103 of the Act also does not create an independent statutory duty. *Salvi v. Village of Lake Zurich,* 2016 IL App (2d) 150249, ¶ 43. The

appellate court has made clear that section 3-103 does "not impose any new obligations on local governments." *O'Brien v. City of Chicago*, 285 Ill. App. 864, 871 (1996). Despite these rulings, Plaintiffs attempt to fit section 3-103 into the analysis of section 3-102 provided in Justice Thomas' concurrence in *Monson*, 2018 IL 122486, by arguing that section 3-103 creates a "hybrid" immunity and statutorily-created liability. (Compare 745 ILCS 10/1-101.1 (West 2020) with Pltf. Br., 83). But section 3-103 is ill-suited for treatment as a "hybrid" because the second sentence of section 3-103 does not create an exception to an immunity, but rather simply codifies a separate duty that arises once the "plan or design" has been put to use. *O'Brien*, 285 Ill. App. at 871. Once that duty arises, which can only arise after a plan or design has been put to use (and the public entity is thus on notice of its defect), the public entity may rely on any applicable immunity in the Tort Immunity Act. This is true even under Justice Thomas's analysis, who opined that an immunity for liability under the duty codified at section 3-102 must arise from within Article III because section 3-102 begins with the words, "[e]xcept as otherwise provided in this Article." *Monson*, 2018 IL 122486, ¶¶ 55-58. In contrast, section 3-103 does not have that same limiting language relied on by Justice Thomas. Plaintiffs' construction would expose local public entities and undermine the public policy of the Tort Immunity Act set forth in section 1-101.1 of the Act. This cannot be the case.

While the Court should reject Plaintiffs' claims based on sections 3-102 and 3-103 because the Act does not create independent statutory duties beyond those found at common law, these counts should also be dismissed because Plaintiffs were not permitted or intended users of any LPE-owned property. See, *e.g.*, *Washington v. City of Chicago*, 188 Ill. 2d 235, 240 (1999) (citing *Boub v. Township of Wayne*, 183 Ill. 2d 520, 524

(1998)). Here, as detailed previously, the LPEs were not the owners of any specific stormwater infrastructure that allegedly injured plaintiffs. *Supra* pp. 15-17. To the extent they were owners, the Plaintiffs are not permitted or intended users of that infrastructure.

The Tort Immunity Act was created for the express purpose of protecting local governments and their taxpayers from the unnecessary dissipation of public funds due to damage awards. *Monson*, 2018 IL 122486, ¶ 15. Given this purpose, it would be a truly perverse result to utilize this Act to hold local governments liable in a situation when no private entity would be found liable. In particular, the Tort Immunity Act should not be used to force liability on LPEs for allegedly unsafe conditions created by development on property owned by other entities.

For these reasons, as well as those expressed by the appellate court, this Court should affirm the dismissal of 34, 35, 57, 58, 74 and 75 with prejudice.

IV. Plaintiffs are not Entitled to an Opportunity to Replead to Reassert Claims that Lack Merit and that Were Abandoned.

Plaintiffs' final request for cross-relief asks the Court to allow them to replead common law negligence claims if it finds the Tort Immunity Act does not create stand-alone statutory duties. They are not entitled to this relief. First, the Plaintiffs had previously included claims for common law negligence for failure to maintain property as to each LPE. (A5AC Counts, 27-28, 47-48, 68 [sic], 66.) Those claims were dismissed prior to the LPEs filing their latest motions to dismiss. So, the Plaintiffs are requesting leave to replead claims that were dismissed long before the appellate court's decision. Further, the A5AC was the Plaintiffs' sixth attempt to file a competent pleading and it was still riddled with improper allegations. Finally, an opportunity to amend is not warranted when the errors could not be corrected. In this case, Plaintiffs could never hold

LPEs liable for unsafe conditions on the LPEs' property because Plaintiffs were not intended or permitted users of any LPE-owned property. For these reasons, the Court should not allow the Plaintiffs to file a Sixth Amended Complaint to reassert any claims against the LPEs.

CONCLUSION

For each of these reasons as well as those expressed by the appellate court in its ruling dismissing, Counts 25, 34, 35, 45, 57, 58, 64, 74 and 75, this Court should deny Plaintiffs' Request for Cross-Relief in its entirety.

Dated: May 5, 2020

Respectfully Submitted,

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SUPREME COURT RULE 341(c)
CERTIFICATE OF COMPLIANCE

I, Susan T. Morakalis, certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this Joint Reply Brief and Response To Request for Cross Relief, excluding the pages containing the Rule 341(d) cover, the Rule 341(c) certificate of compliance, and the certificate of service is 46 pages.

Dated: May 5, 2020

By: /s/Susan T. Morakalis
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CERTIFICATE OF SERVICE

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct, and that she is one of the attorneys for Defendant/Appellant Metropolitan Water Reclamation District of Greater Chicago and that, on May 5, 2020, she electronically filed the Joint Reply Brief and Response to Request for Cross Relief of Defendants-Appellants Maine Township, City of Park Ridge and Metropolitan Water Reclamation District of Greater Chicago with the Clerk of the Illinois Supreme Court and will send copies of said filing to the following attorney(s) of record:

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